



## COVID-19 Ten Construction Industry Questions & Answers

By McLennan Ross Construction and Labour & Employment Team – March 23, 2020

As the Alberta construction industry continues to deal with the evolving COVID-19 crisis, the McLennan Ross Construction Group is working hard to stay ahead of the legal challenges that this unprecedented situation poses to our clients.

To assist you, we have prepared answers to 10 of the most frequently asked COVID-19 questions that affect the Alberta construction industry.

### 1. What precautions are required at a construction site and how does the prohibition on gatherings of more than 50 people apply?

The Alberta Chief Medical Officer of Health has ordered that all persons in the Province of Alberta are prohibited from attending “mass gatherings of more than 50 attendees” (the “Order” can be found by clicking here). The Order explicitly lists places of worship, gatherings, weddings; public recreational facilities and private entertainment facilities; and bars and nightclubs as locations where the prohibition applies.

The Order, however, does not define “mass gatherings,” nor does it mention workers generally, or those at construction sites specifically. So far, this directive does not apply to workplaces generally or to construction sites specifically; however, there have been some calls to restrict construction activities (e.g., some unions in Quebec have the government to prohibit construction activities altogether). Fortunately, the Government of Alberta has recognized the importance of ongoing construction activities and not placed any additional restrictions on the industry.

Employers need to take appropriate precautions to protect workers and worksites from risks related to COVID-19. The precautions include the following:

- Consider limiting workers on site to 50 persons within a given location or any confined place;
- Stagger work shifts to limit employee numbers working at the same site or in the same area at the same time;
- Stagger break times to minimize the number of employees on break at the same time;
- Add lunch trailers if needed to facilitate social distancing;
- Screen employees at the start of each shift, including asking questions about symptoms and exposure to higher risks (e.g., people who have travelled or had contact with others who are sick or have been travelling). Some employers are taking employee temperatures before starting work, although there are potential privacy concerns with collecting this information;
- Immediately send home anyone with symptoms of illness;
- Ensure employees self-isolate in accordance with public health directives;

- Facilitate access to employee benefits for anyone sick or needing to quarantine;
- Consider the use of masks for workers in close proximity to each other;
- Ensure social distancing during morning safety meetings and hold such meetings outside;
- Promote proper hygiene;
- Ensure work areas, trailers, tools, and supplies are properly sanitized, where possible;
- Provide adequate hand cleaning stations to the job site;
- Limit the number of people in work vehicles together;
- Allow office workers to work from home, where feasible;
- Limit access to office trailers;
- Limit numbers in smoking areas and lunch trailers.

More information on what employers should do in relation to construction worksites can be found by clicking here.

## **2. What do we do if someone on our worksite has COVID-19 symptoms or tests positive for COVID-19?**

All individuals with COVID-19 symptoms should be removed from the worksite and self-isolate for 14 days to prevent spreading the infection, and otherwise follow the instructions of the health authorities. If an individual was at the worksite while infectious, the public health authorities should be notified to investigate by calling Health Link at 811.

Although it will be difficult to determine who was in contact with the infectious individual and who the infection was spread to outside of the worksite, the project site should be shut down for the public health authorities to investigate, if required, and all people in contact with potentially infectious individuals should self-isolate. The privacy of all employees should be balanced with the employer's obligation to maintain a safe worksite. More information on what to do if an employee tests positive for COVID-19 can be found by clicking here.

In the event the public health authorities provide direction to keep the project open, all directions should be followed including, but not limited to: disinfecting all services on the worksite; providing disinfecting supplies such as soap and hand sanitizer; and discouraging or prohibiting group gatherings of staff. Importantly, in the event of a widespread COVID-19 outbreak in Canada, an employer's responsibilities under Occupational Health and Safety, Employment Standards, and Human Rights legislation will continue as they would with any other illness impacting employees.

Other frequently asked questions by employers can be found by clicking here.

## **3. Should I just shut my project down?**

Shutting down the worksite (as opposed to just removing particular workers as described above) may put companies at risk of breaching various contractual obligations. For example, removing workers who carry no recognizable risk may result in financial loss to those workers and corresponding risk of liability to the party shutting down the site.

Fortunately for the construction industry, layoff and termination notice or pay in lieu of notice is not required under the *Employment Standards Code* for employees employed at the site of and in the construction, erection, repair, remodeling, alteration, painting, interior decoration or demolition of any building or structure. However, office employees and maintenance employees are entitled to layoff notice and termination notice. Layoff notice is required for 1 week if employed less than 2 years, 2 weeks if employed for 2 years or more, or if unforeseeable circumstances prevent such notice, then as much notice as practicable. Termination notice may be required for office or maintenance employees up to 8 weeks (if employed more than 10 years). Notice may not apply if unforeseeable or unpreventable circumstances make it impossible to give termination notice.

Employees employed for a definite term or task are also exempted from the group termination provisions of the *Employment Standards Code*.

On a unionized work site, the collective agreements would govern in respect to layoff and termination obligations. Every contract up and down the chain should be considered, to determine if shutting down the project can be legally justified – particularly in light of the provisions relating to delay and force majeure as well as the concept of frustration, all discussed below. The decision to shut down the project without legal justification may attract liability for breach of contract. However, it may be possible to amicably negotiate contract revisions where parties have a common interest in taking such actions.

#### **4. Can contractors or owners claim delay damages or an extension of time as a result of COVID-19?**

Most construction contracts expressly set out the relief for delay-related impacts, such as an extension of time to complete the work and possible recovery of costs and damages. In many cases, delays caused by external factors such as COVID-19 will be excusable but not compensable to the contractor, but this may vary from one contract to the next. The delay provisions likely require that the contractor mitigate any losses caused by the delay, and in any event the common law requires the parties to act reasonably if it is possible to reduce or avoid such costs.

Where you are party to multiple agreements related to the work or project (including but not limited to leases, development or financing agreements, subcontracts, supply contracts, and equipment rental contracts), it is important to assess whether you are protected against the consequences of any delays in respect of each contract, as they may not be aligned or consistent. It is also important to take note and comply with all contractual notice requirements.

#### **5. Will a force majeure clause relieve me of my contractual obligations?**

A force majeure clause is common in certain construction contracts and normally frees the parties from liability or obligation when an extraordinary event or circumstance beyond either party's control prevents one or all of the parties from fulfilling their contractual obligations.

Force majeure clauses are read very narrowly. The triggering event must clearly fall within the scope of the force majeure clause. Further, the application of a force majeure clause requires that the triggering event is clearly beyond the control of the contracting parties; and the triggering event must render performance of contractual obligations impossible. Simple inconvenience or the fact that an event is beyond someone's control will likely not be sufficient to render a force majeure provision applicable.

COVID-19 will certainly trigger some force majeure clauses; however, a case-by-case assessment is required. As the impact of COVID-19 and legislative responses continue to evolve, it is prudent to ensure that you understand the specific nature of your contractual arrangements to determine whether a force majeure clause exists and may be relied upon in your particular circumstances.

Further contractual considerations can be found by [clicking here](#).

#### **6. Will the concept of frustration of contract absolve me of my contractual obligations on a project?**

The doctrine of frustration may apply where the force majeure provisions in the construction contract are not met (or such provisions do not exist). The distinguishing feature of frustration is that it is not based on any provision of the contract, whereas relief for force majeure must be explicitly set out in the contract. The common law rule of frustration may apply to absolve the parties to a construction contract of their obligations entirely. The rule is applied narrowly where the obligations of the parties are truly impossible to perform because of a third party.

For example, frustration will not apply where the contract is merely more expensive or more onerous to perform, or where an alternative method of performance is possible. Unless you have a mass outbreak at the worksite, or the authorities shut the worksite down, it would likely be difficult to prove frustration. This is not to say that a construction contract cannot be terminated for frustration as a result of COVID-19, but it is unlikely and will need to be assessed on a case-by-case basis.

### **7. If we are required to shut our project down, will losses be covered by business interruption insurance?**

Business interruption coverage only applies if the loss is caused by an insured peril. COVID-19 is likely not a peril covered by the typical business interruption insurance carried by construction companies. There are several important restrictions on business interruption coverage and, like other types of insurance, the specific policy language must be reviewed to determine if there is coverage for pandemics or epidemics. An important consideration to keep in mind is that most business interruption policies will provide coverage only when physical loss or damage has been caused to the insured's premises or property used in the operation of the business.

Some package policies from insurers may have some limited "outbreak expense coverage," but this will most likely be for a nominal amount and only apply with respect to "confirmed", not "suspected", exposure.

Specialty coverage for disruption of business due to a pandemic does exist. But the number of companies that have this type of coverage is limited, given that the coverage has always been expensive and limited in scope. It is important that you keep complete accounting and financial documentation, review your policy, and speak to your insurance broker to confirm whether you have insurance coverage in such circumstances.

More on business interruption insurance can be found by clicking [here](#).

### **8. What do we do with the Temporary Foreign Workers who we employ?**

Foreign Workers should be treated the same as all other employees. They have the same rights as your Canadian employees. If they are laid off or terminated, they can remain in Canada until their work permits expire. In light of recent travel bans, we expect that Immigration, Refugees and Citizenship Canada will implement special measures to assist laid-off foreign workers who are trapped in Canada, by extending their immigration status.

We recommend that early steps be taken to renew any work permits that will expire in the next 6 months, as there will be significant delays processing immigration applications for the foreseeable future.

### **9. How does COVID-19 relate to the requirement to provide a safe worksite?**

If an employee is refusing to work due to a fear of contracting COVID-19 in the workplace, the employer must respond in compliance with their legal duties under the Occupational Health and Safety Act (Alberta) or equivalent provincial or federal legislation in other jurisdictions. Importantly, all jurisdictions in Canada have legislation allowing workers to refuse work they believe is unsafe, and an employer is prohibited from taking disciplinary action against an employee on this basis. This has already been seen in Quebec, and more recently in Alberta, where more construction workers have refused to attend ongoing construction projects due to the fear of contracting COVID-19. More information on employers' health and safety duties can be found by clicking [here](#).

### **10. What are my obligations if an employee is concerned about the safety of a worksite and exposure to COVID-19?**

Employers are generally required to investigate the employee's concern and attempt to resolve the issue within the workplace. Where no resolution is reached, the employer's decision may be investigated by the responsible government authority in that jurisdiction.

Employers have a positive obligation under the *Occupational Health and Safety Act* (Alberta) to provide employees with a safe work environment. Employers should encourage employees who are sick to stay home, advise all employees to practice good hand sanitization techniques, and review the extent of business travel that is required. More information on what employers should do and know right now can be found by clicking here.

To assist in meeting an employer's responsibility to ensure a safe work environment for its employees, McLennan Ross has prepared a checklist to assist employers in their COVID-19 pandemic planning. A copy of this checklist can be accessed by clicking here.

### **Closing Remarks**

This is not an exhaustive list of the legal questions arising in relation to the COVID-19 crisis. We are sending daily email alerts and notifications, including updates from other practice groups at the firm. If you have not signed up to receive our COVID-19 communications, you can click here to do so. We are also posting all updates to our COVID-19 Resource Centre on a daily basis.

The Alberta Construction Association has also prepared a document titled *Pandemic Planning for the Construction Industry*, which can be found by clicking here. This is a useful resource containing some best practices and thoughts collected from many in the construction industry.

**If you have any specific questions with respect to managing the evolving COVID-19 crisis, please contact us at [covid19@mross.com](mailto:covid19@mross.com) so that we can assist.**



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