

Legal FAQ for the Construction Industry

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With Pennsylvania construction activities back underway companies are using the state's guidance on how to responsibly get back to work to keep its employees, vendors and clients safe from the COVID-19 virus. The requirements apply to "all businesses in the construction industry in the Commonwealth" and specifically reference "design-related field activities."

After close examination of the guidance and talking to firms that have started work again, here are the answers to some of the most important questions we've heard since the state released its guidance.

Who is responsible for enforcement on site? To enforce the guidelines, each project is required to have an onsite "Pandemic Safety Officer" (PSO). For large-scale projects, each contractor must provide one. The implication is that on a project that does not require more than one, the general contractor is to be responsible for providing the PSO. This is consistent with the usual practice of contractor responsibility for safety on the site.

Who is responsible for the cost of enforcement? Most, if not all, projects to be reinstated or reopened were contracted before the COVID-19 shutdown and subsequent issuance of the guidance. No contracts included the cost of such an officer, contractors did not include one in their bids and owners did not budget for one. Nevertheless it is a cost that must be absorbed.

None of the parties involved could have anticipated the necessity of providing a PSO at the time of contracting. A determination will have to be made whether this is simply an unanticipated circumstance for which the contractor will be granted a cost change order, or agreement reached on managing the cost.

Additional restrictions limiting and controlling material and equipment delivery, cleaning of tools and equipment, wearing of protective gear and social (workplace) distancing, will likely cause delay and additional construction costs. The state's guidance does not indicate, nor should anyone anticipate, government funding for these unavoidable additional costs.

Each project will be different and will require individual treatment as to how to deal with these costs. Extending construction schedules will likely not be critical in most cases. Where there are regulatory or otherwise mandated completion dates beyond the control of the owner, extensions will have to be obtained. It can be anticipated that regulatory agencies will be reasonable in granting extensions.

What authority will the PSO have on-site? A PSO will preside over social distancing, provision of hand washing stations, cleaning or sanitizing of implements, limiting conferences and gatherings in size, jobsite screening, prohibiting unnecessary visitors, limiting supplier deliveries, limiting access to enclosed spaces, ensuring individual travel to worksites and encouraging sick workers to stay.

There does not appear to be any specific requirement for either qualifications to serve as a PSO or delineating the extent of the PSO's authority over workers or others on the site. However, the guidance, referencing these behaviors indicates that "All businesses and employees in the construction industry must comply. Presumably the PSO will have authority to take action in the face of violations."

The guidance does indicate ongoing enforcement and advises "law enforcement officers" to "refer to the Enforcement Guidance available online."

Enforcement will require the PSO to exert control over certain activities of a site representative or other personnel of the design professional or the owner. This should be no different than the ability of a construction foreman prohibiting an engineer or owner from entering into an unshored trench or enclosed area without appropriate protection.

Similar to any workplace hazard, the site representative or other design professional representative must be aware of the responsibility of the PSO and not infringe on that responsibility or fail to comply with the safety provisions placed into effect by the PSO. The Design Professional is responsible for the actions of its representatives on site and not for the safe prosecution of the work by the contractor.

Who is liable for claims arising out of infection or provisions for prevention of infection? This is the most difficult determination in the interpretation of the guidance. The contractor has responsibility for safety on the project. This is standard throughout the universe of construction contracting. Prevention of disease should be treated as any other safety provision as the contractor's responsibility. Absent indications to the contrary, this is clearly the reasonable way to handle the cost question.

Design professionals and their representatives on site must be aware of the safety provisions being enforced by the contractor and of the responsibility of each and every employee or representative on site to strictly adhere to those requirements.

Of equal importance, site representatives or others who will or may be on site need to be aware of the PSO's responsibilities. Under no circumstance should the site representative undertake any responsibility to enforce the state's guidance. Interfering in this way could open the design professional to liability as well.

To do as soon as possible: Training and direction to site representatives should be a first step. At a minimum, no site representative should be placed on site without a clear understanding of the authority of the PSO and the site representative's responsibility to adhere to the directives of the PSO.

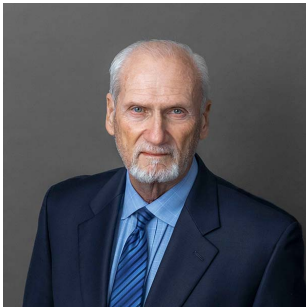
Addendum to professional service and construction contracts should be prepared to cover projects on which a PSO will be required. A standard letter to owners should be drafted indicating the potential - and perhaps likelihood - of additional costs it is likely to incur during the pendency of the guidance. There also should be similar clauses for standardized contracts for future projects.

Over the coming months, everyone in the construction industry should be prepared to navigate these uncertainties and expect difficulties and questions. Anyone with questions regarding compliance with the state's guidance can [contact me](#) or anyone in the [Barley Snyder Construction Industry Group](#).

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