

Q&A on Strikes, Unavoidable Delay & Critical Dates

Strikes may affect a new home transaction in two ways. First, it may delay initial construction and therefore delivery of the home. Secondly, after the homeowner takes possession strikes may also affect the vendors ability to make timely repairs.

Extending the Time for Delivery of Homes

1. Why can't Tarion simply grant a standard length delay for everybody?

There are over 50,000 new homes built each year and a great many of them won't be affected by the strikes. It would not be fair to these homeowners to have the closing arbitrarily extended. It would also be in contravention to the rules set out in the Ontario New Home Warranties Plan Act.

The strikes will have different impacts on the delivery dates of different homes depending on a number of factors. For example:

- The stage of construction.
- How quickly the trades return to work.
- The impact on trades that did not strike
- Problems rescheduling the sequence of trades.
- Possible impact on supply chains.
- Potential that trade backlogs in turn cause backlogs for government inspections.
- Possible impact of trade delays and backlog delays pushing back construction into unseasonal weather.

2. Do I have to send out my Second Notice immediately after the strikes end?

- No. The trigger for sending out the Second Notice is not the end of the strike.
- The time period that can be added to Critical Dates is known as the Unavoidable Delay Period. The Unavoidable Delay Period is made up of two parts. These are:
 - The period of the strike itself; plus
 - the Remobilization Period. This is any additional delay that occurs because of the strike (e.g., delay in trades returning to work, having to reschedule sequence of trades and so on).
- Once the strike is over, you should consider what other impacts the strikes might have and what additional delays (apart from the strike itself) may occur in connection with each home you are building. In some cases, the effects may be minimal; in other cases, effects may be significant. It may take a few weeks

– 30 days if you need it - as a “rule of thumb” – to work out what you see as the reasonable and likely additional overall delay associated with the strike and its after-effects. Only once you have assessed these after-effects – the Remobilization Period – are you required to send out the Second Notice. The Second Notice will advise the homeowner of the delay period being tagged onto the construction schedule (the combined number of days covering the period of the strike plus the Remobilization Period) and the date of the conclusion of the Unavoidable Delay Period.

3. What if there are multiple strikes, each beginning one after the other?

- You must send out a First Notice (and later a Second Notice) for each strike that could result in an extension.
- If two or three strikes start within days of one another, you can collect them in the First Notice but be sure to mention all the strikes that will impact your closing dates.
- If any subsequent strikes occur that have not been mentioned in previous notices to purchasers, you must send separate notices for these strikes if you wish to use them in your calculation of new closing dates.
- The timing for sending out the Second Notice is dependent on how many first notices were sent.
 - If you sent out a First Notice for each strike, then you should be sending out a Second Notice once you have assessed the Unavoidable Delay Period for each strike. Each Unavoidable Delay event should be on a separate track.
 - If you sent out a First Notice that included two or more strikes (ie. a ‘package’ of strikes), then you would send out the Second Notice once you have assessed the Unavoidable Delay period for the package of strikes.

4. Can I simply reset my Critical Dates, (e.g., go back to a First Tentative Closing Date even though I was at a Second Tentative Closing Date)?

- No. The Unavoidable Delay provisions of the Addendum do not permit a new home vendor to start the Critical Dates framework over again. If you are at the point where you set a Second Tentative Closing Date, then you cannot go back to a First Tentative Closing Date. What you can do is take the cumulative total of the delay (e.g., 45 days of strike plus 55 days of Remobilization Period for a total of 100 days) and add that 100 days to your Second Tentative Closing Date and all remaining critical dates. The usual Addendum sequence will then work in the same way from those extended dates.

5. If I underestimate the cumulative total of the delay due to a strike, can I simply send another set of Notices?

- No. The Unavoidable Delay provisions of the Addendum gives the builder a one-time opportunity to extend Critical Dates by the total period of the delay but does not provide for multiple opportunities to do this unless there are new strike events.

That is why it is so important to monitor the length of the strike, take the time to figure out the anticipated additional delay (Remobilization Period) and then send the Second Notice once you have a reasonable level of comfort that the extra time you have tacked on to the construction schedule will be sufficient. You should take this exercise seriously and act prudently but reasonably in assessing the extra time needed.

- If you do underestimate the total delay and are not able to meet the newly set Critical Dates, a purchaser/homeowner may be entitled to make a delay compensation claim.

6. The home I am constructing has been adversely impacted by the pandemic and as a result I have sent out a first notice to the purchaser that there will be delays due to the pandemic. Those impacts are continuing and as such I have not yet sent out a second notice.

In addition to delay caused by the pandemic, there is now a strike which is also going to have effects that will delay completion and delivery of the home. How should I handle this (i.e., do I sent out another first notice for delays caused by the strike)?

Tarion's best guidance is that you should treat each of the unavoidable delay events (pandemic, strike) separately.

For example, do not try to claim delays that are due to the strike as being delays due to the pandemic. Continue to treat the unavoidable delay due to the impacts of the pandemic on its own and continue to monitor and catalog the delays due to the impacts of the pandemic. Follow guidance available on the [COVID-19 builder resource page](#) on Tarion's website and in particular [this advisory](#) on unavoidable delays-

If a strike has occurred which will also cause delays, you should send out a separate First Notice to the purchaser which will reference the strike as a separate reason for further delays. For a strike it is important to send out the First Notice in accordance with the rules set out in the Addendum, catalogue the delays and why they are due to the strike. Monitor and document separately the delays due to the pandemic versus those due to the strike.

You should consider any pandemic and strike-related delays as being on a separate track. The next step is to determine when you should send out a Second Notice for each track. As each notice is tied to its own unavoidable delay event, each second notice does not need to go out at the same time. You may for example find the strike delays end earlier than the pandemic-related delays, and that you can set revised critical dates due to the strike delay. However, those revised dates would be provisional dates as they are still subject to the delays that you can show are continuing due to the pandemic. As a best practice, the provisional nature of the revised dates should be communicated to the purchaser. Alternately, it may be the pandemic delays cease before the strike delays and a similar approach would apply.

When all the delays are over, you can set new revised Critical Dates that reflect both the impacts of the pandemic and of the strike.

Please be aware: In order to unilaterally change Critical Dates for strikes, vendors must follow the rules for Unavoidable Delay set out in the Addendum.

7. I am a builder with a home for which a Firm Closing date of April 1, 2022 had been set. Impacts from the pandemic started affecting the home as of January 30, 2022 and I sent out a First Notice in respect to the pandemic.

The impacts from the pandemic are still affecting the home. However, 4 strikes occurred in May 2022. I sent out a First Notice in respect to all 4 strikes. It has become clear to me that all 4 of these strikes have ended and I have been able to determine my remobilization period in respect of the strike delay. How do I handle sending out Second Notices for only the Unavoidable Delay event that relates to strikes?

- Each First Notice for an Unavoidable Delay event should be treated as a separate tracked communication and monitored separately (in this case one track for the pandemic and one track for the strikes).
- Builders need to ensure that the impacts caused by the pandemic are and remain legitimate and those delays and reasons are being documented. The Second Notice for the pandemic Unavoidable Delay has not been sent out yet, which means that the specific Unavoidable Delay track has not been closed.
- For the strikes that have concluded, a Second Notice can be sent out following the rules of Section 5 of the Addendum.
- When sending out the Second Notice for the strikes, add up the period of delay directly caused from the strikes and the remobilization period. This aggregate is the Unavoidable Delay Period which can be added to the Firm Closing Date of April 1, 2022 and all remaining critical dates. The usual Addendum sequence will then work in the same way from those extended dates. These dates will be adjusted as part of the Revised Statement of Critical Dates that will be provided

to the purchaser by the builder. (In this example, say the full strike Unavoidable Delay Period is 70 days. Adding that to April 1, 2022 would lead to a new Firm Closing Date of June 10, 2022. At first this may seem confusing, but remember these revised Critical Dates are still paused under the pandemic unavoidable delay).

- As noted, it is possible the new date set by the strike Second Notice may be coming up very shortly or may even be in the past. It is necessary to follow the rules in section 5 of the Addendum and recognize that the new date set by the strike Second Notice is effectively “provisional” because the pandemic unavoidable delay is still playing out. **As such it is very important that the builder provide a note explaining that the newly revised Critical Dates are “provisional”. The delivery date of the home is still uncertain because of the ongoing delays due to the pandemic. Make it clear you will be keeping in touch and will provide reasonable advance notice of the Firm Closing Date when it crystalizes based on the pandemic delay.**
- When you are ready to send out the Second Notice for the *pandemic* Unavoidable Delay, you will provide a further Revised Statement of Critical Dates with that Second Notice. You would add up the period of delay directly caused from the pandemic and the remobilization period. This aggregate is then added to the previously revised Firm Closing Date, and all remaining critical dates. At this juncture, you may also want to provide an explanatory note to confirm that these newly Revised Statement of Critical Dates are no longer provisional.

In terms of providing an explanatory note, Tarion’s best guidance on the subject is to be clear in your communications, for example, mentioning the following topics may be helpful.

- There are 2 Unavoidable Delay Events occurring at the same time.
- The purchaser did receive a First Notice for the pandemic Unavoidable Delay Event.
- The impacts and/or knock-on effects of the pandemic are continuing and continue to delay delivery of the home.
- There are now impacts from certain trade strikes and a First Notice for this Unavoidable Delay Event was sent.
- An explanation of how the Revised Statement of Critical Dates was calculated for the strike delay.
- A note about the Revised Statement of Critical Dates regarding the strikes being ‘provisional’ in nature as the pandemic Unavoidable Delay could change applicable dates.

- Once the pandemic unavoidable delay and remobilization period ends, a further Revised Statement of Critical Dates will be provided and the builder will confirm that these dates are no longer provisional.
- From time to time, the vendor will provide informal updates, and will clearly distinguish those updates from the First and Second Notices as required by the Addendum. In all events, the homeowner will have reasonable notice of the upcoming Firm Closing Date.

You may also review the Tarion [example explanatory note](#) for guidance. In all instances, please obtain legal advice from your lawyer. These circumstances (i.e. overlapping multiple unavoidable delay events) are not expressly addressed in the Addendum and a close reading of the Addendum with advice from a lawyer will be important.

8. When I send out my Second Notice, can I send a revised Statement of Critical Dates that moves the Critical Dates by an amount less than the total Unavoidable Delay Period?

The Addendum has an underlying premise (and the principles of contract interpretation and good faith execution of a contract holds) that closings should not surprise the purchaser or be re-scheduled on short notice. Purchasers must have time to arrange their affairs, including alternate accommodation, storage of belongings, and arranging mortgage financing once a new Firm Closing Date is known.

In Tarion’s view, the Addendum requires two notices to be provided in respect of an Unavoidable Delay: the first informs the purchaser of the delay, the second informs them of the new critical dates as extended by the delay. The Second Notice is required in our view because the Addendum says in section 5(c) that after sending the First Notice “As soon as reasonably possible, and no later than 20 days after the vendor knows or ought reasonably to know that an Unavoidable Delay has occurred, the vendor shall provide written notice to the purchaser setting out... [the Second Notice]”. We see the use of the word ‘shall’ in this context as making the sending of a Second Notice mandatory.

The Addendum references extending Critical Dates by both the amount of the Unavoidable Delay Period, but also by an amount that is no more than the length of Unavoidable Delay Period. Extending Critical Dates by less than the Unavoidable Delay Period has not been judicially considered. With that in mind, the answer to this question depends on the interpretation of the Addendum. Tarion’s best guidance is as follows recognizing that an interpretation of the Addendum that reflects consumer protection is to be favoured:

- a. The first scenario is where the relevant Critical Date that was paused at the time the First Notice was sent is an earlier Critical Date (e.g., First/Second Tentative Closing/Occupancy Dates). If a shorter extension period does not prejudice the purchaser (e.g., unreasonably short notice of closing), then Tarion would expect that earlier delivery of the home would be seen as

advantageous by both the purchaser and vendor. This could come up in a situation where the vendor wishes to make no changes to the original Statement of Critical Dates when sending out a Second Notice. However, making no change to the Original Statement of Critical Dates would only be applicable in circumstances where the next Critical Date is e.g. a First or Second Tentative/Occupancy Date. When these specific instances arise, the builder should be clear in their communications that they are not revising the original Statement of Critical Dates.

- b. A second scenario is where the relevant Critical Date that was paused at the time the First Notice was sent is the Firm Closing/Occupancy Date. In that case the guidance in paragraph a. above applies but there is an added element. Namely, the Addendum is clear – the revised Firm Closing/Occupancy Date cannot be less than 10 days from when the Second Notice is given. This is also set out in s. 5 (c) of the Addendum.
 - i. In some situations, purchasers may want to close with less than 10 days' notice. In this case, the closing can be moved forward by mutual agreement (the vendor needs to document this properly and should consult a lawyer). The language of the Addendum provides that either party (the vendor or the purchaser) may request that the closing date be moved earlier and that the parties should not “unreasonably” withhold their consent to such a request. We strongly encourage both vendors and purchasers to work together in these situations to achieve a fair and reasonable outcome recognizing the unusual circumstances of the pandemic.
 - ii. In Tarion's view, the best way for a vendor to ensure they are following the intention of the Addendum and are acting in good faith in respect to the transaction is to follow the above process.
 - iii. In summary:
 - 1) Issue a First Notice
 - 2) Issue a Second Notice, which provides at least 10 days' time before the new closing; and
 - 3) If the parties wish to move the Firm Closing Date, then a mutual agreement in accordance with the Addendum is available.

Extending Builder Repair Periods

1. When should I be requesting the extension?

You can request the extension at any time prior to the expiration of the builder repair period that is affected. This includes the initial 120-day repair period, the 30-day repair period following a request for conciliation, and the 30-day post conciliation repair period for items assessed as warranted at the conciliation. Each extension request will be considered on a case-by-case basis.

2. What is the process for notifying homeowners if they are affected by the strike?

You should advise your homeowners about the strike and indicate which warranty claim items you feel will be affected by the strike. If you plan to seek an extension from Tarion, you should advise them that the applicable builder period may be extended and that you will let them know if that happens.

3. What should I do once the extension is granted by Tarion?

Once the extension is granted you will have to notify each homeowner individually and copy Tarion on the notification so that we can add it to the individual home or common element file for future reference. You will need to let the homeowner know that their request for conciliation timeframe will be moved forward until after the extension for those items affected by the extension. For items not impacted by the extension, they should request a conciliation, if they wish to do so, within the usual timeframe.

4. How is the issue of strikes addressed when a conciliation is requested?

- Homeowner contacts Tarion to request a conciliation inspection.
- If, for example, the inspection is scheduled for 10 items and two of them are strike related, the homeowner will know prior to the inspection that we will not be assessing the two strike-related items. They will be advised to contact us after the extension date if the builder has not resolved the items.
- If any other item is warranted at the conciliation, then the conciliation is chargeable, unless an exception applies.
- For the strike-related items, the WSR will code the item as not assessed and indicate on the report that the builder was given an extension due to the industry strike. They will provide the date in the report as to when the homeowner can contact us for the re-inspection if the builder does not resolve the items.

5. If I can't get the work done because of the strike, how will this affect chargeability?

As mentioned above, each claim will be looked at on a case-by-case basis.