

Insights: Alerts

The Unique Schedule Risk of Government Action in Data Center Construction: How Contractors Can Protect Themselves

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Construction of data centers is big business, with reportedly over 700 data centers currently under construction in at least 38 states. These projects are subject to the types of delays most large industrial projects face, like permitting issues, late owner-furnished equipment, long-lead equipment backlogs, labor shortages, and equipment unavailability, to name but a few. Data center construction is also impacted by a fairly unique set of delays related to technology-driven modifications to equipment such as cooling technologies, AI workloads, changing tenant requirements, utility interconnection constraints, and systems integration failures and rectification during commissioning.

In addition, data center projects are increasingly facing lawsuits and various other forms of opposition over environmental issues, such as water consumption, electricity demand, carbon emissions, and noise concerns. Nearby residents, environmental groups, and local governments are suing data center developers and operators to block data center construction and operation. There are currently active cases pending to enjoin the construction of data centers in twenty-four states. Scores of additional lawsuits are predicted to follow. This opposition has the very real potential to delay construction of these multi-billion-dollar projects. Governments are stepping in with new legislation, including moratoriums, designed to address the public's concerns, but such government actions are an increasing threat to the unimpeded development and construction of data centers.

For example, in May 2026, Hill County, Texas imposed a moratorium on data centers, barring the commencement of construction of data center-related projects throughout the county. On May 27, 2026, RCM Hill, LLC, a developer, filed suit against Hill County for a declaratory judgment that the moratorium is unlawful. RCM Hill alleged it had already invested nearly \$1 million to acquire the contractual rights to buy more than 800 acres of land in Hill County, for an average price of \$100,000 per acre, and to secure legal entitlements to develop a 1,235-megawatt data center there. In this case, Hill County ended the moratorium after the lawsuit was filed and the project had been delayed, allowing development to continue. But that is not always the case.

The Hill County, Texas moratorium is not a one-off. Fourteen state legislatures have introduced bills that call for moratoriums until calendar years 2027-2030, so that impact studies can be conducted or the state legislature adopts a compliance oversight framework. On July 14, 2026, New York Governor Kathy Hochul signed an

executive order that makes New York the first state to impose a statewide moratorium on large data center construction. Other bills imposing specific requirements on large data centers have been proposed in fourteen states. The proposals are transitioning from incentive-focused policies to strict regulatory oversight. For example, they mandate that developers pay for their electrical infrastructure upgrades, uphold the viability of local zoning bans and restrictions, establish minimum siting criteria such as setbacks from residential areas, prohibit ownership by foreign interests, require sound and environmental assessments, limit water consumption for cooling, and require a minimum percentage of electricity use from in-state nuclear or renewable sources. Each of these requirements has the potential to delay development and construction of data centers.

In the lawsuit filed by RCM Hill, construction of the data center had not commenced. But what happens to a data center under construction when a lawsuit is filed, a moratorium is adopted by state or local legislative bodies, or a bill is passed changing the law? Who bears the risk of the delay to the project and the ensuing costs, the developer or the contractor? Data centers are built on tight schedules and often impose liquidated damages on contractors for missing milestones like energization and “rack readiness.” Contractors will likely face increased costs due to the delays caused by moratoriums, changed requirements, and third-party conduct.

To both manage the risk of liquidated damages and to recover increased costs, contractors must be prepared to seek and demonstrate entitlement to schedule extensions and compensation using contract provisions like changes, delay, force majeure, and change in law clauses. During contract negotiations, contractors should ensure that each of these clauses contemplates the vast array of delaying events a data center project will potentially face, including the relatively unique risks of moratoriums, injunctive lawsuits, and governmental actions through legislation and regulation implementation.

Contractors should start with the changes clause. If a proposed bill ultimately requires a modification in the design and construction of the data center, the modification should readily be classified as a change in scope directed by the developer. But where there is a delay without a corresponding change in the work, the changes clause is unlikely to provide much relief.

Delay provisions should be drafted broadly to include entitlement to a schedule extension and compensation in the event any third-party or third-party conduct not within the contractor's control adversely affects the performance of contractual obligations. Limiting compensable delays to those caused by the developer or those within the developer's control will deprive the contractor of a time extension and compensation when a lawsuit against the project is filed or a moratorium or other bill proposed or adopted.

Make sure the force majeure clause is consistent with the changes and delay provisions to avoid conflicting terms. Force majeure clauses typically provide contractors with time extensions, but not monetary compensation, when “acts of God” occur. A standard force majeure clause contains a laundry list of delays, such as war, natural disasters, and pandemics, which qualify as events that prevent a party from performing its obligations. It often will include a catch-all phrase, such as any event that prevents a party from performing its obligations and that is not within the reasonable control of either party. But if there is such a catch-all phrase, or if the third-party litigation or moratorium is enumerated as a force majeure event, the force majeure provision will conflict with a delay provision that provides for time and money in the event of such third-party-caused delays.

Additional language to pay attention to is whether the force majeure definition requires the event to be unforeseeable. Given the prevalence of the growing hostility toward data centers, are such lawsuits and actions by state and local governments foreseeable? Also determine whether the force majeure clause contains any exclusions. One common exclusion is delay in issuance of any approvals by governmental authorities. Contractors should avoid a situation where not only are they not entitled to a schedule extension and compensation under a delay clause where third party-caused delays are not covered, but they are not even entitled to a time extension under the force majeure provision.

And what if a bill providing for a legislative moratorium is introduced but not passed? Is the developer entitled to halt construction until the bill is voted on, and if so, is that delay compensable? These potential eventualities need to be addressed in the contract.

For construction of a data center, consider including specific events in the changes, delay, and force majeure clauses like permitting issues, governmental actions, anticipated or pending legislative action, subsequently introduced legislative bills or proposals, interconnection issues, supply chain disruptions, and third-party lawsuits.

In addition to the conventional changes, delay, and force majeure clauses, each of which should contemplate the potential for moratoriums and lawsuits like those discussed here, the contract should also include a change in law provision. Such a provision could also provide entitlement to extensions of time, as well as monetary relief, in the event of a moratorium or other governmental action. The specific language of the change in law provision, just like in the changes, delay, and force majeure clauses, is critical. And again, ensure that a change in law provision is consistent with the other terms. A force majeure clause will often include a change in law as a force majeure event, which would conflict with a separate change in law provision providing for time and money due to a change in law. Eliminate that conflict during contract negotiations.

With billions of dollars in data center construction currently in play and on the horizon, contractors are eager to dive into this booming industry. But data center developers drive hard bargains on schedule, due to this enthusiasm within the construction industry. Contractors must focus on negotiating up-front protections for unanticipated delays unique to data centers and then implementing these provisions during construction.

As government scrutiny, community opposition, and evolving regulation continue to reshape the data center landscape, contractors and developers alike should take a proactive approach to allocating and managing these emerging schedule risks before they become costly disputes. Careful contract drafting and early risk planning can make the difference between absorbing delay-related losses and preserving entitlement to time and compensation. If you have questions about how to address these issues in your contracts or on an active project, please reach out to [Kilpatrick's Construction Team](#) for guidance and further information.

Related People



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