

# CLIENT ALERTS

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## Coronavirus and the Construction Industry: Plans and Procedures for Construction Companies to Implement to Mitigate the Impact of the Coronavirus

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All of us have recently been inundated with information about the coronavirus, in particular, its impact on industries and companies, plans and procedures for dealing with it, and recommendations for preventing it from spreading. But, what impact is it specifically having or will it have on the construction industry and what plans and procedures should construction companies specifically implement to deal with it?

The construction industry is unique with respect to the coronavirus because construction contracts typically contain provisions about time for performance and fees for failing to perform on time. See, e.g., American Institute of Architects (AIA) A201 – 2017, General Conditions of the Contract for Construction, § 8; Engineers Joint Contract Documents Committee (EJCDC) C-700 – 2013, Standard General Conditions of the Construction Contract, § 4. Specifically, provisions stating that time is “of the essence” in the performance of the contract and providing for liquidated damages for failing to perform on time. See, e.g., AIA A201 – 2017 § 8.2.1 (stating that “Time limits stated in the Contract Document are of the essence of the Contract.”); EJCDC C-520 – 2013, Agreement Between Owner and Contract for Construction Contract, § 4.01 (stating that “All time limits...are of the essence of the Contract.”); AIA A201 – 2017 § 9.5.1.6 (providing for withholding of payment to cover liquidated damages if the work is not completed within the contract time); EJCDC C-520 – 2013 § 4.03 (providing for liquidated damages for not achieving the times specified within the contract).

The coronavirus could have a significant impact on those provisions. For example, a company could easily find itself in breach of or on the brink of breaching those provisions if its labor forces are reduced or its material or equipment cannot be obtained or delivered on time because of the coronavirus. And,

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do not forget about the company's subcontractors and suppliers since impacts on them could ultimately result in impacts on the company and breaches of those provisions. Therefore, it is critical that construction companies be proactive rather than reactive in dealing with the coronavirus and highly recommended that they take the following steps with respect to the coronavirus:

1. **Define** – identify the company's main vulnerabilities (convene a meeting with senior management and decision-makers to identify potential impacts on the company).

- Key Considerations

- What are the company's most important business activities and processes that need to be protected and which people are responsible for them?
- Who are the company's most important subcontractors and suppliers?
- What are the company's most important materials and equipment?

2. **Assess** – understand if and how the company is prepared to deal with the company's main vulnerabilities (review any existing plans and procedures to ensure they are current and begin preparing business continuity and crisis management plans and procedures aimed at minimizing potential impacts on the company).

- Key Considerations

- What policies and initiatives should be reviewed to mitigate further impacts on the company?
- Are critical activities and processes covered by existing plans and procedures or do new plans and procedures need to be implemented?
- Are critical subcontractors and suppliers prepared to respond?

3. **Implement and Manage** – ensure the company's plans and procedures work (work with senior management and decision-makers to establish and embed response and recovery arrangements and confirm senior management and decision-makers understand their roles and support how the plans and procedures will be used).

- Key Considerations

- Who should be the company's teams as far as planning and responding are concerned?
- How will the company monitor the continuing effects on the company's most important business activities and processes?
- At what point does the company anticipate recovery arrangements will need to be invoked?

4. **Communicate and Remain Vigilant** – ensure the company's teams are informed (assign clear responsibilities for internal and external communications).

- Key Considerations

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- What methods are needed to provide ongoing communication and monitoring of the situation?
- Which decision-makers need to be contacted and informed and when?
- Which subcontractors and suppliers need to be contacted and informed and when?
- Who will be responsible for communicating major developments both internally and externally?
- How will the company continue to protect staff and key material and equipment?

The construction industry is even more unique with respect to the coronavirus because construction contracts also typically contain force majeure or excusable delay provisions. See, e.g., AIA A201 – 2017 § 8.3.1 (entitling the contractor to an extension of time for delays caused by “an act or neglect of the Owner or the Architect,” “authorized by the Owner,” or for “labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor’s control.”); EJCDC 700 – 2013 § 4.05 (entitling the contractor to “an equitable adjustment” in time if the “Owner, Engineer, or anyone for whom Owner is responsible, delays, disrupts, or interferes with the performance or progress of the Work” or for delays caused by “severe and unavoidable natural catastrophes such as fires, floods, epidemics, and earthquakes,” “abnormal weather conditions,” and “acts of war or terrorism.”). Obviously, the question becomes — would the coronavirus fall within the category of a force majeure or excusable delay event? It is not entirely clear given the novel nature of the coronavirus. Therefore, it is not recommended that construction companies count on relying upon such force majeure or excusable delay provisions to shield them from liability for delays and disruption in their work or their failure to complete their work within the time specified in their contracts. Instead, construction companies should try to minimize those delays, disruptions, and failures by taking the steps recommended above.

If you have any questions or concerns or need any assistance in handling any matters with respect to the coronavirus and your contracts and projects, please contact the author of this alert or any of the attorneys in Butzel Long’s Construction Law Practice Group.

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