



Insights: Perspectives

10 Key Takeaways | Leading Through a Crisis: Contractual Implications

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10 KEY TAKEAWAYS

Leading Through a Crisis: Contractual Implications

On May 8, [Kilpatrick Townsend's Brian Gaudet](#) an attorney on the firm's [Construction & Infrastructure Team](#), participated in the panel discussion "Leading Through a Crisis: Contractual Implications I Covid-19 Pandemic." The webinar sponsored by the [Rice Global Engineering & Construction Forum](#). This panel of legal experts—in-house counsel, outside counsel and commercial leaders—discussed how the industry is addressing the complex legal issues that the courts will be dealing with for years to come.

Key takeaways from the presentation include:

1

Do not think of COVID-19 as a "thing" that affects a project. COVID-19 is a virus that affects people. As a result of the virus and threat of the virus, various entities have taken and will take various actions: stay at home orders, enhanced PPE requirements, social distancing, impose delays or suspensions, shutdowns, acceleration orders, changes in law, changes in safety rules, etc. The contract must be reviewed with each of these individual actions in mind as well as how they all interacted with each other.

Expect the above analysis to be complicated with each party and the state or local government potentially impacting the project. Be mindful that each party to the contract might find provisions in the contract that helps its own position.

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Read the contract carefully. There may be multiple provisions that potentially deal with the pandemic impacts and they all need to be considered. Also, each sentence and every word matters in interpreting each parties obligations and entitlements.

Contracts may require that the affected party use "best efforts," "commercially reasonable efforts," "reasonable efforts" or some other standard to attempt to overcome the impact of COVID-19. Efforts do not necessarily have to be successful to count as efforts. But efforts require action and those actions should be logged to demonstrate in the future that a party has exercised efforts to overcome the impacts.

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Time and delay impacts are difficult to prove even with good information. If you are encountering or expect to encounter impacts from COVID-19 engage an expert right away that can help you track, document, and analyze COVID-19 related impacts. Consider another expert that may be able to opine on the efforts that were undertaken and whether they meet whatever standard is required in the contract.

Keep in mind that any disputes that will be resolved by a judge, jury or arbitrator will likely be a year or more down the road in different times. Further, different people have different feelings about the stay at home orders and other impacts imposed by governments and parties related to COVID-19. Do not plan on relying on your feelings about COVID-19 or what you perceive other people's feelings about COVID-19 are to support your position. Your best chance of success in a dispute is to have objective/ analytical data that supports your position.

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Remember that if you are contracting for new projects now you need to review all of your contracts with COVID-19 and potential impacts specifically in mind. There are many clauses that should be adjusted. Further, there are many clauses that might give relief on the basis of an impact or change in law being “unanticipated.” Please keep in mind that COVID-19 is no longer “unanticipated.” If you do not account for potential time and cost impacts from COVID-19 in the schedule and contract price or shift the risks appropriately the results could be catastrophic.

Communicate with your contracting party and try to work together to find solutions and compromises that minimize impacts to both parties.

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If you elect to suspend a project, keep in mind that warranties may still be running on any delivered equipment. Certain equipment may require particular storage conditions as well as periodic servicing.

Wash your hands!

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