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## COVID-19 and Florida Construction: Lessons from the Frontlines in New York, New Jersey, and Around the U.S.

While the COVID-19 pandemic continues to impact the construction industry as a whole, the geographic location of projects and business operations, like the expansion of the virus itself, is in many ways influencing the ongoing impact and resulting conditions for those projects – whether public or private, large or small. This Florida COVID-19 Alert for general contractors and others in Florida’s construction community, responds to our newly issued state Executive Order and identifies and summarizes key issues, challenges and conditions impacting the construction industry, nationally, including in areas hardest hit by the pandemic.

The construction industry in Florida has a fleetingly short window of opportunity to learn from the experiences of those in the most affected areas in order to avoid and mitigate losses and impacts, and best prepare to adapt and succeed in a changed world. With the intent of maximizing the opportunity during this short window, this Florida COVID-19 Alert focuses on the lessons learned in New York (where a state-wide order mandating the shut down of non-essential construction projects has already been issued), New Jersey and other locations where the pandemic’s effects are most widespread.

On April 1, Florida Governor Ron DeSantis issued Executive Order [20-91](#) (“EO”), regarding “Essential Services and Activities During COVID-19 Emergency”, which directs “all persons in Florida [to] limit their movements and personal interactions outside of their home to only those necessary to obtain or provide essential services or conduct essential activities.” The Order, which takes effect on Thursday, April 2 and will remain in place until April 30, concerns the list detailed by the U.S. Department of Homeland Security in its [Guidance](#) on the Essential Critical Infrastructure Workforce and includes those businesses and activities designated by Executive Order [20-89](#) and Miami-Dade County Mayor Carlos Gimenez’ Emergency Order [07-20](#), now incorporated into EO 20-91. Other essential services may be added or deleted under the EO in time.

Businesses considered essential include, but are not limited to: (1) contractors and other tradesmen...who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences and other structures; (2) open construction sites, irrespective of the type of building; (3) architectural, engineering, or land surveying services; (4) factories, manufacturing facilities, bottling plants, or other industrial uses; and (5) businesses that supply other essential businesses with the support or supplies necessary to operate, and which do not interact with the general public.

Essential business designations within the orders may enable certain projects to continue but to what degree is it “business as usual”? Running a project in what has become the “new normal” requires contractors to follow the guidance from the CDC, DHS-CISA, OSHA and others for keeping a project safe under these extraordinary circumstances. There are myriad of additional factors to consider that must be addressed to keep a project active: contract terms, notice issues, possible suspensions, employment, additional costs for labor and materials, and many other concerns.



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As of March 27, in what may be a sign of things to come, all non-essential construction job sites in the State of New York (i.e. everything except for public works, transportation, infrastructure and hospital/medical facilities) which had previously been allowed to continue operations, have been ordered to shut down. Thus, issues relating to and consequences of suspension of operations are currently being experienced in New York.

The circumstances attendant to the myriad of issues the construction industry in Florida is facing, and will continue to face, certainly are unlike normal project or contract challenges, but are, in important aspects, similar to issues being faced by the industry in other jurisdictions. While what may have been the right response in one location may not be the right response in another location, the most important issues being faced and the guidance being provided by P&A in response are:

- **You've Been Suspended – Were you Ready?** Contractors and owners across the country are scrambling to comply with mandated governmental suspensions and other restrictions. Although Florida is currently not under a mandated governmental suspension, it is certainly possible that this will happen, locally or statewide. Companies in the construction industry across the state of Florida should already be taking steps and have contingency plans in place for possible project suspensions or shutdowns. Contractors should communicate with the owner, provide notice, document conditions and actions, and seek clear direction regarding suspensions and other issues, including security, costs and protective work before and during the shutdown. Contractors must also communicate with subcontractors to provide direction based on information received from the owner.
- **COVID-19 Impacts on Federal Government Contracts – Protecting Your Rights Associated with Delays & Suspensions of Work.** Those working on projects in Florida with the federal government should review and take steps to preserve and protect their rights under the Federal Acquisition Regulations (“FAR”), including addressing excusable delays, adjustments to the contract time, and possibly a monetary adjustment. The contractor must analyze the requirements of the FAR as they apply to the project delivery method and the particulars of the project.
- **Families First Coronavirus Response Act.** The Families First Coronavirus Response Act (the “Act”) became effective April 1, and expires December 31 of this year. For more on the Families First Act, we refer you to our [Client Alert](#) on this topic.
- **Employer Guidance – Coronavirus Workplace Safety, Employee Screening and CDC/OSHA Compliance.** For now, despite Governor DeSantis’ EO, Florida’s construction sites are still allowed to operate, and while this may change, there are steps that must be taken to minimize the risk that a site may be shut down. For construction sites to continue to operate, Florida’s construction industry should have already established robust policies and practices for safety following the CDC and OSHA guidelines. It is certain that local jurisdictions will increase enforcement efforts to ensure employees are practicing social distancing, especially during lunch and other breaks. In fact, as of March 30, Miami-Dade County increased compliance personnel and law enforcement officials to enforce the orders and mandates in place. Accordingly, for example, the use of cones or other indicators to give workers 6-foot separation, and separated stations for hand washing and other personal hygiene and infection control practices are required. Employers should have already established a protocol to identify and isolate sick individuals and encourage workers to stay home if they are sick.
- **COVID-19 Guidance for Employers on Virus Screening.** Florida contractors, like those across the U.S., are well advised to follow federal guidance from the CDC and OSHA. Our Client Alert on Employer Guidance-Coronavirus Workplace Safety, Employee Screening and CDC/OSHA Compliance can be found [HERE](#).



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- Planning Now to Prove Your COVID-19 Damages and Delays Later.** Even though Florida projects can continue, at least for now, construction projects may be in a state of uncertainty and flux as a result of the COVID-19 outbreak due to labor, supply or material shortages and related issues. Many contractors are working hard managing new and unanticipated burdens trying to keep people and projects safe; keeping projects moving forward; issuing notices to preserve rights; reviewing contracts for applicable relief provisions; reviewing insurance policies; and digesting new governmental orders and laws, to name a few. These challenges are impacting construction projects at a rapid rate. Contractors must implement a real time plan of action to gather the necessary information you need to be specific about added costs and time lost. Such real time action will be enormously helpful for contractors to secure time extensions and monetary recoveries. Whether the claim will be made against an owner, insurer or subcontractor, the claim will likely be challenged and any weakness in the documentation used to prove entitlement and impact will be used to the contractor's detriment. A contemporaneous record showing that the contractor evaluated cost containment and schedule mitigation options before choosing a course of action will make a challenge more difficult.
- Coronavirus (COVID-19) – Guidance for Contractors.** These are certainly not “business as usual” times, but some basic principles of avoiding loss, mitigating impacts, documenting claims and preparing for what's to come should be implemented, such as: (1) review and find relevant contract terms (force majeure, unforeseen conditions, excusable delay, changed work, etc.); (2) provide clear and compliant notice; (3) pay special attention to suspension and termination clauses; (4) document cost and schedule impacts; (5) ensure that contractually required support is created; (6) evaluate whether existing insurance policies potentially provide coverage; (7) analyze subcontracts and other agreements and make sure communications with the subcontractors is addressed in a manner consistent with how that issue should be addressed with the owner; (8) identify challenges early to document mitigation efforts; and (9) revisit job site safety protocols to address possible disease spread and to implement new healthy procedures. When contractors take precautionary and proactive measures, they will stand a better chance of mitigating their risks.

P&A's [COVID-19 Task Force](#) works nationally and internationally to collect, assimilate, and process rapidly evolving information from different federal, state and local governments, prioritizing issues of importance for construction companies to assess impacts and continue operations during the crisis. P&A's COVID-19 [Public Action Matrix](#) contains information on recently passed legislation and related orders and guidance from federal, state and local governments and agencies impacting the construction industry. This and all of our resources are updated frequently in response to this rapidly changing situation. As this pandemic evolves, P&A's COVID-19 Task Force will continue to serve, support, and inform the construction industry in Florida, the United States and around the world.

*The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.*

*As always, we are pleased to share insights and updates related to legal issues of interest with clients and friends of the Firm. Our records reflect that the recipient of this message is not a European Union “Data Subject” as defined by the General Data Protection Regulation (GDPR), enacted on May 25, 2018. If you are or consider yourself to be a Data Subject under the EU's GDPR, kindly email Jennifer Papantonio at JPapantonio@pecklaw.com right away. The GDPR requires that all European Union Data Subjects provide explicit consent in order to continue to receive our communications.*

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