

CE

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EXECUTIVE**

PLUS

The 14th Annual
Construction Law
Special Section

THE TOP 50 CONSTRUCTION LAW FIRMS™

- 42** Executive Insights
- 48** Returning to Work Safely: What Is the “New Normal” for Construction Employers?
- 52** COVID-19: What Contractors Should Do Now to Manage and Mitigate Risks
- 58** Asking the Right Legal Questions to Prepare for COVID-19 Claims

The Top 50 Construction Law Firms™: Navigating the Industry Through a Pandemic

BY CYBELE TAMULONIS

The verdict is in. Having the counsel of an experienced legal ally has never been more crucial to business survival than right now.

In just the first four months of 2020, the COVID-19 pandemic wreaked havoc in every sector of the construction industry. Activity at thousands of jobsites came to a virtual standstill as one state after another enacted shelter-in-place orders. Multitudes of new projects were delayed or canceled in response to market uncertainty. While industry groups, including Associated Builders and Contractors, lobbied federal, state and local government officials to declare construction an essential business, Congress raced to enact historic stimulus legislation. But by the end of April, the industry had already shed nearly one million jobs, the steepest plunge in construction payrolls since the Great Depression.

It was during this unprecedented environment that *Construction Executive's* survey for the second annual U.S. ranking of *The Top 50 Construction Law Firms* was in the field. While legions of general contractors and subcontractors were scrambling to review contract documents with their trusted advisors for delay, default and force majeure clauses, *CE's* editorial team was reaching out to dozens of attorneys at the nation's top construction law firms to learn how they were

advising their clients in the wake of the novel coronavirus.

SAFETY FIRST

The first mandate to avoid risk is to ensure the safety of employees.

"Prior to the outbreak, the most pressing concern was how and where to find skilled workers. Now the concern has shifted to protecting their health and safety," says David Pugh, partner at Bradley Arant Boult Cummings LLP.

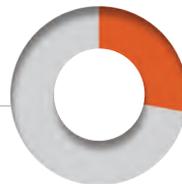
Creating a safe environment in the age of a novel coronavirus is easier said than done. Projects are subject to new EEOC regulatory measures as well as OSHA recommendations that include keeping field workers six feet apart, wiping down tools after use and shortening meetings.

"There are great risks for onsite performance where it's often difficult to maintain specified social distances and properly perform," says Jim Dickson, construction attorney for Adams and Reese, LLP.

"Safe policies in April 2020 may not be safe policies in July 2020 or thereafter," says Jeremy Brummond, attorney at Lewis Rice LLC.

"Employers need to recognize that information on the coronavirus is changing daily. Policies should be revisited and aligned with generally accepted scientific understanding. Safety measures meant to protect workers from coronavirus must

The Top 50 Construction Law Firms, Practice Areas



27% of The Top 50 Construction Law Firms Practice in All Areas Surveyed

Methodology for *The Top 50 Construction Law Firms*

CE developed *The Top 50 Construction Law Firms* ranking by asking hundreds of U.S. construction law firms to complete a survey. The data collected included: 1) 2019 revenues from the firm's construction practice; 2) number of attorneys in the firm's construction practice; 3) percentage of firm's total revenues derived from its construction practice; 4) number of states in which the firm is licensed to practice; 5) year in which the construction practice was established; and 6) The number of AEC clients served during fiscal year 2019. The ranking was determined by an algorithm that weighted the aforementioned factors in descending order of importance. Note: A sizable number of law firms elected not to share revenues, which affected their ranking. For more information, contact surveys@magazineexperts.com.

be coordinated with other safety protocols to avoid additional risks being created.”

“What should you do if a worker shows up sick and works for a day before their symptoms worsen and become obvious?” asks David Peden, partner at Porter Hedges LLP. “Do you shut the whole job down, just that crew, or only send that laborer home? In safety briefings, emphasize the importance of staying home as soon as you have any symptoms. Document that you said this in your daily reports.”

General contractors must carefully monitor subcontractor adherence to coronavirus policies or risk potential liability advises Frank Elmore, president of Elmore Goldsmith.

“Safety policies are only as effective as the implementation,” agrees Kevin Hudson, partner at Hudson Parrott Walker. “Every day, all members on the job need to be forced on enforcement.”

Even with best practices in place, litigation can still arise. Dickson advises contacting insurance carriers now to assess the scope of coverage for potential claims alleging that a firm’s negligence practices led to the spread of the virus.

WORKFORCE WORRIES

Robots may build the projects of the future, but today’s construction projects depend on people and COVID-19 has only magnified construction’s pre-existing condition, its skilled labor shortage. Project managers and craft professionals, the essential workers on construction’s front lines, are understandably concerned about the virus.

“While most construction projects are continuing to move forward during quarantine, clients are experiencing reductions in force,” says Gina Vitiello, attorney at Chamberlain, Hrdlicka, White, Williams & Aughtry. “Many

“Prior to the outbreak, the most pressing concern was how and where to find skilled workers. Now the concern has shifted to protecting their health and safety.

-David Pugh, Partner, Bradley Arant Boult Cummings LLP

Top 10 Law Firms Ranked by Number of States Admitted to Practice



“Safety policies are only as effective as the implementation. Every day, all members on the job need to be forced on enforcement.

-Kevin Hudson, partner at Hudson Parrott Walker

clients are using labor providers to supplement their own workforce.”

As if the labor shortage wasn’t worrisome enough, employers must now continuously monitor the changing legal landscape and be nimble enough to quickly adapt existing employee policies to comply with newly passed COVID-19 laws, regulations and executive orders across multiple states, counties and cities.

“Policies related to employee termination, furloughing, sick and

family leave, and workplace protections should be evaluated and changed where necessary,” says David Santomauro, leader, construction law & litigation team at Gibbons PC. “Failure to abide by these new laws could expose employers to potential liability.”

The needs of multi-generational workers are another key consideration when reviewing employee policies. “Older skilled crafts workers may wish to shelter at home,” says Dickson. “Termination of such persons runs the risk of age discrimination claims.”

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“First and foremost, contractors should focus on the health and safety of their employees,” says Philip Beck, senior partner at Smith, Currie & Hancock LLP. “A close second objective is to ensure the survival of the company. Owners and contractors need to recognize that a virus that was previously unimaginable is now a reality.”

CASH IS STILL KING

With economic uncertainty looming large, contractors must gain a firm grip on payment rights and conserve funds to weather the downturn.

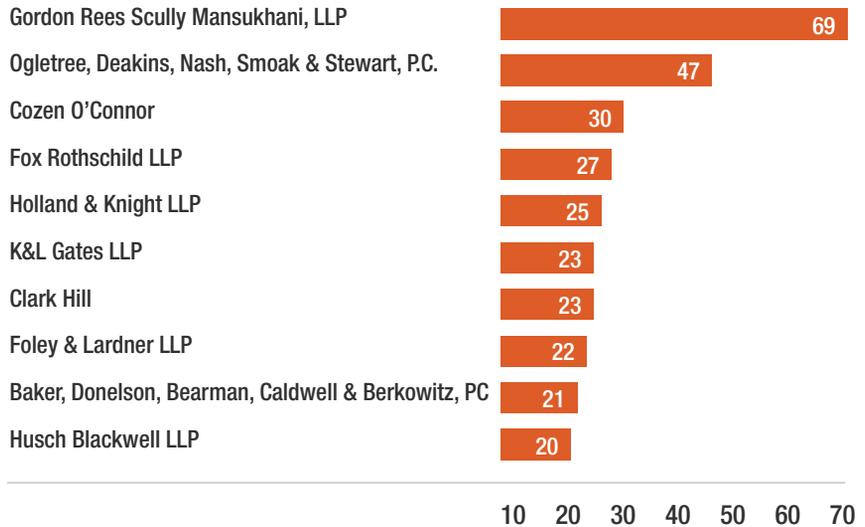
“In the midst of the COVID crisis, our clients are increasingly concerned that project funds remain available to support the cash flow required for all progress and final payments,” says Joshua Levy, partner and co-head of the construction practice at Husch Blackwell, LLP. “We have seen an inordinate number of clients experience delays caused by funding interruption.” Levy points out that contract documents often lack clauses requiring owners to provide proof of their ability to pay.

“A change that can be negotiated to encourage payment is a provision that allows the accrual of interest plus the recovery of attorneys’ fees,” says David Hammargren, head of the construction and surety practice at Larkin Hoffman.

Getting paid is also the most pressing concern for Jackie Maloney’s construction clients at REAL Law, LLC. “This involves confirming owner financing, negotiating payment terms, protecting and enforcing lien and bond rights, and providing creative financing solutions to customers,” she says.

Contractors should not be shy about collecting what’s owed to maintain cash flow. When red flags are raised, it’s important to act quickly before the opportunity to recover payment is lost. While some may be hesitant to file a

Top 10 Law Firms Ranked by Most Office Locations



“We are advising construction clients to give contractual notices of both delay and changed conditions, to seek additional time and extended general conditions.”

-George Pallas, Managing Partner
Cohen Seglias

lien against a business they have good relationships with, filing now might prevent a future uncollectible.

“We had a construction client that was hesitant to pursue liens for millions it was owed despite information that its customer was having financial difficulties,” recalls Brummond. “We pressed the client and it ultimately agreed that we could pursue the liens. Their customer became insolvent, but the client was still able to collect. The key takeaway is if there is any question whether the contractor can

collect from its customer, it’s best to file the lien or pursue the bond claim in a timely manner. They can always be released later if economic circumstances change and reasonable customers will understand the business reasons why such payment remedies are pursued.”

“Under normal circumstances, our construction clients are most concerned about completing their projects safely, profitably and in a timely manner while finding their next set of new projects,” says George Pallas, managing partner and CEO of Cohen Seglias. “Given the current work environment, major concerns for both general contractors and subcontractors include payment for work performed, restarting projects and regaining schedule momentum.”

DELAYS, DELAYS, DELAYS

“While its ultimate effects are not yet fully known, COVID-19 will almost certainly impact project costs and schedules in ways that may or may not be compensable under the governing contracts,” says Beck.

The disruption of the industry’s supply chain has also resulted in

project delays. According to Dodge Data and Analytics, the United States imports around 30% of its building materials from China where many manufacturing facilities have closed or slowed operations in an effort to contain the virus there.

“For projects moving forward, the ability to predict the availability of materials and supplies, especially those reliant on international trade, either directly or as a component, is challenged,” says Steven Charney, chairman of Peckar and Abramson, PC.

“Many clients’ projects have been adversely impacted by delays in the supply chain, labor inefficiencies that have understandably occurred due to illness or other repercussions from the pandemic,” says Hammargren.

“Contractors are attempting to clarify the clause to allow coverage for delays and impacts relating to pandemics and governmental action,” says Pallas, noting that owners are simultaneously seeking to limit their exposure with “no damage for delay” clauses. “We are advising construction clients to give contractual notices of both delay and changed conditions, to seek additional time and extended general conditions.”

Delays appear unavoidable for the foreseeable future as staggered work shifts and physical distancing result in longer completion times. Negotiating a project in phases and using shared payment clauses may be helpful standards in the future. But no matter how well written a contract is, litigation is always a possibility, and all parties involved in a construction project should be aware of claims that might arise from the current pandemic. Meeting these new issues head-on with clear communication is the key to survival for construction companies that must keep their industry relationships viable.

Notice of Claim

David Peden, partner at Porter Hedges LLP, suggests reading all contracts now. “Look at the clauses for delay, changed conditions and claims. A force majeure event may get you more time, but not money. A changed condition clause might get both. If you are being impacted, get your Notices of Claim out, tailored to the exact requirements of each contract. Send it to everyone above you to whom notice must be given. In most contracts, you are required to use the word ‘Claim’ in your notice, so do it if you are sending one,” says Peden.

SAMPLE NOTICE OF CLAIM

DATE:

PROJECT:

We are giving notice of a Claim. The coronavirus is expected to impact our schedule and our costs. We are not at fault. We did not anticipate this event. We cannot control it. We do not know how long it will last. The situation is changing daily. President Trump has just granted Governor Abbott’s request to declare Texas a Disaster Area. At this time, we cannot predict how much additional time we will need, nor can we predict how much our costs will increase. We anticipate disruptions in our labor and in our materials supply lines. We will do what we can to mitigate these impacts, but with symptomatic workers being required to stay home, our onsite labor forces and our suppliers will all be impacted. We will update this Claim as we can.

Thank you for your patience and understanding.

David Peden, Partner
Porter Hedges LLP

RESOLVING DISPUTES

Reading the fine print is essential, says David Loseman, partner at Armstrong Teasdale. “Disputes are often resolved through the language of the relevant contracts themselves, so dispute resolution starts early in the process. We craft construction contracts with a view of how such language would impact and assist our client if a dispute arises,” notes Loseman.

“Owners and general contractors prefer to use a contract form that places almost all of the risk on the downstream party,” says Beck. He advises consulting an attorney to draft, review and negotiate all contract documents rather than waiting until a dispute arises to seek legal assistance. “That is money well spent.”

“Be proactive,” advises Elmore. “The longer an issue remains

unresolved, the larger the financial impact it is likely to have on the project and the project schedule.”

INDUSTRY OUTLOOK

“The effects of the pandemic are evolving almost daily,” says Peter Torricollo, co-chair of commercial and criminal litigation at Gibbons PC. “Our clients seek regular guidance on these various executive orders. They’re focused on the short-term impacts as well as the long-term implications COVID-19 may have on their projects, their businesses and the industry as a whole.”

Eric Grasberger cautions businesses against focusing too much on damages being incurred today. As leader of the construction and design practice at Stoel Rives LLP, he warns that if construction business owners

are too consumed with “shuttered projects, slow supply chains, reduced labor availability and impacted site productivity, they may forget that whenever projects reopen, they’ll face a similar back-end crisis comprised of inadequate sub-trade availability, potential refinancing or supplemental financing challenges, and a construction market where everyone wants to catch up simultaneously.” Grasberger advises planning now “for this eventuality.”

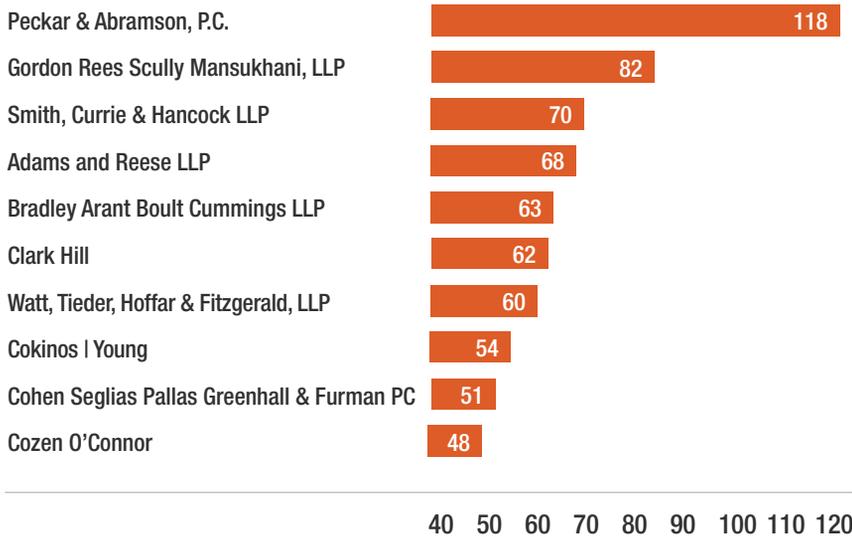
“Questions extend to what businesses will survive and those that cannot, in turn disrupting individual project delivery and the industry as a whole,” says Charney. “To what extent the government may intervene, either locally or nationally, by providing relief or imposing new restrictions remains to be seen. The pace of questions and concerns and the need to adjust has been striking. Amidst the difficulties of working remotely and the impact on so many, it has been gratifying to support our clients in sorting through these unprecedented challenges.”

One thing is certain during these trying times, the construction industry, notorious for its unpredictability, is also known for its resilience.

“The construction industry has overcome tremendous challenges in the past and will, in time, overcome this one as well,” says Beck, adding, “It is both ironic and inspiring that a worldwide crisis which has driven us apart physically has also brought the construction industry and the professionals who serve and care deeply about the industry, closer together.”

“Construction attorneys have a duty to educate and assist the industry in addressing this crisis,” says Beck, adding, “We are meeting that challenge on a daily basis.”

Top 10 Law Firms Ranked by Number of Construction Attorneys



KEY: ¹Number of states where the firm is licensed to practice law, including Washington, D.C. and Puerto Rico. ²Areas of practice are abbreviated: Contract Documents (CD), Construction Defects (DF), Construction Dispute Resolution (DR), Construction Transactions (CT), Government Contracts (GC), International Construction (IC), Labor and Employment (LE), Mergers and Acquisitions (MA), Public-Private Partnerships (P3), Surety Bonding (SB) ³Percentage of overall firm revenues that its construction practice represents. (-) Not provided.

Cybele Tamulonis is marketing manager at MagazineXperts. For more information, email surveys@magazinexperts.com.

Rank	Firm	Year Founded	# States Admitted to Practice ¹	# Office Locations	# Firm Attorneys	# Firm Employees	# Construction Attorneys	# Construction Partners in 2019	Construction Clients	Construction Practice as % of Total Firm Revenues ³	Areas of Practice ²
1	Peckar & Abramson, P.C. New York, NY	1978	18	10	118	102	118	63	1,212	86.48	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
2	Smith, Currie & Hancock LLP Atlanta, GA	1965	22	8	70	52	70	38	800	97.41	CD,DF,DR,CT,GC,IC,LE,P3,SB
3	Bradley Arant Boult Cummings LLP Birmingham, AL	1871	34	10	539	409	63	36	1,500	15.88	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
4	Watt, Tieder, Hoffar & Fitzgerald, LLP Chicago, IL	1978	4	5	50	83	60	40	150	100	CD,DF,DR,CT,GC,IC,P3,SB
5	Gordon Rees Scully Mansukhani, LLP San Francisco, CA	1974	51	69	969	1,376	82	29	460	7.6	CD,DF,DR,CT,GC,LE,MA,P3,SB
6	Cohen Seglias Pallas Greenhall & Furman PC Philadelphia, PA	1988	15	9	72	119	51	18	930	76.16	CD,DF,DR,CT,GC,IC,LE,MA,SB
7	Holland & Knight LLP Washington, DC	1968	55	25	1,350	3,000	40	25	150	2.8	CD,DF,DR,CT,GC,IC,LE,P3,SB
8	Fox Rothschild LLP Philadelphia, PA	1907	42	27	956	1,925	47	36	421	4.63	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
9	Andrews Myers, PC Houston, TX	1990	2	2	51	90	31	12	1,250	73.05	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
10	McElroy, Deutsch, Mulvaney & Carpenter, LLP Morristown, NJ	1983	20	13	234	444	37	22	318	17.55	CD,DF,DR,CT,GC,IC,LE,P3,SB
11	K&L Gates LLP Pittsburgh, PA	1946	35	23	1,058	2,216	17	12	339	2.93	CD,DF,DR,CT,GC,IC,LE,MA,P3
12	Foley & Lardner LLP Milwaukee, WI	1842	55	22	1,050	2,300	38	27	170	2.07	CD,DF,DR,CT,GC,LE,MA
13	Carlton Fields Tampa, FL	1901	27	11	326	654	30	17	143	9.83	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
14	Finch, Thornton & Baird, LLP San Diego, CA	1987	8	3	31	59	31	13	1,317	98.98	CD,DF,DR,CT,GC,LE,P3,SB
15	Husch Blackwell LLP Kansas City, MO	1916	55	20	622	1,500	37	27	100	4.21	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
16	Clark Hill Detroit, MI	1890	38	23	665	1,312	62	21	686	5.11	CD,DF,DR,CT,GC,LE,MA,P3,SB
17	Baker, Donelson, Bearman, Caldwell & Berkowitz, PC Memphis, TN	1888	38	21	669	627	33	16	693	4.21	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
18	Zetlin & De Chiara LLP New York, NY	1992	6	3	26	55	26	12	648	100	CD,DF,DR,CT,GC,IC,P3,SB
19	Cotney Construction Law Tampa, FL	2012	19	14	39	65	35	16	876	80	CD,DF,DR,CT,GC,LE,MA,P3,SB
20	Holland & Hart LLP Denver, CO	1947	8	13	450	900	23	13	50	6.67	CD,DF,CT,GC,LE,MA,P3
21	Fabyanske, Westra, Hart & Thomson, PA Minneapolis, MN	1981	10	1	39	53	18	11	500	64.86	CD,DF,DR,CT,GC,IC,MA,P3,SB
22	Perkins Coie LLP Seattle, WA	1912	41	17	1,185	1,256	20	12	427	1.46	CD,DF,DR,CT,GC,IC,LE,MA,P3
23	Ahlers Cressman & Sleight PLLC Seattle, WA	2007	5	1	16	36	16	5	616	99.79	CD,DF,DR,CT,GC,LE,P3,SB
24	Hahn Loeser & Parks LLP Cleveland, OH	1920	14	6	120	236	26	14	800	15.87	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
25	Adams and Reese LLP New Orleans, LA	1951	28	17	257	517	68	47	350	6.62	CD,DF,DR,CT,GC,LE,MA,P3,SB

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26	Stoel Rives LLP Portland, OR	1907	33	10	378	743	14	10	211	4.75	CD,DF,DR,CT,GC,LE,MA,P3,SB
27	SMTD Law LLP Irvine, CA	2014	5	4	17	25	17	7	162	94.34	CD,DF,DR,CT,GC,IC,LE,P3,SB
28	Asmar, Schor & McKenna, PLLC Washington, DC	2010	6	1	15	21	15	7	170	100	CD,DF,DR,CT,GC,IC
29	Carney Badley Spellman, P.S. Seattle, WA	1972	17	1	48	92	15	9	450	28.58	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
30	Smith, Gambrell & Russell, LLP Atlanta, GA	1893	21	7	230	432	14	12	18	6.22	CD,DF,DR,CT,GC,IC,P3,SB
31	Allensworth & Porter Austin, TX	1995	2	1	15	26	15	7	221	99.57	CD,DF,DR,CT,GC,IC,P3,SB
32	Eversheds Sutherland (US) LLP United States	1924	34	8	403	769	10	5	56	2.33	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
33	Larkin Hoffman Minneapolis, MN	1958	13	1	74	154	14	11	500	(-)	CD,DF,DR,CT,GC,LE,MA,P3,SB
34	Riess LeMieux, LLC New Orleans, LA	2018	3	1	13	29	11	6	253	100	CD,DF,DR,CT,GC,LE,MA,P3,SB
35	Robinson & Cole LLP Hartford, CT	1845	21	11	218	419	13	6	262	5.36	CD,DF,DR,CT,GC,LE,MA,P3,SB
36	Lane Powell PC Seattle, WA	1875	3	3	171	394	14	6	355	5.92	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
37	Offit Kurman, P.A. Fulton, MD	1987	12	13	230	500	23	18	125	5.5	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
38	Hudson Parrott Walker LLC Atlanta, GA	2013	6	1	14	25	14	10	300	91.38	CD,DF,DR,CT,GC,LE,P3,SB
39	Gibbons P.C. Newark, NJ	1926	14	8	200	320	15	12	76	5.6	CD,DF,DR,CT,GC,IC,LE,P3,SB
40	Smith Pachter McWhorter PLC Tysons Corner, VA	1986	8	1	35	42	17	7	55	34.42	CD,DF,DR,CT,GC,IC,P3,SB
41	Davis Wright Tremaine LLP Seattle, WA	1944	24	8	564	1,232	5	15	504	1.43	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
42	Slates Harwell LLP Dallas, TX	2013	4	1	11	17	11	7	189	98.1	CD,DF,DR,CT,GC,IC,P3,SB
43	Hendrick, Phillips, Salzman & Siegel, P.C. Atlanta, GA	1981	2	1	8	13	10	3	366	100	CD,DF,DR,CT,GC,LE,MA,P3
44	Nexsen Pruet Columbia, NC	1945	3	8	186	383	13	6	500	5.28	CD,DF,DR,CT,GC,LE,MA,P3,SB
45	Babcock Scott & Babcock Salt Lake City, UT	1984	5	1	10	13	10	7	250	100	CD,DF,DR,CT,GC,IC,SB
46	Freeman Mathis & Gary, LLP Atlanta, GA	1997	24	19	199	342	46	29	250	4.26	CD,DF,DR,CT,GC,IC,LE,MA,P3,SB
47	Shields Mott LLP New Orleans, LA	1995	8	1	10	7	9	6	151	95.39	CD,DF,DR,CT,GC,LE,P3,SB
48	Hesse Martone Saint Louis, MO	1995	9	3	20	35	5	3	200	46.51	DF,DR,LE,MA
49	Elmore Goldsmith Greenville, SC	2011	4	1	6	6	6	5	157	100	CD,DF,DR,GC,P3,SB
50	Chamberlain Hrdlicka Houston, TX	1965	14	4	138	288	6	4	100	4.58	DF,DR,CT,GC,IC,LE,MA

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At Fox, we guide clients through difficult circumstances to mitigate risk and overcome inherent challenges, harnessing the combined strength of a nationally recognized Construction practice and a deep bench of lawyers focused on Federal and Government Contracts.

We're highly skilled. We're experienced. And like our clients, we know how to get the job done.



Fox Rothschild LLP
ATTORNEYS AT LAW

EXECUTIVE INSIGHTS

In terms of risk management, what can construction firms learn from the COVID-19 pandemic regarding what policies and procedures they should have in place?



(I)f a pandemic strikes, be proactive. Send all required notices to owners, insurers, subcontractors and suppliers, and make sure they are in writing.

DAVID HAMMARGREN
HEAD OF CONSTRUCTION AND
SURETY PRACTICE
Larkin Hoffman



It is extremely important for a contractor's personnel to know some of the basics of contract language, as well as their implications, in order to safeguard the company.

JOHN A. GREENHALL
PARTNER
*Cohen Seglias Pallas Greenhall &
Furman PC*



Contractors that already had a crisis plan in place prior to COVID-19 were able to react and assemble much better than their peers, and their jobsites continued without pause.

BEN WESTCOTT
CO-MANAGING SHAREHOLDER
Andrews Myers, PC



Going forward, construction firms should consider including financial relief in force majeure provisions.

MICHAEL BRANCA
MANAGING PARTNER
WASHINGTON, D.C. OFFICE
Peckar & Abramson, PC

What questions should a construction firm ask before retaining a law firm?



Construction firms should understand the law firm's plan for handling ediscovery and how that plan fits with the strategy and value of the case.

GINA VITELLO
SHAREHOLDER
*Chamberlain Hrdlicka
Williams & Aughtry*



Insist on a firm experienced in construction law with professionals who have a background in the industry, a track record of success and a commitment to client service.

ROB REMINGTON
PARTNER AND CHAIR, CONSTRUCTION
LAW PRACTICE TEAM
Hahn Loeser & Parks LLP



Emphasize skill and leadership in using early dispute resolution methods such as early mediator engagement and 'guided choice' mediation techniques.

MARK BECKER
ATTORNEY
*Fabyanske, Westra, Hart
& Thomson PA*

What should a construction employer be doing today to address unfunded pension withdrawal liability?



Construction employers need to get a handle on their pension fund withdrawal liabilities before they become an extinction event.

ANDREW MARTONE
PRESIDENT & CEO
HesseMartone

What are the top three issues you see in construction contracts that can be avoided?



The most easily avoidable mistake we see contractors make is taking a one-size-fits-all approach to contract drafting.

CHRISTOPHER K. LEMIEUX
MANAGING PARTNER
Riess LeMieux, LLC



Your rule of thumb should be not to accept any risk that you cannot control either through best practices or with insurance.

BRIAN A. WOLF
PARTNER
Smith, Currie & Hancock LLP



As counselors to the construction industry it is critical that we understand the business of our clients. Our advice helps our clients maintain a competitive edge.

ALLEN W. ESTES, III
PARTNER, CO-CHAIR OF
CONSTRUCTION PRACTICE GROUP
Gordon Rees Scully Mansukhani, LLP

What new technology do you think has been the most effective in preventing litigation in the construction industry?



Great record-keeping may not prevent litigation but can cause the other side to think twice about taking that route; and if litigation comes, the odds of winning are enhanced.

SONNY SHIELDS
MANAGING PARTNER
Shields Mott LLP

What legal work should a contractor expect before, during and after a project?



Contractors should expect legal issues to arise in every phase of a project. Regardless of the type of dispute, contracts are the first place to look in an attempt to resolve.

AMAN S. KAHLON
DIRECTOR, CHAIR OF CONSTRUCTION
SERVICES GROUP
Bradley Arant Boult Cummings LLP



A construction lawyer can help negotiate the terms of the contract to ensure that contractors are not taking on unnecessary risks or creating unworkable requirements.

CHIP BACHARA
MANAGING PARTNER
Bachara Construction Law Group

Read all the insights these executives have to share at [ConstructionExec.com/ExecutiveInsights](https://www.constructionexec.com/ExecutiveInsights)

THE TOP 50 CONSTRUCTION LAW FIRMS

CORPORATE PROFILE: LEADERS IN CONSTRUCTION LAW

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Jeffrey A. Ford, *Member*

Charles F. Kenny, *Member*

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COVID-19: The Construction Industry as a Proud Model of Service

The COVID-19 pandemic has barraged us with shocking news of loss of lives and livelihoods. Amid one of our lifetime's most disturbing chapters, the construction industry has modeled teamwork, resiliency and tenacity. There is a special culture that makes the construction community an extraordinary industry to serve—a rare level of pride and commitment to getting the job done right.

Many construction projects were considered “essential,” even during the worst of the outbreak. Construction was hardly “business as usual,” but the industry most often found ways to move forward, despite the adversity.

What is it about contractors that drives them forward when others may not?

It starts with a “can-do” mindset that prevails in the construction community.

Long before COVID-19 the construction community's daily routine has included facing unique difficulties, problems and challenges, and using ingenuity to build the world's marvels. Problems never encounter the notion that there may be no solution.

The construction industry is more than a model of what can be accomplished—it is a literal demonstration of how accomplishments are achieved.

Over the past three decades, worker health and safety has been elevated to a level on par with the “can-do” mindset that is central to a contractor's





DNA. When COVID-19 struck, almost instinctively, contractors assessed the circumstances, studied CDC and other guidance, and designed new protocols and procedures that allowed work to safely continue wherever possible.

Reflexively, the contracting community kept adjusting as new guidance emerged, finding ways to stagger work hours, deploy PPE, reconfigure site access and lunch areas, strategically locate handwashing facilities, alter transportation and modify tasks for social distancing.

Construction requires numerous companies working in concert to produce a completed project on time and budget. Owners, designers, general contractors, construction managers, subcontractors, sub-subcontractors, vendors, suppliers and specialty fabricators regularly balance self-interest with achieving collective success. When faced with this crisis, as in response to 9/11, floods, hurricanes and innumerable emergencies, this industry rallied swiftly and collectively.

Perhaps the construction industry is especially well-poised to respond to a crisis because virtually every construction project is built locally, with a workforce drawn from its surrounding communities, all willing to engage as a team. A project's workforce—people from management, many trades and disciplines, and a wide range of society—coordinate daily, becoming a community of their own.

Facing the new challenges associated with a pandemic has not been without hardship. We hope that owners respond fairly, with a genuine respect and appreciation for what the contracting community has accomplished.

In these fluid and dynamic times, a lifetime's worth of change can occur in a matter of weeks; the same amount of time between writing and publishing this piece. One thing, however, will not change:

Along with the other everyday heroes that have emerged in response to this crisis, the construction industry will continue to serve as a model of what can be accomplished by countless companies and their people working together with a “can-do” mindset and a culture dedicated to getting it done the right way.

Written by Steven Charney, Gregory Chertoff, Matthew Moore and Adam Handfinger



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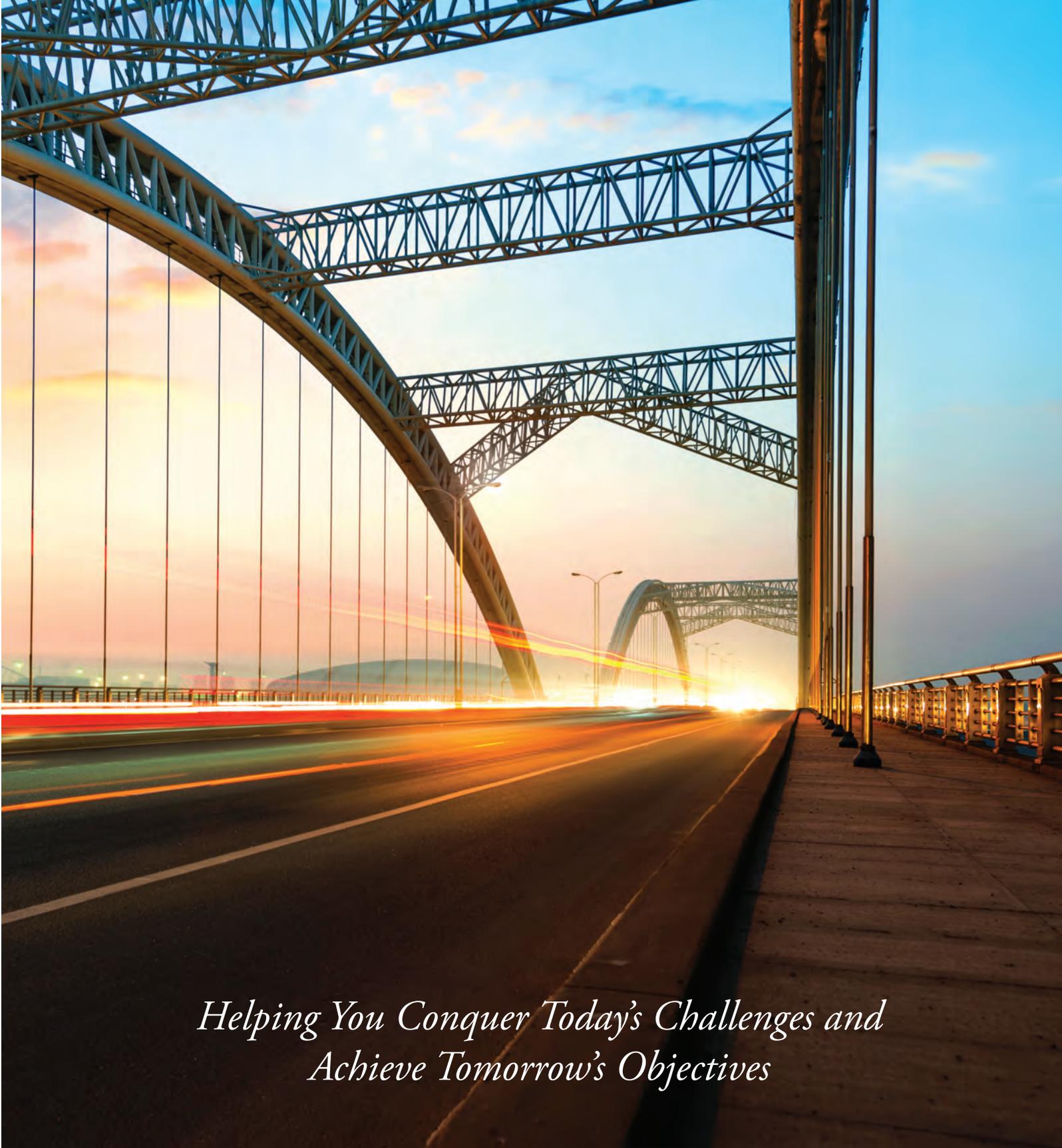
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Returning to Work Safely: What Is The “New Normal” for Construction Employers?

BY MAURY BASKIN

As the country recovers from the COVID-19 pandemic, construction industry employers confront many challenges. Recognized as an essential industry in a majority of states throughout the crisis, many contractors have continued to perform work and provide jobs, while others were shut down in whole or in part. Every aspect of the industry has been affected not only by the virus itself, but by the economic and regulatory pressures imposed by government

reactions to the crisis, to include federal, state and local. The ground rules going forward are conflicting and confusing, and more legal challenges lie ahead.

Safety First

The first challenge for every construction industry employer is to perform work safely in the new COVID-19 environment. The primary source of guidance throughout the pandemic has been, and remains, the guidelines of the Centers for Disease

Control. The Occupational Safety and Health Administration has largely deferred to and reinforced the CDC guidance, though OSHA itself has not yet imposed a COVID-19-specific health and safety standard. As of this writing, however, OSHA is under increasing pressure to issue a temporary emergency standard. The AFL-CIO has petitioned the U.S. Court of Appeals for the D.C. Circuit to force the agency to issue such a standard. A bill passed in the U.S. House of Representative

“ *Contractors that fail to adhere to the CDC and OSHA guidelines will place themselves at risk of liability.* ”

(but not the Senate) contained a similar demand.

But many in the business community, including representatives of the construction industry, have opposed compelling OSHA to issue a new standard. They are concerned that the costs of engaging in the

effort will distract the agency and employers from ongoing compliance efforts, and that a rushed effort will give insufficient attention to the unique circumstances of the construction industry.

Meanwhile, OSHA is stepping up efforts to investigate complaints

about unsafe workplaces.

Contractors that fail to adhere to the CDC and OSHA guidelines will place themselves at risk of liability. Contractors whose employees test positive for the virus need to follow OSHA-recommended protocols for isolation, sanitizing and contact tracing in order to avoid greater liability concerns. OSHA has also recently clarified its requirements for reporting and recording COVID-19-related workplace occurrences, stating that employers must make a determination whether any employee who contracts the illness did so while at work, and if so, to record it and

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report it on the OSHA 300 forms, assuming the coverage requirements are met.

Construction employers are also required to comply with a patchwork of state and local safety requirements regarding such issues as face mask mandates, social distancing and sanitizing stations, among others, even if the CDC/OSHA guidance does not mandate such safety standards to the same degree. Failure to comply may also lead to increased likelihood of workers compensation findings of job-related coronavirus exposure. Indeed, an increasing number of states are imposing presumptions that COVID-19 illness claims should be treated as work-related.

Another negative effect of unsafe workplaces results from recent changes to unemployment

compensation benefits under the federally enacted CARES Act. Under that law, employees who reasonably fear for their safety on the job may refuse to work and receive unemployment benefits. Union organizers are also seeking to take advantage of unsafe workplace claims. Going forward, employers should train their supervisors on a clear and compliant response plan to deal with workplace exposures, and otherwise take all steps necessary to ensure a safe workplace.

Testing, Testing

Many construction contractors have established screening systems designed to protect their jobsites from infection, including temperature checks, screening questionnaires and (where available) testing for infections before

allowing entry to the work site. Guidance issued by the Equal Employment Opportunity Commission states that employers can administer COVID-19 tests, temperature checks, and otherwise screen even asymptomatic employees before allowing them onto worksites, without violating the Americans with Disabilities Act.

Employers should remain sensitive to the ADA and other rules against discrimination, and the EEOC guidance is not a “blank check” in the absence of definitive judicial rulings. Even the EEOC guidance may vary depending on the need to know specific information to avoid a “direct threat” of infection. Employers must also take steps to insure the privacy and confidentiality of the testing process and recordkeeping, and under some circumstances employers may have to pay employees for the time spent in the screening process, whether at work or at home.

Emergency Paid Leave and Wage Requirements

It is widely anticipated that employers will confront increased risk of employment lawsuits as more courts reopen in the coming months, particularly with regard to paid leave and wage requirements. Already, a lawsuit has been filed by the State of New York against the U.S. Department of Labor’s enforcement of the Families First Coronavirus Response Act emergency paid leave guidelines. If the state’s suit succeeds, and if the DOL guidance is overturned by a federal judge, then employers that relied on that guidance to

deny paid leave will be threatened with more class action litigation. Employers are advised to err on the side of caution in responding to paid leave requests, particularly as to coverage questions, documentation requirements and intermittent leave issues.

Wage and hour class actions had already reached epidemic proportions before the COVID-19 virus struck the economy. The emergency measures undertaken to reduce and then reinstate construction workforces will likely increase the potential for new claims of wage underpayments. This is true not only for field employees but for remote telecommuting office staff. Wage and hour issues include notice requirements in many local jurisdictions regarding changes in hours and pay rates; changes in work duties which could affect exempt status of some salaried employees; timekeeping systems that fail to capture all remote working time; compliance with meal and rest break laws; claims for computer and internet expenses; and joint employment claims arising out of increased temporary staffing arrangements.

Of particular concern are the new and often overlapping state and local paid leave and wage requirements that have been enacted during the pandemic. Combined with the already burdensome state and local requirements that existed before the emergency, employers doing business in multiple jurisdictions are at greater risk than ever before of violating employment laws as they reopen or expand their workforces to deal with hoped-for increases in demand.

The challenges posed by the COVID-19 pandemic are in many ways unprecedented. In order to succeed in the “new normal,” construction contractors must pay greater attention than ever before to a dizzying array of new workplace requirements, at least so long as the emergency continues, and perhaps for the long term. 

Maury Baskin chairs the construction industry practice group in the Washington, D.C. office of Littler Mendelson, P.C., and serves as general counsel of Associated Builders and Contractors.



abc.org/Coronavirus/CDC-Guidelines-for-Employers
www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws



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COVID-19: What Contractors Should Do Now to Manage and Mitigate Risks

BY DANIEL A. KAPNER

“**U**ncertainty” is a word repeated frequently as governments and industries do their best to manage the COVID-19

pandemic, and it is a word that companies naturally do not like to hear. This is especially true in the construction industry where inexcusable delays and unanticipated increased costs can erase profits,

cause financial and legal exposure, and lead to major disputes.

While the COVID-19 pandemic will undoubtedly give rise to claims, disputes and lawsuits, it is still too early to

predict the full extent of impacts to the industry. In the short term, construction companies should take all steps available to mitigate potential liabilities.

Promote a Healthy Workforce

As states reopen, and construction is permitted to forge ahead in other jurisdictions as an essential business, it is imperative that contractors:

- stay current with safety recommendations and OSHA requirements;
- expand safety programs to include onsite temperature monitoring, sanitizing and handwashing stations, physical

distancing among workers in addition to other best practices; and

- ensure strict compliance by all subcontractors and laborers.

Comprehensive and transparent measures to ensure the health and safety of workers are critical not only to reduce the risk of delays, work stoppages and potential bad press, but also to protect against third-party liability.

Review Contracts

If contractors have not yet reviewed all of their construction contracts—upstream and downstream—and all insurance policies—including

those identifying the contractor as an additional insured—then they should do so immediately.

Important questions to ask are:

- Do delays caused by the pandemic fall within the scope of excusable delay provisions?
- What are the notice requirements for asserting delay claims?
- Do any insurance policies, including general liability and builder's risk, offer coverage for business interruption losses, "contingent" business interruption losses or other pandemic-related impacts?

Contractors should review their contracts and insurance policies



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carefully to determine their rights and responsibilities and ensure strict compliance with all notice and claim requirements, as well as to collect and preserve materials necessary to substantiate claims.

Assess Projects for Possible Pandemic-Related Delays and Increased Costs

Two shortages likely to cause delays are materials and labor. China makes more than half

of the world's steel and, as the world's fourth largest supplier, the United States produces less than 10% of China's production value. China is also the world's leader in cement manufacturing, and about 80% of the world's air conditioners are made there. Domestic producers will simply not be able to fill the gap created by international COVID-19 work stoppages; export and shipping delays continue to squeeze this supply line. Contractors must know where their materials and equipment are coming from, where those items are in the delivery pipeline and what impacts are

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“ *Ensure contracts expressly identify pandemics as a type of excusable delay or ‘force majeure.’* ”

expected to the critical path. With that information, contractors need to develop a game plan to manage delays and any increased costs.

If COVID-19 or a resurgence of the pandemic keeps workers from jobs, projects will sustain delays. Factory-based industries have clearly been hit the hardest,

but each day has brought new challenges, and it is not yet evident what will be faced in the months ahead.

Once assessments of these impacts are made, contractors should place project owners on notice of potential delays and other pandemic-related impacts liberally

and strictly in accordance with contractual notice requirements. Even if the full extent of impacts are not immediately known, provide notice of potential delays affecting the progress of work, maintain active and open communications and preserve records of all communications.

New Projects and Contracts

It is not surprising that private and public owners throughout the industry have taken a “wait and see” approach, suspending new projects as the country grapples with the economic and legal uncertainties of the pandemic. Once the



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industry emerges from this crisis and contractors are able to take on new projects and contracts, they should implement a few lessons learned during the crisis.

First, given the expected time necessary for developing and rolling

out a vaccine, the possibility of a resurgence of the virus, as well as the tremendous risks and impacts caused by the pandemic, contractors should ensure their contracts expressly identify pandemics as a type of excusable delay or “force

majeure,” thereby allocating the risk of delays to the owner.

Second, contractors should seek insurance coverage for business interruption losses and “contingent” business interruption losses, which are losses suffered because a supplier or subcontractor was delayed.

Third, the success of a project largely depends on the ability of project participants to resolve claims and disputes without having to resort to litigation or arbitration, which is costly, time-consuming and risky. To that end, contractors should include in their disputes provisions

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“ The success of a project depends on the ability to resolve claims and disputes without having to resort to litigation or arbitration.

a meaningful mechanism to facilitate the resolution of disputes amicably.

This should require that business executives conduct multiple meetings, without lawyers present, over a set period of time to negotiate the resolution of claims.

The provision should provide that the discussions are privileged, confidential and not discoverable in any subsequent binding adjudicatory process, which will foster open dialogue and encourage settlement. If executive-level negotiations are unsuccessful, the provision should

require mediation as a condition precedent to litigation.

Discussions and settlement offers made during mediation are also privileged and are not discoverable in a subsequent binding adjudicatory process. The contract should permit litigation or arbitration only after these non-binding, low-cost and highly effective dispute resolution procedures are exhausted. [CE](#)

Daniel A. Kapner is a member of Shapiro Lifschitz & Schram's trial practice for construction law, as well as power and energy construction groups. For more information, email kapner@sllaw.com.

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Asking the Right Legal Questions to Prepare for COVID-19 Claims

BY CAITLIN WARD

The impact of COVID-19 on the construction industry will be greater than any crisis or economic fluctuation in more than a generation. Adding to the uncertainty is the impossible task of understanding the true business impact as each state navigates re-opening the economy and industries work to determine a new “business as usual.”

As stay at home orders are lifted, the construction industry is poised to see a rapid uptick in litigation from engineering firms, project management companies and contractors. After all, COVID-19 has meant increased risk for essential employees and resulted in delayed project timelines due to supply chains

slowdowns, work stoppages and (likely) financing challenges.

Consulting with attorneys and insurance professionals is essential for those in the construction industry to understand their financial exposure and options to get losses and expenses covered under applicable contracts, insurance or various economic relief packages. These professionals provide critical expertise to help companies comply with contractual obligations, maintain relevant documents and understand costs in preparation for the anticipated onslaught of COVID-19-related litigation.

While companies identify means of recovering losses and preparing for litigation or insurance claims that may arise from COVID-19,

it helps to know what questions to ask legal representation or insurance providers. This ensures they’re getting the critical information necessary to make informed decisions on recouping costs, rebuilding business and preparing for potential shutdowns in the future.

Ultimately, construction companies need to understand the full picture of their obligations, how to protect contractual recovery options and what, if any, insurance coverage might be available to help address losses and additional expenses.

What Qualifies as an Excusable Delay?

Most construction contracts require certain milestones to be met on a certain schedule. Ordinarily, failing to meet those

“Delays likely to occur from COVID-19 are out of any party’s control.”

deadlines could result in reduced compensation or litigation over who caused the delay. However, delays likely to occur from COVID-19 are out of any party’s control. Force majeure, civil authority and excusable delay clauses can sometimes be used to find relief in such cases.

Questions to ask:

- Does the impact of COVID-19 qualify as a force majeure event?
- What if some of my tradesmen are deemed essential employees, but we’re dependent on work of “non-essential” personnel to meet our obligations on a given project? Does that qualify as an excusable delay?
- Are supply chain issues, materials shortages and government-ordered closures an excusable delay? If not, are there any statutes, regulations or common law principles that have the same effect?
- What if my area experiences a labor shortage due to the impact of COVID-19—is that an excusable delay?
- Would a change of law provision cover the current circumstances?
- The virus led to a lack of protective equipment for my crew. Does keeping my team onsite, without PPE, violate

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obligations to maintain a safe working environment?

- What evidence/documentation do I need to gather to support my claims?

What Are the Notice Obligations Under My Contracts?

Most contracts include some requirement to provide notice of any issues that impact the ability to perform the required scope of work within the prescribed time frame. Failing to provide these notices could impact valid claims for delay damages at a later date, so working with legal representation to understand notice

obligations will help to protect the business' recovery rights.

Questions to ask:

- What are my notification obligations for each project contract? Under my financing terms? Under my insurance policies?
- What information does the project owner need to provide to project participants, financial institutions or lenders? Does their compliance impact my ability to recover?
- Do I have an obligation to collect delay information from my subcontractors? If so, what are their obligations to notify me?

- What do I need to provide in any notices that I send?

What Rights Do I Have to Terminate My Contract and/or Recover for My Work Already Performed?

From a business standpoint, waiting out the COVID-19 crisis for work to start back up may not be the right thing to do. Explore various options with legal counsel to determine if a contract can be terminated and what rights the business has to recover for costs already incurred.

Questions to ask:

- Do I have the right to terminate my contract?



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- If so, can I recover the costs and value of services of work already performed?
- Could I recover my anticipated profits if I terminate my contract?
- Do I have the right to file a contractor's lien?

What Are My Duties to Mitigate My Damages?

The COVID-19 crisis may result in substantial losses. However, businesses likely still have obligations to mitigate, or lessen, those damages where they can.

Questions to ask:

- Are there contractual mitigation terms?

- Are there statutory or common law obligations beyond my contractual mitigation obligations?
- If I must use a particular kind of equipment or part and it is not available, does that eliminate any need to mitigate?
- If I am unable to get all the required parts from my current supplier, what are my purchase obligations from them? From an alternative supplier?
- If the cost of the goods exceeds the price contemplated in the contract, do I have to purchase the higher priced goods anyway?

- What do I need to document my mitigation efforts?
- How should I be communicating regarding my mitigation efforts? Whom should I notify?

What Are My Potential Insurance Recovery Options?

After identifying all possible insurance policies, evaluate what, if any, claim options are available for the business. Conversations with separate insurance carriers about multiple policies will be necessary, so keep track of the policy number and answers received to make sense of the options later.

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Questions to ask:

- Do I have insurance coverage for my losses resulting from COVID-19 or efforts to combat it?
- Are there any exclusions in my policy preventing me from recovering?
- Is the virus a pollutant under my policy?
- Does my commercial property insurance have a business interruption provision? Do the circumstances qualify me to file a claim under that provision?
- Does my trade disruption insurance cover delays due to supply chain disruption? How

about increased costs to obtain the same goods once normal trade resumes?

- Does my builders risk policy provide coverage for physical loss to the site?
- Would government orders prohibiting site access qualify as “loss of the covered property?”
- Do any of my policies have “civil authority” coverage? If so, would they provide coverage for my losses?
- What are my notice obligations under my policies?
- What evidence do I need to support a claim?
- How do I submit a claim?

What’s Recoverable?

Now that potential recovery options are identified, the next step is to determine what losses and expenses are recoverable.

Questions to ask:

- Are labor costs or additional expenses covered or recoverable?
- Can I recover for the impact of inefficiency causing further delays once sites reopen?
- Can I recover the initial or replacement costs of materials, supplies or equipment purchased before the job site was shut down?
- If materials, supplies, equipment or labor are more expensive now versus my



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bid price, can I recover the difference?

- If the scope of my work expands, do I have the right to recover for the additional costs and work performed?
- If there are any financing costs that I was obligated to pay for the duration of the project shut down and/or will need to pay for longer than anticipated, can I recover those costs?
- If I obtain relief under the CARES Act or other assistance programs, does that impact my ability to recover damages?
- Can I recover costs associated with business interruption,

schedule or time impacts (including any impact on “on-time” bonuses and milestone dates) resulting from project delays?

- If there is additional time required to re-scope projects, adjust project schedules or obtain inspections, can I recover for the delay and business interruption to my work?
- What evidence do I need to support recovery of any of my damages?

The current climate makes navigating financial and legal realities tricky. But staying informed by asking the right questions,

working to reach reasonable resolutions and starting to collect evidence in support of losses now will only help make the upcoming deluge of construction-focused litigation less trying and burdensome on a company.

In addition, organizations will learn to structure future projects to provide greater protection against similar shutdowns or supply chain disruptions. 

Caitlin Ward is an Austin, Texas-based legal technology leader at DISCO, helping lawyers innovate to overcome e-discovery and case management challenges. For more information, visit csdisco.com.

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Essential Terms to Include in All Construction Contracts

BY LAURA A. COLCA

Construction projects are a driving force of growth, and the prospect of a new building or an addition to a current space brings great anticipation.

Parties to the project are often anxious to fast track the venture and get things moving.

However, eagerness to commence work on the project can undermine preparing a well-drafted and thoroughly negotiated construction contract. Admittedly, there are times when the hastiness in preparing

a construction contract is not problematic. The work proceeds smoothly and there are no issues. The contract is filed away and is never utilized. However, this is not always the case.

Notwithstanding the good intentions of the parties at the beginning of the job, things go wrong, mistakes are made, and people are unhappy. When this occurs, it is critical to have a well-drafted agreement to guide the parties. Contractors often overlook several critical provisions

in construction contracts that can make the difference between a smooth resolution when a problem arises and full-blown litigation.

Scope of Work

The scope of the work is a construction contract provision that often is not fully vetted by the parties. From the perspective of the contractor, having a precise and specific scope of the work provision is indispensable. Without it, there can be significant disputes over exactly what the

contractor was retained to do for the agreed upon contract.

By way of example, assume that a construction contract states that the contractor is retained to build an addition to an existing office space. Assume further that there is little detail in the scope of work as to whether the contractor is responsible for simply foundation work and framing, or whether the construction of the structure includes, in addition to the basic components, electrical, HVAC, plumbing and finishing work. The owner assumes that the contract price includes not only just the basic structural components, but also all of the other requirements for the project.

On the other hand, the contractor believes that the description of the work and the respective price includes just the essential elements of the construction project. Ultimately, the parties reach an impasse on the terms of the agreement.

Given the description of the scope of work, it is difficult to determine who is right. Is it the owner or is it the contractor? If the agreement had been specific and set forth the elements included (and not included) in the scope of work, the problem could have been averted. Accordingly, it is essential to have a detailed scope of work provision in every construction contract.

Dispute Resolution

Dispute resolution is a construction contract term that is also often not sufficiently addressed. If a disagreement occurs between the parties regarding pricing issues, the scope or quality of the work, or possible breaches of the contract, a mechanism must be in place to resolve these issues. Do the parties submit the matter to arbitration? Is the arbitration binding or non-binding? Is the issue litigated in court? What is the process for instituting a claim? Is there a non-binding mediation requirement that precedes submission to either arbitration or the institution of a litigated claim?



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Without a clear directive as to how disputes are to be handled, there will be significant confusion as to how to resolve the issues between the parties.

From the contractor's perspective, it is essential to plan ahead of time on how disputed issues will be handled. If there is an impasse on a matter that either delays or impedes construction on a project with many subcontractors, the contractor needs to be assured that the issue will be handled expeditiously and will not derail the entire project.

With proper advance planning during the contract negotiation

stage with the inclusion of a well-drafted dispute resolution provision, contested matters can be addressed and expeditiously resolved without undermining the progress of the project.

Force Majeure

Finally, all construction contracts should contain a force majeure or "superior force" provision. The current COVID-19 crisis facing the United States and the world serves to demonstrate this point. In short, a force majeure provision in a contract serves to mitigate and remove liability for parties resulting from unforeseen

catastrophes which occur and interrupt the natural progression of the work under the contract.

A typical force majeure provision is as follows:

"Notwithstanding anything to the contrary contained herein, neither party shall be liable for any delays or failures in performance resulting from acts beyond its reasonable control including, but not limited to, acts of God, natural disasters, acts of war or terrorism, disease, shortage of supply, breakdowns or malfunctions, interruptions or malfunction of computer facilities, or loss of data due to power

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“Contractors often overlook critical provisions that can make the difference between resolution and litigation.”

It is extremely important for parties to construction contracts to properly memorialize the terms of their agreement in a well-drafted document. While a comprehensive construction contract will not prevent disputes from occurring, it will make their resolution much easier and less costly for all involved. 

failures or mechanical difficulties with information storage or retrieval systems, labor shortages or civil unrest. Notwithstanding the foregoing, in the event of such an occurrence, each party agrees to make a good faith effort to perform its obligations hereunder

and/or resume its performance as soon as reasonably possible.”

The current COVID-19 pandemic would fall within a properly worded force majeure provision and as such, would guide each party as to their conduct and obligations under the contract.

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