

Post-Shutdown Dealings with Owners and Employees

By Stacy Moon



As more of the country reopens, contractors (if they were not already working) will be returning to work on projects that have been shut down, to deal with owners who need their projects completed and employees who have differing opinions regarding the risks associated with COVID-19. Owners are concerned that their projects be on time and that they not be associated with an outbreak of COVID-19. Employees, meanwhile, are concerned that they not be exposed to COVID-19 and that they will actually make less money working than not working.

Owners' Concerns

Delays Caused by COVID-19 and/or Employee Shortages

Undeniably, the COVID-19 pandemic has caused disruption in supplies and the number of employees that contractors and their subcontractors have available. On top of shipping delays, projects' schedules are in danger, if not in absolute shambles. Most projects have contracts with provisions that call for adjustment in delivery of a completed project when circumstances warrant. Addressing the anticipated delays now will avoid last-minute disputes. Contractors need to be aware and comply with deadlines for submitting claims for additional time and the dispute procedures if the additional time is denied. (Although awkward, contractors may have to appeal the denial to the architect and seek alternate dispute resolution in the middle of the project, particularly when claims have a twenty-day deadline.)

While seeking additional time to complete a project, contractors can consider creative ways to work with owners who may be losing income because of the delay. Owners and contractors may be able to work together to allow the owner to take partial possession early. Many contracts include that alternative.

The important take away is to begin working with the owner early to address the schedule and impact of the shutdowns on the project to ensure each party has a realistic expectation moving forward.

Additional Exposure to COVID-19

Owners may also be concerned that they might be liable if subcontractors' employees or other visitors to a construction

site are exposed to, or contract, COVID-19 on the project. This concern could be heightened if the project in question involves renovation of an existing space in which others are still working (for instance – when one floor of a high rise is being renovated). As a result, some owners may demand health screenings of the contractors' and subcontractors' employees.

Although owners' concerns are understandable, particularly with concerns regarding a lack of immunity, contractors must balance owners' concerns with the privacy of the employees. Contractors should already have procedures in place to limit exposure. Contractors' procedures must be consistent with recent guidance from the EEOC and other government agencies. Contractors may take employees' temperatures each day, but they must record the information securely. They cannot inform an owner of the name of a particular employee who might have COVID-19.

One way to address an owner's concerns is to limit visitors to a construction site and to require appropriate distancing on a project. (In at least one jurisdiction, an ordinance requiring face masks at all times excludes heavy exertion, work at heights, and other safety concerns from the requirement.) If a project involves the use of an elevator, a contractor may need to limit the number of people in the elevator. Finally, a contractor may have to modify the use of a communal water jug on projects.

In short, contractors can address owners' safety concerns without violating employees' privacy.

Employees' Concerns

Meanwhile, employees want to know that their employer or the contractor is taking appropriate steps to prevent the spread of COVID-19 among them. The employees may also resist returning to work if they can make more money on unemployment than working.

Unemployment Compensation

To address the second issue first, in certain states, because of increased funding for the COVID-19 emergency, certain employees may actually receive more money through unemployment compensation benefits than when they are actually working—particularly if the employee is returning part-time rather than full-time due to lack of work.

First, in most states, if an employee has available work and refuses it, the employee is no longer entitled to unemployment compensation. Second, though, in many states, unemployment compensation will cover a reduction in wages—not just a total cessation. For instance, if an employee returns to part-time work, but she is ordinarily a full-time employee, the employee may still be entitled to unemployment compensation to cover the reduction of her wages. That benefit may help lessen the burden of returning part-time.

Protecting Employees from COVID-19

Just as owners are concerned about their potential liability for a COVID-19 spread on their property, many employees likewise are concerned about being exposed to COVID-19. As mentioned above, contractors can take certain steps to limit the possibility of an outbreak on a worksite, but, in all candor, no contractor can guarantee that an outbreak will not take place.

Some contractors have considered asking employees to sign releases before returning to work. However, in many jurisdictions, employers may have an affirmative duty to provide a safe workplace. A court may later consider that signed release as evidence that the employer failed to do so. Rather, employers should do what they can to reduce the risk.

On construction projects, limiting exposure, particularly as summer approaches, will be a challenge. As mentioned, contractors can limit the number of people in a particular area (for instance, an elevator). Contractors also need to remind employees of the importance of using hand sanitizer, as possible. In some residential projects, contractors limit the number of trades in one house at one time.

One particular challenge as summer approaches is ensuring employees properly hydrate while not spreading COVID-19. Many contractors traditionally use a large thermos-type jug for employees to share water. Of course, doing so involves multiple employees touching the same nozzle on the same jug. That process increases the risk of spread of COVID-19, if one employee gets water after an employee who has it. One solution, which is more expensive but more secure, is simply providing separate bottles of water. Another solution is to ensure that disinfectant wipes are available at the jug and to instruct employees to wipe the handle each time it is used.

Importantly, contractors can (and probably should) take the temperature of each employee at the beginning of each shift. The process for doing so must be clear. Recent regulations allow employers to take temperatures using a forehead scan thermometer. However, the results must be kept confidential. Contractors should designate one person to take the temperatures and record them but should not save the results on the jobsite unless they can be locked or otherwise secured.

Just as the contractor cannot tell an owner the name of an employee who is later diagnosed with COVID-19, so, too, the contractor cannot tell other employees the name of an employee who is diagnosed. Obviously, when the contractor informs those who may have been exposed, and when those employees realize a co-worker is not on-site, they will likely figure it out. Nevertheless, the contractor should not release the name of the employee.

Conclusion

As more states and cities loosen restrictions on gathering, owners and employees will have questions and concerns regarding how to stay safe and avoid infection. Certainly, contractors do not want additional delay or expenses caused by having to quarantine a large portion of the workforce because someone has been diagnosed with COVID-19. Owners want their projects back on track, and employees want to work. Contractors will have to balance the interests of owners and employees to navigate the post-COVID-19 world and keep projects moving forward.

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