

Advocate's View: Re-opening construction: The new normal (for now)

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During the early stages of the COVID-19 health crisis, certain construction work was deemed “essential” and was permitted to continue. The guidelines regarding what work was considered essential were not always crystal clear and resulted in a lot of confusion and uncertainty from contractors about whether they were allowed to proceed with certain work.

This confusion over what work is essential has been alleviated with the Phase 1 re-opening of construction work in the Finger Lake’s region. However, with the re-opening comes a slew of mandatory guidelines promulgated by the Department of Health that will significantly impact the way construction work is done, at least for the foreseeable future.

These guidelines are applicable to all “employers” with employees working on a construction site. However, from a practical standpoint, on large commercial projects the burden of some of these requirements will fall squarely upon the shoulders of the general contractors or construction managers responsible for coordinating and supervising the work.

The mandatory guidelines applicable to construction activities can be broken down into five categories: protective equipment, physical distancing, cleaning and hygiene, communications and screening procedures.

With respect to protective equipment, the most basic requirement is that the employer must provide all employees (at no cost) with acceptable face coverings and have replacement face coverings available as needed. Employees can use their own acceptable face coverings from home if they choose. All face covering must be either replaced or cleaned after use and/or damage. Employers must also discourage the sharing of tools and equipment, and if objects must be touched by multiple people, gloves should be utilized.

The physical distancing guidelines require that employers ensure six feet of distance between workers, unless safety or the core function of the particular task requires a shorter distance. For all indoor work, the workforce capacity should be limited to one person for every 250 square feet of space. All work in tightly confined spaces (such as elevators) should only be performed by one person at a time. If any of the above distancing guidelines cannot be met, the personnel involved must (at a minimum) wear protective face coverings at all times. Non-essential visitors should be prohibited from the site and designated areas for pick-ups and deliveries must be established to reduce points of contact with outsiders. All in-person gatherings, such as job meetings, should be conducted remotely (using teleconference or videoconference) as much as possible. Otherwise, these gatherings must be conducted in open, well-ventilated spaces where the participants can practice social distancing. The practice of contractors gathering in job trailers to discuss the project is definitely on hold.

While all employers are expected to comply with these physical distancing requirements, the onus will fall on the general contractors and/or construction managers to ensure that these requirements are being adhered to in the field, particularly on large projects with multiple primes.

The new guidelines also require compliance with the cleaning and hygiene requirements promulgated by both the CDC and Department of Health. This means that jobsites must be furnished with sufficient hand sanitizing stations, including areas for soap, water and paper towels and alcohol-based hand sanitizing in areas where soap and water

stations are not feasible. Shared objects and surfaces must be cleaned and disinfected at least on a daily basis, utilizing disinfectants approved by the DEC.

Under the communication guidelines, all employers in construction are required to develop a written safety plan, which should be posted conspicuously. The state has provided a template for these plans, which can be found on the Governor's website at

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf

The communication guidelines also encompass requirements for conspicuously posting signage on site, while also training and updating employees on the new protocols. Employers must also maintain a log of all persons on site, including workers and essential visitors (excluding delivery people). In addition, if any person on site tests positive for COVID-19, the employer must immediately report it to state and local health departments (while maintaining confidentiality) and cooperate with all contact tracing efforts.

The guidelines for screening protocols include the implementation of daily health screenings for all workers and essential visitors, which can include temperature checks and, at a minimum, the completion of daily questionnaires for each worker and visitor. These daily screenings must be performed by properly trained screeners, with the results documented.

While the new guidelines do not specifically address enforcement or penalties for violations, it should be assumed that the rules from prior executive orders remain in place. Thus, enforcement of these guidelines will still be carried out by "state and local governments," which for construction work will typically fall upon the local building inspectors. Under the state's health laws, fines for violations can still run up to \$10,000 per violation.

So what are the practical implications of these re-opening guidelines upon construction? Certainly the biggest impact will be on the time it takes to perform work, particularly on large, commercial projects, as the physical distancing, frequent cleaning/disinfecting and the volume of new administrative requirements will make it exceedingly difficult to progress work at pre-COVID-19 levels. Construction by its very nature often requires multiple people working in close proximity. Typical practices such as "stacking" of trades or significantly increasing manpower to progress or expedite work will be off the table for the foreseeable future. Instead, greater emphasis must be placed upon the coordination and sequencing of work to ensure compliance with physical distancing, while also maximizing efficiency at a time when simply bringing in more bodies to complete tasks or having people working on top of each other is not a viable option. The legal implications of these guidelines will depend largely upon how owners and contractors adjust to the "new normal" and whether they are willing to cooperate and modify expectations. One thing is for certain, the next few months will be very interesting for the industry.



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