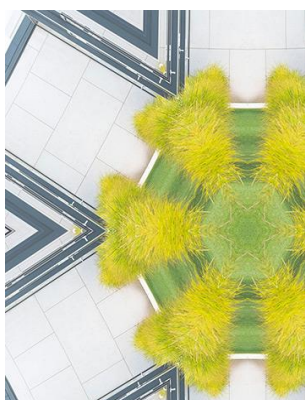


CORPORATE AND COMMERCIAL

COVID-19: Practical Considerations: Return to Site – legal considerations

7 May 2020

Guidance for companies in Northern Ireland.



The Construction industry like many sectors across Northern Ireland is facing unprecedented challenges due to the COVID-19 pandemic.

The majority of construction sites have been closed since mid-March. However since we now appear to be past the initial peak of the pandemic, many employers and contractors are now turning their minds to the practicalities and challenges of how to return to site (and recommence work), within the parameters of the government guidance, while ensuring the health and safety of their staff.

In considering return to work, the 17 April 2020 guidance from the Department for the Economy on making workplaces safer provided welcome direction. The much anticipated list of the priority sectors that accompanied the guidance was also seen as a positive development, with Mining and Quarrying, Waste and Water along with certain Construction activities specified.

Minister for the Economy Diane Dodds at the launch of the guidance did however comment that, "It is important to note that the priority sectors list is advisory and serves to allow companies in Northern Ireland to make their own decisions, and the guidance aims to have practical application in the workplace."

Further clarification on how the Construction industry can continue to operate safe working practices has been provided by the Construction Leadership Council which advises the UK Government and the publication of their Site Operating Procedures (Version 3) which is supported by the Health & Safety Executive for Northern Ireland.

In addition to the officially published guidance, we have highlighted below some other matters that will merit thought, in considering precisely how, when and in what manner work can restart.

RESTARTING THE CONTRACT (UNWINDING PGN 01/20)

Following the immediate closure of a number of construction sites, a position may well have been agreed with the employer concerning relief, or temporary new arrangements put in place pursuant to the guidance set out in CPD's PGN 01/20 Supplier Relief Due to COVID-19.

Early warning notices may also have been issued or relief claimed pursuant to mechanisms in the contract to manage circumstances in which the performance of a party's obligations are impacted by reason, for example, of force majeure, or of a public body exercising authority under law, or by the introduction of a new law.

This document is a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

In returning to site those arrangements will now need to be revisited and unwound or an agreed way forward negotiated and documented.

MANAGING THE REMAINDER OF THE CONTRACT

In addition to dealing with the immediate consequences arising from interruptions on site, the parties to a contract will need to consider how the remainder of the scope of work set out in the existing contract is completed, within the scope of the new restrictions on ways of working, and within the existing agreed contractual terms.

While to a certain extent this will follow on from the course of action agreed when sites were closed or work was stopped, parties may now wish to take a collaborative and cooperative approach to agreeing innovative interim solutions to achieve continuity of services where permitted and in a safe way. In doing this parties will wish to ensure that they do not inadvertently breach the conditions of their contracts, and clear and regular communication between parties is important in achieving this.

SUBCONTRACTS / SUPPLIERS

In being able to deliver future contractual obligations a key question will be the extent to which materials can be obtained from suppliers and the ability of subcontractors to continue to work on site.

It will therefore be vitally important for contractors to also engage with their supply chains to ensure that a consistent approach is adopted to return to work and that any particular restrictions reflecting a particular specialist industry or availability of materials is reflected in whatever arrangements are agreed with the employer.

Again it will be important for the terms of the subcontract to be carefully reviewed in order that both parties understand where they stand regarding their respective legal rights and obligations.

While the Government has sought to put in place a range of financial support measures, it may also be an opportune time to re-examine the allocation of risk in these contracts and determine the consequences should an unfortunate insolvency situation arise.

REMOVING EMPLOYEES FROM FURLOUGH

In the same way as it was vitally important to ensure that any staff furloughing arrangements were implemented properly, it will be important to ensure that the bringing back of staff from furlough is implemented properly and fairly. The current government guidance does not provide a mechanism for ending furlough. It will therefore be important in the first instance to check the wording of the furlough letter agreed with the employees.

If a furloughed employee refuses to return to work in response to their employer's request to do so then they are arguably not willing and able to work and are unlikely to be entitled to wages.

However, contractors should consider whether there is any particular reason to explain why an employee is not keen to return to work. For example, some employees may have received a "shielding" letter (if they are clinically extremely vulnerable), whereby they are strongly advised to stay at home at all times and avoid any face-to-face contact for at least 12 weeks.

Due to the minimum period to be on furlough of 3 weeks, there are complications with the scheme that mean it may not be as flexible as employers would like in terms of managing the capacity of workforces and quickly ramping up and down workers to respond to the fluid COVID-19 changes.

For returning employees, contractors should also consider whether their employment will resume on the terms and conditions which applied immediately before any period of furlough started, or on such amended terms and conditions as may be needed to take account of the applicable circumstances.

HEALTH AND SAFETY

Appropriate measures will need to be put in place to ensure the health and safety of a contractor's employees while they return to site and continue to perform their duties.

Recommended actions here would include:

- Ensuring that an appropriate assessment of the risk from COVID-19 in the workplace is carried out and appropriate measures put in place in line with current Public

Health Agency guidelines. These measures should be communicated to all relevant employees and others at the place of work.

- Reviewing systems of hygiene to ensure that they provide appropriate protection. For instance, staff need to be encouraged to regularly wash their hands with soap, to carry and use tissues and sanitising hand gel. It would also be prudent to increase the cleaning of hard surfaces in the workplace, particularly phones and door handles.

Due consideration will also need to be given to any employees who are in a vulnerable group or who live with someone in a vulnerable group, as to whether they are able to return to work and how to ensure their safety.

SUMMARY

Going forward, the Utilities, Construction and Infrastructure sectors will remain important to the restarting of the Northern Ireland economy. By implementing the recommendations within the COVID-19: Working Through This Together guidance, and adapting to the new working environment, the construction industry is envisaged to be one of the first sectors to see a reopening of operations this month.

However due regard will need to be given to the existing contractual terms noting of course that ensuring that the safety, health and wellbeing of employees remains of paramount importance.

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