

## COVID-19:

### Coverage Consideration in the Construction Industry



On March 11th the World Health Organization declared the rapidly spreading Coronavirus, otherwise known as COVID-19, a Pandemic. This pandemic is a worldwide outbreak of a new virus that infects people easily and spreads in an efficient and sustained way. With a widespread growing number of infections, the World Health Organization has announced the outbreak has reached the “highest level” of risk for the world.

## Insurance Considerations

The nature and magnitude of claims as it relates to COVID-19 and the financial impact are not yet known. In most scenarios businesses could be challenged to find coverage for losses stemming from this pandemic, although some current policies may provide coverage depending on the specific factual scenarios and policy language. Further, with ever changing legislative landscapes, coverage could be afforded under additional policies. Below is a summary of key insurance coverages within the construction arena and how they may respond:

### Workers Compensation

Statutory coverage is for injuries or occupational diseases arising out of an in the course and scope of employment. The insurance carriers are likely to investigate if the employee was at a greater risk of COVID-19 from their occupational responsibility versus the general public, as well as whether their contracting COVID-19 was caused by and arose out of the course and scope of their employment.

### General Liability

General Liability policies are intended to cover third-party claims for “bodily injury” and/or “property damage”. It is possible that this coverage could come into play if it is alleged that your company did not take proper measures to prevent the spread of the Covid-19 virus after learning that it was present on site. In some instances, your General Liability policy may include an exclusion for “Pollutants” as well as a communicable disease exclusion. However, standard Commercial General Liability policies do not contain exclusionary language related to virus or communicable disease. Accordingly, these policies should typically respond in a situation where an individual alleges they were infected with the coronavirus while on the insured’s property or if they were sold a product that caused infection. The burden of proof would be with the injured party to prove causation and associated damages, but the policy would provide defense cost coverage in the process” It is imperative to review your policy for these exclusions and how the terms are defined.

### Property and Business Interruption

Property Coverages are most often either “basic” or “broad” form with specified types of “perils”. Special form “All risk” coverage is triggered by all perils not excluded by the policy. The absence of physical loss or damage, for instance where access to an insured facility is restricted or prohibited may be at issue. Losses due to a general decline of economic activity caused by customers’ fear about contracting the virus or preventative measures such as “social distancing” rather than an outbreak or actual contamination of covered property present roadblocks to coverage unless the policy is specified otherwise.

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Business Interruption: Business Income forms specify the necessary “Suspension” must be caused by direct physical loss or damage to property caused by a covered cause of loss. Losses due to a general decline of economic activity caused by customers’ fear about contracting the virus or preventative measures such as “social distancing” rather than an outbreak or actual contamination of covered property present roadblocks to coverage unless the policy is specified otherwise.

*Extra Expense:* This coverage provides reimbursement of increased costs that are a result of the business suspension from a covered loss.

### **Builders Risk**

Builders risk policies are intended to cover buildings while under construction, as well as any materials, supplies and equipment. In addition, a Builders Risk policy may cover business interruption expenses related to the loss. As with other property policies, the key issues will be whether the presence of the Covid-19 virus constitutes property damage.

### **Contractors Pollution Liability**

Some environmental policies specifically mention “virus” within their definition of “pollutants.” However, some policies include it within their definition of other terms such as “biological agents” or “microbial matter.” Regardless, the “pollution condition” will more than likely require the “virus” to be present at the site to trigger coverage. If the policy is triggered, it could potentially provide coverage for any cleanup or remediation costs, as well as the associated Business Interruption loss.

### **Employment Practices Liability**

Employment Practices Liability insurance (“EPLI”) is coverage that is designed to protect employers from employee lawsuits alleging workplace-related wrongdoing. If you are forced to terminate an employee due to a shutdown of operations, and that employee were to file litigation for wrongful termination, your EPLI policy may provide coverage in that action, depending on the specific policy language.

### **Professional Liability**

Contractors’ professional liability (“CPL”) insurance provides coverage to contractors and professionals for errors made during the construction process. This coverage is typically purchased by contractors that provide design and building services and is intended to provide coverage for errors made by the contractor as well those made by third parties hired by the contractor, such as engineers, architects, etc. At this stage, it is unclear how CPL would be triggered to respond to a claim made for the Corona Virus.

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With more and more employees working remotely, cyber criminals may attempt to exploit networks for their personal gain. Cyber coverages may provide reimbursement for lost funds, cost of investing computer breaches, costs of repairing computers/networks, costs of credit monitoring for privacy breaches and other damages caused by the cyber criminals.

**Contractual Liability**

1. **Read your contracts.** Review all project contracts, including prime contracts and subcontracts, to identify provisions that address the rights, remedies, and associated obligations for unforeseen circumstances and excusable delay. Be sure to include your insurance contracts in your review.
2. **Document thoroughly.** Scrupulously document how COVID-19 has impacted (or will impact) your work. Make sure to address both impacts to duration (time) and cost (money).
3. **Notify.**
  - *Notify the Owner (or GC if applicable)* of disruptions and potential disruptions caused by COVID-19. Be meticulous in complying with the notification requirements in your contract. Do not wait for damage to occur, but proactively notify of anticipated disruptions.
  - Notify your insurers. Consider property (business interruption), pollution/environmental, workers compensation, professional/contractor's liability, Cyber, Employment Practices Liability, Subcontractors Default insurance, Subcontractor Bond.
4. **Key provisions and considerations:**
  - **Force majeure.** "Force majeure" is a French word meaning "superior force." Many construction contracts contain "force majeure" provisions to address delays due to unforeseen circumstances. Be sure to read your contract as these provisions vary widely. For instance, some common industry contracts include "epidemics" as a ground for relief, but are silent to "pandemics." Be sure to document thoroughly and timely notify the owner (\*\* – **because you may have several different available remedies, consider not referencing "force majeure" or any other specific provision in your notification – this enables you to satisfy the notice provision without prematurely electing a remedy**). Extensions of time are typically the exclusive remedy for force majeure delays.
  - **Supply chain issues.** Due to COVID-19's shutdown of commercial centers in China, Europe, and North America, supply chain issues may impact many contractors. Disruptions and delays are likely if suppliers cannot fulfill purchase orders due to impacts on manufacturing or shipping. Review your contracts to determine whether substitution of materials or suppliers is permissible and whether an escalation clause details who bears the risk of increased costs. The Uniform Commercial Code ("UCC") governs contracts for goods (rather than services), so the UCC's rights and remedies may be implicated.
  - **Damages for delay.** Review your contracts for "damages for delay" clauses or "no damages for delay" clauses. These clauses often pertain to only owner-caused and contractor-caused delays, but they can vary from contract to contract. Be sure to document thoroughly and provide timely notification as required by the contract.

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- **Various contract forms.** The importance of reviewing your various contracts cannot be overstated. There are significant differences in terms of rights, remedies, obligations, and notification among the various industry contracts (e.g., AIA vs. ConsensusDocs vs. Federal Government vs. owner contracts).
- **Common law remedies.** If the contract is silent on issues pertaining to unforeseen circumstances and excusable delays, there could be common law remedies available. The doctrines of impossibility and impracticability may excuse performance or provide additional time if performance becomes impossible or impracticable. The doctrine of frustration of purpose is where performance is physically possible, but the primary economic purpose of the transaction is substantially frustrated. Each of these is difficult to prove, but could be available under the unique circumstances presented by COVID-19.
- **Termination and suspension clauses.** Review your contracts for termination and suspension clauses. Even if other relief is available to you, owners could have the right to terminate or suspend the contract due to the burden caused by COVID-19.
- **Future contracts.** Carefully consider the language in contracts being negotiated or about to be executed. Consider including a COVID-19-type “force majeure” or delay clause that addresses some of the uncertainties you are currently facing. Being too specific may limit the application of the clause.
- **OSHA compliance.** The Occupational Safety and Health Act (“OSHA”) establishes a general duty for employers to provide employees a place of employment “free from recognized hazards that are causing or likely to cause death or serious physical harm.” The implications of this duty to COVID-19 are not clear, but contractors should review OSHA and other federal and state regulatory guidance to ensure they are adequately protecting their employees and complying with regulatory requirements.
- **HR 6201.** Both houses of the US Congress recently passed the “Families First Coronavirus Response Act” that could significantly impact US employers. The law takes effect on April 2, 2020, and requires certain employers to pay for extended sick leave and family medical leave beyond what was required under prior law.

One of the most important measures that you can take to preserve your ability to pursue a claim is to give notice of the claim to your carrier. You will be asked to provide additional information eventually, but that should not stop you from providing notice that the construction project is shut down. Keep a record of any expenses related to the shutdown, and preserve any records that will help document the loss.

There is the possibility your project may be shut down for various reasons associated with Covid-19. The following checklist provided by AXA XL insurance contains suggested actions that can be taken in order to minimize the exposures to property and liability losses during the shutdown. Preventing damage to the project will save time and money when work resumes.

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**Recommendations for Safely Shutting Down a Construction Project:**

ACTION	DATE COMPLETED
Review site security, inspect project fencing (hoarding) and gates, repair any openings and verify the integrity of perimeter security measures.	
Arrange for on-site security guards or periodic security patrols.	
Notify the local Police Department that the project will be inactive.	
Notify the local Fire Department that the project will be inactive and advise them of the status of the Fire Sprinkler system and if there are any combustible materials that will remain stored at the site.	
Inspect the SWPPP (Storm Water Pollution Prevention Plan) protection measures, correct all deficiencies and document the conditions. Arrange for periodic inspection and maintenance during the cessation in accordance with local ordinances and building codes to avoid civil penalties.	
If the project has dewatering systems or sump pumps to protect the site from inundation, consult with local AHJs (Authorities Having Jurisdiction) and the Owner to determine what must be done to maintain operation of the pumps. Consider power supply and mechanical breakdown when establishing periodic inspections and maintenance.	
Ensure that all retaining walls or partially completed retaining walls are stable (or are adequately braced) and have adequate drainage to prevent subsidence and/or collapse.	
If the building is partially complete and can be secured, temporarily enclose and secure all openings at ground-level to prevent unauthorized access to the building	
If the building enclosure is partially complete, coordinate with trade contractors to conduct a detailed survey of the cladding systems to verify they are securely attached to the structure and will be able to withstand storms (wind and rain).	
Cladding systems (curtainwall, aluminum windows (storefront), precast concrete, insulated metal panels) and assemblies may not provide 100% of their rated strength or wind-speed resistance if they are only partially completed. Determine if additional bracing should be installed to prevent damage to completed work.	
Identify any installed equipment or materials that could be damaged by exposure to weather or by intruders. Follow manufacturer guidelines for protection and storage. Relocate or remove these items if possible. Make sure materials and storage locations do not create or present fire risks.	

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**Recommendations for Safely Shutting Down a Construction Project (continued):**

ACTION	DATE COMPLETED
<p>Exposure to weather and water damage will largely depend on the type of structure, status of construction, and progress towards enclosure. If the building envelope is still open to the weather, it will not be feasible to prevent water intrusion. However, actions can be taken to minimize the migration of water within the building:</p> <ul style="list-style-type: none"> <li>• Install temporary flashing or curbs around shafts and openings on elevated floor decks exposed to rain to limit migration to lower floors.</li> <li>• Installing a temporary roof on the floor just above the progress of interior work is an effective control to shed water out of the building. This can be a simple single-ply membrane adhered to the floor and covers over shafts and openings. Make sure the membrane is pitched to the exterior so it drains to the outside.</li> <li>• If the structure is complete, or near completion, make sure the roof deck can drain. If the permanent roof drains are installed, make sure that strainers or wire mesh are installed to prevent debris from clogging the drains. If roof drain piping is not yet installed, consider fabricating temporary drain leaders from PVC pipe and route them to the exterior so they project out past the edge of the floor slab.</li> </ul>	
<p>Trade subcontractors should remove all their stored material, tools and equipment from the building. If the material has already been billed and title has transferred to the project, or if removal is not practical, consider bringing storage containers or trailers on-site to provide secure and protected storage.</p> <p>At a minimum, all flammable and explosive materials must be removed from the site and stored properly.</p>	
<p>High-value construction materials (copper pipe, electrical wiring, etc.) should be removed from the site or stored out of site in locked storage containers to reduce the exposure to theft.</p>	
<p>All loose material, trash, and debris should be removed from all floors of the building to prevent items from becoming airborne projectiles in high winds.</p>	
<p>Have all dumpsters emptied and removed from the site.</p>	
<p>Take down and secure all job-built ladders from between floors to prevent unauthorized access and injury claims.</p>	
<p>Ensure that all perimeter hand rails and/or cabling is secured and in good condition.</p>	





**Recommendations for Safely Shutting Down a Construction Project (continued):**

ACTION	DATE COMPLETED
Determine whether construction equipment (cranes, hoists, concrete pumps, earth moving equipment, compactors, portable generators, etc.) at the site will stay in place or be returned to the yard. Small, portable equipment and tools should be stored in a secured location (storage box or interior room). Empty gas tanks to prevent fire risk. Follow the manufacturer’s guidelines for preparing and storing idle equipment.	
Consider whether building systems (HVAC, Domestic Water, Fire Sprinkler) should be drained.	
Consider whether building systems (HVAC, Domestic Water, Fire Sprinkler) should be drained.	
Consider whether temporary structures (scaffold, stair towers, debris netting, fall protection) should be taken down. Verify that any temporary structure to remain is adequately braced, tied off, and anchored to prevent collapse.	
Ensure that all free-standing walls have adequate bracing to withstand potential wind loads to prevent collapse (overturning).	
De-energize and lock-out temporary and/or permanent power supply. (Note that if the Fire Sprinkler system is already active and includes a fire pump, that power supply must be maintained. Coordinate with the Electrical Contractor to shut down power to the rest of the building.)	
Shut off and lock-out the main water supply valve. (Note that if the Fire Sprinkler system is already active, this water supply must be maintained. Coordinate with the Plumbing Contractor to shut off water to the rest of the building).	
Conduct a thorough inspection of the project and site to document existing conditions (video, photos and narrative) and ensure all shut down tasks are complete.	
The contractor and/or owner should establish a team to conduct periodic inspections of the site during the cessation of work to monitor conditions, maintain operating systems (sump pumps) and make minor repairs as needed to keep temporary enclosures and drains in good condition.	

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