

# COVID-19: PENNSYLVANIA CONSTRUCTION AMID COVID-19

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## US Construction Alert

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COVID-19 has made its way into various industries throughout the world, and Pennsylvania's construction industry is no exception. All commercial construction activities throughout the Commonwealth, with a few limited exceptions, have been halted indefinitely to assist in mitigating the ongoing spread of the coronavirus. Similarly, construction supply chains in Pennsylvania, the U.S., and abroad have either limited supply or halted material production altogether, which may result in severe construction delays throughout Pennsylvania once construction projects are cleared to continue. Given the current (and likely ongoing) state of flux faced by Pennsylvania's construction professionals, it is important that contractors familiarize themselves with the state-specific legal concepts currently at play and consider practical efforts to help curtail the economic impact of COVID-19.

## I. STATUS OF CONSTRUCTION IN PENNSYLVANIA

On March 19, 2020, Pennsylvania Governor Tom Wolf issued an Order requiring all “non-life-sustaining” businesses to cease operations immediately to help slow the spread of COVID-19. With the Order, Governor Wolf issued a list of non-life-sustaining businesses, which included an outright ban on forms of commercial construction (with the exception of emergency repairs and the construction of healthcare facilities), including the following:

- Construction of Buildings
- Heavy and Civil Engineering Construction
  - a. Utility Subsystem Construction
  - b. Land Subdivision
  - c. Highway, Street, and Bridge Construction
  - d. Other Heavy and Civil Engineering Construction
- Specialty Trade Contractors
  - e. Foundation, Structure, and Building Exterior Contractors
  - f. Building Equipment Contractors
  - g. Building Finishing Contractors
  - h. Other Specialty Trade Contractors

Residential projects are likewise banned under the Governor's Order. Only if the project is "substantially complete" (i.e., a final occupancy permit has been issued), or if limited activities are necessary to stabilize the site, prevent weather damage, or make emergency repairs, may the project continue.

Pennsylvania contractors and other construction professionals may request an exemption waiver from Governor Wolf's Order to continue business operations. However, such waivers are not automatically granted and contractors should consult with an attorney before requesting a waiver.

Given the still-developing nature of COVID-19, Governor Wolf's Order does not include a time duration for the ban on construction services. However, the Governor's Order is clearly based on social distancing efforts and, on March 29, 2020, President Trump extended federal social distancing guidelines through April 2020. Thus, Pennsylvania commercial contractors should be prepared for the construction ban to last at least through April 2020, with further extensions possible.

However, contractors should be aware of proposed legislation, designated as Pennsylvania House Bill 2400, which seeks to allow all public and private construction activities to continue provided they adhere to social distancing practices and other mitigation measures. If approved, commercial and residential construction projects would be universally exempt from the non-essential-business ban issued under Governor Wolf's Order.

## II. COVID-19 AS FORCE MAJEURE EVENT FOR CONSTRUCTION PROJECTS

A force majeure clause is a provision of a contract that excuses a party from performance if an extraordinary event prevents one or both parties from performing their obligations. Construction contracts typically include force majeure clauses that allow contractors to suspend or excuse performance if events occur beyond the contractor's control.

Under Pennsylvania law, the applicability of a force majeure clause is highly dependent on the specific wording of the clause and the circumstances existing at the time the clause is invoked. Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused. Furthermore, the conditions leading to the force majeure event must be ones that were beyond the reasonable control of the party seeking to enforce the provision and must not have been caused by that party's negligence or fault. Many contracts will include one or more of the following as specified force majeure events, which may arguably apply to COVID-19:

- **Acts of God.** This phrase is typically used to include natural disasters/events not expressly listed in the force majeure provision.
- **A public health emergency or communicable disease outbreak.** COVID-19 is a communicable disease and was declared a public health emergency by U.S. authorities in January 2020.
- **Government or administrative action or changes in laws or regulations.** Governor Wolf's Order has imposed a closure of the majority of construction activities to contain the spread of COVID-19.
- **Failure of upstream suppliers.** If the force majeure clause provides for upstream supplier defaults or delays, a contractor may have an excuse for delayed performance while it finds another capable supplier.

However, even if the event is within the listed force majeure events, it must make the performance impossible.

### **III. COVID-19 AS IMPOSSIBILITY OF PERFORMANCE EVENT FOR CONSTRUCTION PROJECTS**

Under Pennsylvania law, the defense of “impossibility of performance” may also be used as an avenue to excuse a contractor from performing certain contractual obligations as a result of the COVID-19 pandemic. This defense arises where, after a contract is made, a party’s performance is made impracticable through no fault of his or her own. When such impossibility arises, the parties may waive the difficulties or terminate the agreement, ending all contractual obligations.”

With specific respect to the ongoing construction bans, Pennsylvania might recognize scenarios where performance may be made impracticable by having to comply with a domestic or foreign governmental regulation or order, such as Governor Wolf’s COVID-19 Order, the non-occurrence of which was a basic assumption on which the contract was made.

### **IV. FUTURE CONTRACTS**

Due to the major impact COVID-19 is having on construction supply chains, contractors will likely continue to experience difficulties in performing contractual obligations and meeting major milestones long after projects are cleared to reopen. It is important that contractors keep this in mind when negotiating future contracts to account for the ongoing impacts the coronavirus will have on construction projects. Specifically, contractors should consider revisiting their standard force majeure provisions, delay provisions, time extension provisions, and related damage provisions to fairly allocate the ongoing risks resulting from COVID-19.

### **V. INSURANCE**

Contractors should carefully consider current insurance policies and provisions and seek advice on the interplay between insurance claims and contractual obligations.

### **VI. SUPPLY CHAIN**

Contractors should stay in touch with major suppliers and maintain a list of backup suppliers for alternative supply chain options.

### **VII. HEALTH AND SAFETY**

Contractors should consider the health and safety of those on site, particularly in light of currently-mandated social distancing measures. Pennsylvania legislation may eventually be promulgated to ensure that businesses are operating with significant health and safety precautions in place. Now is a great time for contractors to revisit and revise currently-employed health and safety protocol.

## KEY CONTACTS



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