



PATRICK J. GREENE, JR.



NATHAN A. COHEN



CURTIS W. MARTIN

Going Back to Work – Starting or Restarting a Construction Project During the Pandemic

Over the next several weeks and months construction projects that had been shuttered will be restarted and new projects will be commenced. This Alert provides a checklist of issues that should be considered before starting or restarting such projects. These issues are drawn from lessons learned on “essential” projects that continued in hard-hit areas, guidance issued by various agencies including OSHA, the CDC, and the Department of Labor, and requirements announced by jurisdictions that are allowing previously restricted construction projects to proceed. Examples of the information that can be derived from such sources can be accessed [here](#).

1. Establish a Plan Designed to Address Worker Protection and Project Hygiene.

The project participants (owner, contractor, and key subcontractors) need to consult to develop a plan that identifies health and safety precautions to be employed, as well as the party responsible for implementation of those requirements. The plan should be reduced to writing and may need to be submitted to applicable government agencies. It is necessary to consider site-wide safety, safety within individual trades, and the safety of trades that need to interact. Ideally, the parties should agree how the costs of implementation will be borne. Issues to be considered in such a plan include:

- a. Specification as to when Personal Protective Equipment (PPE) will or must be utilized and sourcing and payment for PPE, as well as additional cleaning supplies;
- b. Limitations on access to the job site and related security;
- c. Protocols for screening of employees, workers, and other visitors, including, potentially, use of questionnaires, routine temperature measurements, and other testing methods that become available, as well as the designation of personnel to perform the work (safety manager, nurse, paramedic, or hygiene subcontractor);
- d. Communication protocols, potentially including daily checklists and reporting regarding individuals identified through screening or otherwise as potentially infected individuals;
- e. Procedures to be employed with respect to sick or potentially sick workers (including issues as to payment for workers for show-up time and quarantine times);
- f. Potential need to communicate with third parties with respect to sick or potentially sick workers (health department, union, etc.) and prohibitions on divulging the information;

For More Information Please Contact

Patrick J. Greene, Jr.
 pgreene@pecklaw.com
 201.343.3434

Nathan A. Cohen
 ncohen@pecklaw.com
 310.228.1075

Curtis W. Martin
 cmartin@pecklaw.com
 713.568.1500



CLIENT ALERT

- g. Procedures to be employed to allow return of sick workers (CDC guidelines prescribe several potential measures);
- h. Policies for social distancing, including separation of workers, limited presence on common conveyances (hoists and elevators), policies for use of PPE or other measures (masks) when there is a need to work closely together (this may include the staggering of work crew start times and the employment of shift work);
- i. Establishment of regular toolbox talks to include emphasis on Covid-19 safety – potentially to include remote attendance or conducted in a manner that maintains social distancing;
- j. Development of jobsite meeting protocols that maximize social distancing;
- k. Procedures for the increased cleaning of work areas including “high touch” areas and areas that may have been contaminated;
- l. Implementation and maximization of work-at-home solutions; and,
- m. For cost reimbursable projects, agreement that project management staff working offsite is chargeable as a cost of the work.

2. Educate Workers as They are Mobilized to the Job Site.

Plan to educate workers regarding new procedures, work rules, and protocols. This will likely be an ongoing process that evolves and may differ depending on the project status. Bear in mind that some jurisdictions may require phased mobilization of workers to allow for effective education.

3. Determine How Quality Control and Inspections Will Be Handled.

Before you recommence, you should understand how compliance with codes will be documented before work is covered up. Consider issues such as:

- a. Can some quality control inspections or measures be handled or managed remotely?
- b. Can remote inspections that require travel (factory acceptance tests, etc.) be eliminated or handled remotely?
- c. Are local building authorities prepared to perform inspections?
- d. If not, can remote inspection or other inspection substitutes be used?

4. Document the Status of the Site and the Work.

You should be able to document the status of the site and the work before you start. This should include the taking of detailed photographs and videos. Creating such documentation before work commences may help you keep the project team safe and avoid disputes later about the status of the job at recommencement. Consider:

- a. Is any remediation required?
- b. Are safety barriers still in place?
- c. Has the shutdown affected any work or equipment in place or on site?



CLIENT ALERT

5. Beware of Requests to Certify Compliance.

Some owners and local authorities have demanded certifications that may not be required by the contract to allow the contractor to proceed with work. For example, one jurisdiction demanded that the contractor certify it is performing in “strict compliance” with all applicable state, local, CDC, and OSHA “applicable regulations, guidelines and requirements.” Is the contractor in default of its certification if some workers do not follow social distancing or other requirements? Does the prime contractor’s certification apply to subcontractors’ actions? Is the contractor subjecting itself to new potential false claims liability due to the certification? Careful consideration should be exercised before executing certifications of this sort, and consultation with counsel may be advisable.

6. Check Schedule and Performance Measures.

Double-check the current schedule: it will be a new baseline for the completion of the project. Make sure the schedule reflects the project’s current status and is based on sound logic and reasonable durations for completion. Keep in mind that planned durations and sequences may need to be revised to account for changes in crew size, restricted presence of trades, restricted use of hoists and changes in productivity that may derive from the use of PPE, implementation of social distancing and other hygiene policies, and other issues. If possible, reach agreement among the parties on the revised schedule and any cost implications. At the very least, you should follow all documentation and notice provisions to preserve your rights.

In a similar vein, consider the need to assess productivity, for example, using existing information to establish levels of productivity in the non-Covid-19 environment which then can be compared to productivity on a going forward basis. This may be helpful in establishing baseline “measured miles” that will help any analysis of reduced productivity that can be useful in revising the as-planned schedule and in any eventual dispute.

7. Prepare to Document Cost and Time Impacts.

Real-time documentation can be more economical and persuasive than retroactive cost collection. Segregate costs as much as possible to facilitate analysis. Prepare to document delays or work slowdowns and to track them both in the schedule and schedule narratives. You should consider whether to employ an independent schedule consultant to help.

Consider potential cost impacts that may include:

- a. Suspension costs;
- b. Delay costs incurred to date and expected future costs;
- c. Inefficiency costs to date and expected future costs;
- d. Costs due to demobilization and remobilization;
- e. Site access costs;
- f. Additional cleaning costs;
- g. Escalation costs for material and labor;
- h. Additional staff and consultant costs; and
- i. Additional PPE costs.



CLIENT ALERT

8. Consider Project Financial Issues.

The Covid-19 crisis created significant, unanticipated financial burdens, which likely impacted each party differently. The impact may have strained some parties' financial ability to continue performing as they would have before the crisis. You should consider whether to utilize contract provisions or legally granted rights to seek assurances and documentation that the project is properly funded, and that the other parties have the current wherewithal to perform. You may consider seeking confirmation from sureties that their promises remain in place.

9. Prepare for Compliance with New and Existing Notice Requirements.

All construction contracts contain notice and/or claim requirements that have the potential for impacting the rights of participating parties. The current crisis raises the potential for new notice requirements related to or dealing with the health emergency. Consider, for instance, who needs to be advised regarding a sick worker? What information needs to be provided to government entities or other persons who might be affected? What are the limitations on the transmission of health information? You should review the contract for notice and claim procedures and fully comply with them before the day-to-day demands of the project push such considerations into the background. In this regard, consider notices that may need to be made to:

- a. The owner;
- b. Bonding companies;
- c. Building department;
- d. Health Department;
- e. Labor unions;
- f. Insurance carriers; and
- g. Trade contractors.

10. Conclusion.

It will be imperative to carefully consider many issues involved in starting/restarting a project in the current environment – which is a “new normal”. The establishment of effective procedures is likely best accomplished in a cooperative manner among the project participants, which would include pro-active planning and early, frequent communication. Working together, the parties can establish procedures for effective communication, compliance with government and contract requirements, and, above all else, the foundation for executing the project while protecting the health and safety of all involved. Reaching early agreement as to their respective roles and responsibilities – including responsibility for the increased cost of performing – can ease the path forward.

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.

C O U N S E L T O T H E C O N S T R U C T I O N I N D U S T R Y

NEW YORK, NY • RIVER EDGE, NJ • MIAMI, FL • WASHINGTON, D.C. • LOS ANGELES, CA
OAKLAND, CA • CHICAGO, IL • AUSTIN, TX • DALLAS, TX • HOUSTON, TX

WWW.PECKLAW.COM