

## Return to Work Toolkit

### Introduction

Many counties in Washington State are moving closer, or have already moved, to Phase 2 of the Governor’s Safe Start plan to return to the workplace after COVID-19 disruptions. This CH& Return to Work Toolkit is designed to help employers navigate the changing expectations and regulations related to welcoming employees back to the workplace. It pays special attention to the requirements for construction jobsites and office locations.

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**Disclaimer**

This Return to Work Toolkit represents the knowledge and recommendations of the authors based on the best information known as of the date of publication (June 2020). Information about implementation of the various re-entry Phases is consistently changing and may vary based on county and city policies. Businesses are strongly advised to stay independently abreast of the re-entry rules, policies, and procedures applicable to your industry and business location. The attorneys at Cairncross & Hempelmann remain ready to help you navigate this landscape. We encourage you to reach out with any questions.

**About Cairncross & Hempelmann**

Cairncross & Hempelmann is a full-service law firm with office in Seattle's historic Pioneer Square District. Founded in 1987, CH& advises companies and individuals in business, real estate, land use, and litigation. Our attorneys stand ready to help clients navigate through the workplace changes created by the COVID-19 pandemic and related announcements by government and health officials.

## II. Review and Prepare Your Construction Contracts

Whether you are an owner, contractor, subcontractor or subconsultant, you undoubtedly have concerns about construction contracts and their implications because of this pandemic.

Subject to certain mandatory health and safety requirements and protections (detailed elsewhere herein), Phase 2 permits *new* construction projects to begin as well as certain existing projects to resume that were not permitted to resume in Phase 1. However, as we have seen, COVID-19 poses a multitude of challenges for project execution; that may continue for some time to some degree. So, if you have already executed contracts for construction projects that can resume in Phase 2, or are going to undertake contract negotiations for a new project, you should consider COVID-19's impacts to the following contractual provisions; this is true irrespective of whether or not you use a form contract. Revising construction contracts to address these issues will allow for maximum protection should a dispute arise. Discussing these contract issues and terms with an experienced construction lawyer is recommended.

### **Force Majeure**

"Force majeure" is generally defined in the law as an event or effect that parties could not have anticipated or controlled that makes performance of a party's contract obligations impossible or impracticable. Standard examples include war, civil unrest, natural disaster, and the unavailability of labor, and can sometimes include pandemic. However, the current pandemic is shining new light on force majeure provisions, especially those related to construction projects. In the event of a dispute, a court will look at the specific contract language to see how the parties agreed to allocate such a risk. Legal counsel may be necessary to navigate the uncertain waters of a force majeure claim.

Unlike protections that may be afforded by force majeure provisions to construction projects that were already underway when the COVID-19 pandemic began, new contracts' force majeure provisions will likely be worded and interpreted differently. This is simply because of foreseeability issues associated with this pandemic – arguably, no party should be able to invoke the ongoing pandemic as an excuse to defer performance of its obligations for a new project. Therefore, parties should give more thought to force majeure definitions – this, of course, acknowledges that owners and contractors likely will want different terms within a force majeure provision. Should the definition of force majeure be more specific and/or set out assumptions establishing a baseline of infection? Then, for example, impacts on the workforce and supply chains beyond the set baseline could trigger the typical relief from a force majeure provision.

### **Changes in Law**

Many construction contracts contain a clause requiring compliance with laws, codes and regulations. As we have already seen, governments may implement new legislation, executive orders and directives regarding COVID-19. Parties need to consider what amounts to a change in law under their contract. It is important to consider, for example, if such change gives rise to a possibility for an extension of time and additional cost claims for a new project.

### **Schedule**

With the uncertainty created by the pandemic and its undeniable impacts to the workforce, productivity, and the supply chain, parties should give particular consideration to any schedule provided for, or incorporated into, a construction contract. Important issues to consider include (1) how social distancing

safety protocols decrease productivity; (2) if there are staggered shifts, how many workers will be on-site per staggered shift and how does that impact the schedule; (3) are certain parties in danger of not performing; (4) should procurement happen sooner; (5) what impacts will the pandemic have on delivery of equipment and materials to the site; and (6) will submittals and permits take longer because people are working from home?

### **Hold Harmless/Waiver of Liability**

Construction contracts routinely include hold harmless and indemnification provisions. However, where a particular project will require physical interaction with a customer, you may want to be particularly proactive in risk mitigation. For example, if a contractor needs to go into an owner's building or home to perform your services, it is important to consider having the owner sign a contract that includes a hold harmless provision, or a separate and distinct liability waiver, to protect against possible future liability for coronavirus exposure claims.

### **Safety**

Site safety is the sole responsibility of the contractor, but with the increased safety requirements associated with COVID-19, there are additional costs associated with sanitization and cleaning requirements, as well as the use of PPE by everyone on the jobsite, not to mention the severe penalties that could result from non-compliance. Owners, contractors, subcontractors and consultants will each need to ensure their respective contracts for new or existing projects address who will bear the additional costs for PPE and sanitization. The contractor should also consider whether it will contractually require its subcontractors to abide by and enforce the contractor's COVID-19 plan.

### **Insurance**

One type of coverage to consider is business interruption insurance. Note that the language of the policy is key – it may or may not include coverage for having to shut down due to “stay at home” restrictions or other pandemic-related measures such as curfews and quarantines. That said, if it is available and applicable, it could be a viable option to protect company finances.

### **Notice**

Notice provisions often are woven throughout a contract rather than being contained within a specific clause. Many rights, obligations and defenses under a construction contract are reliant upon some sort of notice. For example, notice may be required for claims stemming from delay damages, change orders, extension of time, and termination.

Review and understand all details in your contract associated with notice requirements – that is, when a notice is required, who should receive the notice, the time period in which the notice must be sent, and the form and manner in which the notice should take. If offices are being staffed remotely during the project because of the pandemic, can mailing a notice, where it might not be timely reviewed, suffice? Ensuring that you understand all details relating to the contract's notice provisions will help to ensure you maintain your potential claims and defenses.

### **Delay and Disruption Damages**

Given the ongoing nature of the pandemic, there is almost no question that delays will occur on construction projects going forward. Thus, you'll want to know what your contract says regarding delay claims and disruption claims and understand which types of delays and disruptions are excusable and inexcusable.

### **Escalation Clauses**

With volatile markets, travel and transportation embargoes, and supply shortages, an escalation clause may protect contractors from price fluctuations for raw materials. But such a clause then shifts the burden of increased costs from the contractor to the client. Owners must be aware of whether such a clause is in play and consider its risks and cost implications for the project.

### **Termination**

Each party to a construction contract may want to terminate a contract in the event the coronavirus pandemic gets worse. Therefore, each party will want to ensure the contract clearly provides the circumstances, notice requirements, and other relevant procedures to implement a termination for convenience. For example, a contractor will want to consider price protections as supply chain shortages and slowdowns usually cause added costs for contractors – a termination clause could allow a contractor an escape from this problem if it becomes too overwhelming. That being said, legal counsel should evaluate the termination clause and potential exposure to damages that could come with utilizing this clause.