



## **The impact of COVID-19 on construction projects and potential legal consequences - Andrew Richards**

August 04, 2020 - Long Island



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The cost impact of COVID-19 has affected almost every industry in America. Construction is no exception. Since March 2020 construction project owners, contractors and subcontractors have been struggling to determine who will pay for the excess costs associated with protecting construction site workers from COVID-19 as well as shifting any liability to others for damages suffered due to COVID-19.

There are a variety of costs, damages and liability that each party to a construction project must

assess when entering into a new construction project or protecting themselves from liability for on-site issues due to COVID-19. First, for on-going projects, the parties will have to determine whether work delays qualify a contractor for an extension of time to complete its work without incurring consequential damages. Most construction contracts in New York State have a “no damage for delay” clause which precludes monetary damages for delays caused by, among other things, a force majeure or an Act of God, and affords the contractor an extension of time as its sole remedy. It is this writer’s opinion that contractors will be afforded an extension of time in most cases without liability for delay due to COVID-19 as the pandemic is surely an Act of God or force majeure. The interesting question is monetary damages for contracts that were executed prior to the pandemic. While the New York State courts have not published any decisions on whether a contractor may recover damages against the owner due to costs associated with COVID-19, a court would be hard pressed to award damages to the contractor because the COVID-19 delay impacts are not caused by the owner. In addition, owners will suffer their own extra costs for delay such as extended loan payments on construction loans.

In addition, many contractors and owners are faced with additional costs for protecting workers from being infected by COVID-19 while working at the construction site. New York State has issued mandatory protections for workers at construction sites such as providing PPE, temperature checks, and obtaining completed forms from the workers stating that they have not knowingly been in contact with someone who tested positive for COVID-19. While these costs may or may not be significant, they surely add overhead costs for administering a program for the protection of workers.

Perhaps the most unknown and significant legal issue that will arise from COVID-19 cases arising at a construction site is the liability that an owner or contractor may have when a worker or others become infected at the site. While a contractor can take action to protect its workers, it may not be able protect its workers from infection from other contractor’s workers. There are actions that an owner can take which affect all workers at the site such as temperature checks. However, there are precautions that only a contractor can take which affect its own workers such as providing the proper PPE for the workers depending on the trade and making sure the workers are socially distant at the site to best of their capability. We have seen contracts that are being let after the pandemic containing provisions that pass the liability off to another party to the contract for pandemic related costs.

Another big legal issue concerns what precautions a contractor or owner must take to absolve it of liability for COVID-19 related illnesses. There is no guideline which advises a contractor or owner what precautions need to be taken to preclude liability for COVID-19 illnesses. We know that the State of New York has issued regulations for the protection of workers. However, it is not yet known if liability can be avoided if those regulations are followed without further action. If, and when, a lawsuit is brought against an owner or contractor by a worker who suffers a COVID-19 related illness, courts will have to determine the legal standard to be applied to determine liability. Negligence is the most likely legal standard, which begs the question whether the contractor or owner acted reasonably to protect the workers. Such a question will be left to a jury and will be determined most likely on a case by case basis. The next big issue is whether insurance will cover

legal fees and expenses when a case is brought due to COVID-19 illnesses, and whether any damages are covered by insurance. This issue may not be determined for some time but will surely be a battle between insureds and insurers since the legal fees and damages may be substantial.

It is important for all parties to a construction contract to adhere to all governmental regulations and institute a protection program for its workers. These costs will be minimal compared to any damages incurred due to a court determination that the party is liable for pandemic related illnesses.

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