



COVID-19 Testing and Vaccinations in Construction – What Contractors Need to Know

MARCH 22, 2021

Today's Speakers



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AGENDA

- May a contractor (as an employer) require its employees to be tested for COVID-19? What happens if an employee refuses to be tested?
- May a contractor (as an employer) mandate that employees be vaccinated? What happens if an employee refuses to get vaccinated?
- Can an owner/workplace mandate testing and vaccination?
- What are the rules where employees are represented by a union?
- What should appear in your subcontracts?

Employer's Right to Test

Right to Test

- Americans with Disabilities Act (ADA) and the U.S. Equal Employment Opportunity Commission (EEOC)
- National Labor Relations Act (NLRA)
- Centers for Disease Control and Prevention (CDC)
- Testing Requirements (Reliability of Tests)
- Health Insurance Portability and Accountability Act (HIPAA)
- Occupational Safety and Health Administration (OSHA)
- Wage and Hour Issues

Right to Test – ADA & EEOC

- The ADA generally prohibits medical examinations of employees unless job related and consistent with business necessity.
 - However, this standard is met where the employer has a reasonable belief, based on objective evidence, that the employee may pose a direct threat to the workplace due to a medical condition.
 - The EEOC has determined that COVID-19 poses a “direct threat” in the workplace.
- An employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others.
 - The ADA does not interfere with employers following CDC recommendations (or other public health authorities) regarding whether, when, and for whom testing or other screening is appropriate.
 - Testing administered by employers consistent with current CDC guidance will meet the ADA’s “business necessity” standard.

Right to Test – CDC Guidance

- Workplace-based testing should not be conducted without employees' informed consent, which requires disclosure, understanding, and free choice.
- According to the CDC, employees must receive the following information in advance of testing:
 - The manufacturer and the name of the test.
 - The type of test.
 - The purpose of the test.
 - The reliability of the test.
 - Any limitations associated with the test.
 - Who will pay for the test.
 - How the test will be performed.
 - How to understand the results.
 - Actions associated with negative or positive results.
 - Who will receive the results.
 - How the results may be used.
 - Consequences for declining to be tested.
- Employees must also receive a patient fact sheet (found on the CDC's website).

Right to Test – NLRA

- Absent a legal mandate, unionized employers must determine whether their collective bargaining agreements grant the right to unilaterally test employees.
 - Testing is a mandatory subject of bargaining.
 - The NLRA mandates bargaining over mandatory subjects.
 - Every collective bargaining agreement is different, but there are bargaining strategies for employers to obtain the right to test.
- Even in a non-union setting, the NLRA can still impact an employer’s right to test its employees.
 - Section 7 grants employees the right to engage in “concerted activities for the purpose of mutual aid and protection.” Examples might include:
 - Protesting against testing.
 - Office communications among co-workers.
 - Flyers among co-workers.
 - Co-worker discussions about testing.

Right to Test – Reliability of Tests

- EEOC mandates that testing must be “accurate and reliable.”
- Antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA.
 - Antibody testing does not meet the ADA’s “job related and consistent with business necessity” standard for medical examinations or inquiries for current employees.
 - Antibody testing does not determine if someone has an active case of COVID-19.
- EEOC guidance recognizes that viral tests, such as the PCR test, meet the “accurate and reliable” standard.
- EEOC has been silent on the reliability of rapid antigen tests in making employment decisions.
- The EEOC monitors CDC’s recommendations, and could update testing requirements in response to changes in CDC’s recommendations.

Right to Test – HIPAA

- HIPAA and the ADA regulate the collection, use and disclosure of protected health information (PHI).
- HIPAA generally prohibits a covered entity from disclosing PHI without the individual first executing a HIPAA-compliant authorization.
- Employees must sign a HIPAA-compliant authorization form, and such must be provided to the testing laboratory.
- If contracting with a third-party vendor to provide the testing, employers should review the vendor's security protocols, including how the vendor will protect the PHI collected and what protections exist in the event of a security breach.
 - Include provisions that address information security and the risk of a security breach in a service agreement with any testing laboratory.

Right to Test – OSHA

- Under Occupational Safety and Health Administration (OSHA) Guidance, issued on January 21, 2021, employers may test, and in so doing, should follow state and local guidance.
- Under the OSHA recordkeeping requirements, COVID-19 is a recordable illness for all employers. Recording is required when:
 - Confirmed COVID-19;
 - Work related, defined as “resulting from events or exposures occurring in the work environment”; and
 - Involves one or more of the general recording criteria, which include death, days away from work, medical treatment beyond first aid, or loss of consciousness.

Right to Test –Wage & Hour Issues

- Both the EEOC and U.S. Department of Labor have been silent on whether employers are required to compensate employees for the time spent undergoing the COVID-19 test (i.e., travel and time at testing center).
 - A Fair Labor Standards Act (FLSA) opinion letter regarding employer-mandated drug tests asserts that time spent traveling to and from the test as well as time spent undergoing the test constitutes hours worked for FLSA purposes.
 - Employers should assume the same result with respect to mandatory COVID-19 testing.

Right to Test – Employee “Refusals” and Accommodations

- If an employee “refuses” testing, it is critical to explore WHY he or she is refusing and whether reasonable accommodations are necessary.
- EEOC allows employers to make COVID-19 testing a condition of employment, but employers are required to provide accommodations for employees who, due to **disabilities** or **sincerely-held religious beliefs**, decline or refuse to be tested.
- Employers must engage in the interactive process if an employee requests an accommodation (i.e., an exception from the testing requirement).
 - This process may present an opportunity to request medical documentation confirming the existence of a disability and the need for an accommodation.
- Potential accommodations might include:
 - Working from home;
 - Masking on the worksite; or
 - Switching an employee’s shift to one in which the employee work with fewer people.

Right to Test – Employee “Refusals” and Accommodations Cont’d

- ❖ Employers have the discretion to choose among multiple effective accommodations.
 - So the employee is not necessarily entitled to the accommodation of his or her choice.
- ❖ Employers are not required to provide an accommodation that would create undue hardship (significant difficulty or expense).
 - ❖ But, if a particular accommodation does create undue hardship, have to consider alternative accommodations that might be effective and would not create undue hardship.
- ❖ By contrast, if the employee simply refuses a COVID-19 test for personal reasons, an employer may discipline (up to and including termination) the employee and/or exclude him from the workplace until he or she agrees to be tested.

Mandating Vaccines

Mandating Vaccines

- Emergency Use Authorization (EUA)
- OSHA
- EEOC
- National Labor Relations Act (NLRA)
- Governor Andrew Cuomo
- New York State Legislative Developments
- Vaccine Incentives
- Wage and Hour Issues
- Worker's Compensation and Liability Protections

Mandating Vaccines - EUA

- EUA is a mechanism to facilitate the availability and use of vaccines during public health emergencies.
 - EUA is not full FDA approval.
 - All three COVID-19 vaccines received EUA authorization.
- When a vaccine is issued under a EUA, the FDA (or vaccine provider) has an obligation to inform vaccine recipients of the following:
 - Potential benefits and risks;
 - The extent to which such benefits and risks are unknown;
 - Whether any alternative products are available; and
 - **“That they have the option to accept or refuse the vaccine.”**
- Legislation seems to prohibit mandatory vaccinations (at least during the EUA stage).
 - However, a solid read of EUA is that it is directed at governmental entities (as opposed to private employers).

Mandating Vaccines – OSHA

- In 2009, OSHA issued a letter of interpretation stating that employers may require a seasonal flu vaccine (subject to certain exceptions).
 - Employees must be properly informed of the benefits of the vaccination.
 - Employees may refuse the vaccine due to a reasonable belief that they have a medical condition creating a real danger of serious illness or death.
 - Whistleblower protection under Section 11(c) of the Occupational Safety and Health Act.
- OSHA has not yet taken a public position as to whether or not employers may require the COVID-19 vaccination.

Mandating Vaccines – EEOC

- On December 16, 2020, the EEOC issued Guidance presupposing that employers are implementing and enforcing mandatory COVID-19 vaccination policies, with certain exceptions and caveats.
- Employers can require that employees receive the COVID-19 vaccine as a condition of returning to, or remaining in, the workplace.
 - But, as with testing, employers may be required to provide accommodations to employees who, due to **disabilities** or **sincerely-held religious beliefs**, decline or refuse the vaccine.
 - So, if an employee refuses, critical to explore WHY and engage in the interactive process if accommodations may be necessary.
- Examples of reasonable accommodations may include exempting an employee from a vaccination requirement; requiring approved masks as an alternative to vaccination; requiring PPE, such as a protective hood with face shield, etc.; reassigning the employee to a worksite that does not require vaccination; leave; or schedule modification.

Mandating Vaccines – EEOC Cont’d

- So, if an employer determines, based on objective evidence, that the presence of an unvaccinated employee (one that has refused or declined due to a disability or religion) presents a “direct threat to the health and safety of persons in the workplace that cannot be reduced or eliminated through a reasonable accommodation,” the employer can exclude the employee or employees from the workplace.
 - Once an employer excludes an employee, however, that employer must assess whether other accommodations, such as remote work, can be provided.
- The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.

Mandating Vaccines- EEOC Cont'd

- Administration of the vaccination is not, in and of itself, a medical examination.
 - According to the EEOC, a medical examination is “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.”
 - A vaccine is administered for protection against contracting COVID-19; the employer is not seeking information about an individual’s impairments or current health status.
- Pre-screening vaccination questions may constitute disability-related inquiries, as they are likely to elicit information about a disability.
 - According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination.
 - If the employer administers the vaccine or requires an employee to receive the vaccination through a third party with whom the employer contracts to administer a vaccine, any screening questions must meet the ADA’s standards for disability-related inquiries, i.e., the employer must show that the questions are “job-related and consistent with business necessity.”

Mandating Vaccines – NLRA

- As with testing, absent a legal mandate, unionized employers must determine whether their collective bargaining agreements grant the right to unilaterally test employees.
 - Vaccination is a mandatory subject of bargaining.
- And, as noted under “testing,” the NLRA can still impact an employer in a non-union setting.
 - Section 7 grants employees the right to engage in “concerted activities for the purpose of mutual aid and protection.” Examples might include:
 - Protesting against vaccines.
 - Office communications among co-workers.
 - Flyers among co-workers.
 - Co-worker discussions about vaccines.

Mandating Vaccines – Governor Cuomo’s Position

- On December 2, 2020, Governor Cuomo said: “You can’t mandate that somebody takes the vaccine We’re trying to do it the other way – education, show that it’s safe.”

Mandating Vaccines – State Legislative Developments

- Assembly Member Linda Rosenthal (D-67th District, Manhattan) recently introduced A.11179, which requires NYS to administer the COVID-19 vaccine and makes the vaccine mandatory in certain situations.
 - Mandate triggers if the State “fails to achieve sufficient immunity.”
 - Individuals can avoid the mandate if they get a letter from a licensed medical professional indicating they are medically exempt.
- A difficult future ahead, but the problems with the bill highlight the exact issues that employers will need to resolve in deciding whether to mandate vaccines.
- No Senate sponsor yet.

Mandating Vaccines – State Legislative Developments Cont'd

- On March 15, 2021, Governor Cuomo signed Senate Bill S2588A into law.
- Guarantees virtually every New York State employee—whether employed in the public or private sector—paid leave to receive a COVID-19 vaccination.
- The law allows employees to take paid leave for a “sufficient period of time, not to exceed four hours per vaccine injection” (or more if allowed through a CBA or the employer’s policy).
- This leave must be provided without charge against any other leave bank to which the given employee is otherwise entitled, including NYS Paid Sick Leave.
- Employers are prohibited from discharging, threatening, penalizing, or otherwise discriminating or retaliating against an employee because he or she has exercised rights under the new law.

Mandating Vaccines – Incentives as an Alternative Approach

- Some employers have considered incentives as an alternative approach to mandating vaccines.
 - Potential problem: the ADA prohibits employers from “coercing” employees to participate in wellness activities.
- On January 7, 2021, the EEOC released a set of proposed rules limiting the value of incentives awarded for participating in programs that collect employee health information
 - Only items of minimal value permitted (e.g., water bottles).
 - High value incentives violate the ADA or the Genetic Information Nondiscrimination Act (GINA) by coercing participation in wellness activities.
- On January 20, 2021, the Biden administration withdrew the proposed regulations (under a regulatory freeze).

Mandating Vaccines – Incentives as an Alternative Approach, Cont'd

- On February 1, 2021, 42 business groups joined together and asked the EEOC to clarify “the extent to which employers may offer employee incentives to vaccinate without running afoul of the Americans with Disabilities Act (ADA) and other laws enforced by the EEOC.”
- Some employers are not waiting for the EEOC and are publicly announcing vaccine incentives, such as:
 - Hourly compensation to receive the vaccine (e.g., Aldi is paying employees up to four hours of pay; Chobani paying up to six);
 - Small cash incentive bonuses (e.g., Kroger offering \$100 cash bonus);
 - Gas credits and travel expenses to the vaccination site (e.g., Uber/Lyft ride up to \$15 each way).

Mandating Vaccines – Incentives as an Alternative Approach, Cont'd

- Takeaways of incentives:
 - Lawsuits are possible.
 - Regulatory uncertainty in wellness activities.
 - Need to provide accommodations due to disability and religion. Employers must consider alternatives, such as periodic testing or working remote, so that employees with the disability-related or religious objections are still able to earn the incentive.
 - Cash bonuses could be deemed nondiscretionary bonuses under the FLSA, thereby triggering overtime adjustments for some employees.

Mandating Vaccines – Wage & Hour Issues

- As with testing, the EEOC and U.S. Department of Labor have been silent on whether employers are required to compensate employees for the time spent getting the vaccine under an employer mandate (i.e., travel and time at vaccine center).
 - As noted under “testing,” a FLSA opinion letter regarding employer-mandated drug tests asserts that time spent traveling to and from the test as well as time spent undergoing the test constitutes hours worked for FLSA purposes.
 - Employers should assume the same result with respect to mandatory vaccines and, in fact, as discussed, New York State requires paid leave for COVID-19 vaccinations.

Mandating Vaccines – Worker’s Compensation

- An injury or illness occurring after the administration of a COVID-19 vaccine that has been approved by FDA may be compensable under New York State’s workers’ compensation scheme.
- Even in cases where immunization was voluntary, such vaccination would have arguably been encouraged by the employer, benefited the employer, and served a business purpose.
- Furthermore, if the vaccination occurred at work or was paid for by the employer, these factors also would support a finding that workers’ compensation applies.
- However, the workers’ compensation exclusivity bar may be defeated if the employer engaged in gross negligence or reckless conduct.

Mandating Vaccines – Liability Protections

- Employers administering a COVID-19 vaccination program may likely be afforded another layer of immunity through the Public Readiness and Emergency Preparedness (PREP) Act.
- Grants liability immunity to covered persons against any claim of loss “caused by, arising out of, relating to, or resulting from” the distribution, administration, or use of COVID-19 vaccines approved by the FDA.
 - Covered Persons can include companies that administer vaccines or provide facilities for vaccine administration.
 - The only exception to immunity is for claims involving “willful misconduct” as defined in the PREP Act.
- On December 3, 2020, Health and Human Services (HHS) amended the PREP Act Declaration to expand civil immunity under the PREP Act to tort claims related to the manufacture, distribution, administration, and non-administration of COVID-19 countermeasures, which would include COVID-19 vaccines.
- As of December 3, 2020, private distribution of covered countermeasures, including COVID-19 vaccines approved by the FDA, are now entitled to immunity.
- The PREP Act also provides a “fund supplied by Congress, to compensate individuals who suffer an injury or death as a result of a COVID-19 vaccine approved under the EUA or a full FDA approval.” The fund operates as a remedy of last resort and would be offset by any health insurance or workers’ compensation payments received by the employee.

Testing and Vaccination Mandates Contract Issues

Testing & Vaccination: Contract Issues

1. May project Owners require construction workers to be screened, tested or vaccinated before entering the work site?
2. May Contractors require Subcontractors' employees to be screened, tested or vaccinated before entering the work site?
3. In either case, who bears the associated costs and delays?

Testing & Vaccination: Contract Issues

How big a deal is it?

- Symptom Screening
 - Experiencing symptoms?
 - fever $>100.3^{\circ}$?
 - recent Covid diagnosis?
 - recent contact with someone infected?

- Low tech & low cost

Testing & Vaccination: Contract Issues

How big a deal is it?

1. Antibody testing
 - Not recommended for current diagnosis
2. Viral Testing
 - A. NAAT (nucleic acid amplification testing) may be freely available, but
 - Results may take several days
 - Results valid only as of time tested
 - B. Antigen Testing
 - 15-30 minutes
 - \$5 - \$50 per test
 - CDC recommends testing *“at least weekly”*

Testing & Vaccination: Contract Issues

How big a deal is it?

- Vaccination
 - Currently available in limited doses
 - Not administrable on site
 - Two-shot vaccinations may take six weeks
 - Significant resistance in the population
 - 53% willing in construction

Owner-Contractor

Safe Work Place Responsibilities

Responsibility as Owner or Contractor:

New York Labor Law §200

“All [construction projects] shall be so constructed equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places.”

Project Owner may be liable for creating a dangerous condition, or failing to remedy one of which it has notice.

Safe Work Place Responsibilities

Responsibility as Employer

No OSHA Standard for Covid-19, BUT:

“Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” (29 U.S.C. 654(a)(1), General Duty clause.)

- Covid-19 is a “recordable illness” and a condition that *may* cause death or serious physical harm. See OSHA’s Covid-19 Guidance for Construction Workers.
- OSHA recommends generally that workplace prevention programs “follow state or local guidance” for screening and testing; though not, specifically, for construction.

Safe Work Place Responsibilities

Responsibility as Employer

OSHA National Emphasis Program, 3/12/21:

1. Prioritizes for inspection “establishments that have workers with increased potential exposure” to the Covid-19 virus, “and that puts the largest numbers of workers at serious risk.”
 - “Primary Target Industries” include health care, residential care, meat-processing, supermarkets and warehousing.
 - “Secondary Target Industries” include construction and related industries.
2. Also prioritizes protecting workers from retaliation for reporting exposures.

Owner-Contractor Issues

CDC Guidance for SARS-CoV-2 Testing in Non-Healthcare Workplaces (3/17/21):

SARS-CoV-2 testing may be incorporated as part of a comprehensive approach to reducing transmission in non-healthcare workplaces. Symptom screening, testing, and contact tracing are strategies to identify workers infected with SARS-CoV-2, the virus that causes COVID-19, so that actions can be taken to slow and stop the spread of the virus.

COVID-19 vaccine is currently available in limited doses; therefore, CDC's Advisory Committee on Immunization Practices (ACIP) described recommendations for prioritization during the early phases of the vaccination program. As vaccine supply increases and additional priority groups receive vaccine, CDC's priorities for SARS-CoV-2 testing will change and the guidance will be updated.

Owner-Contractor Issues

A non-contractual mandate to test or vaccinate that increases costs or limits work force may be a compensable Constructive Change

1. Contracting parties have an obligation not to interfere unreasonably with one another's performance
2. Conduct of an Owner that materially changes the conditions under which the Contractor reasonably expected to perform may be compensable as a breach of contract.
 - See, e.g., *Rao Electric*, 36 AD2d 1017 (1971), where Owner wrongfully interfered with the Contractor's work by taking early occupancy of the project (a hospital building).

Owner-Contractor Issues

ConsensusDocs 200 (2019)

3.1.3 Unless the Contract Documents instruct otherwise, Constructor shall be responsible for the supervision and coordination of the Work, including the construction means, methods, techniques, sequences and procedures utilized. . . .

3.4.3 The Constructor shall permit only qualified persons to perform the Work. The Constructor shall enforce safety procedures, strict discipline and good order among persons performing the Work. If the Owner determines that a particular person does not follow safety procedures, or is unfit or unskilled for the assigned Work, the Constructor shall immediately reassign the person upon receipt of the Owner's written notice to do so.

Owner-Contractor Issues

ConsensusDocs 200 (2019)

3.11.1 SAFETY PROGRAMS. Constructor holds overall responsibility for safety programs. However, such obligation does not relieve Subcontractors of their safety responsibilities and to comply with the Law. Constructor shall prevent against injury, loss, or damage to persons or property by taking reasonable steps to protect: (a) its employees and other persons at the Worksite; . . .

3.11.3 . . . Constructor's safety program shall comply with the requirements of authorities having jurisdiction.

Owner-Contractor Issues

ConsensusDocs 200 (2019)

3.11.5 If Owner deems any part of the Work or Worksite unsafe, Owner, without assuming responsibility for the Constructor's safety program, may require by Interim Directive, Constructor to stop performance of the Work, take corrective measures satisfactory to Owner, or both. If the Constructor does not adopt corrective measures, Owner may perform them and deduct the cost from the Contract Price. Constructor agrees to make no claim for damages, for an increase in the Contract Price or Contract Time based on Constructor's compliance with Owner's reasonable request.

8.2.1 Owner may issue an Interim Directive directing a change in the Work before agreeing on an adjustment to the Contract Price or Contract Time, or directing Constructor to perform Work that Owner believes is not a change. If the Parties disagree that the Interim Directed work is within the scope of the Work, Constructor shall perform the disputed work in accordance with Owner's interpretation.

Owner-Contractor Issues

ConsensusDocs 210 (2014) [Public Work]

3.11.6 If Owner deems any part of the Work or Worksite unsafe, Owner, without assuming responsibility for the Constructor's safety program, may require Constructor to stop performance of the Work or take corrective measures satisfactory to Owner, or both. If Constructor does not adopt corrective measures, Owner may perform them and deduct the cost from the Contract Price. Constructor agrees to make no claim for damages, for an increase in the Contract Price or Contract Time based on Constructor's compliance with Owner's reasonable request.

Owner-Contractor Issues

1. Beware contract terms that incorporate Owner's "facility rules", "safety rules" or "workplace regulations."
 - Especially at hospitals, nursing homes, schools and colleges, prisons
2. Reasonableness of extra-contractual testing or vaccination requirements may turn on whether the Owner will have employees at or near the worksite.
3. Under present conditions, required testing is more likely to be found reasonable than required vaccination.
 - *Old Dominion Security*, ASBCA, 1991 (Owner liable for reducing contractor's work force by limiting number of available security passes without prior notice).

Owner-Contractor Issues

Public Work

Workforce constraints must bear a reasonable relationship to the goals of competitive bidding. *AGC v NYS Thruway Authority*, 88 NY2d 56 (limiting government use of Project Labor Agreements).

1. Obtaining best work at lowest price
2. Preventing favoritism

Subcontracts

Contractor-Subcontractor Issues

ConsensusDocs 750 (2018)

3.1 . . . To the extent the terms of the prime agreement apply to the Subcontract Work, then Constructor assumes toward Subcontractor all the obligations, rights, duties, and redress that owner under the prime agreement assumes toward Constructor. In an identical way, Subcontractor hereby assumes toward Constructor all the same obligations, rights, duties, and redress that Constructor assumes toward Owner and the Design Professional under the prime contract. . . .

But breadth of “flow-down” clauses may be limited without more.

Contractor-Subcontractor Issues

ConsensusDocs 750 (2018)

3.14 Subcontractor is required to perform the Subcontract Work in a safe and reasonable manner. Subcontractor shall prevent against injury, loss or damage to persons or property by taking reasonable steps to protect: (a) employees and other persons at the Worksite; . . .

- 3.14.1 Subcontractor shall . . . comply with all applicable rules, regulations, orders, and other lawful requirements established to prevent injury, loss, or damage to persons or property*
- 3.14.2 Subcontractor shall implement appropriate safety programs pertaining to the Subcontract Work and Project, . . .*
- 3.14.8 . . . Subcontractor shall establish its own safety program implementing safety measures, policies, and standards conforming to those required or recommended by governmental and quasi-governmental authorities having jurisdiction and by Constructor and Owner, including but not limited to, requirements imposed by the Subcontract Documents.*

Contractor-Subcontractor Issues

AIA A401-2017

4.4.1 . . . The Subcontractor shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, for the safety of persons and property, in accordance with the requirements of the Prime Contract. . . .

Contractor-Subcontractor Issues

Don't forget Purchase Orders with a labor component!

- Delivery
- Set-Up
- Inspection
- Commissioning

Labor Issues

Labor Issues

1. Union Signatory Companies
2. Project Labor Agreements

Labor Issues

Is Union Consent Required?

- Management Rights Clause?

Sample - The management of the job and the direction of the work force, including but not limited to the right to hire, suspend or discharge for just cause and the right to relieve Employees from duty because of lack of work or other reasons, is vested exclusively in the Employer, subject to the provisions of this Agreement.

- Practical Answer: Consult With the Local

- Reaction/Grievance could turn on who's imposing the mandate

- Applied to Employer's entire work force or to a single site?

Labor Issues

Hiring Hall Issues

- Mandatory vs Optional Referral
 - Hybrid: *The Employer agrees to notify the Union when workers are required, and the Union may refer workers to the Employer when so notified. . . (Bricklayers Local No. 3)*
- Options if Union cannot, or refuses, to provide compliant labor
 - Find your own hires and sign them to union
 - Underman the job and seek time extension
 - Seek relief from subcontracting clause
 - Surrender the work scope

Labor Issues

Other Issues

- Apprentices Ratios
- Workforce Diversity Requirements
- On-Site Positive Test Result
 - Were other workers sufficiently separated before and after testing?

Proceed with Caution!

Change is Likely!

- Additional statutes and further guidance from agencies and public health authorities are likely to change as the COVID-19 pandemic continues to evolve and vaccines become more available.
- So, this remains a rapidly moving target.
- Contractors need to stay up-to-date on the most current enforcement positions and legislative developments.
- Work closely with your labor/employment and construction counsel to implement any policies or protocols surrounding COVID-19 testing and vaccination.
- Proceed with caution and stay safe!

Questions?

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