



Ep. 09: Covid on the Job: Construction Sites

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Construction has been deemed an essential industry during this pandemic, but what do employers do when the Coronavirus hits their jobsite?

Zelma Frederick: Hi, I'm **Zelma Frederick**. I'm a Member of McGlinchey in the Baton Rouge office and I practice construction and complex commercial litigation. Today I'm joined by my friend **Mag Bickford**, who is a Member in our New Orleans office and handles labor and employment matters. Mag and I are going to chat today about the interesting intersection of employment law and construction law during these crazy times.

Mag Bickford: Now, Zelma, you and I, as you mentioned, intersect in a lot of ways. And I think the biggest way that our employment clients and construction clients are calling today is, what to do when there is COVID identified on the work site. Do we shut down? What's the course of action to take?

Zelma Frederick: Well, unfortunately, it's not a novel question, but there's no bright line rule for this. Just like every construction site is so different, each job is going to need to be evaluated on a case by case basis. If you have a small job or a residential job, it seems like one positive test might make sense to go ahead and shut the whole job down, because you want to be as safe as possible with every third party. If you do have to shut down the site, the important thing is to first notify all the parties at issue, so that they can then start the chain of notifications to affect everyone that they've then come in contact with. You're going to immediately take those steps to stop everything, notify, start decontaminating your site, and be sure to shut down at least any areas that are in contact with the effected person.

Mag Bickford: So once we do those actions and we've waited our time and cleaned our site, what proof is needed to reopen the site? How do we go back there?

Zelma Frederick: Again, there's no one answer for this. Proof of a safe site is going to vary for each project. And sometimes in these construction projects, there are multiple layers of

parties who were involved who might have a say on what works for them. I think a good rule of thumb would be, always ensure the safest environment that you have possible. Identify everyone who was on the site in a certain window of time, both before the positive case and after, and ask them to go and get tested and provide you with negative results. The alternative to that, of course, would be have anyone that you've identified that was in contact during that time to self-quarantine for a minimum of 14 days, and stay away to ensure that they're not coming back prematurely. If we have to go through this, Mag, from the employer's standpoint, who's going to pay for test if everyone is required to test?

Many clients are bringing in occupational med groups to do the testing, because they want their people back to work if they can work. So it makes more sense to have someone come in and do that testing, as opposed to sending the whole job site home for 14 days if it's not necessary.

Mag Bickford: That's a really good question and like the questions we've had before, there's no bright line rule on that. I think many of my clients are actually bringing in occupational med groups to come in and do the testing in that scenario, because they want their people back to work if they can work. So it makes more sense to have someone come in and do that testing, as opposed to sending the whole job site home for 14 days if it's not necessary. So there is no hard line rule, except in the situation where there's a unionized environment. In that scenario, depending on the terms of the collective bargaining agreement or, terms and conditions of employment that have to be discussed with the union, you may actually want to pay for it in that scenario as well.

Another thing that I think is important when you look at testing is, what tests are they taking? For example, I had a client who kept sending their supposedly sick worker to the Occ-Med clinic and they kept doing the antibody test. Well, if you've got active COVID, it's usually a little bit too early to identify antibodies. So you want to make sure when you send people for testing outside of the business unit, that they're getting the right test, and hopefully getting it back quickly. Part of the problem we're having right now is that it's very difficult, if almost impossible, to get a quick turnaround test. And in that case, you really have no option other than to go home until that test comes back, which may be a week, maybe 12 days, maybe even longer.

Zelma Frederick: Goodness. So I wonder if it'd be helpful to give some strategy for reopening. Say you have a construction site that has multiple players and subcontractors coming back on. They've had a positive COVID test. What's the best strategy for planning purposes for an employer in that situation?

Mag Bickford: Well, plan. You hit the word right on there. You know, you've got to come up with a plan for that. What does that look like? For example, are you bringing your entire workforce back after that? Are you going to bring them in in stages? Have you set the workplace up in a clean and safe environment so that people can come back? You want to make sure that the people you bring back are compliant and following the rules. And that

takes a lot of work, right? We're all busy in our jobs, but now we have an additional thing we have to supervise, is that compliance with safety measures. It's easy just to say, "oh, we need to do all these things," but it doesn't really work unless you set out a plan with specific targeted action items for when your workers come back to the site.

Zelma Frederick: I could not agree with you more. I think a construction site, especially, is this little civilization of people coming in and out and doing everything on their own time schedule and coming on for a day, leaving for a day, coming on for a week, leaving for a week. And so finding the time and having someone own the responsibility of monitoring and ensuring compliance is so important. If your project manager is there to manage construction, potentially you might want to bring in another third party and have their scope of work be to monitor COVID restrictions and compliance. Things to consider putting into place after a site shutdown, or if you haven't put these into place already, you're going to want to sanitize and decontaminate the site, and maintain really good records of what was used to sanitize. Was it a third party? What were their qualifications? What was done? You want to be sure to know that what you've done is enough, if you're reporting to someone else. And then maybe have that third party or have someone on your team that is in charge of noting compliance and keeping records of compliance for all the people that are coming in and off of this site. And that comes to the next question of, okay, well, what can you do? Are you relying on people to self-report, or... How far can you go to prevent contagion in the worksite?

A construction site is this little civilization of people coming in and out on their own schedule. Having someone own the responsibility of monitoring and ensuring compliance is so important.

Mag Bickford: As far as you can. That's the right answer.

Zelma Frederick: Take it to the limit.

Mag Bickford: Take it to the limit. So CDC has certainly given us guidelines on what they expect to see in the workforce. In fact, if you go on CDC's website, they're going to have some guidance that's specifically targeted to the construction industry. And some of the things that they talk about (and remember, this is going to be part of our plan before we even open the door!) are signage for cleanliness and safety. Now that's something most construction sites are used to in the workforce, so we just need to build it better and place it where it's really going to be read.

Temperature checks. That's an interesting topic. I think a lot of businesses right now are instituting temperature checks, which is just fine. Under normal circumstances, I probably wouldn't be so confident to say "fine," because of the limitations imposed by the Americans with Disabilities Act (ADA) and certain privacy concerns, but that has been lifted for the COVID experience. So another thing that we're seeing in the workforce these days are temperature checks. And that is a medical record. It seems a little inconsequential for a medical record, but it actually is under the terms of the

Americans with Disabilities Act. So when we take temperatures in the workplace, whether it be for our employees or vendors or site visitors, we have to treat that record as confidential. You want to have separate medical records, not in employees' personnel files. It has to be kept separately under lock and key. It should be on a need-to-know basis; it shouldn't be shared with anyone. It should also be bigger than just the taking of the temperature. For example, I read one particular scenario recently where the person taking the temperatures, after someone came back with, you know, a hundred or whatever, she responded in front of other people, "Oh my God, you have a temperature!"

Zelma Frederick: Oh!

Mag Bickford: That's not cool! That's a violation of the ADA as well. So you want to make sure when you're taking the temperature, it's in a confined area, it's private and it's not going to have any sort of possibility of being overheard or seen by anybody else.

Zelma Frederick: This might be a silly question, but for a temperature check – I have two kids and it's so hard to take their temperature. I probably have 12 thermometers at home because I don't think any of them work. It sounds silly, but is there a training? Is that where you get a third party in to do it? Do you just train the one person?

Mag Bickford: Yeah, no, you're going to have to train the one person. And you definitely want a thermometer that shoots at you. You don't want to touch anyone. Don't ask them to say "ah," like they normally do.

Zelma Frederick: Right.

Mag Bickford: But I will tell you this. There are certain medical providers that will come in and monitor the process for you, which may make sense in a construction situation because the risks are big. Right? If you shut down, that costs money.

Zelma Frederick: It's real money. That's right.

Mag Bickford: So it's something you might want to look at, to see what does that cost? So Zelma, how do we go about setting a quote or a budget to accommodate work slowdowns and all these COVID-related expenses that are very hard to anticipate?

You can build in additional costs on the front end for those unanticipated yet anticipated expenses. And look back at past jobs, research the issues. You're going to probably want to add time into your schedule.

Zelma Frederick: I mean, they are hard to anticipate because no one knows what's going to happen from this day to the next, and how long the actual pandemic will last as well as all the ripple effects. But the best advice I can give would be for anyone and everyone in construction

to try their best to do that. You can build in additional costs on the front end for those unanticipated yet anticipated expenses. And look back at past jobs, research the issues. You're going to probably want to add time into your schedule. And that means the day-to-day schedule, that it's going to take your workers to check into the site, to do temperature checks, as well as your long-term schedule. Because you might have to have flex periods in your schedule that doesn't affect your critical path, because if your workforce gets COVID, you're going to be shut down. So you need to build in some flex time on the overall schedule as well.

You're probably gonna need to go ahead and add some costs in on the front end for your PPE, your masks, any foggers any third party cleanings, any third party servicers that are going to come and monitor your workforce. If you have areas that you want to divide with plexiglass, or technology so that you can have weekly meetings via Zoom -- any of those costs, you need to roll into your contract, and be sure to negotiate it in each contract on the job. So your contract, if you're the owner, with your general. If you're the GC, you're going to look at it from the owner contract, as well as downward toward the subs. You want to have all that in place for each layer of the contracting before the job starts.

The parties should also really evaluate purchasing additional property and environmental insurance. You know, that's going to be another cost, but that might have coverage options for site decontamination, communicable disease clean up, crisis management, emergency vacating expenses, you know, things like that. And go look at your insurance policies right now. Stop everything and go look to see what your insurance policies cover currently and talk to your broker and see what you need to add to be best protected. And that would be advice for owners, GCs, subs, material men, everyone down the line.

Mag Bickford: So one thing we have to keep in mind as we analyze these very important issues is that things are changing every day, given the lack of predictability of this disease and how it's going to be playing out in our communities. So please stay tuned because we may have additional information on these topics going forward.

Zelma Frederick: Yeah. And try to stay creative and flexible. I think everybody's doing a good job of it. I've seen a new news article recently where a creative approach for an outside job construction project that was large, the GC or the owner had a fly-over disinfectant system scheduled to just kind of try to disinfect the entire project from overhead instead of trying to get down in the weeds, or perhaps it was in addition to that. So stay flexible and watch out because your neighbors might have a great idea that would be useful for your project.

I think that is all that Mag and I have for you today. So I'm Zelma Frederick.

Mag Bickford: And I'm Mag Bickford. Until next time!

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