

February 2020

Crisis Management (including a Pandemic) and the Construction Industry

Whether tornado, flood, death of the owner, or a virus pandemic, crisis management is one of those things few do well, most people do poorly, and some do not do at all. Planning for a pandemic is run-of-the-mill crisis management.

Here are some thoughts about how a virus pandemic might affect the construction industry. Following that are excerpts of what some experts say and some resources to help you create a plan to manage a pandemic or any other disaster crisis.

Employees:

- How would management handle 20-50% absenteeism, for workers and supervisors?
- Allow for sickness of the employee and absenteeism when family members are sick. Do you tell sick employees who come to work with a communicable disease to go home? Do you have work at home strategies?
- Will there be increased fear of coming to work?
- Does workers' compensation kick in if the employee gets sick at work?
- OSHA requires employers to have a safe workplace. Is there liability for having sick employees next to healthy employees?
- Employee leave/vacation policies; short term disability; FMLA, ADA, & city mandated leave laws.

Construction projects:

- Can you continue the project? Will large projects be shut down?
- If the issue is worldwide, can you get your product? Is the supply chain compromised?
- On service calls, should employees clean their hands and shoes, and don a mask; especially employees dealing with wastewater?
- What are the contractual consequences of a delay in finishing the project? Can you get a time extension?
- What about equipment rental?
- What if your supplier (and the transporter, and the manufacturer) is having absenteeism issues and cannot get the product for you to install?
- Will there be increased demand for certain construction services: touch-less hand operations in restrooms, including sink operation; higher barriers between employees in open offices; temporary triage centers when existing health care facilities are overwhelmed; acceleration of health care projects; and indoor air quality?
- Does the city have enough personnel for issuing permits and for inspection?

Insurance:

- Does a company need additional insurance like project completion and business interruption insurance?
- *Force majeure* clauses in construction contracts usually apply to unforeseen events. Was this pandemic unforeseen?
- Have you assumed the risk of any loss or consequence of delay?
- What if your employee infects another contractor's employee while at work (third party liability)?

Management:

- Does more than one person have responsibility for various management roles and cross training; including check authorization, assignment of duties, project supervision, and computer operations?
- What if key management individuals cannot work?

Canadian Construction Association on Coronavirus

“[At a February 18th webinar sponsored by the Canadian Construction Association, Cheri] Hanes urged Canadian firms to immediately conduct a supply chain audit. Rather than narrowly focusing on the city of Wuhan, she said, their sights should be trained on all of China and beyond, including any third parties their suppliers and partners deal with. The audit should look to identify possible shortages of raw materials in addition to finished products and prepare for costs to soar, with the timetable for distress most likely extending well after the outbreak becomes contained. “It’s not only that materials will be unavailable, it’s that materials will be unaffordable,” said Hanes, adding the effects could be “catastrophic” to a balance sheet.”

“The third contributor to the panel was Andrea Lee, partner with Glaholt Bowles, who explained that many contracts include force majeure clauses that release parties from performance of contractual obligations when unexpected events occur that will make performance more onerous than expected. Typical criteria include an event that is beyond the control of a claiming party, when the event prevents or delays contract performance, when the event was not due to negligence or fault of the claiming party, and when the claiming party has exercised reasonable diligence to overcome the specified force majeure event.... “Keeping track of all the evidence that might have to be used down the road, I think that is important” in showing reasonable efforts were made to find alternative solutions, Lee said.”

<https://canada.constructconnect.com/dcn/news/economic/2020/02/coronavirus-could-have-multiple-impacts-on-construction>

2002 Study: HIV/AIDS and its effect on the South Africa construction industry:

“Due to its mobility and migrant nature, the construction industry is the third hardest hit by HIV and AIDS after mining and transport. The pandemic in South Africa threatens to reduce the overall construction labor force, shift the age structure due to mortality, change the skill composition of the construction labor supply and increase labor turnover. The resultant absenteeism, medical incapacity, sick leave and disability pensions, medical care, pensions to surviving dependents and loss of productivity potentially affect the direct costs of construction companies and thereby the cost of construction.”

From Minnesota attorney Patrick O’Connor, Jr.’s “Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World” (2003).

“What is fairly clear, however, is that a truly deadly pandemic, whether caused by man or nature, would be highly disruptive to all forms of commerce, including construction activity. In fact, if the epidemic was severe enough in a particular location, it could well result in the virtual destruction of a region’s labor force making the continuation of any construction project extremely difficult. Moreover, the underlying purpose and justification for a project may no longer exist. Needless to say, predicting such events is a ‘fool’s game.’”

Resources:

- Federal Center for Disease website on Coronavirus: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- Interim Guidance for Businesses from CDC: : https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fguidance-business-response.html
- Minnesota Dept. of Health on Coronavirus: <https://www.health.state.mn.us/diseases/coronavirus/basics.html>
- Federal OSHA on Coronavirus: <https://www.osha.gov/SLTC/covid-19/>
- U. S. Dept. of Labor OSHA 2007 publication, “Guidance on Preparing Workplaces for an Influenza Pandemic” (OSHA 3327-02N) (not construction specific): https://www.osha.gov/Publications/influenza_pandemic.html
- “Doing Business during a Pandemic: Human Resources Policies, Protocols, Templates, Tools, & Tips” Developed by the University of Minnesota and the Society of Human Resource Management: <http://www.cidrap.umn.edu/sites/default/files/public/downloads/cidrap-shrm-hr-pandemic-toolkit.pdf>

-Gary Thaden, Government Affairs Director, MMCA, Gthaden@Gmail.com, 651-646-2121