Over the past few months, construction projects in most states have carried on because construction was deemed essential and projects were exempted from government orders that closed businesses. In the jurisdictions that halted construction operations, state and local authorities are now easing those restrictions and allowing construction to resume. As we pivot toward this next phase of the COVID-19 pandemic, construction sites will be very different than they were a few months ago and business-as-usual is likely a thing of the past.

Even during “normal” times, employers have certain obligations when it comes to the health and safety of their employees. In the era of COVID-19, minimizing the spread of the virus has become a top priority. This can be particularly challenging on construction projects, as field workers, by definition, cannot work from home and often must work in very close proximity to others. Just last week, 19 workers at a construction site in Maine...
tested positive for COVID-19, despite the prior implementation of a number of CDC-recommended precautions. And in Texas, Austin is seeing a spike in the number of COVID-19 cases with construction workers and their families.

Construction projects will continue to face unique challenges in trying to minimize the risk of spreading COVID-19. More and more states (and cities/counties) are issuing requirements or guidelines specific to the construction industry as the country begins to reopen. In this article, we discuss some of the guidelines and requirements unique to the construction industry. You are encouraged to also consider broader Employer Considerations for Returning Employees to Onsite Work.

Review Federal, State, and Local Requirements and Guidelines
The COVID-19 pandemic is a continuously evolving problem, and regulations and guidelines directed at stopping its spread are constantly changing as new information becomes available.

Agencies of the federal government tend to issue guidance that is advisory in nature and leave the regulations to state and local authorities. The Occupational Safety and Health Administration (OSHA) issued COVID-19 Guidance for the Construction Workforce. OSHA’s one-page alert includes 12 tips to help reduce the risk of exposure. This construction-specific OSHA guidance is in addition to OSHA’s general Guidance on Preparing Workplaces for COVID-19. Note that employers in higher-risk industries such as construction do have certain heightened recording and reporting requirements, and may be more susceptible to OSHA COVID-19 investigations, especially if located in a geographic area where community transmission of COVID-19 has not decreased (OSHA guidance related to these topics is discussed in Pillsbury client alerts here and here.) [UPDATE: On May 26, OSHA issued additional guidance and established a webpage related to safety for construction projects.] Although the Centers for Disease Control and Prevention (CDC) has not issued guidance specific to the construction industry, it has issued general reopening guidance. The OSHA and CDC guidance are good starting points, but to understand any additional requirements, you need to look at the states and cities or counties in which your projects are under construction.

Just like there was no “one size fits all” response to whether construction had to cease in the face of COVID-19, there are also no universal guidelines or requirements for COVID-19 safety measures going forward on construction projects. Some jurisdictions have issued mandatory requirements pertaining to construction projects, others have issued mere guidance, and still others are silent. To add to the confusion, some states include requirements or suggestions in the state orders themselves, whereas other states publish separate documents specifically to provide guidance on implementing safety measures.

The importance of understanding state and local regulations cannot be overstated, as local ordinances vary in significant ways. Pillsbury is tracking the COVID-19 Impact on Construction Services in all 50 states and the District of Columbia and will continue to update as states issue new orders and guidelines. We expect to
publish a revised chart Tuesday, May 26, which includes a column specific to guidelines impacting construction projects. In this section, we explore a few examples of states and city guidelines for construction projects.

Kentucky
As a part of its Healthy at Work initiative, Kentucky issued robust requirements pertaining not only to businesses that are re-opening, but also to businesses—like construction—that remained open. Kentucky mandated that all businesses must meet 14 **Minimum Requirements** no later than May 11, which includes such things as enforcing social distancing, ensuring the use of face masks to the greatest extent practicable, and sanitizing frequently touched areas. The document also includes two pages related to the now-mandatory daily temperature and health screenings and an additional page regarding entities’ responsibilities pertaining to contact notification (and tracing), which it deems a critical part of the effort to stop the transmission of COVID-19.

Kentucky issued additional **Requirements for Construction Businesses**, which includes more details on requirements related to social distancing, cleaning and disinfecting, PPE, and training. Notably, among other things, the construction requirements prohibit communal coolers or drink stations, discourage riding in vehicles together, mandate designation of a Safety Coordinator to manage the new requirements, and mandate training employees in the language best understood by the individual receiving the training.

Pennsylvania
In Pennsylvania, all construction other than emergency repairs and construction of health care facilities was halted on March 19. Beginning on May 1, Pennsylvania allowed construction to resume as long as construction activities strictly adhere to the Governor’s **Guidance for Businesses in the Construction Industry Permitted to Operate During the COVID-19 Disaster Emergency**. The Pennsylvania guidance incorporates provisions of other Orders issued by the State Secretary of Health providing for business and building safety measures—including the mandatory requirement for face masks. The guidance also lists specific requirements for all construction activities, which includes familiar measures such as social distancing, limiting gatherings, limiting tool-sharing, and staggering shifts. Most notably, the guidance limits the number of workers that can be in an enclosed space at the same time. For commercial construction, that number is based on the enclosed square footage of the project.

Ohio
Ohio established a one-page list of mandatory requirements and recommended best practices for **Manufacturing, Distribution & Construction**. Many of Ohio’s requirements are similar to those in Kentucky and Pennsylvania, but with much less detail. For example, Ohio’s “daily symptom assessment” for employees states only that the employee should take his or her temperature check and monitor fever. And Ohio merely recommends working with the local health department to facilitate contact tracing.
Cities and Counties

In addition to requirements or guidelines issued by states, construction projects must consider that some cities and counties have issued their own independent requirements.

For example, the City of Boston has been heavy-handed when it comes to construction projects. When the Massachusetts Governor issued an order allowing most construction to continue, the City began to allow a phased resumption of construction work beginning on May 18. The City will allow essential construction as long as the projects comply with a new permitting process. Contractors must submit a Compliance Affidavit, certifying that the contractor understands it must develop, maintain and follow a “written project-specific COVID-19 Safety Plan specifying how it will meet its obligations.” The baseline for such a safety plan is in the Construction Site Best Practices Worksheet (Exhibit A to the Compliance Affidavit), indicating which safety measures the contractor meets, explaining why it does not meet those it does not, and where it cannot meet a worksheet safety measure, providing information about an alternative measure the contractor will implement.

In California, in addition to the requirements set forth by CAL OSHA, construction projects may be subject to further requirements. For example, in San Francisco, projects are allowed only if they follow a Large Construction Safety Protocol or a Small Construction Safety Protocol, whichever is applicable.

In Texas, although the state has yet to issue any guidance specific to construction and the Governor’s reopening order expressly supersedes local directives, that will not stop counties like Harris County (Houston) from issuing guidance to the construction workforce.

The District of Columbia has taken a community-driven approach, which included engaging local construction industry leaders and hosting virtual focus groups. See Pillsbury Alert, One Size Does Not Fit All for more information about the D.C. Real Estate and Construction Committee Recommendations for reopening.

The point here is that location is everything and a review of applicable city and county requirements is of the utmost importance. If your company has construction projects in multiple localities with different requirements, and it would be overly cumbersome to juggle the different regulations, one solution may be to adopt a company-wide approach implementing the most restrictive applicable requirements. That said, because of the evolving nature of the various guidance and regulations, it is important to keep abreast of changes to requirements in the applicable localities and consult counsel with any questions.

Company-Wide Safety Measures

Even if your projects are not in jurisdictions with mandatory requirements or guidelines, it would be a mistake not to establish COVID-19 safety measures on your construction projects, if you have not already. Some of the basic COVID-19-related safety measures are seen repeated across federal, state and local guidance and are discussed below.
Social Distancing

One common form of social distancing is working from home, which is obviously not an option for construction projects. But it is possible that some portion of the team is not required to be on site every day and could work from home. Moreover, the ultimate goal of reducing physical proximity between workers can be achieved in other ways: make water bottles available in place of communal drinking fountains; establish protocols for virtual meetings, as opposed to in-person meetings; or permit people to stagger break time to reduce density in break rooms. Consider how to cultivate a new workplace culture that keeps worker morale strong even as you discourage physical proximity between work friends in common areas.

Face Masks

Face masks should be considered as part of the first line of safety measures for employees on the jobsite. Depending on what is reasonable for a task at hand, you may want to encourage or require masks, especially if applicable local and state ordinances require you to do so. Any face mask policy should include flexibility. For example, closer proximity between workers or work indoors could call for a more protective mask than work outdoors. And masks need not be N95/KN95, as they remain a priority for health care workers.

Enhanced Cleaning Procedures

Taking the offensive, implement enhanced cleaning procedures involving sanitation of surfaces on shared equipment and common areas. If possible, minimize the sharing of equipment. And before deciding on which cleaning solutions to use, consider the CDC’s recommended disinfectants, as well as its other cleaning recommendations for workplaces. Consider testing cleaning solutions to see what effect they have on surfaces, keeping in mind that slippery heavy equipment presents its own hazards. Cleaning procedures might also work best if they require sanitation on regularly scheduled sanitation rounds. Also think about where disinfectants may be left for as-you-go use, such as making disinfectant wipes available in shared vehicles and requiring that they be used if more than two people have shared a ride.

Education and Training

It is imperative that employees are properly educated and trained on COVID-19-related safety enhancements and procedures. In fact, some jurisdictions require such training and include specific requirements for the training itself. In general, the training should be easy to follow and should include policies and procedures for maximizing social distancing, using personal protective equipment properly, and addressing actual or suspected COVID-19 cases in a manner that minimizes continued spread of the virus.

Educating employees includes not only verbal training presentations, but also posting signage and keeping written training material in visible places on the jobsite.

Suspected or Actual COVID-19 Cases

You should develop policies and procedures to promptly identify and isolate individuals with suspected or actual positive COVID-19 results. Both the CDC and OSHA have issued guidance for addressing suspected or actual cases of COVID-19 on the job.
If, for some reason, a worker with suspected or actual COVID-19 cannot leave the site immediately, that person should be isolated. Employees should also be provided with information about local testing locations. Individuals who have tested positive or who are suspected to have COVID-19 should be barred from returning to work onsite without confirmation from a medical practitioner that the worker is no longer contagious.

**COVID-19 Compliance Management**

Once you establish COVID-19-related safety procedures, you will also need to manage compliance. As an initial matter, know who is responsible for establishing procedures. While construction site safety is usually the responsibility of the contractor, it is possible the owner may bear some responsibility as well. For example, Massachusetts’ enforcement guidelines related to safety procedures for construction sites states that “A city or town may additionally require the Owner to develop and submit a site-specific risk analysis and enhanced COVID-19 safety plan.”

Some localities require that projects designate a person responsible for ensuring that employees comply with COVID-19-related requirements and best practices. Just like the other safety requirements, this requirement varies depending on the location. For example, Pennsylvania requires that companies identify a “Pandemic Safety Officer” to convey, implement or enforce requirements at construction sites, but leaves open how the officer is to accomplish this. On the other hand, several counties in California provide more oversight of compliance officers through detailed orders. Large construction projects in San Francisco (and some other California locations) must assign a COVID-19 Safety Compliance Officer (SCO) as well as a COVID-19 Third-Party Jobsite Safety Accountability Supervisor (JSAS) for each jobsite. In addition to designation and coordination of these individuals, the orders impose a host of requirements including daily briefings, daily written verifications, visual inspections, and random interviews.

While it may be tempting to simply add “COVID-19 Compliance” to an already-established safety officer’s duties, it may be that your project’s jurisdiction mandates a separate person dedicated to the compliance of COVID-19 safety measures. As with other COVID-19 safety requirements, it is important to understand what your state or city mandates. Even in localities that have not imposed specific compliance requirements, your company, your project, and certainly your employees, may benefit from designating a person to ensure compliance with COVID-19 safety measures.

This Alert is a general guide only as of the date of publication. Specific advice bears largely on state, local government and public health guidance which is ever evolving. Please consult with legal counsel for the latest updates and advice. For more information, please reach out to your regular Pillsbury contact or the authors of this alert.

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