

COVID-19 AND THE CONSTRUCTION AND  
DEVELOPMENT INDUSTRY—NAVIGATING THE CRISIS  
AND PREPARING FOR AN UNCERTAIN FUTURE

*MAY 8, 2020*

# PRESENTERS



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CURRENT STATUS OF  
COVID-19 RESTRICTIONS



# CURRENT STATUS

- Stay In Place Orders
  - As of May 7, 2020:
    - States that are shut down or restricted:
      - California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, Wisconsin

# CURRENT STATUS

- Stay In Place Orders
  - As of May 7, 2020:
    - Partial Reopening:
      - Arkansas, Alaska, Alabama, Colorado, Georgia, Idaho, Iowa, Maine, Montana, Minnesota, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Wyoming, Florida, Indiana, Kansas, Missouri, Nebraska, West Virginia

# CURRENT STATUS

- Stay In Place Orders
  - As of May 7, 2020:
    - Reopening Soon:
      - Arizona, New Hampshire, North Carolina, Ohio, Pennsylvania

# CURRENT STATUS

Is Construction considered an “Essential Business?”

- CA statewide order allows construction, but also allows counties to adopt stricter rules.
- 7 counties in Nor Cal have adopted more stringent rules:

# CURRENT STATUS

- EG: For the purposes of this Order, “Essential Businesses” are:
  - v. Construction, but only of the types listed in this subparagraph below:
    - 1. Projects immediately necessary to the maintenance, operation, or repair of Essential Infrastructure;
    - 2. Projects associated with Healthcare Operations, including creating or expanding Healthcare Operations, provided that such construction is directly related to the COVID-19 response;
    - 3. Affordable housing that is or will be income-restricted, including multi-unit or mixed-use developments containing at least 10% income-restricted units;



# CURRENT STATUS

- 4. Public works projects if specifically designated as an Essential Governmental Function by the City Administrator in consultation with the Health Officer;
- 5. Shelters and temporary housing, but not including hotels or motels;
- 6. Projects immediately necessary to provide critical noncommercial services to individuals experiencing homelessness, elderly persons, persons who are economically disadvantaged, and persons with special needs;

# CURRENT STATUS

- 7. Construction necessary to ensure that existing construction sites that must be shut down under this Order are left in a safe and secure manner, but only to the extent necessary to do so; and
- 8. Construction or repair necessary to ensure that residences and buildings containing Essential Businesses are safe, sanitary, or habitable to the extent such construction or repair cannot reasonably be delayed.

# CURRENT STATUS: UK

- UK (actually England in this case): **What regulations govern which businesses and premises should close?**
- Since 26 March 2020, the **Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350)**.
- Since 22 April 2020, the **Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 (SI 2020/447)**.

# CURRENT STATUS: UK

- On 24 March 2020, the UK government published its “**Closing certain businesses and venues guidance**” identifying which businesses and premises are considered non-essential and which are essential
- On 7 April 2020, the UK government published “**Sector guidance on social distancing in the workplace**” which sets out advice for different sectors (including construction, on how social distancing and other measures might be implemented by employers in England
- The UK government's guidance is underpinned by the **Public Health England (PHE) guidelines**, which address social distancing measures.

# CURRENT STATUS

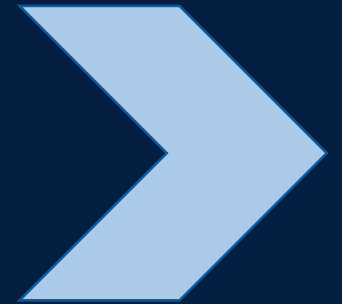
## Pop-Up Question:

What state has adopted the strictest restrictions on construction?

1. California
2. Nevada
3. Pennsylvania
4. New York



# JOB SITE BEST PRACTICES



# JOB SITE BEST PRACTICES

- Project Site Access
  - Contract
    - Identify relevant provisions addressing site access.
- Secure the site
  - Schedule crews to take the necessary measures to keep your site secure, keep materials from risk of loss, and prevent trespassing.

# JOB SITE BEST PRACTICES

- Maintain essential workforce.
- Identify and schedule “emergency” work.
  - advanced approval required?
- Document and photograph conditions.
- Notify subs and suppliers.



# JOB SITE BEST PRACTICES

- OSHA Compliance
  - “Guidance on Preparing for COVID-19” to help companies respond in the event of coronavirus in the workplace.
  - [www.osha.gov/Publications/OSHA3990.pdf](http://www.osha.gov/Publications/OSHA3990.pdf)
  - Develop and implement an infectious disease preparedness and emergency response plan.
  - OSHA allows employees to refuse to work without retaliation if the assignment carries a risk of death or serious physical harm and other factors are met.

# JOB SITE BEST PRACTICES

- Update safety policy referencing COVID-19
  - Personal responsibility
  - Social distancing
  - Reference CDC guidelines
  - Train employees

# JOB SITE BEST PRACTICES: UK

- Construction sites were not specifically listed in the government's guidance, which initially led to confusion over whether they could and should remain open. However, the current position is that construction sites in England may stay open and parties:
- Should follow the **Sector guidance on social distancing in the workplace**, which was issued on 7 April 2020. In terms of construction, the overriding message is that work can continue if done in accordance with the PHE social distancing guidelines wherever possible.
- Are encouraged to implement Build UK and the Construction Leadership Council's (CLC) code of practice, **Site Operating Procedures (SOP) - Protecting Your Workforce** (version 3, 15 April 2020), which aims to provide a standard approach that all firms and workers can adopt.
- The CLC has also prepared a template letter that firms can adapt to issue to their workforces regarding travel to work (see Build UK: Coronavirus update 30 March 2020).

# JOB SITE BEST PRACTICES: UK

- **Site Operating Procedures (SOP) - Protecting Your Workforce** (version 3, 15 April 2020):

*“The health and safety requirements of any construction activity must not be compromised at this time. If an activity cannot be undertaken safely, it should not take place.”*

- **PHE guidance** for construction states:

*“where it is not possible to follow the social distancing guidelines **in full** in relation to a particular activity, you should consider whether that activity needs to continue for the site to continue to operate, and, if so, **take all the mitigating actions possible** to reduce the risk of transmission.”*

- The **Health & Safety Executive** is the relevant enforcing authority for PHE guidelines. If a site is not consistently implementing the measures set out by PHE, it may be subject to enforcement action.



# CONTRACTUAL PROVISIONS

# APPLICABLE CONTRACT PROVISIONS

- Notice
  - 1. COVID-19 and government actions to slow its spread constitute force majeure and entitle the contractor to relief under the contract.
  - 2. Explain with appropriate specificity how the project is impacted, including references to specific materials delayed and activities affected.
  - 3. Identify the potential impact in terms of time and money and the efforts the contractor is undertaking to mitigate those impacts.

# APPLICABLE CONTRACT PROVISIONS

- Force Majeure and Delay Clauses:
  - Force majeure is an unforeseeable circumstance that prevents someone from fulfilling a contractual obligation. Most U.S.-based contract forms include force majeure concepts in the delay clause.
  - Provides the contractor with an extension of the contract time for delays caused by forces outside the control of the contractor, but establish no right to additional compensation.
  - Potential “Constructive acceleration” claim.
  - May be coverage under the Builder’s Risk policy or other contract provisions.

# APPLICABLE CONTRACT PROVISIONS

- Escalation Clauses
  - Allow a contractor to receive an increase in its contract price if the costs go up under circumstances described in the clause.
- Change in Law Clauses
  - EG: “Should any change in law affect the contractor’s cost or time of performance, it shall receive an adjustment in the contract, price and time for performance caused by such change in law.”



# APPLICABLE CONTRACT PROVISIONS

- No Damages for Delay Clauses
  - Could prevents the contractor or subcontractor from claiming damages for delay.
  - Generally unenforceable, or enforcement may be subject to exceptions in many jurisdictions.
  - Exception for delays that were outside the reasonable contemplation of the parties. If the force majeure or delay clause expressly identifies “epidemics” as a delay outside the control of the contractor, COVID-19 is likely covered.

# APPLICABLE CONTRACT PROVISIONS

- Mutual Waiver of Consequential Damages
- Owner's financing

# APPLICABLE CONTRACT PROVISIONS

- Termination and Suspension Provisions
  - Could allow a contractor to terminate a contract if the work is stopped for a period of 30 consecutive days through no act or fault of the contractor, and expressly mentions an “act of government, such as a declaration of national emergency that requires all work to be stopped.”

# APPLICABLE CONTRACT PROVISIONS

- Emergency and Safety Clauses
  - Authorize the contractor to act in an emergency affecting the safety of persons or property, and to obtain compensation for the costs incurred.
  - Generally require the contractor to provide a safe and healthy workplace.

# APPLICABLE CONTRACT PROVISIONS: UK

- **JCT contracts** (Joint Contracts Tribunal)
- The contractor is entitled to claim an EOT if a Relevant Event causes delay to the progress of the works. Relevant Events under DB 2016 include:
- The **exercise of statutory powers by the UK government or any local or public authority** after an agreed date (often the date of the contract or the contractor's tender) that is not caused by a contractor default and directly affects the execution of the works (clause 2.26.12).
- For ongoing projects, there is a strong argument that current restrictions imposed by the government on the movement of people and goods fall within this provision.
- **Force majeure** (clause 2.26.14)
- An **instruction by the employer to postpone any work** to be executed under the contract (clause 2.26.2.2). This may be relevant where an employer postpones work because it cannot be carried out safely in accordance with current guidance about safe working practices on site.

# APPLICABLE CONTRACT PROVISIONS: UK

- **Any impediment, prevention or default by the employer**, except to the extent caused or contributed to by any default of the contractor (clause 2.26.6).
- Any "**Change**" (or "**Variation**"), defined as including:  
*"the imposition by the Employer of any... restrictions in regard to... access to the site... or limitations on working space... or working hours"*  
(clause 2.26.1 and 5.1.2, DB 2016).
- **Strike, lock-out or local combination of workmen affecting any trade employed on the works** or engaged in the preparation, manufacture or transportation of any of the goods or materials required for them or any persons engaged in design work for the works (clause 2.26.11).
- While the contractor may be entitled to claim an EOT where a **Relevant Event** delays progress of the works, it is not entitled to claim loss and expense unless the "event" is also a **Relevant Matter** under clause 4.21.

# APPLICABLE CONTRACT PROVISIONS: UK

- The **Relevant Events** listed above **that are also Relevant Matters** under DB 2016 are:
  - **Changes** instructed by the employer (clause 4.21.1).
  - An **employer's instruction** to postpone work (clause 4.21.2.1).
  - Any **impediment, prevention or default** by the employer (clause 4.21.5).
- A force majeure event does not entitle the contractor to claim loss and expense.
- It is also worth noting that DB 2016's list of Relevant Matters includes:  
*"delay in receipt of any permission or approval for the purposes of Development Control Requirements..."*  
(clause 4.21.4).
- This allows the Contractor to claim loss and expense arising from delay in the provision of planning approvals or permissions (with the corresponding Relevant Event falling under the clause 2.26.13).

THANK YOU! IF YOU HAVE ANY QUESTIONS,  
PLEASE CONTACT ONE OF THE PRESENTERS.



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