



COVID-19 RESOURCE PACKAGE 2.0





Dear MCAA members,

The law firm of Cohen and Seglias has put together the following “COVID-19” 2.0 package for contractor members to use as the situation dictates for protection and to ensure relief — time, money, etc. This packet is for the use of our members. These forms will need to be edited to a given project’s specific circumstances. This information is not an endorsement, simply a resource as we navigate these uncertain times as an industry.

On March 13, President Donald Trump declared a national emergency. Since then the COVID-19 pandemic has only expanded, and the impact cannot be denied. The coronavirus has fundamentally changed the way we now do business.

That said, as the COVID-19 crisis continues to evolve, we need to take steps to continue working in a manner that doesn’t endanger our office staff, field labor and families. The construction industry is still considered an “essential business” for some states, whereas others are mandating that all “non-essential” construction projects close immediately. For jobsites that are open, all employers are required to follow proper protocol in accordance with the CDC. Unfortunately, not everyone is adhering to the provided CDC requirements and recommendations and continue to work without a formal exemption.

Cohen Seglias’ Construction Contracts & Risk Management Group prepared sample notice letters for use on jobs where contractors and subcontractors are still ordered to work either in violation of shutdown orders or under unsafe work conditions that are contrary to the CDC guidelines. Also, with many companies still bidding and entering into contracts for new work, Cohen Seglias has provided sample force majeure language that covers pandemics such as this, as an unforeseen event, entitling you to an extension of time and an increase in price caused by any resultant delays. Understand that these forms may need to be revised to fit your particular circumstances.

Contents of the package include:

- [Disclaimers](#)
- [General Contractor Ordered to Work but Disagreement with Owner on Exemption](#)
- [Subcontractor Ordered to Work but Disagreement with General Contractor on Exemption](#)
- [Contractor Ordered to Work but Issue with Working Conditions](#)
- [Subcontractor Ordered to Work but Issue with Working Conditions](#)
- [Force Majeure Clause for General Contract](#)
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General Contractor Ordered to Work but Disagreement with Owner on Exemption

As you know, the recent government shutdown order requires construction to be suspended. [Owner] has taken the position that our project is exempt and has directed [Contractor] to proceed with the Work even though the dangers of coronavirus are unknown and there is a possibility of fines and criminal charges under the shutdown order. While we dispute that the project is exempt, our contract with [Owner] does not permit us to stop work in the face of a dispute. As such, we are proceeding. Please note that in the event a fine or charge is levied against [Contractor] that [Owner] will be responsible for payment of such fines and for fully indemnifying [Contractor] from any damages that arise from your direction to proceed with the Work.

Subcontractor Ordered to Work but Disagreement with General Contractor on Exemption

As you know, the recent government shutdown order requires construction to be suspended. [Contractor] has taken the position that our project is exempt and has directed [Subcontractor] to proceed with the Work even though the dangers of coronavirus are unknown and there is a possibility of fines and criminal charges under the shutdown order. While we dispute that the project is exempt, our contract with [Contractor] does not permit us to stop work in the face of a dispute. As such, we are proceeding. Please note that in the event a fine or charge is levied against [Subcontractor] that [Contractor] will be responsible for payment of such fines and for fully indemnifying [Subcontractor] from any damages that arise from your direction to proceed with the Work.

Contractor Ordered to Work but Issue with Working Conditions

While the local and state governments are allowing construction on limited types of construction projects, they have all couched that exception by requiring the sites to maintain the requirements and recommendations of the CDC. For example, Governor Wolf of Pennsylvania provided:

Individuals leaving their home or place of residence to access, support, or provide life sustaining services for themselves, another person, or a pet must employ social distancing practices as defined by the Centers for Disease Control and Prevention.

Governor Cuomo of New York signed the “New York State on PAUSE” Executive Order, which included:

Businesses and entities that provide other essential services must implement rules that help facilitate social distancing of at least six feet.

Similar restrictions apply in almost every state and have also been followed by OSHA.

Given those restrictions on working, it is necessary for [Contractor] to put [Owner] on notice of the unsafe practices that are occurring on this jobsite. [Owner] has required [Contractor] to schedule the work in such a way that it is requiring our employees and subcontractors to share workspaces as well as elevators in violation of the CDC's recent rules and regulations. In this time of national emergency, [Owner] cannot simply ignore the reality of coronavirus, and owes it to its employees, its contractors and our subcontractors to manage the work in compliance with the CDC's requirements.

If [Owner] continues to ignore these common-sense rules and regulations, [Contractor] will have no choice but to protect the safety of its personnel on its own. Specifically, [Contractor] will take one or more of the following steps:

- Decrease its workforce;
- Refuse to work in areas where the 6' social distancing rule cannot be honored;
- Work in areas where the 6' social distancing rule can be honored in accordance with a reasonably revised written schedule;
- Limit elevator use to times when a safe number of workers can ride the elevator;
- Suspend work until safe work conditions can be provided; or
- Other reasonable steps taken after notice to [Owner].

Obviously, this method of working may create inefficiencies. At this time, [Contractor] cannot determine the impact of these work site changes may have on our costs or schedule. As the Project proceeds,

[Contractor] will continue to keep [Owner] apprised of these impacts. If there is a specific procedure Owner would like us to follow to track this Cost Event, please advise us as soon as possible.

[Contractor] does not intend to be adversarial, but our contract requires us to notify [Owner] of any impacts that may lead to extra costs or the need for additional time. Please allow this letter to serve as this notice. Hopefully, [Owner] will work with [Contractor] and its subcontractors to address these safety concerns.

Please stay safe and healthy,

[Contractor]

Subcontractor Ordered to Work but Issue with Working Conditions

While the local and state governments are allowing construction on limited types of construction projects, they have all couched that exception by requiring the sites to maintain the requirements and recommendations of the CDC. For example, Governor Wolf of Pennsylvania provided:

Individuals leaving their home or place of residence to access, support, or provide life sustaining services for themselves, another person, or a pet must employ social distancing practices as defined by the Centers for Disease Control and Prevention.

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Businesses and entities that provide other essential services must implement rules that help facilitate social distancing of at least six feet.

Similar restrictions apply in almost every state and have also been followed by OSHA.

Given those restrictions on working, it is necessary for [Subcontractor] to put [Contractor] on notice of the unsafe practices that are occurring on this jobsite. [Contractor] is scheduling the work in such a way that it is requiring subcontractors to share workspaces as well as elevators in violation of the CDC’s recent rules and regulations. In this time of national emergency, [Contractor] cannot simply ignore the reality of coronavirus and owes it to its employees and its subcontractors to manage the work in compliance with the CDC’s requirements.

If [Contractor] continues to ignore these common-sense rules and regulations, [Subcontractor] will have no choice but to protect the safety of its personnel on its own. Specifically, [Subcontractor] will take one or more of the following steps:

- Decrease its workforce;
- Refuse to work in areas where the 6’ social distancing rule cannot be honored;
- At [Contractor]’s direction in accordance with a reasonably revised written schedule, work in areas where the 6’ social distancing rule can be honored;
- Limit elevator use to times when a safe number of workers can ride the elevator;
- Suspend work until safe work conditions can be provided; or
- Other reasonable steps taken after notice to [Contractor].

Obviously, this method of working may create inefficiencies. At this time, [Subcontractor] cannot determine the impact of these work site changes may have on our costs or schedule. As the Project proceeds, [Subcontractor] will continue to keep [Contractor] apprised of these impacts. If there is a specific procedure Contractor would like us to follow to track this Cost Event, please advise us as soon as possible.

[Subcontractor] does not intend to be adversarial, but our contract requires us to notify [Contractor] of any impacts that may lead to extra costs or the need for additional time. Please allow this letter to serve as this notice. Hopefully, [Contractor] will work with the Owner and other subcontractors to address these safety concerns.

Please stay safe and healthy,

[Subcontractor]

Force Majeure Clause for General Contract

If Contractor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Contractor, Contractor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Contractor include, but are not limited to, the following: (a) acts or omissions of Owner, Architect, or others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Contractor; (g) general labor disputes impacting the Project, but not specifically related to the Project; (h) fire; (i) terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; and (m) adverse weather conditions not reasonably anticipated. Contractor shall submit any requests for equitable extensions of Contract Time in accordance with the change order provisions of the Contract. In addition, if Contractor incurs additional costs as a result of a delay that is caused by any cause beyond the control of Contractor, Contractor shall be entitled to an equitable adjustment in the Contract Price.

Force Majeure Clause for Subcontract

If Subcontractor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Subcontractor, Subcontractor shall be entitled to an equitable extension of the Subcontract Time. Examples of causes beyond the control of Subcontractor include, but are not limited to, the following: (a) acts or omissions of Contractor, Owner, Architect, or others; (b) changes in the Work or the sequencing of the Work ordered by Contractor, or arising from decisions of Owner or Contractor that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Contractor pending dispute resolution or suspension by Owner or Contractor; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Subcontractor; (g) general labor disputes impacting the Project but not specifically related to the Subcontractor; (h) fire; (i) terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; and (m) adverse weather conditions not reasonably anticipated. Subcontractor shall submit any requests for equitable extensions of Subcontract Time in accordance with the change order provisions of the Subcontract. In addition, if Subcontractor incurs additional costs as a result of a delay that is caused by any cause beyond the control of Subcontractor, Subcontractor shall be entitled to an equitable adjustment in the Subcontract Price.