

## LEGAL UPDATES

# Ripped From The Headlines – Construction Workers Test Positive for COVID – Who Pays?

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With construction projects ramping up, the construction industry faces another new challenge: project shutdowns when workers test positive for COVID-19. The response should be automatic based upon each project's Jobsite Specific Plan or Safety Protocols required by governing Shelter In Place ("SIP") Orders. Public health authorities are notified, and everyone on the Project is required to take immediate steps to stop the spread, including investigating the cause, testing the workers, and cleaning up the site. The result is additional expense and delays in construction. What is not necessarily automatic, however, is: who is responsible for that expense and the delays? Under existing contracts, various provisions may help. For new contracts, the parties can negotiate the allocation of these impacts. In either case, enlightened parties will work together to negotiate a solution that fairly distributes the impacts and keeps the focus on the main objective of completing the project.

## Applicable Project Rules For Responding To A COVID-19 Case

Initially, it is important to understand the required steps if someone on a construction project gets COVID-19. Each municipality has its own rules and procedures, so those governing the location of a project must be consulted. By way of example, according to Santa Clara County Large Construction Project Safety Protocol 2k – "In the event of a confirmed case of COVID 19 at any jobsite, the following must take place:

1. Immediately remove the infected individual from jobsite with directions to seek medical care.
2. Each location the infected worker was at must be decontaminated and sanitized by an outside vendor certified in hazmat cleanups, and work in these locations must cease until decontamination and sanitization is complete.
3. The County Public Health Department must be notified immediately and any additional requirements per the County health officials must be completed, including full compliance with any tracing efforts by the County."

## Related People

### David W. Lively

Senior Counsel

San Jose

408.286.9800

[david.lively@lathropgpm.com](mailto:david.lively@lathropgpm.com)

### Richard O. McDonald

Partner

San Jose

408.299.1482

[richard.mcdonald@lathropgpm.com](mailto:richard.mcdonald@lathropgpm.com)

### Jay M. Ross

Partner

San Jose

408.286.9800

[jay.ross@lathropgpm.com](mailto:jay.ross@lathropgpm.com)

### Lisa H. Stalteri

Partner

Redwood Shores

In addition, according to the Cal-OSHA COVID-19 Industry Guidance: Construction Guidelines require that the Worksite Specific Plan include provisions to investigate the incident (a confirmed case of COVID-19 on the jobsite) to determine if “any work related factors could have contributed to the risk of infection.” Pending that determination, responsibility will first fall upon the GC to take action necessary to protect the Project from threatened harm.

## Handling Cost and Schedule Impacts Under Existing Contracts

With respect to contracts executed BC-19 (i.e., before Covid-19 so that the parties could not negotiate for specific provisions to address this circumstance), several key contract terms should be considered for guidance (e.g., from AIA Form A-201 General Conditions), including the following:

- Pursuant to §10.4 of A-201, the GC is obligated to take “Emergency” action to protect “Property,” and is authorized to bill the Owner for doing so without notice or prior approval.
- Under §3.7.2 of A-201, the GC is required to comply with all laws at its expense, which could include SIP Orders and related Safety Protocols triggered by a COVID-19 case on a project.
- A GC may pursue a change order under §§ 3.2.2 and 3.7.4 of A-201, because new laws/ordinances imposed due to the COVID-19 pandemic may constitute qualifying “changed conditions.”
- The “Force Majeure” provisions in §8.3 of A-201 might support a GC’s claim on the basis that, notwithstanding its compliance with applicable Safety Protocols, a COVID-19 infection is beyond its control. These provisions, however, permit extensions of time, but not necessarily more money. As such, they may be inadequate to resolve the problem.
- Under the indemnity provisions in §3.18 of A-201, the GC protects the Owner (and, downhill, the Subs protect the GC) from liabilities “to the extent caused by the negligent acts or omissions....” As a result, the utility of this term turns on establishing fault, which would include demonstrating failure to comply with a Site Specific Plan or other applicable Safety Protocols.

The difficulty is that none of these provisions are controlling on their face and we do not yet have a judicial or other binding determination on any of them. At the same time, as technology and cleaning methods improve, the cost and time impacts associated with responding to a COVID-19 case on a construction project could reduce dramatically. GCs will likely follow protocols in response to a COVID-19 case and invoice (or back charge) accordingly. It is important to recognize, however, that the responsibility issue is unsettled and the impacts may not be severe. Consequently, negotiation instead of expensive and time-consuming litigation or other dispute resolution procedure is the most effective approach. A contract change order to manage and allocate the risks in the event of a temporary shutdown can be utilized. In that context, consideration may be given, for example, to using contingency or allowance funds, with or without overhead and profit and conditional on Plan compliance, as a possible solution in the event of a COVID-19 incident. The schedule impact of the incident should also be addressed in the change order.

### Pandemic-Related Risks and Responsibilities Should Be Negotiated In Future Contracts

Regarding future projects and contracts, both Owner and the General Contractor are encouraged to negotiate terms to allocate the risks and responsibilities for and impacts of shutdowns due to a COVID-19 incident, or for future SIP Orders. For guidance, we refer you to our June 11, 2020 alert entitled [Addressing Pandemic Risks in New Construction Contracts](#).