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## COVID-19 Damages and Time Recovery Contract Checklist and Analysis

This Alert explores the contract provisions and related rights that are likely to govern time and compensation adjustments for COVID-19 impacts. As parties begin analyzing such rights, this is intended to serve as a useful guide and checklist.

Analysis of relevant contract provisions should start with careful consideration of the specific impacts that have been experienced and the causes of those impacts. The nature of the impact (delay, extra work, disruption, etc.) and the causes of such impacts (owner direction, government order, etc.) will generally govern the analysis and resulting course of action. Listing or creating a matrix of impacts and their causes may be an effective working tool.

Essentially, there are five primary impacts that will likely require critical analysis under the relevant contract provisions, and notably, more than one impact may be present:

- a. complete or partial suspension of work,
- b. additional work or requirements,
- c. added cost,
- d. delay, and
- e. disruption.

Once identified, these impacts must be evaluated in relation to their respective causes. Identifying which impacts have been encountered, and their related causes will facilitate the process of identifying the relevant contract provisions and evaluating their implications.

Complete suspension of a project will result in project delay, but it may also trigger additional costs to wind down the work and secure the site. When work resumes, increased costs for labor or material may well be encountered. These separate effects need to be identified and, potentially, segregated for contractual analysis. Importantly, the result of that analysis may vary based upon the cause of the suspension; a suspension initiated by the owner may have different contractual significance from a suspension caused directly by governmental order. In addition to aiding analysis of contractual rights, segregating issues in this manner may also be helpful when taking the later step of assembling damages and delays.

Ongoing projects are subject to a litany of impacts.

Added safety measures such as employee screening, temperature checking, and the increased cleaning and the use of personal protective equipment can be examples of additional work and costs that are being incurred. Implementing such measures may disrupt the project, along with other



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factors, such as material and labor shortages, subcontractor/supplier failures to perform, social distancing and restriction of worker access to facilities (such as lifts, rest rooms or break areas) and dealing with sick, absent and worried workers, including those subject to quarantine.

Of course, external factors are resulting in material price increases that will impact the cost of performance. Trying to list all such factors would be unrealistic.

A clear sense of cause and impact will facilitate more efficiently moving to the next critical step - examination of the contract provisions to determine whether such impacts create rights to time extensions and/or additional compensation.

In reviewing such provisions, careful attention must be paid to notice and documentation requirements. It is also important to recognize that the analysis should not be limited to the general conditions but should extend to the specifications, especially any related to changes and extensions of time to identify any additional notice and documentation requirements. Failure to strictly comply with such requirements can seriously impair a party's rights.

Listed below are key provisions to note, together with some insight that may be helpful in conducting the evaluation in the context of the pending crisis. Clauses may not be identified with a subtitle in the contract that clearly leads the reviewer to such provisions or correlates with the subheading used in the alert. Additionally, there may be an interplay between various clauses that dictate contract rights.

## **Force Majeure/Extension of Time/Delay Clauses**

The natural inclination is to consider the COVID-19 effects as falling under a contractual *force majeure* provision or similar type clause that excuses timely performance due to categories of circumstances outside the control of the parties. Such things as epidemics, pandemics and government orders that are not reasonably foreseeable at the time of contracting may or may not be expressly included. However, even if a court determines that they are implicitly included, a contractor is often required to mitigate the effects of such events. Some *force majeure* clauses do not mention compensation, while others provide that a contractor may recover additional compensation for *force majeure* events. Whether such compensation would extend to just the cost of delay or to other cost impacts would depend on the specific wording of the clause.

## **Emergency Clauses**

Some industry standard contract documents such as the AIA and the ConsensusDocs include clauses that require the contractor to take prudent action to respond to an emergency. In both, such clauses tie back to the changes provision, creating the potential that a contractor would be entitled to compensation for such actions. While such clauses were probably intended to cover job-site accidents and the like, their language is often broad enough to arguably cover the current situation where an "emergency" has been declared by a governmental entity. Similar clauses may also appear in other contracts not based on these standard forms.



### **Suspension of Work Clauses**

Many contracts afford the owner the right to suspend all or part of the work. Usually, these clauses provide an opportunity for compensation to the contractor, although some limit recovery to the “unreasonable” duration of a suspension. Such clauses often contain strict notice requirements. Whether or not the owner has directed the suspension is a key to the potential application of these provisions. Such direction can be explicit or, sometimes, implied by the owner’s actions or failures to act.

### **Changes and Extra Work Clauses**

Almost all construction related contracts include clauses that allow the owner to require the contractor to perform changed, new or extra work. Best practice is for the project participants to agree on the scope and compensation for additional or changed work; but that standard is not always realized, and disputes often arise as to whether work performed by the contractor with the owner’s knowledge or acquiescence should result in compensation in the form of time or money under such provisions. Currently, governors and local governments have issued orders requiring “social distancing” and the CDC, OSHA, EEOC, and other entities have all issued workplace “guidelines” that may or may not carry the force of law. Compliance with these orders and guidelines necessarily requires the contractor to do things differently. Such guidance will surely evolve as work resumes and we move through next phases involving a return to work. Questions will abound as to whether this different performance constitutes changed or extra work under such clauses. Another related question is whether the owner’s direction to comply with such orders and guidelines or even its direction to continue with construction with knowledge of such guidelines, would constitute direction to perform such changed or extra work.

### **Change in Law Clause**

The contract may have a provision that affords a contractor a remedy, compensable or otherwise, if the law changes after the contract is executed. In the COVID-19 environment, a shelter in place or suspension of work order from a governmental entity arguably could be considered a change in the law, as would the imposition of social distancing and other workplace guidelines to check the spread of the virus.

### **Differing Site Conditions/Concealed and/or Unknown Site Conditions Clause**

Site conditions clauses generally provide compensation when the contractor encounters conditions that differ from those described in the contract or from those reasonably expected to be encountered. It could be argued that the presence of an unanticipated contagion fits within such clauses. However, the very limited law on the subject (one case found) suggests these clauses are limited to conditions that existed at the time of contracting.



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## Non-Contract Based Theories: Impossibility, Frustration of Purpose, Mutual Mistake

In the rare case that a contract does not include contract provisions explicitly dealing with performance under circumstances such as those currently being experienced, legal doctrines such as impossibility of performance, frustration of purpose or mutual mistake and an implied duty of good-faith and fair dealing may be implicated. Their application may serve to result in an “equitable” remedy, such as an extended period of performance, contract rescission or some form of *quantum meruit* recovery for additional costs.

## Conclusion

Aside from invoking contract provisions and legal remedies, the contract parties need to engage in candid communications as to the circumstances affecting the work. Maintaining records that allow the parties to accurately track impacts and the resultant delays and extra expenditures is also critical. Proper evaluation of lost productivity will be greatly facilitated if a baseline for productivity before the COVID-19 impacts is established. It cannot be over emphasized that we are in an unprecedented period of disruption and we can expect unusual remedial measures to evolve. We will certainly keep you abreast of developments and changes through these Alerts.

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