

# *Construction Advisory*: Responsibility for Site Safety in a Coronavirus World

## Executive Summary

 6 MINUTE READ

Construction site safety is in the spotlight during the coronavirus (COVID-19) pandemic. Our Construction Group tours new safety concerns and potential liabilities contractors face under most contracts.

- What are the contractor's express and implied duties for site safety?
- Do subcontractors have any additional site safety responsibilities?
- Can safety obligations extend to third parties in offsite locations?

Construction is one of the industries most affected by the coronavirus pandemic. In some states, construction projects are being shut down, and even in those states where construction is proceeding, heightened safety standards are required. Depending on the locale of the project, some of the heightened safety standards include:

- Keeping a safe distance between workers.
- Replacing the common water bucket with bottled water.
- Increasing the supply and availability of hand washing stations and sanitizer.
- Temperature checks when workers arrive on site and when they leave for home.
- Implementing shift work.
- Limiting crossover of subcontractors.
- Limiting gatherings during breaks.
- Mandatory handwashing for at least 20 seconds before work begins, after workers remove gloves, before and after the use of shared items such as tools, before and after any restroom break, and after shifts end.
- Mandatory rest breaks of at least 15 minutes every four hours so that workers can follow hygiene guidelines.
- Having one working flushing toilet for every 15 workers on site or one outdoor portable toilet for every 10 workers on site.
- No adverse action against employees who are quarantined or advised to self-quarantine.
- Designating a COVID-19 safety monitor on each site who has the authority to enforce COVID-19 safety-related rules.

### **The Contractor's Express Duties**

As a matter of industry practice and custom, contractors are responsible for ensuring safe working conditions on a project site. The rationale for assigning responsibility to the contractor is the control the contractor has over the site. Site control can and typically is dictated by the terms of the construction contract, such as under the [AIA A-201 General Conditions of the Contract of Construction](#), which expressly delegates control over construction means and methods, including site safety, to the contractor. The delegation of control is addressed in Section 3.3: "The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract." The delegation of safety is addressed in Section 10.1: "The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract."

The contractor's responsibility for site safety is reinforced by several other provisions in the A-201 such as Section 2.3.4, which makes it clear that regardless of the information provided by the owner, the contractor "shall exercise proper precautions relating to the safe performance of the Work," and Section 4.2.2, which makes it clear that the architect "will not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents."

### **The Contractor's Implied Duties**

While the A-201 is unambiguous about the contractor's responsibility for site safety, even if the contract of construction is less definitive than the A-201, case law provides that the party with control over the site, and the ability to prevent injuries from occurring, has the duty to exercise that control. The courts have held that if the contractor has the power to control the means and manner of the work, it is responsible for compliance with applicable codes and regulations, particularly those related to safety. On multiprime projects, where the owner holds the contracts and the construction manager is principally responsible for the coordination of the performance of the work, if the owner delegates site supervision to the construction manager, and the construction manager has the authority to stop the prime contractors' work if safety violations occur, the construction manager can be liable to injured workers and to third parties.

A common theme in all of these cases is jobsite control, and this frequently is the determining factor the courts rely on when determining liability for jobsite injuries. Since the contractor has jobsite control, the contractor is responsible for safety since it has the ability to prevent unsafe conditions from occurring. Conversely, and without the contractual right or responsibility to supervise or control the work, the owner, architects, and engineers are usually absolved from liability for worksite safety issues.

### **The Subcontractor's Duties**

Subcontractors are responsible for the safety of their personnel, as made clear in Section 5.3 of the A-201: "Contractor shall require each Subcontractor ... to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work that the Contractor ... assumes toward the Owner and Architect."

As with the contractor, the subcontractor's duty flows from its control of the area of the work where its personnel are performing. A party that controls an area of the project, such as a subcontractor, is responsible for the safe operations in the area that it controls.

### **Duties to Third Parties**

In the coronavirus context, a significant issue is the duty owed by the contractor to third parties that may never set foot on the project site but are affected by what happens on the site. What if, for example, a worker contracts the coronavirus on the site from another worker and then spreads it to others on or off the site? What liability does the contractor face?

The contractor's liability to third parties is analogous to the liability of design professionals where the courts look at whether the duties assumed by the designer made it "foreseeable" that the plaintiff could be injured by a breach of a contractually assumed duty, or whether the professional services contract established a "special relationship" between the design professional and the injured party. Regardless of the terminology employed, design professionals have an obligation to exercise reasonable care in the performance of their contractual and professional obligations to avoid causing injuries or death to third parties.

The same standard is likely to be applied to contractors. If the duties assumed by the contractor in its contract make it foreseeable that a third party would be injured by a failure to perform the contractual duty, then liability will likely apply.

This is precisely the approach in the A-201, which broadly makes the contractor responsible to reasonably foreseeable third parties in Section 10.2: "The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to ... employees on the Work and other persons who may be affected thereby."

## **Conclusion**

Contractors are on the front lines in dealing with the coronavirus and must impose strict safety standards to minimize the transmission of the disease between workers on the site and to third parties off the site. A failure to impose appropriate safety procedures subjects the contractor to liability for injury or sicknesses to workers on site and also to foreseeable third parties.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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The coronavirus (COVID-19) is infecting the construction industry with multiple crises simultaneously. Our Construction Group takes stock of five emerging trends we're following.

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