Arizona Builders Alliance

Advisory Board Meeting

Legal Report

May 13, 2020

Contracts – Force Majeure Clauses For Future Contracts

Despite the uncertainty for the economy moving forward, we are still seeing future private construction projects move forward. Even though most contracts have some form of force majeure clause, it is imperative to be clear regarding what is covered by the force majeure clause and to what relief the Contractor is entitled if a force majeure event occurs:

* Specifying that, although the COVID-19 pandemic is a known circumstance, because of all of the uncertainty surrounding how a future project may be delayed, the parties acknowledge that the Contract Sum and the Contract Time do not contemplate or include schedule or cost impacts associated with COVID-19; and
* Outlining what relief is available in the event of a schedule or cost impact, which relief may include: additional time, extended general conditions, demobilization or remobilization costs, unavailability of materials or supply chain impacts; and

Returning to Work: A Checklist to Help Reopen Safely

Many states, including Arizona, have begun the process of allowing certain nonessential businesses to reopen. Reopening is not as simple as it seems, employers will be faced with the dual responsibilities of keeping their customers and employees as safe as possible while also maintaining compliance with the Fair Labor Standards Act, the Americans with Disabilities Act, as well as the Health Insurance Portability and Accountability Act (“HIPAA”), among other laws.

1. **Are My Employees Ready to Come Back to Work?**

Unfortunately, it depends. As you prepare to open, you must determine who will be the first employees (i.e., your critical workers) to return. We recommend that you call each critical employee and utilize the following prompt and questions:

*We wish to reopen but want to do so safely. Your safety and the safety of our clients is paramount. To ensure you can return to work, we need to ask you the following questions:*

1. Are you currently sick with COVID-19 symptoms or have you been sick in the last 2 weeks?
2. Is anyone in your household currently sick with COVID-19 symptoms or has anyone exhibited symptoms in the last 2 weeks?
3. To your knowledge, have you been in contact with anyone who has been diagnosed with COVID-19 or has had COVID-19 symptoms in the last 2 weeks?
4. Has anyone in your household been ordered to quarantine by a medical caregiver in the last two weeks?

The employee’s answers will dictate how you should respond in compliance with the CDC guidance, and controlling local, state, and federal laws. When in doubt, direct the employee to consult with the employee’s healthcare provider. Generally, if the employee is symptom-free and has had no exposure to COVID-19 in the prior 2 weeks, then the employee can return to work as long as you adopt and enact appropriate safety measures to keep the work environment safe (see #2 below). To be certain, however, we recommend that you consult with your trusted legal advisor because this issue is tricky, and you can inadvertently and innocuously violate the law.

2. **Can an Employer Require an Employee to Stay Home Following a Positive Test, or if the Employee is Showing Symptoms?**

Yes. If an employee tests positive for COVID-19, is exposed to the virus or is showing possible symptoms of the virus, the employee should be ordered to stay home and seek medical care or a diagnosis. If the employee is too sick to work remotely while at home and your business has fewer than 500 employees, the Families First Coronavirus Relief Act (“FFCRA”) provides eligible employees with emergency paid sick leave and emergency paid family medical leave.

3. **May an Employer Take the Temperature of Employees at Work?**

Yes, but care must be exercised. The employer must balance privacy rights versus safety obligations. Ensure the thermometer is non-invasive (e.g., a non-touch geothermal thermometer is highly recommended) and take the employee’s temperature in a private setting. If possible, plan for an alternate exit, so co-workers are not aware of the results. You must record the information and store it in a separate, locked medical file. Whoever takes the temperature, must use appropriate PPE including gloves (to be switched between employees), masks, and gowns. You should give employees advance notice, get consent, and explain that many people with COVID-19 present no fever and are asymptomatic so the results are not fail-proof. If you have a unionized workforce, you will need to consult your labor agreement and attorney before implementing temperature checks. If conducting onsite checks, you will want to consider staggered start times to avoid long waits. You will need to determine if the wait / temperature check time should be paid time.