

# The **LEXIS PRACTICE ADVISOR** Journal™

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## **EMPLOYERS CONFRONTING THEIR OBLIGATIONS AS CORONAVIRUS SPREADS**

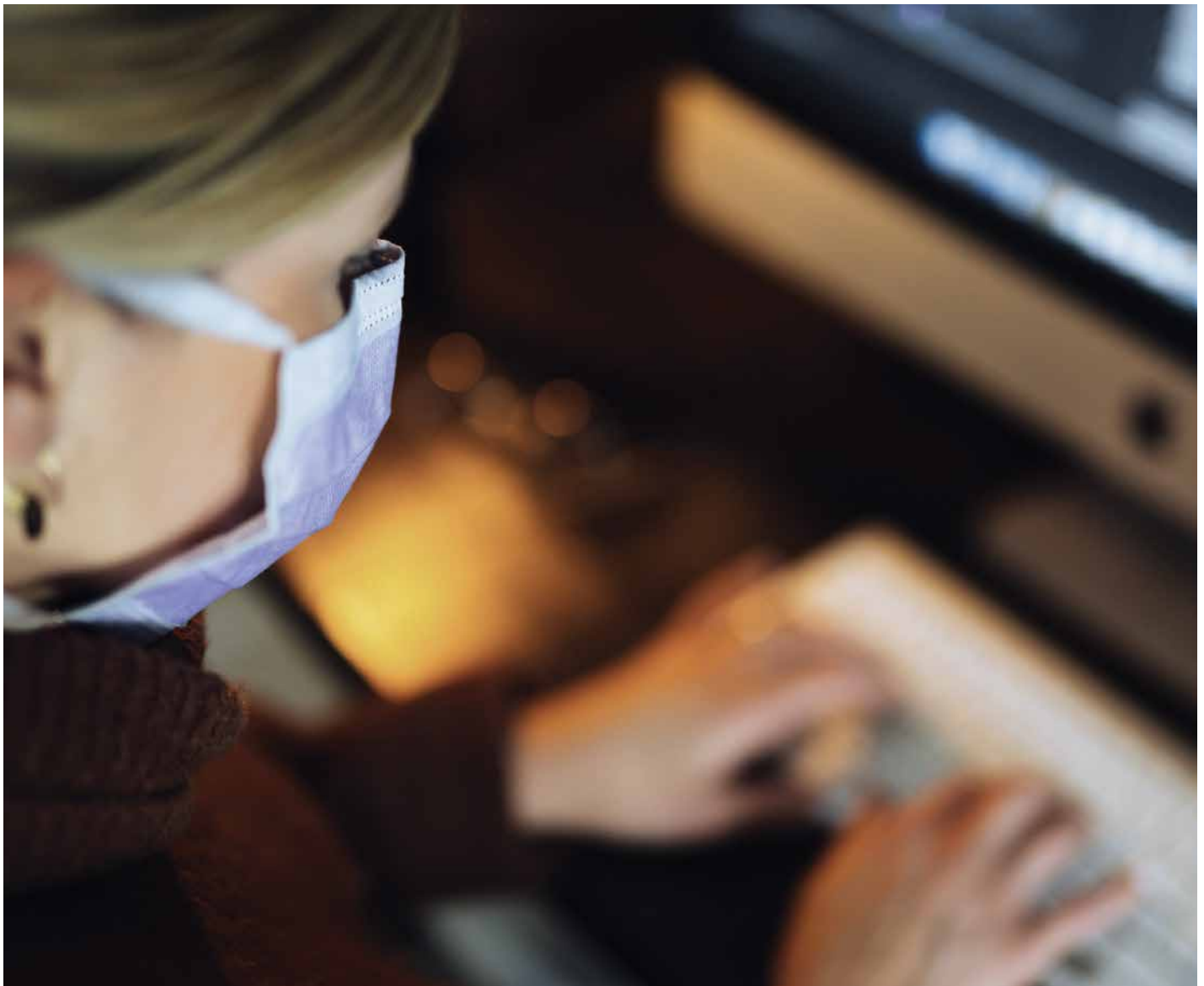
**COVID-19  
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**Diagnosing and  
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**CORONAVIRUS**

**Special Edition 2020**



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To help U.S. attorneys manage the evolving COVID-19 crisis, Lexis Practice Advisor® has developed the Coronavirus Resource Kit.

Featuring coronavirus guidance across a variety of practice areas, including:

- ▶ **75+** practice notes, checklists, and forms
- ▶ The latest legal developments from **Law360**
- ▶ **Top insights** from leading practitioners

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# Contents

CORONAVIRUS SPECIAL EDITION 2020

## Current Awareness

### 4 EMPLOYERS CONFRONTING THEIR OBLIGATIONS AS CORONAVIRUS (COVID-19) SPREADS

*Labor & Employment*

### 13 DIAGNOSING AND TREATING CORONAVIRUS RISKS IN M&A TRANSACTIONS

*Corporate and M&A*

### 18 HHS ADDRESSES HIPPA PRIVACY AND SECURITY RULE ISSUES IN COMBATTING CORONAVIRUS

*Employee Benefits & Executive Compensation*

## Practice Tips

### 22 CORONAVIRUS AND FORCE MAJEURE CHECKLIST

*Commercial Transactions*

### 26 COVID-19 CLAIMS IMPACT ENTIRE INSURANCE COVERAGE SPECTRUM

*Insurance*

### 32 FDA EMERGENCY USE AUTHORIZATIONS

*Life Sciences*

### 38 TELECOMMUTING EMPLOYEES: BEST PRACTICES CHECKLIST

*Labor & Employment*

### 47 TELECOMMUTING POLICIES: KEY DRAFTING TIPS

*Labor & Employment*

## Practice Notes

### 49 CORONAVIRUS TAX RELIEF

*Tax*

### 55 SEEKING TIME EXTENSIONS IN LITIGATION

*Civil Litigation*

### 61 COVID-19 RAMIFICATIONS FOR PUBLIC COMPANIES

*Capital Markets & Corporate Governance*

### 67 SEC REPORTING COMPANIES: CONSIDERING THE IMPACT OF THE CORONAVIRUS ON PUBLIC DISCLOSURE AND OTHER OBLIGATIONS

*Capital Markets & Corporate Governance*

### 73 SEC ISSUES STATEMENT ON CORONAVIRUS REPORTING CONSIDERATIONS AND POTENTIAL RELIEF

*Capital Markets & Corporate Governance*

### 76 NAVIGATING CORONAVIRUS: A GUIDE FOR REIT GENERAL COUNSEL

*Real Estate*





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**AS THE NOVEL CORONAVIRUS** (COVID-19) pandemic impacts all of our lives and practices, we would like to express our sincere concern for your safety and health. Our thoughts are with anyone impacted by the virus, those who have suffered losses, those who are sick, and our dedicated healthcare workers helping people around the globe.

In our own small way, we would like to assist with guidance and insights as your customers, firms, and companies work to move forward in this tenuous economy and rapidly changing legal and business environment. We are providing a legal Coronavirus (COVID-19) Resource Kit to our customers and the entire legal

community. In it you will find cross-practice area guidance that we hope will be useful as you search for answers to a multitude of emerging legal concerns.

Employers are facing issues across the board, from protecting the safety and health of employees, to implementing flexible work programs, to notifying employees of the consequences of government-required shutdowns of non-essential businesses. The coronavirus pandemic has transformed telecommuting from trendy to mandatory for many businesses and industries. This edition includes tips for drafting a comprehensive telecommuting policy to help make sure employees stay productive and accountable while working offsite.

Commercial transactions are being impacted on a grand scale. Large events are being cancelled, parties in the supply chain are unable to secure necessary materials and supplies, distribution and shipping channels have been disrupted, and labor force restrictions have occurred, among other negative consequences. Given these issues, questions emerge about the ability to invoke a force majeure clause in a contract. We are including guidance on issues and measures you should consider when determining the applicability of force majeure clauses in commercial contracts due to the coronavirus pandemic.

Without question, COVID-19 will impact merger and acquisition (M&A) activity. Review insights on protecting against risks posed by the coronavirus in M&A transactions, such as conducting thorough

## Letter From The Editor

and effective due diligence without in-person meetings and making sound pricing and valuation determinations. Companies required to report to the Securities and Exchange Commission (SEC) need to consider not only the impact of the coronavirus on their operations from business continuity and risk management perspectives, but also on their public disclosure and SEC filing obligations. Learn about the SEC-issued conditional relief for reporting companies with upcoming filing deadlines. Also, consider practitioner insights on assessing and updating risk factors, and compiling accurate accounting/financial data.

Many are filing insurance claims spanning the entire spectrum of coverages due to the coronavirus outbreak's impact. Clients are experiencing unimaginable losses, both personally and to their businesses. We include guidance on the types of insurance policyholders might consider pursuing. In addition, we consider the positions both insureds and insurers are likely to take for and against coverage.

Please take time to care for yourselves, your families, and friends so you can stay safe and healthy through this difficult time.

## Our mission

*The Lexis Practice Advisor Journal™ is designed to help attorneys start on point. This supplement to our online practical guidance resource, Lexis Practice Advisor®, brings you a sophisticated collection of practice insights, trends, and forward-thinking articles. Grounded in the real-world experience of our 850+ seasoned attorney authors, the Lexis Practice Advisor Journal offers fresh, contemporary perspectives and compelling insights on matters impacting your practice.*





Richard D. Glovsky, Jordon R. Ferguson, and  
Rufino Gaytán III LOCKE LORD LLP

# Employers Confront Their Obligations as Coronavirus (COVID-19) Spreads

This article provides practical guidance regarding how employers should address legal issues raised by the coronavirus (COVID-19). As the coronavirus spreads around the globe and cases are rapidly appearing in the United States, employers must confront issues in the workplace concerning risks to their employees.

## Families First Coronavirus Response Act (Including Emergency FMLA Expansion and Emergency Paid Sick Leave)

President Trump signed The Families First Coronavirus Response Act (FFCRA) into law on March 18, 2020. It includes two major overhauls to leave programs for employers—an expansion to the Family and Medical Leave Act (FMLA) via the Emergency Family and Medical Leave Expansion Act, and newly provided Emergency Paid Sick Leave.

According to guidance issued by the U.S. Department of Labor (DOL) on March 24, 2020, both laws go into effect on April 1, 2020, and run through December 31, 2020. That guidance confirmed that neither of the new leave programs are retroactive (i.e., they apply to leave taken between April 1, 2020, and December 31, 2020).

Additionally, the DOL has issued a model poster that covered workplaces must post, as well as an FAQ related to the poster.

### Emergency Family and Medical Leave Expansion Act

The main component of the Emergency Family and Medical Leave Expansion Act portion of the FFCRA is the addition of Public Health Emergency Leave, with certain job protection requirements and paid and unpaid leave for certain eligible employees.

Public Health Emergency Leave applies to all private employers with fewer than 500 employees. This criteria is different from the FMLA's usual coverage threshold (i.e., a 50-employee minimum). Employees on leave, temporary employees jointly employed by one or more companies (regardless of where the jointly-employed employees are housed for payroll purposes), and day laborers supplied by a temporary agency are also counted toward the leave coverage limit.

A corporation, including its separate establishments or divisions, is considered to be a single employer and its employees should be each counted toward the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers as defined in the Fair Labor Standards Act (FLSA) regarding certain employees. If two entities are deemed joint employers, all of their common employees must be counted in determining whether Public Health Emergency Leave applies. If two or more entities satisfy the integrated employer test under the FMLA, then all employees of all entities making up the integrated employer will be counted in determining employer coverage for Public Health Emergency Leave.

Employers that are signatories to multi-employer collective bargaining agreements may find some relief from this amendment if they make contributions to a multiemployer fund, plan, or program based on the paid leave entitlements to which employees would otherwise be entitled.

There is also some relief possible for smaller employers and employers in the health care industry. The amended FMLA, as it relates to Public Health Emergency Leave, allows the Secretary of Labor to issue good-cause regulations to exclude certain health care providers and emergency responders from eligibility.

The amended FMLA also allows the Secretary of Labor to issue regulations that exempt small businesses with fewer than 50 employees if the obligations would jeopardize the viability of the business as a going concern. The U.S. Internal Revenue Service (IRS), DOL, and Department of Treasury issued a joint press release on March 20, 2020, stating that this small business exemption would be enacted, at least as to leave requirements relating to school closings or child care unavailability, where the requirements would jeopardize the ability of the business to continue.

Notably, the Emergency Family and Medical Leave Expansion Act portion contains a "Special Rule for Certain Employers." It provides that an employer, as defined by the Emergency Family and Medical Leave Expansion Act (i.e., fewer than 500 employees), will not be subject to section 107(a) of the FMLA (29 U.S.C. § 2617) (i.e., its section that allows employees to bring an enforcement action) for a violation based on the Emergency Family and Medical Leave Expansion Act unless that employer also meets the traditional definition of employer under the FMLA (i.e., 50 or more employees).

The March 20, 2020, joint press release by the IRS, DOL, and the Department of Treasury states that the DOL will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the Act. Under this policy, the DOL will not bring an enforcement action against any employer for violations of the FFCRA if the employer has acted reasonably and in good faith to comply with the Act.

### Relaxed Eligibility Requirements for Employees

Ordinarily, employees must work at least 1,250 hours and at least 12 consecutive months to be eligible for FMLA leave. Public Health Emergency Leave coverage is more expansive. Employees who have been employed for at least 30 days are eligible for this leave from that employer.



To qualify for Public Health Emergency Leave, an employee must have a qualifying need related to an emergency declared by a federal, state, or local authority regarding COVID-19. To establish a qualifying need, the employee must be unable to work (or telework) because he or she needs to care for his or her minor child if the child's elementary or secondary school or place of care has been closed, or if the child's regular paid care provider is unavailable, because of an emergency declared by a federal, state, or local authority regarding the coronavirus. Additionally, employers of health care providers or emergency responders may decline to offer Public Health Emergency Leave to those employees.

*No Additional FMLA Time*

Employees who take Public Health Emergency Leave are eligible for the same amount of FMLA leave (12 weeks) as employees who take leave for other FMLA-covered reasons. Unlike typical FMLA leave, however, Public Health Emergency Leave also provides paid leave for any eligible leave taken after the first 10 days. Additionally, employers in states like California, with their own state-equivalents of the FMLA, face the potential of leave covered by the amended FMLA that does not exhaust leave under their state's FMLA equivalent law, unless those state laws also are amended. Thus, it is possible that an employee in a state like California could be entitled to up to 12 weeks of Public Health Emergency Leave in addition to up to 12 weeks of leave under the California Family Rights Act (CFRA), assuming qualifying reasons for both.

*Job Protection*

In keeping with traditional FMLA leave, employers must restore employees to their same or a similar position upon their return from Public Health Emergency Leave. Smaller employers (25 or fewer employees) are exempt from this job protection requirement, however, if:

- The position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a coronavirus-related emergency declared by a federal, state, or local authority
- The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment
- After those reasonable efforts fail, the employer makes reasonable efforts to contact the employee about an equivalent position, if one becomes available, for one year following the conclusion of the coronavirus-related emergency or the conclusion of the 12 weeks of coronavirus-related leave taken by the employee, whichever is earlier

*Pay Requirements for Public Health Emergency Leave*

Employers need not pay employees who take Public Health Emergency Leave for the first 10 days of leave. Employees may opt to use (substitute) any accrued paid time off, vacation time, sick



leave, or other paid leave during this initial period (including sick leave under the Emergency Paid Sick Leave Act below).

After the first 10 days of Public Health Emergency Leave, employers must pay employees on such leave at a rate of two-thirds the employees' regular rate of pay (as determined under the Fair Labor Standards Act (FLSA)) and for the number of hours the employee would normally be scheduled to work. In no event, however, will the employee's paid leave exceed \$200 per day and \$10,000 in the aggregate.

For employees with variable work schedules, employers are to average the employee's hours worked per day over the previous six months or, if the employee has not worked during that period of time, the average daily hours the employee would have been reasonably expected to be scheduled to work when hired. Though it is unclear from the statute, it appears an employee may be able to substitute paid leave for lost pay during this portion of Public Health Emergency Leave.

*Tax Credit*

Recognizing the fiscal impact of the Public Health Emergency Leave, the FFCRA provides a payroll tax credit for covered employers to cover the cost of the paid leave.

The March 20, 2020, joint press release by the IRS, DOL, and Department of Treasury indicates that under the anticipated guidance, employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying leave that they paid, rather than deposit those amounts with the U.S. Internal Revenue Services (IRS) under the traditional scheme. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes concerning all employees. Notably, if there are not sufficient payroll taxes to cover the cost of qualified sick and child-care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process those requests in two weeks or less.

According to that joint press release, additional guidance is expected by the IRS before March 27, 2020.

**Emergency Paid Sick Leave Act**

Like the Emergency Family and Medical Leave Expansion Act, the Emergency Paid Sick Leave Act goes into effect on April 1, 2020, and runs through December 31, 2020.

*Coverage of Sick Leave Act*

Like the Emergency Family and Medical Leave Expansion Act, the Emergency Paid Sick Leave Act only applies to private employers to the extent they have fewer than 500 employees. This count includes employees on leave, temporary employees jointly employed by one or more companies (regardless of where the jointly-employed

employees are maintained for payroll purposes), and day laborers supplied by a temporary agency.

Also, similarly, smaller employers and employers in the health care industry receive a break. The Secretary of Labor is authorized to issue good-cause regulations to exempt from coverage certain health care providers and emergency responders.

Moreover, the Act also authorizes the Secretary of Labor to issue good cause regulations that exempt small businesses (under 50 employees) from providing paid sick leave to employees who seek leave to care for their child when the child's school or place of care has been closed, or the child's care provider is unavailable, due to COVID-19 precautions. That narrow exemption would only apply, however, where providing paid sick leave for that reason would jeopardize the viability of the business as a going concern. According to the March 20, 2020, joint press release by the DOL, IRS, and Department of Treasury, this exemption will be enacted and supported by emergency guidance and rulemaking to be issued by the DOL.

Finally, the Secretary of Labor is authorized to issue good cause regulations as necessary to carry out the purposes of the Emergency Paid Sick Leave Act, including to ensure consistency with the amended FMLA and the tax credit provisions of the FFCRA.

A corporation, including its separate establishments or divisions, is considered to be a single employer and its employees should be each counted toward the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are deemed joint employers, all of their common employees must be counted in determining whether the Emergency Paid Sick Leave Act applies.

*Qualifying Events for Sick Leave*

The Emergency Paid Sick Leave Act provides leave for several reasons arising out of the COVID-19 pandemic, including to:


- Self-isolate or seek medical diagnosis or treatment following diagnosis or exhibition of symptoms
- Follow health care or public official recommendation or orders –or–
- Care for family members who are self-isolating or seeking medical diagnosis or treatment, or to care for children following school closures or unavailability of childcare

The Emergency Paid Sick Leave Act has a wider breadth of coverage than the Public Health Emergency Leave in the FFCRA. It does not, however, have the same job protection requirements. Still, employers should tread carefully in taking adverse action against those on paid leave other than in group terminations or furloughs or other cost-saving measures.

**Related Content**


*For an overview of practical guidance on the novel coronavirus (COVID-19) covered in many practice area offerings in Lexis Practice Advisor, including Labor & Employment, see*

**CORONAVIRUS (COVID-19) RESOURCE KIT**

 **RESEARCH PATH:** *Labor & Employment > Workplace Safety and Health > Occupational Safety and Health Act > Practice Notes*


*For general information about the Family and Medical Leave Act, see*

**FMLA LEAVE: GUIDANCE FOR EMPLOYERS AND EMPLOYEES**

 **RESEARCH PATH:** *Labor & Employment > Attendance, Leaves and Disabilities > Family and Medical Leave > Practice Notes*


*For more information on paid sick leave, see*

**PAID SICK LEAVE STATE AND LOCAL LAW SURVEY (PRIVATE EMPLOYERS)**

 **RESEARCH PATH:** *Labor & Employment > Attendance, Leaves, and Disabilities > Attendance and Time Off > Practice Notes*

*For an examination of issues to consider when drafting sick leave policies, see*

**PAID SICK LEAVE POLICIES CHECKLIST (BEST DRAFTING PRACTICES FOR EMPLOYERS)**

 **RESEARCH PATH:** *Labor & Employment > Attendance, Leaves, and Disabilities > Attendance and Time Off > Checklists*

Many states and localities have issued shelter in place orders for their communities. Currently, there is no official guidance determinative on the issue of whether this qualifies as an order for quarantine or isolation for paid sick leave.

*Number of Sick Leave Hours Provided*

Full-time employees are entitled to 80 hours of paid sick leave, and part-time employees are entitled to sick leave equivalent to those hours the employee works, on average, over a two-week period.

Where the employee takes leave for his or her own self-isolation, medical diagnosis, or treatment, the employee is entitled to paid leave at 100% of his or her regular rate of pay. However, where the employee takes leave to care for a family member or child, employers only need to provide leave at two-thirds the employee's regular rate of pay.

The Act imposes a cap on daily and aggregate sick leave pay, dictating that in no event is paid sick leave to exceed \$511 per day and \$5,110 in the aggregate for an employee's self-isolation, medical diagnosis, or treatment. Additionally, a cap of \$200 per day and \$2,000 in the aggregate applies to any sick leave that an employee takes to care for a family member or child.

For those employees paid under atypical or unusual arrangements, employers must calculate average daily hours worked in the same manner as the amended FMLA. Additionally, employers can expect the DOL to publish guidance by April 2, 2020, to assist in calculating employee hours and pay.

Notably, Section 5107 of the Emergency Paid Sick Leave Act states that nothing in the Act will be construed to diminish rights or benefits to which an employee is already entitled under any other federal, state, or local law; collective bargaining agreement; or existing employer policy. Thus, you should caution employers that if they currently have a paid time off/vacation policy and/or if they are in a state or locality that requires paid sick leave, such as California or the City of Los Angeles, the employer must provide paid sick leave benefits under the FFCRA **in addition** to those already-existing benefits.

Furthermore, Section 5102(e)(2)(B) states that an employer may not require employees to use other paid leave before he or she may use the paid sick leave entitlements afforded under this law. This also tends to suggest that employers cannot retroactively apply this paid sick leave. For example, an employer cannot deduct from this paid sick leave allotment paid time that was afforded to the employee prior to the date the law went into effect.


*Penalties for Noncompliance*

The Emergency Paid Sick Leave Act prohibits any employer from discharging, disciplining, or in any other manner discriminating against any employee who takes leave in accordance with the Act or who has filed a complaint or who has caused a proceeding to be instituted under the Act or who provides testimony in any such

**Related Content**


*For more guidance on telecommuting employees, see*

**TELECOMMUTING EMPLOYEES: BEST PRACTICES CHECKLIST**

 **RESEARCH PATH:** *Labor and Employment > Employment Policies > Terms of Employment > Checklists*


*For an overview of employers' obligations under the ADA, see*

**AMERICANS WITH DISABILITIES ACT: GUIDANCE FOR EMPLOYERS**

 **RESEARCH PATH:** *Labor & Employment > Attendance, Leaves, and Disabilities > The ADA and Disability Management > Practice Notes*

*For state-by-state information on wage and hour law, see*

**WAGE AND HOUR STATE PRACTICE NOTES CHART**

 **RESEARCH PATH:** *Labor & Employment > Wage and Hour > Policies and Procedures > Practice Notes*

proceeding. Any employer who willfully violates this prohibition is deemed in violation of the Fair Labor Standards Act (FLSA) and is subject to penalties.

Employers that violate the terms of the Emergency Sick Leave Act by not paying employees for the leave will be considered to have failed to pay minimum wage in violation of the FLSA, and be subject to penalties under the FLSA.

The March 20, 2020, joint press release from the IRS, DOL, and Department of Treasury states that the DOL will not bring an enforcement action against any employer for violations of the FFCRA so long as the employer has acted reasonably and in good faith to comply with the Act.

*Tax Credit*

Similar to the tax credit afforded to employers for Public Health Emergency Leave, the Emergency Paid Sick Leave Act also provides a payroll tax credit for the Emergency Paid Sick Leave Act to cover the cost of the paid leave.

The March 20, 2020, joint press release by the IRS, DOL, and Department of Treasury indicates that under the anticipated guidance, employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying leave that they paid, rather than deposit those amounts with the IRS under the traditional scheme. The payroll taxes that are available for retention include withheld federal income taxes,

the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes concerning all employees. Notably, if there are not sufficient payroll taxes to cover the cost of qualified sick and child-care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process those requests in two weeks or less. According to the press release, additional guidance is expected before March 27, 2020.

**Health and Safety Policies**

This section provides guidance to employers on handling key workplace health and safety issues regarding the coronavirus.

**Preventing and Responding to Coronavirus Outbreaks in the Workplace**

In general, employers should establish clear policies for dealing with health issues related to the coronavirus. The Centers for Disease Control and Prevention (CDC) has convenient question and answer sheets for this purpose that employers can post prominently so that employees have accurate information about COVID-19.<sup>1</sup>

The Occupational Safety and Health Administration (OSHA) has issued non-mandatory coronavirus guidance encouraging employers to, among other things:

- Develop an infectious disease preparedness and response plan (e.g., identifying potential sources of infection in and outside of the workplace, identifying and implementing controls to reduce exposure, such as use of personal protective equipment, preparing for increased absenteeism and supply chain disruptions, and considering downsizing or closing operations)
- Prepare and implement basic infection prevention measures (promoting hand washing, covering coughs and sneezes, and social distancing, and encouraging employees to stay home if they are ill)
- Develop procedures for prompt identification and isolation of ill employees/visitors
- Consider and implement flexible work arrangements, such as working from home, reduced hours, alternating schedules –and–
- Follow existing OSHA standards, particularly taking additional measures to maintain a clean and sanitary workplace<sup>2</sup>

The risk of work-related infection will vary based on the nature of each work environment. For example, employees in hospital or other health care settings may be at increased risk of infection if the employer cannot provide appropriate personal protective equipment or otherwise take steps to mitigate the risk. Moreover, these

employers must ensure compliance with standards that are unique to these work environments, such as OSHA's bloodborne pathogen standard.<sup>3</sup> On the other hand, employees in a manufacturing setting may have little contact with each other on a daily basis, in which case practicing proper hygiene and "social distancing" may suffice.

If an employer confirms that an employee tested positive for COVID-19, it should consider whether to record the exposure on the OSHA 300 log. Generally, a COVID-19 case will be a recordable illness if the employee contracted the infection as a result of performing his or her work-related duties. Employers must analyze each exposure on a case-by-case basis in light of each employee's job duties and the resulting effects of the infection (e.g., medical treatment received, days away from work, and restriction posed by the infection). In many cases, it will not be possible to determine whether an employee contracted COVID-19 at work.

**What if Employees Are Hesitant to Come to Work?**

Employers should anticipate that, under certain circumstances, employees may refuse to work based on concerns over COVID-19. If the employee's concern for his or her safety or well-being is reasonable and raised in good faith, the Occupational Health and Safety Act protects the employee from retaliatory actions. Determining whether the employee's concern is reasonable will require careful consideration of the circumstances of his or her job requirements. For example, if the employee will need to travel by airplane or other mass transit for work or if the work would require working in large groups, then his or her fear of contracting the virus might be reasonable based on the latest CDC guidance. Employers should consider alternatives and any administrative or engineering controls that may reduce or eliminate the risk altogether.

**Can Employers Prevent Employees from Coming to Work?**

Absent an agreement with an employee or a collective bargaining agreement that restricts the employer's authority to dictate hours of work, levels of production, or similar issues, an employer is typically free to send employees home from work. To the extent that employees can work remotely, OSHA encourages employers to allow telecommuting, working from home, alternating schedules, reducing work hours, or similar measures to reduce the risk of spreading COVID-19.

If an employee is diagnosed with COVID-19, an employer should prohibit that employee from coming into the workplace, consistent with the latest guidelines from public health authorities like the CDC. If the employee can work remotely, the employer should allow the employee to do so. Moreover, for employees who may display symptoms of COVID-19, employers should consider taking similar actions, provided that they account for other employment

<sup>1</sup> See What you need to know about coronavirus disease 2019 (COVID-19) and What to do if you are sick with coronavirus disease 2019 (COVID-19). <sup>2</sup> See Guidance on Preparing Workplaces for COVID-19. See also OSHA's COVID-19 webpage and Prevent Worker Exposure to Coronavirus (COVID-19). <sup>3</sup> See 29 C.F.R. § 1910.1030.





laws, including the American with Disabilities Act. To the extent an employee who is confirmed or presumptively diagnosed with COVID-19 has been in close contact with coworkers, the employer may inform those coworkers of their potential exposure, but the employer must not disclose the employee's identity without his or her written consent.

### Americans with Disabilities Act (ADA) Issues

Even during a pandemic such as COVID-19, employers should still be conscious of their obligations to their employees and to the public so as not to impede on rights, including those related to public accommodations and employee health.

In light of the ongoing COVID-19 pandemic, the U.S. Equal Employment Opportunity Commission (EEOC) has offered guidance on the relaxing of certain requirements related to the Americans with Disabilities Act (ADA) and the Rehabilitation Act.<sup>4</sup>

Many employers have begun taking body temperatures of employees and on-site visitors. Because the CDC and other state/local health authorities have acknowledged community spread of the coronavirus and have issued attendant precautions, employers may measure body temperatures of employees and visitors. Similarly, employers may screen applicants for symptoms of COVID-19 after making a conditional job offer and may take an applicant's temperature as part of a post-offer pre-employment medical exam. Employers should be cautious, however, as many infected individuals do not exhibit symptoms such as a fever.

Employers that are dealing with sick employees may ask employees if they are experiencing symptoms of COVID-19 such as fever, chills, cough, shortness of breath, or sore throat. Similarly, employers may require employees returning to work following an illness to provide a fitness for duty certification from a physician, though the EEOC recommends that employers evaluate new approaches given

that many medical facilities and doctors are inundated with cases. Employers must maintain all information about employee illness as part of a confidential medical record in compliance with the ADA.

Before visitors come on site, employers may want to evaluate whether it is feasible to have those visitors complete a questionnaire, including questions on the individual's recent travel, contact with individuals exposed to COVID-19, or whether he or she is currently showing symptoms of, awaiting test results for, or is diagnosed with the coronavirus.

Employers should also be cautious not to run afoul of any state-equivalent statutes to the ADA, such as California's Fair Employment and Housing Act, which may have stricter or different requirements or considerations. Additionally, employers should also consider whether they must make disclosures under privacy acts such as the California Consumer Privacy Act (CCPA) about the collection of any information from employees or visitors, including temperatures or other information.

### Wage and Hour Issues

Federal and state wage and hour laws have not changed in the COVID-19 environment. However, wage and hour laws may impact a number of actions employers may consider today in reaction to the coronavirus outbreak.

Employers considering temporary or permanent layoffs must consider any state-specific requirements related to payment of final wages, bonuses, commissions, and accrued but unused vacation time. The timing of these payments and what must be included in them or may be excluded from them varies from one state to another. For example, employers in California and Massachusetts must generally pay final wages to a terminated employee immediately upon termination, whereas an employer in Texas must generally pay final wages to a terminated employee no later than the sixth day after the date of termination.

Similarly, employers considering other cost-saving measures, like reduced work hours, wage/salary reductions and furloughs may help reduce labor costs, they are not risk-free propositions. For example, reducing employee's work hours by more than 50% over the course of several months can trigger the notice requirements under the Worker Adjustment and Retraining Notification Act (WARN). The selection of employees for reduced schedules or other cost-saving measures also can create the potential for disparate treatment and/or disparate impact claims. Employers should use objective selection criteria to reduce these risks.

Likewise, a furlough or reduced work schedule may jeopardize the exempt status of salaried exempt employees under the FLSA, which could then trigger minimum wage and overtime pay requirements.

Under the current COVID-19 circumstances, and even more generally, employers may require employees to work from home. However, there are numerous aspects of employment laws and regulations which employers cannot ignore when it comes to remote employees.

Employers should instead consider the following measures to reduce risk of non-compliance with the FLSA.

- **Full-week shutdowns.** A full-week shutdown avoids improper salary deductions and complies with the FLSA because employers must only pay exempt employees their salary for weeks in which they perform work. If an exempt employee performs no work during an entire workweek, the employee is not entitled to a salary for that workweek. Employers that implement this option also must prohibit exempt employees from performing any work during the shutdown and should consider eliminating an employee's ability to work remotely (e.g., by eliminating email access or remote connectivity). If an employee nevertheless performs work, the employer must pay the corresponding salary but may discipline the employee for violating the no-work directive.
- **Reduced workweek and pay.** A prospective reduced workweek coupled with a reduction in salary may avoid violations of the salary basis test under the FLSA, provided the salary reduction is a bona fide change reflecting long-term business needs. Before implementing any changes, employers considering this option should, at least one week in advance, notify affected employees in writing of the reduced workweek and salary plan. Employers should also keep in mind potential notice requirements under state or local law, as well as potential issues in eligibility for health care coverage for employers utilizing an Affordable Care Act lookback measurement period method for variable hour employees.
- **Reduced pay without a reduced workweek.** Unless prohibited by an agreement or state or local law, an employer is typically free to set salary/wage rates at any level (subject to minimum wage and salary requirements). A prospective reduction in employee salaries generally does not violate the FLSA if it is a bona fide change reflecting long-term business needs. However, employers should be mindful of employment agreements or other contracts providing, for example, that a reduction in salary/compensation may trigger resignations "for good reason," which require the payment of severance benefits.

- **Requiring use of vacation time.** The FLSA does not address use of vacation or paid time off, so employers generally are free to require use of paid time off in accordance with their policies or practices. However, some states impose restrictions on mandatory use of vacation or paid time off. So employers should consider any such requirements before requiring use of vacation or paid time off as a cost-saving measure. Moreover, practically speaking, this option likely does not lead to immediate cost savings; employees are simply substituting paid time off for actual work.

Employers that sponsor foreign workers should also consider whether they must report furloughs or reductions in hours or pay to the United States Citizenship and Immigration Services (USCIS) or DOL. In some instances, these employers cannot change the essential terms and conditions of a foreign worker's employment without first notifying USCIS and/or the DOL.

Employers must always consider whether any state wage and hour laws limit their ability to impose a desired cost-saving measure.

### Telecommuting Employees

Under the current COVID-19 circumstances, and even more generally, employers may require employees to work from home. However, there are numerous aspects of employment laws and regulations which employers cannot ignore when it comes to remote employees.

First, employers may not discriminate regarding any protected category when they assign employees to work remotely. Second, various state and federal laws still apply. In fact, legal and practical implications applicable to telecommuting employees may surpass those applicable to in-office employees. For example, an employee who works from home may need additional or other resources not available in his or her office location, such as ergonomic chairs or work stations that allow the employee to stand while working. Provided it does not present the business with undue hardship, employers will need to accommodate workers with those sorts of needs. It should be noted that the EEOC has indicated delays in providing accommodations may be excusable.

Also, the Occupational Safety and Health Act (OSHA) continues to apply to employees who work remotely. While OSHA authorities indicate it will not inspect home work locations and will not hold employers responsible for accidents and injuries which occur

<sup>4</sup> See What You Should Know About the ADA, the Rehabilitation Act, and COVID-19.





there, nonetheless employers must still abide by OSHA reporting requirements, such as 300 logs.

In addition, with regard to employees working remotely, employers must continue to comply with other aspects of the law already applicable to all of their employees. For example, employees who work remotely remain entitled to statutory and regulatory meal and rest breaks as well as the benefits of overtime pay.

Employers also need to pay attention to cybersecurity issues attendant to telecommuting employees.

Finally, all employers need to understand that the current circumstances and legal implications are in flux and changing daily, if not hourly. Employers need to monitor closely legal developments and consult with counsel as they arise.

### Business Travel


Employers should consider suspending all nonessential business travel to China, Italy, and other places with the greatest number of coronavirus cases. For employees who cannot avoid business trips, employers must make certain that their workers understand all possible risks involved. Furthermore, if a worker has a health condition and informs the employer of it, there is a risk that the employer will violate the Americans with Disabilities Act (ADA) by forcing the employee to go on the trip.

When workers return from stays in or trips to China, Italy, or other places with high numbers of coronavirus cases, employers should generally ask them to work from home for at least the 14-day incubation period of the disease. This is particularly easy to do for white collar businesses, such as finance, tech, and insurance.

For businesses that do this, it is advisable to create a paper trail clearly explaining why this was necessary. Otherwise, other employees whose jobs require them to be onsite and for whom travel is not a part of their jobs might later file a claim under the ADA that they were not offered telework opportunities due to the coronavirus outbreak. The paper trail for employees who traveled will serve as clear evidence supporting the necessity of telework for the employees who went to areas where coronavirus exposure was a strong possibility.

### Privacy Issues

A potential pitfall for employers is the protection of employees' health information. Naturally, workers are going to be concerned about working in proximity of others who have been travelling to places affected by coronavirus. HR officials who are trying to quell their fears must take care not to single out any particular person and say anything like, "We're going to have him screened," and instead, assure people that all steps will be taken to ensure safety with anyone who travels. If a worker is diagnosed with the coronavirus, employers should not involve themselves in the medical care or condition of other employees. It is likely that the department of public health or the CDC will come in and assess the possibility of exposure.

Contents of this article are up-to-date through March 25, 2020. 

**Richard D. Glovsky**, a partner in Locke Lord's Boston office, co-chairs the firm's robust Labor and Employment Practice Group. He handles employment litigation, including class actions, wage and hour issues, and discrimination and retaliation claims; prosecutes cases for Fortune 500 companies and other businesses to protect their trade secrets and to prevent former employees from violating non-competition and non-solicitation obligations; and is a valued counselor on employment related matters. Mr. Glovsky is recognized in both Chambers USA and The Best Lawyers in America for his work in labor and employment law. He is a former Assistant United States Attorney and Chief of the Civil Division of the United States Attorney's Office for the District of Massachusetts. **Jordon Ferguson's** practice is devoted to providing litigation and counseling services to employers on national and state-specific bases. Jordon has extensive experience defending and prosecuting claims on behalf of employers on individual, representative, and class-wide claims before state and federal courts and governmental agencies, including the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, and the California Division of Labor Standards Enforcement. **Rufino Gaytán** counsels employers in every aspect of labor and employment law. Rufino has extensive experience advising clients on workplace health and safety issues, and he has represented clients before the Occupational Safety and Health Administration (OSHA). Rufino has advised and represented clients during OSHA's initial onsite inspections, negotiated the reduction or elimination of alleged violations and penalties and defended clients before the Occupational Safety and Health Review Commission.



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Ryan M. Scofield and Parthiv Rishi | SIDLEY AUSTIN LLP

# Diagnosing and Treating Coronavirus Risks in M&A Transactions





Novel Coronavirus (COVID-19) is now a global pandemic and continues to dominate headlines as confirmed cases of the virus escalate. As of March 27, 2020, The World Health Organization reports more than 509,164 confirmed cases and 23,335 deaths worldwide.

**THESE DEVELOPMENTS HAVE LED GLOBAL MARKETS TO** decline precipitously, local economies to suffer, and governments to take dramatic steps to protect against the spread of the virus turning into a pandemic. Factory, school, and office closures; quarantine and stay-at-home orders; travel and transport restrictions; and other measures have been introduced around the world and will inevitably expand as more nations report COVID-19 cases. These steps have significant consequences on businesses across industries by reducing consumer spending, creating disruption to supply chains and workforces, and decreasing energy demand. The full effect of COVID-19 on global M&A activity will not be known for some time, but as buyers and sellers continue to diligence businesses and negotiate transactions, they can take certain steps to protect against risks introduced by this outbreak. This article seeks to help parties navigate such issues in the context of M&A transactions. While these issues are most acute when the target business is based, or has significant operations, in Asia, as COVID-19 continues to spread globally, so, too, will the relevance of the issues discussed below.

**Due Diligence**

Many offices and factories in the communities most affected by the coronavirus epidemic largely remain closed or limited in operation. Combined with significant travel restrictions and quarantine measures, in-person management presentations and site visits have become challenging or impossible, especially in the hardest hit areas. Transaction parties will need to adjust expectations and timetables accordingly. Due diligence and electronic meetings, however, can continue to proceed thanks to the proliferation of virtual data rooms and video conferencing.

Buyers should ensure their diligence on the target business extends to:

- Existing insurance policies and their coverage, including business interruption policies and the nature and extent of stopgap health and disability coverage related to the target’s welfare plans for employees
- The effectiveness and use of business continuity plans and crisis management procedures
- Supply chain risk and the availability of, and costs associated with, utilizing alternative sources of supply
- Exposure of the business (including its key counterparties, suppliers, and customers) to jurisdictions highly impacted by the coronavirus epidemic

- Regulatory, licensing, and data privacy implications as a result of remote working arrangements, particularly in certain industries (e.g., financial services)
- The effectiveness of any risk protocols in place for dealing with unwell or higher-risk employees, the communication and implementation of health and safety procedures within the workplace, adequate compliance with relevant government health guidelines, and the possible impact of travel bans for highly mobile or immigration dependent workforces
- The legal basis under privacy laws, particularly the GDPR in the EU/UK, to process health data on employees, visitors, and customers and whether privacy notices cover processing for COVID-19 purposes
- Solvency or going-concern risk and the ability to service debt (especially where high-yield debt may be in place)
- The ability of the target business or its counterparties to perform, suspend, or walk away from obligations under material contracts, including exercising force majeure or similar provisions—in particular, investigating scenarios where the nonperformance by the target’s counterparty has the consequence of causing the target to breach its obligations under other contracts

Sellers should be prepared for buyer sensitivity to these issues and preemptively prepare information on the current and expected future impact of the coronavirus outbreak on the target business and relevant mitigation efforts. Sellers should also be prepared to manage due diligence expectations and be prepared and organized, including making use of third-party advisor resources to help manage the due diligence process. The effects of the coronavirus outbreak are likely to have an impact on various aspects of the target (or seller) businesses resulting in management time and attention being diverted away from the relevant transaction.

**Price and Consideration**

The uncertainty around the short- and long-term impact of the virus on businesses can make valuations challenging. Because the outbreak is likely to have a negative effect on revenue and earnings forecasts, and deals are commonly priced on the basis of revenue or earnings expectations, certain buyers may be tempted to take advantage of the outbreak to secure more favorable pricing. On the other hand, because the outbreak’s effects are still unknown and may be short-term, sellers are likely to resist such attempts and take the position that the effects and duration of the outbreak are atypical and business fundamentals are unaffected. How



negotiations will unfold on this issue is yet to be seen, but largely will be a function of several factors, including the negotiating leverage a party has relative to its counterparty in any particular transaction and the ultimate scope, reach, and duration of the outbreak.

Buyers should consider whether locked-box and fixed pricing carries too much risk in this environment. In this regard, a trend may develop toward post-closing purchase price adjustment mechanics to ensure that the purchase price paid reflects the state of the target business as of the closing (i.e., that it reflects any deterioration of the target business between signing and closing). Buyers may also consider structuring the purchase price through deferred or staggered consideration payments that are contingent on the performance of the business post-closing in line with agreed targets. If a deal involves post-closing deferred payments, sellers should insist on adequate audit and information rights and post-closing covenants from the buyer to ensure that the new owners conduct the target business optimally post-closing. Given the highly public nature of the coronavirus outbreak, however, sellers may instead prefer to resist these types of purchase price adjustment and payment mechanics altogether on the premise that COVID-19 is a well-known market risk at this time that should be borne by buyers.

COVID-19 will continue to impact the revenue and solvency of businesses in certain industries and, of course, in affected jurisdictions. This, in turn, may adversely affect the cash reserves and ability of certain trade buyers to obtain acquisition financing. Sellers should be cognizant of the credit risk of their counterparties

and should undertake due diligence on the financial viability of buyers and consider the use of structures such as escrow arrangements, parent company guarantees, and termination fees to reduce the risk of buyers defaulting on their payment obligations under acquisition agreements. Sellers should also carefully review all acquisition financing documents, including all side letters, in order to make sure that the coronavirus risk is not treated differently than in the acquisition documents themselves.

**Material Adverse Change**

Buyers would be well-served to insist on material adverse change (MAC) clauses that capture COVID-19 and other pandemic or epidemic risks to give them the ability to terminate and walk away from an agreed transaction if the situation continues to materially worsen. These clauses are heavily negotiated, however, and buyers should expect strong pushback from sellers on the basis that the coronavirus risk has been broadly publicized and is well known to market participants. Parties may, however, be able to compromise so that situations where the impact of the coronavirus on the target business is disproportionate to other businesses in the same industry or jurisdiction, or where there is a disproportionate impact of the coronavirus on specific important contracts, would trigger the MAC clause. MAC clauses with these compromise formulations (i.e., specifically picking up the effects of the COVID-19 outbreak to the extent disproportionately impactful on the target business relative to other industry participants) have begun to appear in acquisition agreements.





Outside Dates

Most acquisition agreements include a drop-dead date, outside date, or long stop date provision that enables termination of the agreement if the transaction has not closed by a specified date. Even though some governments and regulators are publicizing that their operations are business as usual, the reality is that office closures, working-from-home arrangements, and dislocation of employees means that parties should expect governmental and regulatory approvals and other change of control approvals or third-party consents to take longer than normal in the countries affected by the outbreak of the coronavirus. Given that due diligence and in-person meetings are increasingly being delayed or have become impossible, and credit markets have begun to tighten quickly, it is likely that financing may become more difficult and take longer than would otherwise be customary. In light of all of the foregoing, parties should adjust outside dates accordingly. Given the fast-changing environment, longer periods between signing and closing of a transaction will mean greater risk on the operations of target businesses, and buyers should be alert to this when negotiating clauses such as purchase price mechanisms and MAC clauses (each described above), as well as the scope and granularity of interim operating covenants (described below). Parties should consider including automatic extensions of outside dates where the only unsatisfied conditions precedent are in highly affected jurisdictions (e.g., Chinese regulatory approval), but only if the relevant party has used, and continues to use, appropriate efforts to satisfy the relevant conditions.

Interim Operating (and Other Operating) Covenants

Between the signing and closing of a transaction, buyers generally want sellers to operate the target business in the ordinary course to protect the value of the business they committed to purchase and want to be consulted (and their consent obtained) on a variety of material or non-ordinary course matters. On the other hand, sellers continue to own the target business until closing and, particularly if the transaction has been priced under a post-closing adjustment mechanism, sellers will continue to take pricing risk on the business

during the applicable measuring period. Sellers will therefore want to retain the authority to take the steps they feel necessary to operate the business during the sign-to-close period with minimum oversight and interference by the buyer, as well as rights over the operation of the business during any post-closing adjustment period. The uncertainty associated with the coronavirus outbreak means that sellers should insist on being able to (and buyers should be amenable to allowing them to) respond quickly to the coronavirus threat in order to protect their workforce, comply with legal or public health requirements and orders, and undertake other activities that may be deemed necessary or prudent in this environment. In this regard, it may be beneficial for sellers to review their coronavirus contingency plan with a buyer prior to signing the acquisition agreement to obtain pre-approval for activities outlined in the plan.

Representations and Warranties

Buyers should consider seeking additional representations and warranties relating to the target business’s emergency protocols, contingency planning, business continuity processes, and other similar matters that are critical in this environment. If sellers are willing to agree to such expanded representation and warranty coverage, it is fair for them to seek appropriate knowledge, materiality, and subject-to-law qualifiers, to resist forward-looking representations and warranties, and to insist on appropriate bring-down standards at closing. Sellers should also consider ring-fencing their representations and warranties to protect against buyers having the ability to make coronavirus-related claims across the entire suite of representations and warranties. In addition, sellers should disclose as much as possible in the disclosure schedules about the impact or potential impact of the coronavirus on the target business and its effects or potential effects to ensure adequate defenses in the event of a claim. If parties are considering utilizing representations and warranties insurance, they should pay close attention to the policy exclusions—since coronavirus is a known risk, some insurers have started to specifically exclude coronavirus-related losses from their policy coverage.

Choice of Governing Law

Finally, buyers and sellers should be thoughtful and deliberate in selecting the governing law applicable to their contracts. While a full accounting of the differences among various jurisdictions is beyond the scope of this article, it is worth noting that the laws of many U.S. jurisdictions will deal with the interpretation and enforcement of contractual clauses (e.g., MAC clauses) differently than the laws of other jurisdictions (including those of China, Hong Kong, England, and Singapore, for example). Ultimately, it is likely that no jurisdiction is entirely seller-favorable or buyer-favorable in the context of contractual issues arising from the coronavirus outbreak, so parties will need to take the good with the bad.

This is a rapidly evolving situation, and Sidley’s global team of M&A and Private Equity lawyers based in Asia, the United States, and Europe are ideally positioned to help you address and mitigate the risks posed by the coronavirus and ensure you are appropriately protected and informed.

*Editor’s Note: The global situation around COVID-19 outbreak continues to evolve daily, with increasing numbers of confirmed cases and expanding response by private industry and public institutions.*

**Ryan M. Scofield** is a partner in Sidley’s Dallas office who regularly advises public and private companies, private equity firms, and financial institutions on complex corporate and transactional matters, with a primary focus on public and private mergers and acquisitions across various industries. **Parthiv Rishi** is a partner in Sidley’s Singapore office who advises private equity firms, financial sponsors, and large corporate and financial institutions on acquisitions, investments, divestments, venture capital financings, restructurings, joint ventures, and shareholder arrangements across Asia Pacific and India.

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Rex Iacurci LEXIS PRACTICE ADVISOR

# HHS Addresses HIPAA Privacy and Security Rule Issues in Combatting Coronavirus

This article discusses recent guidance by the Department of Health and Human Services’ Office for Civil Rights (OCR) addressing how entities subject to the Health Insurance Protection and Accountability Act (HIPAA) and their business associates must continue to comply with HIPAA’s privacy and security rules when sharing protected health information (PHI) as part of a response to an outbreak of infectious disease or other emergency situation such as the worldwide spread of novel coronavirus (COVID-19).

THE HIPAA PRIVACY RULE PROTECTS THE PRIVACY OF AN individual’s PHI but is balanced to ensure that appropriate uses and disclosures of the information still may be made when necessary, including to treat a patient, to protect the public health, and for other critical purposes.<sup>1</sup>

### Background

The use and disclosure of PHI is strictly regulated by HIPAA’s Privacy Rule so that covered entities (like a group health plan, health service provider, or hospital) and their business associates (service providers that handle PHI on their behalf) may only use or disclose PHI as permitted or required by the rule. (The rules described for covered entities in this article are also applicable to their business associates). In addition, except as noted below, they must limit the use or disclosure (or requests for use or disclosure) to the minimum amount necessary to accomplish the intended purpose.<sup>2</sup>



This minimum necessary standard does not apply to:

- Disclosures requested or authorized by the individual
- Disclosures required by law or to comply with the HIPAA Privacy Rule –or–
- Uses or disclosures by a health care provider in order to treat the individual<sup>3</sup>

### OCR Bulletin

The OCR Bulletin reminds covered entities and their business associates of their continuing obligation to observe the HIPAA privacy rules in the face of the coronavirus outbreak and identifies existing exceptions, particularly emergency exceptions to the HIPAA Privacy Rule, as discussed below.

### Sharing PHI

The OCR Bulletin discusses several relevant permitted disclosures that may be pertinent to the coronavirus outbreak: (1) for treatment, (2) for certain public health activities, (3) to the individual’s family, friends, and others for the individual’s care, and (4) for the prevention of a serious and imminent threat. PHI may also be disclosed if the individual consents in writing.

#### For Treatment

Under the HIPAA Privacy Rule, covered entities may disclose PHI, without an individual’s authorization, to the extent necessary to treat the individual or to treat a different individual. For this purpose, treatment includes:

- The coordination or management of health care and related services by one or more health care providers and others
- Consultations between health care providers –and–
- Referring patients for treatment<sup>4</sup>

This exception is common in order to comprehensively treat a patient. In the context of an illness, the patient’s primary care physician may share information with the patient’s pulmonary care specialist, who together share information from a radiology office.


#### For Public Health Activities

The HIPAA Privacy Rule recognizes the legitimate need for public health authorities and others responsible for ensuring public health and safety to have access to PHI that is necessary to carry out their public health mission. Therefore, the HIPAA Privacy Rule permits covered entities to disclose needed PHI in the following circumstances:

### Related Content


For a full discussion of HIPAA’s Privacy and Security Rules, see

> [HIPAA PRIVACY, SECURITY, BREACH NOTIFICATION, AND OTHER ADMINISTRATIVE SIMPLIFICATION RULES](#)

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For guidance in preparing a presentation to train personnel of a group health plan sponsor about their obligations under HIPAA, see

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For an overview on the enforcement of the Privacy Rule, Security Rule, Breach Notification Rule, and Transaction Rule under HIPAA, see

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1. The guidance is available at OCR, Bulletin: HIPAA Privacy and Novel Coronavirus (OCR Bulletin). 2. 45 C.F.R. §§ 164.502(b), 164.514(d).

3. 45 C.F.R. § 164.502(b)(2). 4. See 45 C.F.R. §§ 164.502(a)(1)(ii), 164.506(c), and 164.501 (definition of treatment).



- To a public health authority, such as the Centers for Disease Control and Prevention (CDC) or a state or local health department, authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability. This would include, for example, gathering the information for:
  - The reporting of disease or injury
  - Reporting vital events, such as births or deaths –and–
  - Conducting public health surveillance, investigations, or interventions<sup>5</sup>
- At the direction of a public health authority to a foreign government agency that is acting in collaboration with the public health authority<sup>6</sup>
- To persons at risk of contracting or spreading a disease or condition if other law, such as state law, authorizes the covered entity to notify such persons as necessary to prevent or control the spread of the disease or otherwise to carry out public health interventions or investigations<sup>7</sup>

*Disclosures to Family, Friends, and Others Involved in an Individual's Care*

A covered entity may share protected health information with a patient's family members, relatives, friends, or other persons identified by the patient as involved in the patient's care. A covered entity also may share information about a patient as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the patient's care, of the patient's location, general condition, or death. This may include where necessary to notify family members and others, the police, the press, or the public at large.<sup>8</sup>

The covered entity should get verbal permission from individuals or otherwise be able to reasonably infer that the patient does not object, when possible; if the individual is incapacitated or not available, covered entities may share information for these purposes if, in their professional judgment, doing so is in the patient's best interest.

For patients who are unconscious or incapacitated, a health care provider may share relevant information about the patient with family, friends, or others involved in the patient's care or payment for care, if the health care provider determines, based on professional judgment, that doing so is in the best interest of the patient. For example, a provider may determine that it is in the best interest of an elderly patient to share relevant information with the patient's adult child, but generally could not share unrelated information about the patient's medical history without permission.

*Disclosures to Disaster Relief Organizations*

In addition, a covered entity may share protected health information with disaster relief organizations that, like the American Red Cross, are authorized by law or by their charters to assist in disaster relief efforts, for the purpose of coordinating the notification of family members or other persons involved in the patient's care, of the patient's location, general condition, or death. It is unnecessary to obtain a patient's permission to share the information in this situation if doing so would interfere with the organization's ability to respond to the emergency.<sup>9</sup>

*Disclosures to Prevent a Serious and Imminent Threat*

Health care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public—consistent with applicable law and the provider's standards of ethical conduct.<sup>10</sup> Providers may disclose an individual's PHI to anyone who is in a position to prevent or lessen the serious and imminent threat, including family, friends, caregivers, and law enforcement without the individual's permission. HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health and safety.<sup>11</sup>

**Disclosures to the Media Generally Prohibited**

Except in the limited circumstances, disclosing PHI to the media or the public at large, such as information about an individual's specific tests, test results, or details of their illness, is prohibited without the individual's (or authorized personal representative's) written authorization.<sup>12</sup> Two exceptions noted in the OCR Bulletin are:

- **Hospital exception.** Where a patient has not objected to or restricted the release of PHI, a covered hospital or other health care facility may, upon request (such as by a patient's visitors):
  - Disclose information about a particular patient by name
  - Release limited facility directory information to acknowledge an individual is a patient at the facility –and–
  - Provide basic information about the patient's condition in general terms (e.g., critical or stable, deceased, or treated and released)
- **Incapacity exception.** Covered entities may disclose information about an incapacitated patient if the disclosure is believed to be in the best interest of the patient and

consistent with any prior expressed preferences of the patient.<sup>13</sup>

**Comply with Minimum Necessary Standard**

For most disclosures, a covered entity must make reasonable efforts to limit the information disclosed to that which is the minimum necessary to accomplish the purpose. As noted above, this minimum necessary requirement does not apply to disclosures to health care providers for treatment purposes or where the individual has authorized the disclosure, but it otherwise applies to any of the special rules permitting PHI disclosure discussed.

Covered entities may rely on reasonable representations from a public health authority or other public official that the requested information they request is the minimum necessary for the purpose. For example, a covered entity may rely on representations from the CDC that the CDC's request for PHI about all of the covered entity's patients exposed to or suspected or confirmed to have coronavirus is the minimum necessary for the public health purpose.

In addition, internally, covered entities should continue to apply their role-based access policies to limit access to PHI to only those workforce members who need it to carry out their duties.<sup>14</sup>


**Looking Ahead**

The OCR Bulletin reminds covered entities that existing HIPAA regulations can be flexible enough to allow for the necessary sharing of PHI in emergency situations so long as the applicable conditions are satisfied and subject to other applicable HIPAA rules. Even in a potential health crisis, like the coronavirus outbreak, covered entities must not only adhere to the minimum necessary standard, but also continue to implement reasonable safeguards to protect PHI against intentional or unintentional impermissible uses and disclosures. Further, covered entities must continue to apply the administrative, physical, and technical safeguards of the HIPAA Security Rule to electronic protected health information (ePHI). **L**


*Rex Iacurci is a Content Manager for Lexis Practice Advisor® in its Labor & Employment module, specializing in Employee Benefits & Executive Compensation. Prior to joining LexisNexis, Rex was an editor/author at Thomson Reuters. Previously, Rex worked as senior benefits counsel for Eversource Energy, a New England utility, and as senior tax counsel for Chevron Corporation (formerly Texaco Inc.). Rex is a CPA and began his career in public accounting and benefits and compensation consulting.*

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5. 45 C.F.R. § 164.512(b)(1)(i). The OCR Bulletin notes that a covered entity may disclose to the CDC protected health information on an ongoing basis as needed to report all prior and prospective cases of patients exposed to or suspected or confirmed to have coronavirus. 6. *Id.* 7. 45 C.F.R. § 164.512(b)(1)(iv). 8. See 45 C.F.R. § 164.510(b). 9. See 45 C.F.R. § 164.510(b)(4). 10. See 45 C.F.R. § 164.512(j). 11. *Id.* 12. See 45 C.F.R. § 164.508. 13. 45 C.F.R. § 164.510(a).

14. See 45 C.F.R. §§ 164.502(b), 164.514(d).

Glenn Gordon LEXIS PRACTICE ADVISOR

## Coronavirus and Force Majeure Checklist

This Coronavirus and Force Majeure Checklist provides guidance on issues and measures counsel should consider when determining the applicability of the coronavirus with respect to force majeure clauses in your clients' commercial contracts. This checklist is jurisdiction and industry neutral and, therefore, you should review applicable state and industry law before taking any definitive action regarding your clients' agreements.

The impact that the expanding outbreak of the novel coronavirus (COVID-19) is having on commercial transactions has become readily apparent. Large-scale events are being cancelled or postponed, parties in the supply chain are unable to secure necessary materials and supplies, distribution and shipping channels have been disrupted, and there are shortages in the labor force, among other negative consequences. The ability to invoke a force majeure clause in a client's contract based on the coronavirus will naturally be fact-specific, focusing on the specific terms of the client's agreement and the unique facts and circumstances germane to the client's transaction. Relevant factors will include the existence of, and particular language contained in, a force majeure clause, whether and how the coronavirus has impacted the contracting party's capability to reasonably perform the contract, and whether the coronavirus has rendered performance impossible or impracticable.

When determining whether the coronavirus might constitute a force majeure event in your clients' agreements, you should consider the following:

### 1. Determine if your client's agreement includes a force majeure clause.

You should review your clients' agreements and ascertain if they include a force majeure clause or similar provision. A force majeure clause generally states that the occurrence of certain unforeseen events or circumstances beyond a party's reasonable control will excuse that party from its performance obligations. The provision usually lists a series of force majeure events or circumstances, the occurrence of which will excuse performance for the duration of that force majeure event (and sometimes for a reasonable period thereafter) and relieve that party from liability caused by such nonperformance. A force majeure clause may also set forth obligations on the party claiming a force majeure event, such as providing notice of its occurrence, advising of its anticipated effect on performance and likely duration, and taking reasonable measures to diminish the impact or shorten the duration of the force majeure event. If there is no force majeure clause in the client's agreement, relief may still be available on other grounds, such as failure of a condition or supervening events.

### 2. Does the force majeure clause include language that would encompass the coronavirus?

Examine the specific language in the force majeure provision to determine whether the coronavirus constitutes a force majeure event. See if the clause expressly includes a pandemic, epidemic, public health emergency, outbreak of communicable disease, or other similar occurrence as a force majeure event, which would increase the likelihood of enforceability. If such language is not included, consider whether the coronavirus outbreak would fall under another part of the force majeure clause, including general force majeure language (such as acts of God or events beyond the control of a party), governmental or administrative action, disruption to the labor force, unavailability of materials, etc. The party invoking force majeure must be able to establish that the coronavirus falls within the scope of the provision. While a force majeure event must usually have been unforeseeable at the time of contracting, this will not likely be an issue for contracts entered into before the coronavirus outbreak.

### 3. Is the coronavirus the reason the party is unable to perform the agreement?

Establishing causation between the coronavirus and the client's inability to perform its contractual obligations is required to invoke force majeure. Such a determination will be fact-sensitive. Even if the client's agreement includes a provision that encompasses the coronavirus, this will not automatically excuse performance or relieve it from liability resulting from nonperformance, as you must still meet the other force majeure requirements. The coronavirus must be the true reason your client cannot satisfy its contractual obligations. For example, the coronavirus may have impacted its distribution and supply chain channels, precluded it from securing necessary materials, prevented the timely transportation of goods, or resulted in an insufficient workforce.

However, if the party asserting force majeure would not have been able to perform notwithstanding the coronavirus, it will not find relief in force majeure.

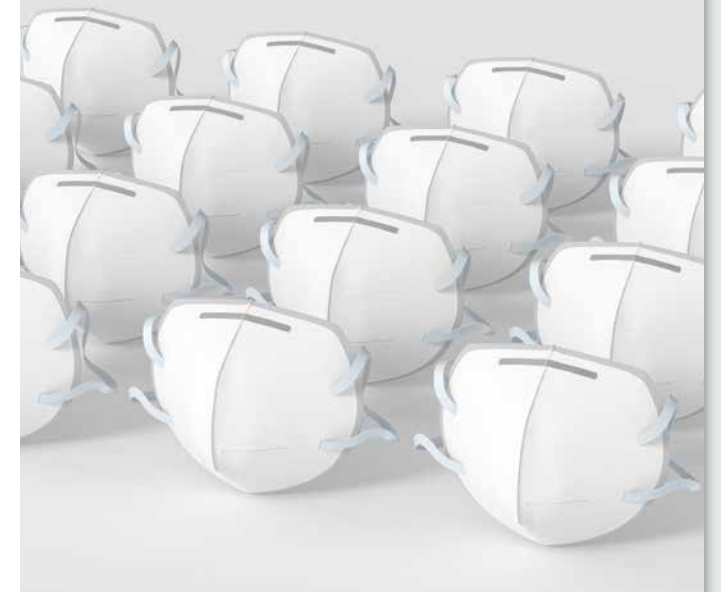
The standard for force majeure may also be a critical factor. The relevant language may require that performance be "impossible," as opposed to a lesser standard such as requiring performance be "impeded," "impracticable," or "hindered." Depending on the relevant standard, a party may not be excused simply because the ability to perform has become more difficult or expensive. If the client can still perform in an alternate manner (such as by obtaining materials or labor from another, more expensive source), it may not be released from its obligations.

### 4. Are there any exceptions or exclusions that would prevent application of force majeure?

Ascertain whether there is any language in the force majeure provision that might serve as an exception or otherwise exclude its applicability. For example, some agreements may exclude force majeure from events that could have been foreseen by a party or that are a result of a change in market conditions. Additionally, the provision may include carve-outs to its application, such as for a party's payment obligations.

### 5. Weigh the risks of declaring force majeure.

Before invoking the coronavirus as a force majeure event, confer with the client and carefully consider the potential ramifications that such action may trigger. If performance by the client has been rendered impossible or economically unfeasible, there may be no other viable alternative. Invoking force majeure will, however, be accompanied by business and legal perils. While declaring force majeure may advance the client's immediate business interests, there could be unintended and unwanted consequences that the client should contemplate. For example, the client's reputation in its industry could be impaired, relationships with critical customers could be jeopardized, and the terms of the contract may permit the other party to terminate the agreement. The other party may also dispute the applicability of force majeure and initiate litigation and/or exercise other remedies available in the event of the client's nonperformance. If a force majeure declaration results in litigation, there is the possibility the presiding court or tribunal will interpret the provision narrowly and rule against the client. In light of the possibility of litigation, ensure the client documents all relevant facts and circumstances that will support its force majeure declaration.







## 6. Provide timely notice of the force majeure event.

Ensure your client meets all notice requirements contained in the force majeure provision or as may otherwise be required by the contract. Many force majeure provisions establish specific procedures that must be adhered to in order to effectively obtain relief. Some provisions will require a party to furnish notice of a force majeure event immediately or within a few days after it experiences the event. The clause may also state what information must be included in the notice, such as the specific event giving rise to the claim, its anticipated effect on performance, and the expected duration. Even if the agreement does not expressly mandate notice within a specific time period, best practices call for prompt written notice to the other party or parties to the agreement.

## 7. Determine how force majeure will apply to the client's performance obligations.

How a force majeure event such as coronavirus will impact the client's contractual obligations will largely depend on the controlling language in the parties' agreement and the particular circumstances resulting in invocation of force majeure. Generally, if applicable, then the client should be relieved of those performance obligations that have been prevented by the event without being in breach of contract—the time for performance will be delayed for the duration of the force majeure event. However, the client may still be able to perform certain aspects of the agreement, as the force majeure event may only influence some of its contractual responsibilities. For example, a supplier may not be able to provide certain goods that it receives from China but still be able to furnish other goods as required by the contract. The declaration of force majeure may also trigger termination rights, as discussed below. The client may also be required to take available and reasonable measures that would lessen the impact and/or duration of the force majeure event.

## 8. Ascertain whether a party can terminate the agreement.

For certain agreements, the force majeure provision may permit a party to terminate the agreement if there is a force majeure event. Termination rights often require that the force majeure event must delay performance for a specified period of time. Review the agreement and determine whether contract termination might be or become an available option and, if so, under what circumstances. If termination may be the outcome, ensure the client is aware of this fact and has taken it into consideration before making a final decision on whether to declare force majeure. In such transactions, the client may be able to take measures and/or engage in communications with the other party at an early juncture to try and stave off termination.

## 9. Determine the client's duty to mitigate the impact of the force majeure event.

Parties to commercial agreements will often have a duty to engage in reasonable measures to mitigate the adverse consequences of a force majeure event. Ensure the client satisfies mitigation obligations after declaring a force majeure event, such as taking action that will serve to reduce the period of delay. Measures such as seeking alternate locations to perform the contract, securing new suppliers, or allowing personnel to work remotely, may be required by the contract or warranted under the circumstances. Any mitigation efforts by the client should be well-documented, as the client may need to demonstrate its mitigation efforts in potential litigation resulting from its nonperformance due to force majeure, even if the efforts prove to be unsuccessful.

## 10. Require substantiation if your client receives notice claiming force majeure based on the coronavirus.

If your client received notice from a party it has contracted with alleging force majeure due to the coronavirus, request the other party provide relevant information and/or documentation that substantiates the force majeure claim. Also review the subject agreement and verify that the force majeure provision applies to the prevailing circumstances. As discussed above, the mere existence of the provision will not necessarily mean that it can be properly invoked by a party. Ascertain the rights and remedies available to the client, including possible termination of the agreement.

## 11. Review and revise (as necessary) your clients' force majeure provisions.


In light of the coronavirus pandemic and the possibility that similar events may occur in the future, you should review the existing language contained in your clients' force majeure provisions and update their forms as may be necessary and prudent. If not already existing, you can add language expressly including events such as pandemics, epidemics, local disease outbreaks, public health emergencies, communicable diseases, and quarantines to the list of force majeure events. Also revisit the standard for invoking force majeure, such as if the event must render performance impossible or whether a lower threshold is preferable. **L**

*Glenn Gordon is a Content Manager for Lexis Practice Advisor's® Commercial Transactions module and previously consulted for the company. His prior legal practice includes a diverse combination of in-house and law firm experience, including serving as assistant general counsel at Formica Corporation and providing consulting services for corporations including LG Electronics, Panasonic Corporation of North America, and Citrix Systems, Inc. Glenn was also a shareholder in the Herold and Haines law firm, where he specialized in general corporate law and commercial litigation.*

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[> MITIGATION OF DAMAGES IN SALE OF GOODS CONTRACTS](#)

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Karen C. Yotis LEXIS PRACTICE ADVISOR ATTORNEY TEAM

# COVID-19 Claims Impact Entire Insurance Coverage Spectrum

Now that the coronavirus first discovered in Wuhan, China in late 2019 has migrated across the globe, the impact on both public health and business is triggering a barrage of insurance claims across the entire spectrum of traditional coverages.

## CLIENTS ARE EXPERIENCING LOSS ARISING FROM

circumstances ranging from business interruption and event cancellation to illness and death. The unique circumstances of a situation and whether the specific wording of an insurance policy will result in coverage are consequently matters of immediate concern that will have long-term effects. This article identifies the types of insurance that policyholders might pursue for coverage and the positions insureds and insurers are likely to take for and against coverage, so practitioners can consider a client's situation, address coverage weaknesses and gaps, and determine whether to litigate any coronavirus claim.

The high-risk losses arising from the steadily escalating spread of coronavirus are partly about supply chain and partly about movement of people. As the supply chain suffers drastic disruption and governments shut down entire regions or countries, general themes are beginning to emerge to help the insurance industry and policyholders comprehend where they stand and how to deal with claims going forward. Of immediate concern are the following:

- Travel insurance policies coalescing around the distinction between destinations where advisories not to travel are in place as opposed to a more general reluctance to travel because of the coronavirus situation as a whole
- Event cancellation coverage that is moving toward a focus on the need for cancellation as it relates to exclusions or extensions involving infectious diseases
- Business interruption insurance that requires physical property damage under all but the most specialized policies; state legislatures are attacking these contractual provisions through legislation that would force insurers to cover business interruption claims in the absence of damage to the insured's covered property, in spite of the arm's length negotiated insurance agreements in place between those insurers and their sophisticated business insureds
- Cyber claims that are expected to skyrocket because of the increased risk of cyber criminals asking for sensitive information
- Commercial General Liability (CGL) policyholders and insurers gearing up for litigation because of the spike in infections on cruise ships and in the hospitality and other industries
- The extent to which other reasons exist for financial loss, such as political instability or the Chinese New Year

How these trends might impact insurers and policyholders alike is explored more fully below.

## Travel Insurance

Coverage under travel policies may not be available, depending upon the restrictions insurers have put into place since approximately late January, when the coronavirus became a known event. Policies issued before the virus was widely reported in global media are most likely to cover claims arising from trips impacted by coronavirus, with most insurers considering policyholders aware of the outbreak after January 21, 2020. Further, most international plans exclude coverage related to pandemics if a travel warning is issued for the policyholder's intended destination. As of March 12, 2020, the Center for Disease Control had issued a Level 3 travel health notice for China, Iran, the United Kingdom and Ireland, and most European cities, including Italy, France, Germany, and Vatican City.

However, insureds stranded in lockdown cities may have reasonable claims for the cost of accommodations or flight changes. These claims must be fair and reasonable, as insurers will not issue limitless payments for unnecessarily expensive charges. Policies that restrict coronavirus may also continue to cover unforeseen losses like lost baggage, broken limbs, or events arising out of a significant weather event.

If travel arrangements are not impacted by coronavirus but a policyholder simply changes his or her mind or is apprehensive about travelling, those circumstances will not support a claim under a travel policy.







## Business Interruption Insurance

The business interruption coverage that most companies purchase typically allows for recovery of lost income and associated extra expense, but coverage requires that the interruption result from direct physical loss or damage to the insured property caused by a covered peril. Exclusions broadly applicable to pollutants or specific to bacteria or viruses may also limit coverage for business interruption.

The case that may guide coverage counsel around this setback for policyholders is *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*,<sup>1</sup> in which a New Jersey federal court defined physical damage as a distinct, demonstrable, and physical alteration of a property structure. Reasoning that a property can sustain a physical loss or damage without experiencing a structural alteration, the court concluded that ammonia, a dangerous gas that rendered the insured's premises uninhabitable, constituted a direct physical loss sufficient to trigger coverage under the insurer's policy. Other opinions suggest that the issue, even post-*Gregory Packaging*, is not as cut and dry as one might wish.

Further bolstering the insurer's position in spite of the lone decision in *Gregory Packaging* is ISO form CP 01 40 07 06 [Loss Due to Virus or Bacteria] which provides:

We will not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease.

The ISO exclusion goes on to specifically provide that it applies to business income (i.e., business interruption).

Attorneys have already moved ahead with the nation's first coronavirus business interruption case, even though the client insured has not yet suffered a covered loss, or had a claim denied by its insurer. *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's London, et al.*, Civ. Dist. Ct. La. (2020), filed March 17, 2020 in the Louisiana state court, seeks a declaratory judgment that New Orleans restaurant's all-risk business interruption policy should respond in the event of a future direct physical loss from coronavirus. Counsel should monitor development in this case.

A client's efforts to secure business interruption coverage stand to receive a welcome assist from state regulatory authorities. The New Jersey Legislature is currently taking the extraordinary step of considering Bill A-3844, which would eliminate the ISO virus exclusion which the legislature approved years ago.

As drafted, this law would mandate that insurers cover COVID-19 losses of certain businesses under their business interruption policies, irrespective of whether the regulator-approved virus exclusion is contained in a policy. The proposed New Jersey bill also

initiates a special purpose apportionment that would force business interruption carriers to spread the cost of the coronavirus claims they cover over the other non-business interruption carriers that conduct insurance business in New Jersey. This unprecedented legislative move--which not only sidesteps the virus exclusion but decimates the foundational property damage element of business interruption policies--could transfer the financial burden of coronavirus to virtually all carriers insuring New Jersey risks. Other states are expected to follow New Jersey's example.

The New York State Department of Financial Services (DFS) has also issued guidance to all DFS-regulated entities, requesting that they have plans in place to address the risks that coronavirus poses. The guidance also calls for special reports to all authorized property and casualty insurers, requesting that they provide policyholders with information and developments surrounding business interruption and related coverage written in New York.

These and other regulatory developments need to be closely monitored and given due consideration in any coverage analysis for coronavirus business interruption claims.

Other specialized types of business interruption insurance may afford coverage for coronavirus-related losses. Contingent business interruption or supply chain insurance, which is more narrowly limited to disruptions or delay in the receipt of specified products or services from a named supplier, may cover events that are not contingent upon physical loss or damage, such as pandemics. Another type of business interruption coverage extension where an order of civil authority prohibits access to the insured location may cover financial loss, although direct physical damage may be required. Business interruption extensions based upon interference with ingress and egress to the insured's business location may also be part of your client's coverage package, but the details in these provisions vary widely and may or may not impose a physical damage prerequisite as well as distance requirements.

Finally, political risk insurance may cover loss arising from business interruption if the losses that a company suffers in a host country result from a local government's regulatory actions. Government shutdowns and travel restrictions issued by local governments in response to coronavirus could fall into this loss category. While it

is by no means certain that disruptions from an edict relating to coronavirus would constitute expropriation or contract frustration, a political risk policy may offer a viable alternative to an otherwise problematic business interruption claim even in the absence of physical damage to the client's place of operations.

## Event Cancellation Insurance

With the postponement or cancellation of events across the nation and worldwide, including the remaining NBA season, the NCAA men's and women's basketball tournaments, political primaries, conferences, and even the entertainment along the Las Vegas strip, event cancellation carriers will also experience an unprecedented increase in claims. Many jurisdictions are specifically prohibiting gatherings of 50 people or even fewer if the group is composed of elderly participants who are more susceptible to coronavirus. Although the parameters of what constitutes a covered event are specified in each policy and typically extend to the physical, practical, or legal inability to proceed with an event as planned, these policies are subject to exclusions that you must carefully consider when assessing the viability of a claim.

## Liability Insurance – CGL/D&O/E&O

In the coming months, business owners will be faced with liability claims filed by those who allege they became infected with coronavirus while on the company's premises or because of something that the company did or did not do. While the hospitality industry and cruise lines may be the predominant defendants in these cases, the sheer virulence of coronavirus indicates that any business that involves concentrations of people in close proximity may be required to defend claims.

CGL policies will most likely be the first line of protection for businesses facing the risk of being sued for negligently causing someone to contract coronavirus. These policies are written on a claims made or claims made and reported basis, which limits coverage to claims first asserted against the insured and noticed to the insurer before the end of the policy period or within a specified extended reporting period. Counsel should advise companies to be vigilant in promptly providing notice upon first learning about a claim to ensure that these types of specific policy conditions are satisfied.

Directors & Officers (D&O) Liability policies may provide coverage for loss arising from shareholder lawsuits alleging a company acted unreasonably or improperly in response to the coronavirus. Examples of potential shareholder allegations against directors and officers include failing to develop supply chain alternatives or other contingency plans, failing to observe required government protocols, and failing to adequately disclose the risk that coronavirus poses to continuation of the company's business or its financial status. Counsel must consider the so-called absolute bodily injury exclusions that are included in these policies and expect insurers to deny coverage on any shareholder claim with any connection to

a coronavirus-related bodily injury, however attenuated. Certain conduct exclusions may also complicate coverage under a D&O policy claim.

Some businesses, such as hospitals and healthcare providers, may also seek coverage under their Errors & Omissions (E&O) policies, which cover losses relating to claims over errors made during the providing of professional services. Applicable exclusions upon which insurers will rely include bodily injury exclusions, in addition to exclusions for fraud, dishonesty, and willful violations of law.

## Workers' Compensation Insurance

Hospital and other healthcare employees, as well as workers throughout various industries who may be exposed to or contract coronavirus as a result of and during the course of their employment, can turn to workers' compensation insurance for coverage. While the ordinary diseases of life, which are interpreted to mean those to which the general public are also equally exposed, are excluded from workers' compensation insurance, there could be an argument for workers' compensation coverage if counsel can prove a direct causal connection between the worker's infection with coronavirus and the workplace. In addition, although coronavirus is transmitted through animal and human contact, a worker who acquires coronavirus in the laboratory could possibly qualify for coverage.

## Marine and Transport Insurance

The spread of coronavirus has also affected the marine and transportation industry. Marsh LLC has reported that the impact resulting from China's plummeting industrial production levels, the drop in crude oil prices, and the lessening of oil demand across the global energy market has resulted in the futures market moving into what is called a contango state. A market is in contango when it has unexpectedly weakened to the extent that the commodity's market price is expected to be lower on delivery than it was when agreed within futures contracts. This confluence of events has caused Marsh to raise concerns about the marine insurance market for marine cargo insurance, marine hull insurance, oil traders' liability insurance, charterer's legal liability, and protection and indemnity cover. Counsel who represent clients in this niche area must keep abreast of these developments and consider the effectiveness of a client's insurance coverage in the current contango market.


## Trade Credit Insurance

With the increase in supply chain disruption and shutdowns of entire states and even countries, a spike in business bankruptcies is likely to occur. If your client trades in a red zone area, they must expect its credit insurer to review its exposure to limit losses in the coming months. Although trade is expected to fall, insurers will try to reduce exposures to a need-only basis (i.e., what is being delivered, what is pending, and what is being ordered). It is likely that insurance will cover some insolvency or defaults on any valid due debt.


<sup>1</sup> 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014).

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> [CORONAVIRUS AND FORCE MAJEURE CHECKLIST](#)  
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For an overview of coverage for business interruption, see

> [BUSINESS INTERRUPTION INSURANCE](#)  
 **RESEARCH PATH:** [Insurance > Assessing Claims and Coverage > Types of Insurance > Practice Notes](#)

For information about commercial general liabilities policies, see

> [COMMERCIAL GENERAL LIABILITY \(CGL\) INSURANCE](#)  
 **RESEARCH PATH:** [Insurance > Assessing Claims and Coverage > Types of Insurance > Practice Notes](#)

For information about coverage for directors and officers, see

> [DIRECTOR AND OFFICER \(D&O\) INSURANCE](#)  
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Health Insurance


Health insurance coverage for coronavirus is a more straightforward analysis. Absent any misrepresentation in an application for health insurance which could void coverage, individuals infected with coronavirus can expect to be reimbursed for the costs of testing and treatment. Full coverage for the public health sector is being boosted by legislative and regulatory efforts on both the state and federal level, with state insurance departments and the federal government extracting agreements from carriers to waive co-pays and deductibles for all COVID-19 testing. Additional mandates involve prohibitions against surprise billing, waiver of treatment co-pays, free home delivery of prescriptions, liberalized prescription refill rules, and telemedicine. Coronavirus testing has also been deemed an essential health benefit within the meaning of the Affordable Care Act rules, which impacts small group insurance plans as well as Medicaid. Employers with self-insured health plans are also exploring how to modify plan designs

so plan participants can more easily seek testing and treatment for coronavirus without incurring out-of-pocket expenses or surprise medical bills from out-of-network providers. The Centers for Medicare and Medicaid Services has also issued Medicare guidance which clarifies coverage for diagnostic tests, vaccines, inpatient hospital care, inpatient hospital quarantines, prescription refills, ambulatory services, and emergency ambulance transportation for all coronavirus patients.


Life Insurance

Barring any issues that may arise during a life policy’s two-year incontestability clause, coverage for the death of an insured resulting from coronavirus should result in full payment of benefits. Life insurers facing potentially large payouts in the event of a spike in the coronavirus death toll are also facing a severe downturn of their investments as the stock markets continue to fall. This is a potential double dilemma that could require increases in a life insurer’s statutory reserves if its claim payouts are high enough and state regulators get nervous about an unprecedented multiplying of risk scenarios. Although life insurance policies already in place will not likely see any changes or coverage disputes due to coronavirus, even if a policyholder is travelling to a highly compromised area or the virus spreads in his or her community, individuals applying for life insurance policies during the pandemic must be fully transparent about past or future travel plans to avoid an invalidated policy in the event that a claim eventually occurs.

Conclusion

The coronavirus has migrated from a health concern for employees and customers, to a supply chain/business interruption issue, to an almost complete breakdown of operations in travel and hospitality industries and a dangerous shortage of manufacturing industrial and consumer products. As the world watches to see if the ongoing rise in confirmed cases and deaths will begin to level off as drastic containment measures are put into place, counsel for commercial policyholders should assess their coronavirus-related risks, identify policies that could potentially provide coverage, examine conditions and exclusions, and immediately notify insurers if a potentially covered loss or claim occurs. Counsel representing insureds and insurers alike should also expect more litigation in the coming year as business losses start to add up and attorneys seek better ways around the limits and exclusions that insurers inserted into policies following the exposures they faced after Ebola and H1N1. Until the dust settles, the goals are to minimize loss, maximize coverage, and implement response strategies to make recovery from the pandemic as smooth as possible. 

*Karen C. Yotis is an Illinois attorney specializing in insurance compliance and coverage matters. She was a past president for the Great Lakes Chapter of the Association of Insurance Compliance Professionals (AICP) and is a regular contributor to commentary and treatises for the insurance and workers' compensation industries.*

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Chad Landmon and Drew Hillier AXINN, VELTROP &amp; HARKRIDER, LLP

# FDA Emergency Use Authorizations

This article provides guidance on Food and Drug Administration (FDA) Emergency Use Authorizations (EUAs). This article offers an overview of the legal and regulatory framework for EUAs, provides practical tips for obtaining an EUA, introduces considerations for importing and exporting under an EUA, and highlights certain recent EUAs, including some relating to the coronavirus disease (COVID-19).

## EUA Framework

In an emergency, and when there are no adequate, approved, and available alternatives, Section 564 of the Federal Food, Drug, and Cosmetic Act (FD&C Act),<sup>1</sup> authorizes the FDA Commissioner to allow unapproved medical products or unapproved uses of approved medical products to diagnose, treat, or prevent serious or life-threatening diseases or conditions. These medical products, also known as medical countermeasures, include drugs, biologics, and devices (including in vitro diagnostics and personal protective equipment).

FDA's authority to allow EUAs was created through multiple amendments to the FD&C Act, including the Project Bioshield Act of 2004,<sup>2</sup> the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (PAHPRA), the 21st Century Cures Act of 2016,<sup>3</sup> and Pub. L. 115-92, 131 Stat. 2023 (Dec. 12, 2017).

In 2017, FDA finalized its guidance Emergency Use Authorization of Medical Products and Related Authorities (2017 Guidance).<sup>4</sup> The 2017 Guidance replaces two prior guidance texts: Emergency Use Authorization of Medical



Products (July 2007) and Emergency Use Authorization Questions and Answers (April 2009).

In February 2020, FDA issued its guidance Policy for Diagnostics Testing in Laboratories Certified to Perform High Complexity Testing under CLIA Prior to Emergency Use Authorization for Coronavirus Disease-2019 During the Public Health Emergency (COVID-19 Guidance).<sup>5</sup>



## How to Obtain an EUA

As explained in the 2017 Guidance, obtaining an EUA involves:

- A determination of the justifications for an emergency use
- Meeting criteria for issuance
- Participating in pre-EUA activities and submissions
- Formally requesting an EUA
- FDA's processing, approval, and issuance of an EUA letter
- Meeting conditions of authorization

### Justification

Before an EUA can issue, pursuant to FD&C Act § 564(b)(1),<sup>6</sup> the Secretary of the U.S. Department of Health and Human Services (HHS) must declare that at least one of four circumstances exists. The four circumstances are:

- A domestic emergency or a significant potential for a domestic emergency involving a heightened risk of attack with a chemical, biological, radiological, or nuclear (CBRN) agent, as determined by the Secretary of Homeland Security<sup>7</sup>
- A military emergency, or significant potential for a military emergency, with a heightened risk of an attack with a CBRN agent on U.S. military forces, as determined by the Secretary of Defense<sup>8</sup>
- A public health emergency, or a significant potential for a public health emergency, affecting or with the significant potential to affect national security or the health and security of U.S. citizens living abroad, that involves a CBRN

agent or related disease or condition, as determined by the Secretary of HHS<sup>9</sup>

- A material threat sufficient to affect national security or the health and security of U.S. citizens living abroad, identified by the Secretary of Homeland Security<sup>10</sup>

### Criteria for Issuance

After the HHS Secretary makes an EUA declaration, FDA can authorize unapproved products or unapproved uses of approved products, subject to the criteria discussed below. Even if there has been an EUA declaration, for an EUA to issue, four criteria must be met:

- **Serious Condition.** The CBRN agent(s) must be capable of causing a serious or life-threatening disease or condition.<sup>11</sup>
- **May Be Effective.** There must be a showing that the unapproved product or unapproved use may be effective in treating the disease or condition. This is lower than the effectiveness standard used for other product approvals.<sup>12</sup>
- **Risk Benefit Analysis.** FDA must determine that the known and potential benefits of the product outweigh the known and potential risks of the product.<sup>13</sup>
- **No Alternatives.** There must be no adequate, approved, and available alternative.<sup>14</sup>
  - An alternative may be inadequate if, for example, there are contraindications for a population, the dosage form is inappropriate, or the CBRN agent is resistant to approved and available products.
  - An alternative may be unavailable if, for example, there are insufficient supplies to meet the emergency need.

<sup>1</sup> 21 U.S.C.S. § 301 et seq. <sup>2</sup> Pub. L. 108-276, 118 Stat. 835 (July 21, 2004). <sup>3</sup> Pub. L. 114-255, 130 Stat. 1033 (Dec. 13, 2016). <sup>4</sup> <https://www.fda.gov/media/97321/download>. <sup>5</sup> <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/policy-diagnostics-testing-laboratories-certified-perform-high-complexity-testing-under-clia-prior>.

<sup>6</sup> 21 U.S.C.S. § 360bbb-3(b)(1). <sup>7</sup> FD&C Act § 564(b)(1)(A); 21 U.S.C. S. § 360bbb-3(b)(1)(A). <sup>8</sup> FD&C Act § 564(b)(1)(B); 21 U.S.C.S. § 360bbb-3(b)(1)(B). <sup>9</sup> FD&C Act § 564(b)(1)(C), as amended by the PAHPRA; 21 U.S.C.S. § 360bbb-3(b)(1)(C). <sup>10</sup> FD&C Act § 564(b)(1)(D); 21 U.S.C.S. § 360bbb-3(b)(1)(D). <sup>11</sup> 2017 Guidance § III.B.1.a. <sup>12</sup> 2017 Guidance § III.B.1.b. <sup>13</sup> 2017 Guidance § III.B.1.c. <sup>14</sup> 2017 Guidance § III.B.1.d.

### Pre-EUA Activities and Submissions

Before applying for an EUA designation, a product sponsor should contact FDA. This will allow the sponsor to coordinate with FDA on appropriate clinical trials and the proper form for supplying data prior to a formal submission.

Submission of an Investigational New Drug Application (IND) or Investigational Device Exemption (IDE) is not required for potential EUA products. Sponsors submitting data, however, as part of pre-EUA activities should follow FDA recommendations for submitting pre-IND, IND, and device pre-submissions, as well as the recommendations in 2017 Guidance § III.C.

Early discussions with FDA allow sponsors to address the factors that FDA takes into account in prioritizing EUA requests.<sup>15</sup> These factors include:

- Seriousness and incidence of the disease
- Public health need for the product
- Urgency for the treatment need
- Availability and adequacy of information on safety and efficacy
- The potential role of the product in ensuring national security
- Whether the product is included in government stockpiles
- The extent of meeting a significant unmet medical need in particular subpopulations or stages of emergency response
- Whether the request is from or supported by a government stakeholder
- The availability of the product
- Whether other mechanisms, such as an IND or IDE, would be more appropriate (e.g., where there is little or no safety or efficacy data available)

### Requests for an EUA

Many formal requests are made by a government sponsor (e.g., an executive branch agency), although industry sponsors are free to make formal requests. Obtaining a government sponsor or supporter can be a key component in the attention given by FDA to a request. The actual authorization is a letter to the sponsor that includes a description of the product, its uses, contraindication, criteria for issuance, the scope of authorization, waiver of any requirements, and any conditions. The letter will also be issued with certain materials, for example, instructions for use and fact sheets.

2017 Guidance § III.D.2.a recommends that the following information be included in any request for an EUA:

- Description of product and its intended use
- Description of the product’s FDA approval status
- The need for the product, including whether there are adequate, approved, and available alternatives
- Safety and efficacy information:
  - Required safety information will vary by product and emergency. It can include, for example, controlled clinical trials, bench testing, and/or clinical experience if the circumstances warrant.<sup>16</sup>
  - Early discussions with FDA about the required safety and efficacy information are critical.
- A discussion of risks and benefits:
  - A discussion of risks and benefits should include: (a) measures taken to mitigate risk or optimize benefit; (b) limitations, uncertainty, and data gaps; (c) contraindications; and (d) actual and potential threats posed by CBRN agents that may be relevant.
- Information on chemistry, manufacturing and controls, and the sites of manufacture, including the current good manufacturing practices (CGMP) status of those sites
- Information on the quantity of product on-hand and surge manufacturing capabilities
- Information comparable to an FDA-approved package insert or instructions for use; drafts of fact sheets for healthcare professionals and recipients of the product; and a discussion of the feasibility of providing this information in an emergency (a sample of instructions for use for an EUA diagnostic panel for the coronavirus is available on FDA’s website)<sup>17</sup>
- Information to support an extension of a label’s expiration date, if sought
- Any right of reference (a right of reference means “the authority to rely upon, and otherwise use, data submitted from reports of an investigation or data previously submitted to FDA in support of an application, including the ability to make available the underlying raw data for FDA audit”)

A formal request to issue an EUA should generally not be submitted until there has been an EUA declaration. If required and if FDA has adequate information, FDA can issue an EUA within hours or days of a request. To facilitate a fast approval, sponsors should provide as much information to FDA as possible as part of its Pre-EUA Activities and Submissions.



### Waivers and Conditions of Authorization

FDA may waive certain requirements or impose conditions for an unapproved product or unapproved use.

FDA will waive requirements on a case by case basis.<sup>18</sup> These waivers can include:

- **CGMPs.** FDA will consider alternatives to ordinarily required compliance with CGMPs.
- **Prescription Requirements.** FDA will allow waivers to prescription requirements where, for example, the emergency requires large-scale administration outside of traditional healthcare settings, called points of dispensing. Note that emergency mass dispensing of FDA-approved products is allowed under certain conditions set forth in 2017 Guidance § IV.D.
- **Risk Evaluation and Mitigation Strategy (REMS).** REMS is a drug safety program for certain medications with serious safety concerns. If needed, FDA will waive REMS requirements.

FDA will impose conditions similar to conditions for approved products and uses. The following is a non-exhaustive list:

- **Notice to Healthcare Professionals.** FDA requires adequate notice to healthcare professionals and authorized dispensers that FDA has authorized the emergency use of, the benefits and risks, and available alternatives:
  - In practice, this is accomplished by including a fact sheet for healthcare professionals or authorized dispensers with the request for an EUA.

- The fact sheet should target the healthcare professional with the lowest level of training, generally be very brief, and contain no more than a few pages. If necessary, this information can be given through mass media, videos, or direct communication.<sup>19</sup>

- **Information for Recipients.** FDA does not require informed consent for administering or use of an EUA product.<sup>20</sup> But to meet FDA disclosure requirements, sponsors should include an additional fact sheet for patients:

- To the extent applicable, the fact sheet should specify that FDA has authorized the emergency use, benefits, and risks; the patient’s option to accept or refuse the product and consequences of refusing administration; and available alternatives.
- The fact sheet should also include the product name and an explanation of its intended use, a description of the disease or condition, a description of items to discuss with the patient’s healthcare provider, adverse event information, and dosing information and instructions.
- Like the health-care provider fact sheet, the information should be easily understood and may be communicated through mass media, videos, or direct communication. Translations into multiple languages may be needed.<sup>21</sup>
- **Monitoring and Reporting of Adverse Events.** Sponsors should provide proposals for data collection and follow-up for adverse events to FDA during pre-EUA interactions.

15. 2017 Guidance §§ III.C and III.D.4.a. 16. 2017 Guidance § III.D.2.b. 17. <https://www.fda.gov/media/134922/download>.

18. See FD&C Act § 564(e)(3); 21 U.S.C. S. § 360bbb-3(e)(3). 19. For an example of a healthcare provider fact sheet for the novel coronavirus, see <https://www.fda.gov/media/134920/download>. 20. See 21 C.F.R. pt. 50; 2017 Guidance § III.E.1.b. 21. For an example of a patient fact sheet for the novel coronavirus, see <https://www.fda.gov/media/134921/download>.



Given the fact that FDA’s resources will likely be relatively taxed during the health emergency, contacting the agency both early and often is recommended throughout the process.

Duration and Revision of an EUA

An EUA generally remains in effect for the duration of the related EUA declaration. The effective date will be specified in the EUA. FDA will periodically review EUAs and may revoke an EUA for a number of reasons, including the following:

- Justification for its issuance no longer exists
- Criteria for issuance are no longer met
- Revocation is needed to protect public health or safety (e.g., adverse manufacturing inspections, reports of adverse events, product failure, or product ineffectiveness)

Practice Tips on Submissions

Keep the following in mind for EUA submissions:

- References to previously submitted data (e.g., in an IDE or Drug Master File) should identify prior submissions by submission date, name, reference number, volume, and page number.
- Submissions with a cover letter may be provided in electronic format. If submitted by paper, sponsors should provide at least three hard copies.

- Because of the emergency nature of EUAs, product sponsors should contact FDA before submitting any materials for directions on format by emailing the appropriate center.

In addition to other submission requirements outlined in the 2017 Guidance, a message highlighting the urgency and including the cover letter and submission should be sent to [EUA.O CET@fda.hhs.gov](mailto:EUA.O CET@fda.hhs.gov), as well as the appropriate center, and any other contacts familiar with the submission.

Given the fact that FDA’s resources will likely be relatively taxed during the health emergency, contacting the agency both early and often is recommended throughout the process.

Contact information for each center can be found in the 2017 Guidance.

Import and Export Considerations

A medical product authorized for emergency use under an EUA may be legally imported and exported under FD&C Act § 801.<sup>22</sup> According to 2017 Guidance § VIII, the EUA letter of authorization is the appropriate documentation or certification to show that the product may be imported or exported.

Snapshot of Select EUAs

COVID-19

The HHS Secretary determined on February 4, 2020 that there is a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad, and that involves the virus, SARS-CoV-2, that causes the disease COVID-19. On March 4, 2020, the HHS Secretary also declared that there was justification to authorize emergency use of personal respiratory protective devices during the COVID-19 outbreak.

In the early stages of the coronavirus outbreak, FDA issued letters of EUA on February 4, February 29, and March 4, 2020 to allow for emergency uses of diagnostic panels and protective devices. FDA has issued a specific guidance for diagnostic tests that have not received EUA. The policy sets recommended limits of detection, standards for clinical evaluation in the absence of known positive samples, and reporting suggestions, among other things.

FDA has also provided a template for a COVID-19 EUA requests. The template, which practitioners should consult before preparing a request, is available on FDA’s website.<sup>23</sup>

Keep in mind that FDA’s website<sup>24</sup> contains historical letters of authorization, fact sheets, and instructions for use.

Practitioners should consult FDA’s website for the latest developments.

Enterovirus D68 (EV-D68)

In contrast to the response for COVID-19, the HHS Secretary issued a determination on Enterovirus D68 on February 6, 2015, but it was not until May 12, 2015 that FDA issued a letter of EUA. The slower time to issuance can be explained by the significantly lower scale of the Enterovirus D68 outbreak compared to SARS-CoV-2.

Zika

FDA issued its EUA determination on tests for detection of Zika Virus and/or diagnosis of Zika infections on February 26, 2016, the same day that it issued an EUA letter for the CDC’s Zika immunoglobulin M Antibody Capture Enzyme-Linked Immunosorbent Assay. Additional EUA letters issued in March, April, May, June, July, September, November, and December 2016, as well as August and September 2017.


As is frequently the case for emergency conditions lasting several years, the authorizations were amended multiple times.

23. <https://www.fda.gov/media/135900/download>. 24. <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization>. 25. <https://www.fda.gov/media/96355/download>. 26. <https://www.fda.gov/media/120190/download>. 27. <https://www.fda.gov/media/96373/download>.

Related Content

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For practical guidance on the coronavirus in a number of practice areas, see

> [CORONAVIRUS \(COVID-19\) RESOURCE KIT](#)

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Practitioners can review FDA’s template for Zika-related EUA submissions by contacting FDA at [CDRH-ZIKA-Templates@fda.hhs.gov](mailto:CDRH-ZIKA-Templates@fda.hhs.gov).

Examples of healthcare provider<sup>25</sup> and patient<sup>26</sup> fact sheets, as well instructions of use<sup>27</sup> are available on FDA’s website. 

***Chad Landmon** chairs Axinn’s Intellectual Property and Food and Drug Administration Practice Groups and focuses his practice on patent litigation and counseling and food and drug law, with an emphasis on pharmaceuticals, biologics, medical devices, and human tissue products. He maintains a particular focus on patent trial work, having served as a first chair trial lawyer on multiple cases and having litigated over 50 cases during the past 10 years alone, many of which have included products with billions of dollars in annual sales. **Drew Hillier** is an attorney at Axinn, Veltrop & Harkrider LLP. His experience includes representing manufacturers of pharmaceutical, biologic, and medical-device products in patent litigation, as well as related commercial and regulatory matters. Drew graduated first in his class from the University of Connecticut School of Law, where he was editor-in-chief of the law review. He clerked for U.S. District Judge Michael P. Shea in the District of Connecticut.*

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Jeffrey H. Ruzal and Carly Baratt EPSTEIN BECKER & GREEN, P.C.

# Telecommuting Employees: Best Practices Checklist

With the advent of sophisticated workplace information technology that allows employees to connect to a company's computer network from their homes with little more than a laptop and an internet hookup, telecommuting or teleworking has become a common phenomenon across various industries. Moreover, telecommuting and work-from-home arrangements are increasing exponentially during the novel coronavirus (COVID-19) pandemic as a way of protecting employees and customers from exposure. This checklist provides practical guidance on navigating the various legal and practical issues facing employers with respect to telecommuting, from responding to one-off employee requests to telework, to deploying a formal telecommuting policy, to devising a way to effectively train and monitor remote employees.

## Telecommuting as a Reasonable Accommodation under the Americans with Disabilities Act (ADA)

Carefully consider whether the employer is required to offer a telecommuting arrangement as a reasonable accommodation in accordance with the ADA.

### What Is a Reasonable Accommodation under the ADA?

The ADA prohibits discrimination against individuals with disabilities and guarantees that such individuals have the same opportunities as the rest of the general public. Title I of the ADA requires an employer to provide "reasonable accommodation" to qualified individuals with disabilities and creates a cause of action for failure to accommodate.<sup>1</sup>

In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.<sup>2</sup> In recent years, plaintiffs have argued that telecommuting is a reasonable accommodation within the meaning of the ADA.

### Assess Whether Telecommuting Is a Reasonable Accommodation

When assessing whether telecommuting is a reasonable accommodation, consider the following:

- ✓ **Official telework program is not needed.** Permitting an employee to telecommute can be a reasonable accommodation even if there is no official telework program.<sup>3</sup>
- ✓ **Disability causes substantial limitations.** Telecommuting may be required if an employee's disability causes substantial limitations on standing, sitting, etc., that interfere with commuting.
- ✓ **Assess on an individual, case-by-case basis.** Employers must assess requests to work at home on an individual, case-by-case basis by engaging in an "interactive process" with the at-issue employees. Employers should request and carefully review information from employees to decide whether they can perform all of the essential job functions outside the workplace.<sup>4</sup>

Before deciding, employers should assess the following factors:

- ✓ Can the employer adequately supervise the employee remotely?
- ✓ Do the employee's duties require access to equipment or tools that are not available outside the workplace?
- ✓ Is face-to-face interaction and coordination of work with other employees needed?
- ✓ Is in-person interaction with outside colleagues, clients, or customers necessary?<sup>5</sup>
- Does the employee need immediate access to documents or other information located only at work?<sup>6</sup>
- Are coworkers with similar roles and responsibilities allowed to telecommute?<sup>7</sup>
- ✓ Has the employee in question teleworked during core business hours in the past "without any attendance issues or decline in work product"? <sup>8</sup>
- ✓ Does an accurate, up-to-date job description list in-person presence as an essential function?<sup>9</sup>

Remember, even if the employer concludes that some job duties must be performed on-site, the employer must still consider whether the employee can work part-time at home and part-time in the workplace.

## Telecommuting Issues under the Fair Labor Standards Act (FLSA)

### FLSA Overview

At its core, the Fair Labor Standards Act (FLSA)<sup>10</sup> requires employers to pay nonexempt employees (1) at least minimum wage for all work performed and (2) at least one-half times an employee's regular rate of pay for hours worked over 40 in a week (i.e., "overtime hours"). Complicating matters, the FLSA requires an employer to compensate an employee not only for work that the employee has expressly directed, but also for work not requested but "suffered or permitted" to be performed.<sup>11</sup>

This includes situations where an employee works overtime without permission but the employer "knows or has reason to believe" the employee is continuing to work.<sup>12</sup>

Telecommuting is often viewed as problematic because it can be difficult for an employer to monitor telecommuters' hours when they are working off-site. But, FLSA compliance and telecommuting arrangements are not mutually exclusive.



<sup>5</sup> See *Hall v. Verizon N.Y.*, 2017 U.S. Dist. LEXIS 122729, at \*12-13 (S.D.N.Y. July 26, 2017) (finding physical presence of employee was essential function of job where employee conceded that she attended regular, in-person client meetings). <sup>6</sup> See, e.g., *Samperv. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1238-39 (9th Cir. 2012) (neonatal nurse who provided direct patient care); *E.E.O.C. v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 949 (7th Cir. 2001) (forklift operator); *Hypesv. First Commerce Corp.*, 134 F.3d 721, 726 (5th Cir. 1998) (loan review analyst who used confidential documents that could not leave the office); *Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 213 (4th Cir. 1994) (teacher). <sup>7</sup> See, e.g., 29 C.F.R. § 1630.2(n)(3)(vi) ("Evidence of whether a particular function is essential includes . . . [t]he work experience of past incumbents in the job . . ."); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 774 (6th Cir. 2015) ("[T]he telecommuting arrangements of other resale buyers undercut Ford's claim that, at any given moment, resale buyers must engage in spur of the moment, face-to-face troubleshooting in order to perform their jobs effectively."). <sup>8</sup> *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 605 (6th Cir. 2018). <sup>9</sup> 29 C.F.R. § 1630.2(n)(3)(iii) ("Evidence of whether a particular function is essential includes . . . [w]ritten job descriptions[.]"). <sup>10</sup> 29 U.S.C.S. § 201 et seq. <sup>11</sup> See U.S. Department of Labor Wage and Hour Division Fact Sheet #22 (July 2008). <sup>12</sup> 29 C.F.R. § 785.11.



Mitigate Risk of Off-the-Clock and Overtime Claims

To mitigate the risk of teleworker off-the-clock and overtime claims, employers should consider taking the following steps:

- ✓ **Use software that can accurately record and submit hours remotely.** Direct teleworkers to use software that allows them to accurately record and submit their hours remotely. There are a number of easy-to-use timekeeping smartphone applications. Some are even free. In addition, require teleworkers to agree in writing that they will use the firm-recommended software to document time spent working.
- ✓ **Create a written policy.** Adopt a written policy requiring all workers, including teleworkers, to record all hours worked contemporaneously.
- ✓ **Adopt a written policy prohibiting unauthorized overtime.** Adopt a written policy prohibiting unauthorized overtime, strictly monitor for compliance with that policy, and impose discipline for any violations. While an employer may still have to pay overtime upon an employee's first infraction, if the employee continues to work overtime following discipline, the employer can credibly argue that it did not "suffer or permit" the work.
- ✓ **Assume commute time by teleworkers is not normal travel time.** Assume that any commute time by teleworkers (i.e., to work in person for a meeting or otherwise) is not normal travel from home to work and compensate teleworkers for such time. To reduce costs, employers can try to limit the occasions when a teleworker is required to come to the office.

Immigration Reform and Control Act (IRCA) Compliance

ICRA Overview

Congress enacted Immigration Reform and Control Act (IRCA)<sup>13</sup> in 1986 to prevent unauthorized employment of foreign workers by requiring U.S. employers to verify their U.S. workforce. Specifically, IRCA requires employers to complete the Form I-9 verification process for all new hires to confirm their valid U.S. work authorization as citizens, U.S. permanent residents, asylees, or work-authorized foreign nationals. This process involves new hires presenting their employers with specific types of required original documentation evidencing their U.S. legal work authorization and identity and completing their section of the Form I-9 on or before their first day of hire. The employer must thereafter complete the verification section of the Form I-9 within three business days of the employment start date to confirm the validity of the documents presented.<sup>14</sup>

Consider Immigration Violation Risks When Hiring Teleworkers without First Meeting

Although an employer could feasibly hire a teleworker without first meeting him or her in person by having an off-site authorized representative complete the verification of original documents presented by the employer for completing the Form I-9 verification process, keep in mind that there are certain risks inherent in this approach, including:

- ✓ **Improper completion of Form I-9.** Employers are still liable for any violations resulting from the improper completion of the Form I-9s by off-site authorized representatives.<sup>15</sup>
- ✓ **High civil penalties.** If found liable, civil penalties can number in the hundreds to thousands of dollars per each Form I-9 violation.
- ✓ **Unwarranted security by federal authorities if violations are found.** A systematic pattern of Form I-9 violations can also bring unwanted scrutiny and targeting by federal authorities that could lead to more serious charges and fines.



13. 8 U.S.C.S. § 1101 et seq. 14. See U.S. Citizenship and Immigration Services (USCIS) M-274 I-9 Handbook at § 4.0 for details. 15. See U.S. Citizenship and Immigration Services (USCIS) M-274 I-9 Handbook at § 4.0.

Health and Safety Issues

OSHA Overview

The Occupational Safety and Health Act of 1970 (OSHA),<sup>16</sup> which was passed to assure U.S. employees safe and healthful working conditions, applies to every private employer who has any employees doing work in a workplace in the United States. Covered employers must provide a workplace free from recognized, serious hazards, record work-related injuries and illnesses, and comply with OSHA standards and regulations.

While home offices are workplaces covered by OSHA, the U.S. Department of Labor has advised that it:

- ✓ Will not conduct inspections of employees' home offices
- ✓ Does not expect employers to conduct such inspections
- ✓ Will not hold employers liable for employees' home offices<sup>17</sup>

If OSHA receives a complaint about a home office, it will inform the employee of OSHA's policy and, only upon request, will informally apprise an employer of a complaint regarding the conditions of a home office.<sup>18</sup> The only exception to this "hands-off" policy is for home-based worksites where more than standard clerical office work is performed, such as home manufacturing operations.<sup>19</sup>

Promote Safe Working Conditions for Teleworkers

Although OSHA does not require employers to ensure that their teleworkers' home offices are safe and healthful, there are benefits to promoting safe working conditions for teleworkers, including:

- ✓ **Required to record any work-related injuries and illnesses of telecommuting employees.** Employers may be required (due to size or industry classification) to record any work-related injuries and illnesses experienced by telecommuting employees. In the context of teleworkers, an injury is work-related "if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting."<sup>20</sup>
- ✓ **Liable for any devices or electronic platforms used by teleworkers.** Employers could be held liable for any devices or electronic platforms provided to employees to facilitate telecommuting.<sup>21</sup>
- ✓ **Workers' compensation could cover injuries.** Workers' compensation could cover injuries incurred at a home office during the course and scope of employment.

For these reasons, consider issuing employees safety checklists and/or tips that address the following topics:

- ✓ Fire safety (working smoke detector in area, access to unobstructed exits, etc.)
- ✓ Electrical safety (e.g., use of surge protectors, proper extension cords, and power strips)
- ✓ Workstation design and arrangement (ergonomics)
- ✓ Emergency procedures (access to first aid kit and evacuation plan)



16. 29 U.S.C.S. § 651 et seq. 17. See OSHA Instruction, Directive Number CPL 2-0.125, "Home-Based Worksites" (Feb. 25, 2000). 18. Id. 19. Id. 20. U.S. Department of Labor, OSHA Standard Interpretations, "Determining work-relatedness for injuries in the home when telecommuting" (Mar. 30, 2009). 21. See U.S. Department of Labor, OSHA Instruction, "Home-Based Worksites," Directive No. CPL 2-0.125 (February 25, 2000). ("Employers are responsible in home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home.")

Telecommuting Policies

If an employer decides to offer telecommuting arrangements, it should prepare and disseminate a telecommuting policy and/or guidelines to ensure consistency amongst employees who participate in such arrangements. Every employee authorized to participate in a telecommuting arrangement should also sign a telecommuting agreement.

Draft a Telecommuting Policy

A model telecommuting policy should:

- ✓ Describe the process for requesting a telecommuting arrangement, including identifying the relevant decision maker(s)
- ✓ Explain any eligibility criteria, such as performance expectations and prior length of employment
- ✓ Clearly state the company’s expectations (substantive and ministerial) for telecommuters (e.g., the telecommuter must perform all duties of his or her current role in a manner satisfactory to his or her manager; be available during the company’s regular hours (and define those hours); keep their home workspace in a clean, professional, and safe condition; comply with the company’s timekeeping, overtime, and paid time off policies and procedures; record all time worked in the manner directed by the company; etc.)
- ✓ Detail what telecommuting expenses will be reimbursed and how (most typical are telephone charges, internet service, and office supplies)
- ✓ State that management will regularly revisit the telecommuting arrangement to determine whether it continues to be appropriate and effective

Create a Model Telecommuting Arrangement

A model telecommuting arrangement should identify the following information:

- ✓ The telecommuter’s alternative workplaces
- ✓ The number of hours the employee is expected to work at the alternative workplace and the specific hours the employee will keep
- ✓ Any special equipment needed
- ✓ The proposed start and end dates of the arrangement

Related Content

For an overview of practical guidance on the novel coronavirus (COVID-19) covered in many practice area offerings in Lexis Practice Advisor, including Labor & Employment, see

> CORONAVIRUS (COVID-19) RESOURCE KIT

RESEARCH PATH: Labor & Employment > Workplace Safety and Health > Occupational Safety and Health Act > Practice Notes

For advice on dealing with coronavirus in the workplace, see

> 9 CORONAVIRUS SCENARIOS THAT COULD TRIP UP EMPLOYERS

RESEARCH PATH: Labor & Employment > Trends & Insights > Articles

For an overview of OSHA, see

> OSH ACT REQUIREMENTS, INSPECTIONS, CITATIONS, AND DEFENSES

RESEARCH PATH: Labor & Employment > Workplace Safety and Health > Occupational Safety and Health Act > Practice Notes

For practical guidance on reasonable accommodation under the ADA, see

> AMERICANS WITH DISABILITIES ACT: GUIDANCE FOR EMPLOYERS

RESEARCH PATH: Labor & Employment > Discrimination, Harassment, and Retaliation > EEO Laws and Protections > Practice Notes

The telecommuting arrangement should include a certification that the telecommuter has reviewed, understands, and agrees to follow the telecommuting guidelines, as well as all company policies and procedures, including, but not limited to the following:

- ✓ **The telecommuter will remain an at-will employee.** The telecommuter will remain an at-will employee during the term of this Agreement, and the Agreement in no way creates either an express or implied employment contract for any particular period.
- ✓ **The telecommuter’s job responsibilities will not change.** The telecommuter’s job responsibilities will not change due to the telecommuting arrangement, except as may be specifically outlined and approved in his/her Agreement.
- ✓ **The telecommuter will continue to be subject to all company policies.** The telecommuter will continue to be subject to all company policies and procedures during the term of the Agreement.
- ✓ **The telecommuter’s work location is free from hazards.**
- ✓ **The telecommuter will maintain safe working conditions.** The telecommuter will maintain safe working conditions and practice appropriate safety habits.
- ✓ **The terms of the Agreement may be revised by the company at its discretion at any time during the term of the Agreement.**
- ✓ **The Agreement is voluntary and does not create an entitlement to a continued telecommuting arrangement.** If the Agreement is terminated, the company will generally provide reasonable advance written notice to the telecommuter to give the telecommuter time to transition back to the primary workplace.
- ✓ **The agreement to enter into a telecommuting arrangement is understood to be a benefit available to qualifying employees.** It is not a right owed to any employees, nor an obligation owed by the company.

Workplace Posters

Various federal and state labor laws require employers to post posters notices and advising workers of particular laws and regulations in the workplace, in conspicuous locations where they are easily visible to all employees. These requirements extend to remote workers too.

To ensure teleworkers view these posters, employers should:

- ✓ Electronically post the posters to the company intranet
- ✓ Physically mail the teleworker their own set of posters
  - **Out-of-state teleworkers.** For out-of-state teleworkers, employers should be sure to ment of predefined goals rather than with software showing when employees are logged in or off the network, which may foster distrust by teleworkers.

Maintaining physical paper copies of posters at the office is likely only sufficient if the teleworker visits the office frequently.





### Information Security

Employers with remote workers need to be mindful of data security, which can be compromised by risky behavior by remote workers, including their failure to follow company procedures.

To mitigate security risk, employers should consider memorializing the following instructions and requirements as part, or an addendum to, its telecommuting policy:

- ✓ Make sure that all devices owned by the teleworker are data encrypted.
- ✓ Require teleworkers to use a secure connection while remotely accessing company data.
- ✓ Reiterate instructions around confidentiality.
- ✓ Instruct teleworkers never to use their personal email address for work communications.
- ✓ Prohibit teleworkers from working over public Wi-Fi (or, at a minimum, from sending or accessing sensitive information over public Wi-Fi).
- ✓ Have workers save data on a central file database rather than locally on their laptops.
- ✓ Train employees to identify suspicious email files and to bring these to management's attention.
- ✓ At the start of any teleworker arrangement, itemize all company equipment issued to the teleworker and ensure that all such equipment is promptly returned upon the conclusion of the arrangement and/or the employee's separation from the company.

### Training and Monitoring Telecommuting Employees

Employers often express concern over how to manage, train, and supervise telecommuters. However, modern technology can often allay these concerns.

Employers can use technology to stay in close contact with their teleworkers by:

- ✓ Establishing daily or weekly check-ins using video and screen-sharing technology, where the team can discuss ongoing and upcoming projects
- ✓ Supplementing this daily/weekly contact with a persistent chat open to all members of the team

To ensure teleworkers meet performance expectations, employers should adopt the following measures:

- ✓ **Establish clear performance objectives.** Action plans with specific timetables are particularly useful in this regard.
- ✓ **Track productivity by achievement of predefined goals.** Track productivity by achievement of predefined goals rather than with software showing when employees are logged in or off the network, which may foster distrust by teleworkers.
- ✓ **Schedule quarterly check-ins with individual telecommuters.** Schedule quarterly check-ins with individual telecommuters to discuss performance, as well as any issues the employee may be experiencing as a function of working remotely.
  - **Keep in mind.** While such attempts to monitor productivity are entirely lawful, employers should take care not to impose higher work standards on teleworkers. For example, teleworkers should not be expected to work longer hours than their peers merely because they are working from home.



### E-signatures

Because teleworkers by definition do not regularly report to a physical office, it can be difficult for employers to ensure that they complete and return—in a timely manner—physical agreements and other documents that require traditional physical or “wet” signatures, particularly if the teleworker does not have access to a scanner or fax. Allowing teleworkers to sign and transmit such documents electronically can prove much more convenient and potentially more secure.

Before an employer decides to allow certain documents to be e-signed, it should consider the following key factors:


- ✓ **Enforceability.** Any benefit gained by allowing a teleworker to e-sign (e.g., a contract) is obviously lost if the signature is not subsequently enforceable in a court of law. Accordingly, employers must determine whether e-signatures are accepted in the jurisdiction in which they are transacting and if so, whether the document type in question can be e-signed.
  - **Federal law.** With the passage of the federal Electronic Signatures in Global and National Commerce Act in 2000 (the E-Sign Act),<sup>22</sup> the use of a digital signature in the United States is as legally valid as a traditional written signature, subject to a few exceptions, such as court orders or notices, official court documents, and the cancellation or termination of health insurance or benefits or life insurance benefits.
  - **State law.** The E-Sign Act does not preclude states from limiting the use and effectiveness of e-signatures provided certain prerequisites are met. Most states, including New York, Massachusetts, New Jersey, and California, as well as Washington, D.C., have adopted local versions of the E-Sign Act, though some prohibit the use of electronic documents for all documents. For example, New York prohibits the use of electronic signatures on, inter alia, wills, trusts, and powers of attorney and health-care proxies (except for contractual beneficiary designations). In addition, courts in certain jurisdictions have refused to enforce employee agreements when the authenticity of the signature could not be established by the employer.<sup>23</sup>
- ✓ **Best practice.** As a best practice, employers should put their e-signature policy in writing in a widely disseminated and available document, such as an employee handbook. In addition, documents with electronic signatures should ideally include before the e-signature an employee affirmation like the following: “By providing my electronic signature credentials and selecting the submit button below, I accept the terms and conditions herein. I understand that this electronic signature is as legally binding as if physically signed by me in writing. No certification authority or other third-party verification is necessary to validate my electronic signature.”
- ✓ **Risk prevention.** Although a wet signature could theoretically be forged, generally, e-signatures present greater risk for fraud than wet signatures. Therefore, employers are well advised to adopt controls to ensure that e-signatures are authentic. Common controls include requiring an individual to enter a password unique to the signatory, inputting a code sent by text message or email to the signatory, or answering a predetermined security question. These same measures also serve to authentic an employee's signature. Several companies, such as DocuSign, offer e-signing tools that allow employers to upload documents, set signature locations, send documents via email, and prompt recipients to e-sign.



<sup>22</sup> 15 U.S.C.S. § 7001 et seq., <sup>23</sup> See, e.g., Ruiz v. Moss Bros. Auto Group, Inc., 232 Cal. App. 4th 836, 843–44 (2014) (where plaintiff testified that he could not recall e-signing the agreement in question, the fact that the agreement purportedly bore his electronic signature and a date and time stamp did not establish that the signature was in fact his).

Additional Telecommuting Best Practices

To ensure that telecommuting aids employers and their teleworker(s), employers should adopt the following additional best practices:


- ✓ **Assess technology.** Assess technology on an annual basis to make sure that teleworkers are appropriately supported and connected.
- ✓ **Determine whether to disclose telecommuting arrangements to clients.** Consider any obligations to disclose teleworking arrangements to clients.
- ✓ **When terminating a telecommuting arrangement, consider legal consequences.** If planning to terminate a telecommuting arrangement, make sure to consider the legal consequences first and save all records surrounding the decision making.
- ✓ **Remember to include teleworkers in promotions and raises.** Do not overlook teleworkers for promotions and raises or otherwise treat teleworkers differently than employees who are physically present at the office.
- ✓ **Instruct managers not to regularly communicate with nonexempt teleworkers.** Instruct managers not to regularly communicate with nonexempt teleworkers who may be inclined to respond immediately, thereby creating potential FLSA compliance issues if not compensated for such work.
- ✓ **Train managers on working with teleworkers.** Train managers on how to successfully manage an employee transitioning from working at the office to working remotely.
- ✓ **Comply with payroll laws.** Make sure the company complies with payroll laws, which typically depend on the employee's location, not where the employer's office is located.
- ✓ **When telecommuting arrangement ends, collect all company equipment, data, and documents.** After a telecommuter's employment ends, remember to collect all equipment, data, and documents in the telecommuter's possession. 

**Jeffrey H. Ruzal** is a member of Epstein Becker Green's Employment, Labor & Workforce Management practice. He leads the firm's hospitality service team and represents clients in such diverse industries as hospitality, financial services, retail, health care, and technology. Mr. Ruzal advises employers in all aspects of the employment relationship, from pre-employment and hiring to terminations and post-employment restrictions; provides regulatory advice and conducts labor and employment due diligence in connection with significant M&A deals; conducts audits of employers' policies and procedures to determine compliance with applicable federal, state, and local laws; and counsels employers with respect to federal and state wage and hour compliance, including exempt employee and independent contractor classification audits, compensation reviews, and non-exempt recordkeeping practices. **Carly Baratt** is an associate in the Employment, Labor & Workforce Management and Litigation & Business Disputes practices, in the New York office of Epstein Becker Green. She represents clients in employment-related litigation on a broad array of matters, including claims of discrimination, harassment, retaliation, wrongful termination, and breach of employment contract.

Related Content

For federal workplace notice and posting requirements, see

> [WORKPLACE NOTICE AND POSTING REQUIREMENTS CHART \(FEDERAL\)](#)

 **RESEARCH PATH:** Labor & Employment > Screening and Hiring > Hiring and Onboarding > Practice Notes

For more information on state laws prohibiting disability discrimination and/or requiring reasonable accommodations, see

> [DISCRIMINATION, HARASSMENT, AND RETALIATION STATE PRACTICE NOTES CHART](#)

 **RESEARCH PATH:** Labor & Employment > State Law Surveys and Content Guides > State Law Content Guides > Practice Notes


For more information on state wage and hour laws, see


> [WAGE AND HOURS STATE PRACTICE NOTES CHART](#)

 **RESEARCH PATH:** Labor & Employment > Wage and Hour > Statutory Requirements and Exemptions > Practice Notes

For practical guidance on Form I-9 compliance, see

> [I-9 POLICIES AND BEST PRACTICES FOR I-9 COMPLIANCE](#)

 **RESEARCH PATH:** Labor & Employment > Screening and Hiring > Hiring and Onboarding > Practice Notes

 **RESEARCH PATH:** [Labor and Employment > Employment Policies > Terms of Employment > Checklist](#)



Joseph D. Guarino DLA PIPER LLP

# Telecommuting Policies: Key Drafting Tips

Telecommuting and work-from-home arrangements are increasing exponentially during the novel coronavirus (COVID-19) pandemic as a way of protecting employees and customers from exposure. In addition, telecommuting arrangements help attract and retain employees, create a professional atmosphere supportive of employees reaching their full potential, and meet the needs of a 24-hour global marketplace.

However, allowing employees to work remotely or from home is not always possible or beneficial for the employer. Telecommuting may not be feasible for certain jobs, such as those in the service industry. And, even if feasible, some employees will take advantage of the arrangement because working outside of the office setting may diminish the employer's control and the employee's accountability.

Any well-written telecommuting policy should include the following:

- ✓ Which positions are eligible for telecommuting
- ✓ How to request a telecommuting arrangement
- ✓ Any restrictions on telecommuting, for instance, if the employer only allows telecommuting a few days each week
- ✓ A clear statement that employees who telecommute continue to be responsible for complying with all employer policies and procedures

Additionally, employers should consider entering into a stand-alone telecommuting agreement with employees for whom the employer has approved telecommuting arrangements. This agreement may detail any specifics of the telecommuting arrangement (e.g., hours of work, how non-exempt employees will record time, communication with the employee's supervisor, company equipment, etc.) and include a disclaimer that the employer may withdraw permission to telecommute at any time.





Sample Language for Telecommuting Policy with Drafting Notes

Telecommuting Policy

[Company] may allow [full-time] employees to telecommute (i.e., work remotely or work from home). All requests to telecommute should be in writing and submitted to your supervisor and the Human Resources Department. All telecommuting arrangements must be approved in advance by [Company]. Permission to telecommute is at [Company's] discretion and can be withdrawn at any time.

Employees permitted to telecommute will be required to sign a written telecommuting agreement that, among other things, describes the agreed-upon hours of work, how hours will be recorded, communications with your supervisor, when (if at all) you will be required to report to [Company's] offices, equipment issued to you, the security of any [Company] equipment issued to you, and technological support. In addition, employees permitted to telecommute must continue to abide by all employment policies, including those found in this Handbook. Failure to follow this agreement or these policies may result in discipline (up to and including the termination of your employment) and/or the termination of the telecommuting arrangement.

**Drafting Note:**  
You should advise employers to enter into a stand-alone telecommuting agreement with employees for whom the employer has approved telecommuting arrangements. This agreement should detail any specifics of the telecommuting arrangement and include a disclaimer that the employer may withdraw permission to telecommute at any time.

This policy applies to employees permitted to telecommute on a regular basis. This policy does not apply to requests for reasonable accommodation or occasional work-from-home arrangements such as in instances of inclement weather. Employees requesting to telecommute as a reasonable accommodation should follow [Company's] procedures on requests for reasonable accommodation.

**Drafting Note:**  
Working outside of the office setting may diminish the employer's control and the employee's accountability. Because some employees will take advantage of the arrangement, the policy should include a clear statement that employees who telecommute continue to be responsible for complying with all employer policies and procedures.

If you have any questions regarding this policy or if you have questions about telecommuting that this policy does not address, please contact the Human Resources Department.

**Drafting Note:**  
For information on reasonable accommodations, see Disability and Reasonable Accommodation Policies: Key Drafting Tips and Americans with Disabilities Act: Guidance for Employers.

*Joseph D. Guarino is a partner at DLA Piper. His practice emphasizes the representation of management and employers in labor and employment matters, including both preventive counseling and litigation. His clients have a national and worldwide presence and primarily conduct business in the healthcare, dietary supplement, transportation, retail, and financial services industries. He regularly advises clients on layoffs, terminations, disability accommodations, hiring and firing, medical leaves, policies and procedures, wage and hour issues, employee theft, workplace investigations, employment agreements, and background checks. On the litigation side, he has litigated every type of employment dispute, including FLSA class actions and representative hearings before the National Labor Relations Board.*



Neil Aragon, Sean Craig, and Patricia Tyler  
LEXIS PRACTICE ADVISOR TAX TEAM

Coronavirus Tax Relief

This article discusses action taken by Congress and the IRS to provide coronavirus tax relief, including H.R. 6201 and high deductible health plan guidance. Also included is a discussion of the I.R.C. § 139 tax benefits and the potential tax filing extension.

Families First Coronavirus Response Act (H.R. 6201)

On March 14, 2020, House lawmakers passed emergency legislation titled the Families First Coronavirus Response Act (the Act) to provide support to American families impacted by the novel coronavirus (COVID-19), including a new tax credit for employers who provide emergency paid sick leave for their workers. On March 16, 2020, a House Resolution was submitted making corrections to the House Bill. On March 18, 2020, the Act was passed by the Senate and signed by the President. The following is a detailed analysis of the tax related provisions in the Act.

Tax Credit for Employers Providing Paid Sick Leave

Section 7001(a) of the Act establishes a refundable tax credit for employers equal to 100% of qualified paid sick leave wages required to be paid by the Emergency Paid Sick Leave Act, set forth in Division E of the Act (the EPSL Act), that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by I.R.C. § 3111(a), which is the employer portion of Social Security taxes, or I.R.C. § 3221(a), which is the employer portion of the railroad retirement tax.

Note the multiple limitations on the amount of the credit.<sup>1</sup> Generally, the amount of wages that are eligible for this credit are limited to \$200 per day.<sup>2</sup> However, the daily wage limit can be as high as \$511 if the employee was:

- Subject to a Federal, state, or local quarantine or isolation order related to the coronavirus



- Advised by a health care provider to self-quarantine due to concerns related to the coronavirus
- Was experiencing symptoms of the coronavirus and seeking a medical diagnosis

In addition to the limit on the amount of daily wages which are eligible for the credit, there are limits to the number of days for which the credit may be awarded to the excess, if any, of:

- 10, over
- The aggregate number of days taken into account for all preceding calendar quarters<sup>3</sup>

1. H.R. 6201, § 7001(b). 2. H.R. 6201, § 7001(b)(1). 3. H.R. 6201, § 7001(b)(2).



Any excess in the amount of the credit is treated as an overpayment that will be refunded pursuant to I.R.C. §§ 6402(a) and 6413(b). The amount of the credit is increased for any amounts paid by the employer to maintain health insurance benefits for employees if such amounts are allocable to qualified sick leave wages.<sup>4</sup> The task of determining the proper means of allocation was delegated to the Treasury Secretary, but a pro rata allocation among covered employees and the periods of coverage shall be deemed as properly made.<sup>5</sup>

Qualified sick leave wages are wages<sup>6</sup> and compensation<sup>7</sup> paid by an employer which are required to be paid by reason of the EPSL Act.<sup>8</sup>

Employers are prohibited from deriving double benefits with these credits. Specifically, the credit established by the Act may not be combined with the credit available under I.R.C. § 45S.<sup>9</sup> Also, the employer must take any credit amounts into gross income for the taxable year claimed.

**Tax Credit for Self-Employed Individuals Requiring Sick Leave**

To compliment the credit for employers in Section 7001, the Act provides for a refundable tax credit for self-employed individuals equal to 100% of a qualified sick leave equivalent amount for eligible self-employed individuals.<sup>10</sup> The self-employed individuals who qualify for the credit are those who must:

- Self-isolate
- Obtain a diagnosis –or–
- comply with a self-isolation recommendation with respect to coronavirus

For eligible self-employed individuals caring for a family member or for a child whose school or place of care has been closed due to coronavirus, a refundable tax credit is provided equal to 67% of a qualified sick leave equivalent amount.<sup>11</sup>

The first step in determining if a taxpayer is entitled to this credit is to determine if they are an eligible self-employed individual. An eligible self-employed individual is an individual who:

1. Regularly carries on any trade or business within the meaning of I.R.C. § 1402 –and–
2. Would be entitled to receive paid leave during the taxable year pursuant to the EPSL Act if the individual were an employee of an employer (other than himself or herself).<sup>12</sup>

The next step in the analysis is to determine the amount of qualified sick leave equivalent the eligible self-employed



individual is entitled to claim. Qualified sick leave equivalent is an amount equal to the number of days for which the eligible self-employed individual was unable to perform their trade or business multiplied by the lesser of:

- \$200 –or–
- 67% for those eligible self-employed individuals who were caring for another family member (or 100% of an increased amount of \$511 per day for eligible self-employed individuals who sick or quarantined themselves) of the average self-employment income for the year.<sup>13</sup>

Average self-employment income is an amount equal to:

- The net earnings from self-employment of the individual for the taxable year, divided by
- 260.<sup>14</sup>

Similar to the credit for employers, any excess credits for self-employed individuals are also refundable to the taxpayer. Additionally, there are similar rules that prevent the taxpayer from deriving any inappropriate double benefits.<sup>15</sup>

In both H.R. 6201, §§ 7001 and 7002, the Act empowers the Treasury Secretary to promulgate rules as necessary to carry out the purpose of the Act.

**Payroll Credit for Required Paid Family Leave**

Under the Act, employers are allowed, for each calendar quarter, a credit against the payroll taxes imposed by I.R.C. §§ 3111(a) or 3221(a) in an amount equal to 100% of the qualified family leave wages paid by the employer for such calendar year.<sup>16</sup>

Note that the amount of qualified family leave wages taken into account for the credit for any individual is subject to limitations. The amount of qualified family leave wages for any individual cannot exceed the following:

- \$200 for any day or portion of a day for which the individual is paid qualified family leave wages
- A total of \$10,000 for all calendar quarters

President Trump declared the coronavirus a national emergency on March 13, 2020, to authorize aid to state and local governments and to waive regulations that hinder access to health care. This declaration makes the coronavirus a qualified disaster.

In addition, the credit for any calendar year cannot exceed the payroll taxes paid by the employer for that calendar year, reduced by certain allowable credits, on the wages paid with respect to the employment of all the employer’s employees. If the credit exceeds the limit for any calendar quarter, the excess is treated as an overpayment and will be refunded.

Certain health plan expenses of an employer also qualify for the required family leave credit. The amount of the credit is increased by so much of an employer’s qualified health plan expenses that are properly allocable to the qualified family leave wages for which the credit is so allowed. Qualified health plan expenses are amounts paid or incurred by the employer to provide and maintain a group health plan, but only to the extent that such amounts are excluded from the gross income of employees as employer contributions to accident or health plans.

Be aware that the Act prevents a double benefit to employers. Also, an employer can elect for the credit not to apply. Note that the credit does not apply to the employees of:

- The U.S. government
- Any state government or a political subdivision of the state, or any agency –or–
- Any instrumentality of the federal government or any state or political subdivision thereof as an employer

The Treasury Secretary or the Secretary’s delegate is authorized to issue regulations or other guidance on the credit.

Note that the application of the required family leave credit is temporary. The credit applies only to wages paid for the period beginning on a date selected by the Secretary of the Treasury or the Secretary’s delegate which is during the 15-day period that starts on the date that the Act is enacted and ending on December 31, 2020.

The Act provides for the transfer of funds to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund and the Social Security Equivalent Benefit Account of amounts equal to the reduction in revenues to the Treasury because of required family leave credit.

**Credit for Family Leave for Certain Self-Employed Individuals**

As mentioned, the Act provides a family leave credit for certain self-employed individuals. An eligible self-employed individual, for any taxable year, is allowed a credit against income taxes in an amount equal to 100% of the qualified family leave equivalent amount with respect to the individual. An eligible self-employed individual is an individual who regularly carries on any self-employed trade or business and who would be entitled to receive paid leave during the taxable year pursuant to the Emergency Family and Medical Leave Expansion Act if the individual were an employer, other than himself or herself. Provisions of the Act define the terms qualified family leave equivalent amount and average daily self-employment income for purposes of the credit. The Act provides that the credit will be treated as a credit allowed to the taxpayer as a refundable credit under the Internal Revenue Code.

Note that to qualify for the credit, a self-employed individual must provide certain documentation establishing such individual as an eligible self-employed individual. Also, provisions of the Act are aimed at preventing a double benefit to an individual who receives wages and compensation paid by an employer that are required to be paid by reason of the Emergency Family and Medical Leave Expansion Act.

Be aware that the application of the credit for family leave for self-employed individuals is temporary. The Act provides that only days occurring during the period starting on a date selected by the Treasury Secretary or the Secretary’s delegate that is during the 15-day period beginning on the date of that the Act was enacted and ending on December 31, 2020, may be taken into account in applying the credit.

The credit will only apply in certain U.S. possessions. If a U.S. possession has a mirror code tax system, the Secretary or the Treasury’s delegate will pay to such U.S. possession amounts equal to the loss (if any) to the possession by reason of the application of the credit. If a U.S. possession does not have a mirror code tax system, the Secretary or Secretary’s delegate will pay to each such possession amounts estimated by the Secretary or Secretary’s delegate as being equal to the aggregate benefits (if any) that would have been provided to

4. H.R. 6201, § 7001(d)(1). 5. H.R. 6201, § 7001(d)(3). 6. As defined in I.R.C. § 3121(a). 7. As defined in I.R.C. § 3231(e). 8. H.R. 6201, § 7001(c). 9. H.R. 6201, § 7001(e). 10. H.R. 6201, § 7002(a). 11. H.R. 6201, § 7002(c)(1)(B)(ii). 12. H.R. 6201, § 7002(b). 13. H.R. 6201, § 7002(c). 14. H.R. 6201, § 7002(c)(2). 15. H.R. 6201, § 7002(d)(3). 16. H.R. 6201, § 7003.



such possession’s residents by reason of the Act’s provisions if a mirror code tax system had been in effect in the possession.

In addition, the Act gives the Treasury Secretary or the Secretary’s delegate authority to prescribe regulations or other guidance necessary to carry out the purposes of the credit.

**Special Rule Related to Tax on Employers**

If the employer makes payments required by the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, these payments are not considered wages under I.R.C. § 3111(a), which pertains to social security taxes paid by employers. Note that these required payments are not considered compensation for purposes of I.R.C. § 3221(a), which pertains to the Tier 1 excise tax paid on the applicable percentage of compensation paid to employees.<sup>17</sup>

Employees should be aware that the payroll credit for required paid sick leave and the payroll credit for required paid family leave will each be increased by the amount of tax imposed by I.R.C. § 3111(b), which pertains to the employee excise tax for Medicare, on qualified sick leave wages, or qualified family leave wages, for which one of the above credits is allowed.<sup>18</sup>

**Utilizing I.R.C. § 139**

President Trump declared the coronavirus a national emergency on March 13, 2020 to authorize aid to state and local governments and to waive regulations that hinder access to health care. This declaration makes the coronavirus a qualified disaster.<sup>19</sup> You should advise individuals and employers to take advantage of the tax benefits provided in I.R.C. § 139 if possible.



For individuals, gross income does not include any amount received as a qualified disaster relief payment.<sup>20</sup> Employers will be able to take a deduction for these payments. A qualified disaster relief payment is any amount paid to or for the benefit of an individual:

1. To reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster
2. To reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that the need for such repair, rehabilitation, or replacement is attributable to a qualified disaster
3. By a person engaged in the furnishing or sale of transportation as a common carrier by reason of the death or personal physical injuries incurred as a result of a qualified disaster
4. If such amount is paid by a Federal, state, or local government, or agency or instrumentality thereof, in connection with a qualified disaster in order to promote the general welfare

However, these are qualified payments only if the payment is not otherwise compensated for by insurance or otherwise.<sup>21</sup> There are no regulations that clarify exactly which expenses qualify as disaster relief payments. You may want to review Rev. Rul. 2003-12 (I.R.S. Jan 2003), which was issued to address payments to individuals living in flooded areas that were declared a disaster area. In this circumstance, grants were made to employees to reimburse them for reasonable and necessary medical, temporary housing, and transportation expenses. Employer payments to reimburse employees for the following types of expenses connected to the coronavirus are likely to be excluded from income under I.R.C. § 139:

- Medical expenses including necessary critical care
- Funeral expenses
- Health maintenance expenses such as hand sanitizer, disinfectants, and over-the-counter medications
- Child related expenses due to school closure such as childcare, tutoring, or online learning resources
- Telecommuting expenses such as internet, computer, phone, and printer

Although not required, to ensure income exclusion for employees and a deduction for employers, you may want to advise employers to have some type of written program or set

criteria indicating exactly what type of employee expenses would be reimbursed.

Be aware that I.R.C. § 139 does not cover any type of wage replacement including paid sick leave.

**High Deductible Health Plans**

The IRS has issued Notice 2020-15 (I.R.S. Mar. 11, 2020) regarding the coronavirus in relation to high deductible health plans (HDHP). The purpose of the notice is to help remove any barriers that may prevent the testing or treatment of the coronavirus.

A HDHP under I.R.C. § 223(c)(2)(A) will not fail to be an HDHP because the health plan provides health benefits associated with testing for and treatment of the coronavirus without satisfying the applicable minimum deductible, or with a deductible below the regular minimum deductible. Likewise, individuals covered by a HDHP will not fail to be eligible individuals under I.R.C. § 223(c)(1) merely because of the benefits provided for testing and treatment of the coronavirus.

**Filing and Payment Deadlines**

On March 11, 2020, President Trump asked for an extension of the income tax filing deadline and instructed the U.S. Department of the Treasury to allow deferred tax payments by affected individuals and businesses without penalties or interest. Treasury Secretary Steven Mnuchin stated: “We are looking at providing substantial relief to certain taxpayers and small businesses who will be able to get extensions on their taxes.”


Currently, the tax return filing deadline remains April 15. On Tuesday, March 17, 2020, Mnuchin encouraged the public to electronically file their tax returns by April 15 and get their refunds or request extensions if they owe payments. Anyone can request an automatic 6-month extension of the income tax filing deadline by filing Form 4868.

In his March 17, 2020 statement, Mnuchin urged a three-month deferral on the payment of 2019 taxes. Mnuchin clarified that IRS rules allow individuals and pass-through businesses owing up to \$1 million in federal income taxes and corporations owing up to \$10 million in taxes to defer payments for 90 days without interest and penalties. Subsequently, the IRS issued Notice 2020-17 (I.R.S. Mar. 18, 2020), which extends the due date for the payment of Federal income taxes otherwise due on April 15, 2020, until July 15, 2020, as a result of the ongoing the coronavirus emergency. You do not need to file any additional forms or contact the IRS to qualify for the extension. Penalties and interest on any remaining unpaid balance will

begin to accrue on July 16, 2020. Be aware that the extension is limited to the following maximum applicable amounts:

- Up to \$1 million for individuals, regardless of filing status, and other unincorporated entities such as trust and estates –and–
- Up to \$10 million for each C corporation that does not join in filing a consolidated return or for each consolidated group

This extension is only available for Federal income tax payments and payments of tax on self-employment income that would otherwise be due on April 15, 2020.

The IRS has established a special section focused on steps to help taxpayers, businesses, and others affected by the coronavirus.<sup>22</sup> The IRS will continue to update this website as new information is available. 

***Neil Aragon**es is an attorney staff writer for LexisNexis in the Tax & Accounting group. Prior to joining the Tax & Accounting group, Neil was a Case Law Editor and Senior Quality Editor with LexisNexis. Before joining LexisNexis, Neil was an associate with a law firm in Pittsburgh and specialized in insurance defense. Neil earned his BA from the University of Pittsburgh, his JD from the Cleveland-Marshall College of Law, Cleveland State University, and his LLM in Taxation from the Case Western Reserve University School of Law and is admitted to practice in Ohio and before the U.S. District Court, Northern District of Ohio. **Sean Craig** is a federal tax analyst for Lexis Practice Advisor. Sean has practiced federal, state, and international tax law in Texas and Florida and brings several years of law firm and accounting firm experience to LexisNexis. Prior to joining LexisNexis, Sean was a manager in the National Tax Groups at PriceWaterhouseCoopers and Ernst & Young, where he specialized in partnership taxation. Sean began his career as an associate at Winstead Sechrest & Minick in Dallas, where he worked on a variety of tax issues. Sean earned his JD from Southern Methodist University School of Law and his LLM in Taxation from New York University School of Law. **Patricia Tyler** is a federal tax analyst for Lexis Practice Advisor. Patricia worked for several years in private practice as an estate and tax attorney. She currently edits and updates the Lexis Tax Advisor-Federal Code Reporter, Lexis Tax Advisor -Federal Topical, and the Matthew Bender treatises Taxation of Securities Transactions and Taxation of Public Utilities. Her topic areas include trust, estate and gift tax, and exempt organizations. She is also the author of an article for Bender's Business Tax Articles titled “Changes to the Landscape of Securities Transactions.”*

17. H.R. 6201, § 7005(a). 18. H.R. 6201, § 7005(b). 19. See I.R.C. §§ 139(c) and 165(j)(5)(A). 20. I.R.C. § 139(a). 21. I.R.C. § 139(b).

22. See <https://www.irs.gov/coronavirus>.



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**Randi-Lynn Smallheer** LEXIS PRACTICE ADVISOR

# Seeking Time Extensions in Litigation

As the novel coronavirus outbreak forces people around the world to suspend business as usual, litigators still face deadlines, whether imposed by a judge, a set of rules, or a statute. This article describes how to compute time periods in federal court litigations under Rule 6 of the Federal Rules of Civil Procedure<sup>1</sup> (Federal Rules), and how to get those time periods extended.

**SPECIFICALLY, THIS ARTICLE DISCUSSES DETERMINING THE** length of your time period; identifying your trigger event; computing time periods measured in hours, days, or longer periods; extending time periods for service by mail; extending time periods by stipulation or court order; and strategic considerations.

## How to Compute Time Periods

The first step to extending a deadline is determining exactly when the deadline falls. Civil litigation is characterized by a dizzying array of deadlines that emanate from a variety of sources, including:

- The Federal Rules
- Court rules
- Court orders
- Statutes

These sources typically express deadlines as a certain number of hours, days, months, or years running from or to an event, such as a complaint filing or a court hearing. Deadlines can be forward-looking or backward-looking:



- **Forward-looking deadlines.** These deadlines involve calculating how much time you have to perform a future act after an event occurs. For example, Rule 26 requires you to make your initial disclosures “at or within 14 days after the parties’ Rule 26(f) conference.”<sup>2</sup>
- **Backward-looking deadlines.** These deadlines involve calculating how much time you have to perform an act before a certain event occurs. For example, your pretrial scheduling order may require you to file your final pretrial disclosures a certain number of days before your trial date.

1. Fed. R. Civ. P. 6 **2.** See Fed. R. Civ. P. 26(a)(1)(C).



To properly calculate your deadline, you will need to:

- Determine whether your deadline is forward- or backward-looking.
- Determine the length of your applicable time period.
- Identify the trigger event—the event that starts the clock running.
- Determine how to count the period, accounting for weekends and holidays.
- Account for any factors that might extend the period.

Determining the Applicable Period

The Federal Rules establish dozens of procedural time limits, including filing and service deadlines. In most cases, you should consult the Federal Rules first to determine your applicable time limit.

The most critical statutory deadlines are statutes of limitations. These deadlines limit the period within which you may bring a wide variety of legal causes of action. If you miss a statute of

limitations deadline, your client may be barred from bringing that claim, and you may face discipline or a malpractice suit.

Identifying the Trigger Event

To properly compute your deadline, you must precisely identify your trigger event. This is critical for you to correctly determine when your applicable time limit begins or ends.

For forward-looking deadlines, identify the event that starts the time period, such as your adversary serving you with a complaint or discovery requests. In these circumstances, the service date is your trigger event date. For statute of limitations purposes, the trigger event date is typically the date the cause of action accrues (e.g., the date on which the events underlying the plaintiff’s claims occurred). For certain specific types of causes of action, such as fraud, the trigger event date is the date the plaintiff learned or should have learned of the alleged wrong.<sup>3</sup> To ensure you do not miss a statute of limitations deadline, be sure to use the earliest possible accrual date as your trigger event date when computing the limitations period.

Use your trigger event date to count forward to determine the applicable forward-looking deadline. For example:

Trigger Event	Period Length	Deadline Calculation
Your adversary serves you with a document request on May 30.	You have 30 days to respond to the document request under Rule 34 of the Federal Rules.	Calculate your response date by counting forward 30 days from May 30.
Your client is served with a complaint on November 8.	You have 21 days to file an answer to the complaint under Rule 12 of the Federal Rules.	Calculate your response date by counting forward 21 days from November 8.

3. See CBD & Sons, Ltd. v. Setteducati, 2019 U.S. Dist. LEXIS 15489 (D.N.J. Jan. 31, 2019); Garcia v. GM LLC, 2019 U.S. Dist. LEXIS 8678 (C.D. Cal. Jan. 17, 2019).

Your adversary will typically serve a certificate of service along with any papers he or she is serving. Unless the service date in the certificate of service is obviously incorrect, you should treat the identified service date as your trigger event date.

For backward-looking deadlines, identify the event that ends the time period, such as a trial or hearing date. Use that event date to count backwards to determine your deadline. For example:

Trigger Event	Period Length	Deadline Calculation
You are filing a motion for summary judgment and your hearing date is April 15.	You must serve your motion 14 days before the specified hearing date under Rule 6 of the Federal Rules.	Calculate your filing date by counting backwards 14 days from April 15.
Your adversary serves you with a motion to compel discovery with a March 1 hearing date.	You have seven days before the March 1 hearing date to file an affidavit opposing the motion under Rule 6 of the Federal Rules.	Calculate your filing date by counting backwards seven days from March 1.

Determining How to Count the Period

Rule 6 sets forth the basic rules for counting a time period’s length in federal court civil litigations. Consider the following when counting your applicable period:

- For periods stated in days or a longer unit of time:
  - Do not count the first day of the period.
  - Count every day after that, including the last day of the period—unless it is a Saturday, Sunday, or legal holiday, in which case the last day of the period will be the next day that is not a Saturday, Sunday, or legal holiday.
    - If you are filing a document electronically, the last day ends at midnight in the court’s time zone.<sup>4</sup>
    - If you are filing a document by other means, the last day ends when the clerk’s office is scheduled to close.<sup>5</sup>
  - Count intermediate Saturdays, Sundays, and legal holidays.<sup>6</sup>
- For periods stated in hours:
  - Immediately begin counting your period from the moment the trigger event occurs.
  - Count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays.
  - If the period ends on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.<sup>7</sup>

Under Rule 6(a)(6) of the Federal Rules,<sup>8</sup> legal holidays include:

New Year's Day
Washington's Birthday
Independence Day
Columbus Day
Thanksgiving Day
Any day the President or the U.S. Congress declares a holiday
Martin Luther King Jr. Day
Memorial Day
Labor Day
Veterans' Day
Christmas Day
Any day the state where your district court is located declares a holiday

4. See Fed. R. Civ. P. 6(a)(4)(A). 5. See Fed. R. Civ. P. 6(a)(4)(B). 6. See Fed. R. Civ. P. 6(a)(1). 7. See Fed. R. Civ. P. 6(a)(2). 8. Fed. R. Civ. P. 6(a)(6).



Be aware that the automatic three-day extension applies only to service by mail. If your adversary effectuates service by hand delivery, overnight delivery, or electronic transmission, the Federal Rules do not automatically extend your time period.

The Federal Rules do not explicitly address how to calculate backward-looking deadlines. To avoid any timing issues, you should assume the same rules apply counting backwards as counting forwards. If the first day is a weekend day or a legal holiday, keep counting backwards until you arrive at a non-holiday weekday.

Whenever possible, have another legal professional independently verify your calculation—you can never be too careful with respect to calendaring a deadline. If you have questions about a filing deadline, consider calling the clerk of court. When an important deadline is ambiguous or unclear, never make assumptions.

It is necessary to calculate your time period only when a statute, the Federal Rules, a court order, or a similarly authoritative source requires you to perform an act within a particular number of days. If a court instead orders you to file papers on a date certain, Rule 6’s calculation provisions do not apply.<sup>9</sup>

### Extending Time Periods

Under Rule 6 of the Federal Rules, you can extend most deadlines in one of three ways:

- Automatic extension for service by mail
- Stipulation of the parties
- Court order<sup>10</sup>

#### Automatic Extensions for Service by Mail

After service of process is complete, the Federal Rules generally authorize service of subsequent documents only by:

- Hand delivery
- Mail
- Electronic transmission<sup>11</sup>

Service by mail triggers an automatic three-day extension of your applicable time period.<sup>12</sup> This automatic extension applies only when service starts the recipient’s time to perform a future act. For example, serving a document request on a party

triggers the start of that party’s 30-day response period. In this example, the party’s response period is automatically extended by three days if the propounding party serves the requests by mail.<sup>13</sup>

Be aware that the automatic three-day extension applies only to service by mail. If your adversary effectuates service by hand delivery, overnight delivery, or electronic transmission, the Federal Rules do not automatically extend your time period.

#### Stipulated Extensions

Parties can—and frequently do—agree to extend most deadlines without prior court permission. In practice, attorneys often consent to extensions of time that the court would ordinarily grant, such as extensions for:

- Filing an answer
- Responding to interrogatories
- Responding to document requests
- Responding to motion papers

However, do not expect opposing counsel to save you from expired deadlines that are fatal to your case, such as a statute of limitations deadline.

If all parties agree to your extension request, you should prepare a written stipulation containing all the terms of your agreement, including:

- The new deadline
- Any other dates adjusted by the new deadline
- A description of the reasons for needing the extension

Counsel for all parties should promptly sign the stipulation. The Federal Rules generally do not require court approval of a stipulation unless the requested extension will interfere with:

- The court’s discovery completion date
- A motion hearing
- Trial<sup>14</sup>



As a practical matter, many attorneys file stipulations extending time with the court even if the extension will not interfere with a court-imposed discovery completion, hearing, or trial date. Be sure to consult your court’s applicable local rules and your judge’s individual rules and standing orders to determine if the court imposes any specific requirements for filing or approving your stipulation.

### Extension by Court Order

With some exceptions, Rule 6 authorizes the court to extend deadlines. If your deadline has not expired, Rule 6 allows the court, in its discretion, to extend the period with or without a motion or notice.

If the period has already expired, you must file a motion for an extension and show excusable neglect. To establish excusable neglect, you must show some reasonable basis for not complying with the deadline.<sup>15</sup> In assessing this, the court will consider:

- Whether the delay was within your client’s reasonable control
- The length of the delay
- The potential impact of the delay on the litigation
- Prejudice to the nonmoving party
- Whether your client acted in good faith<sup>16</sup>

Courts frequently grant extension requests, such as for filing an answer beyond the prescribed time limit. However, if you fail to serve a defendant with process within 90 days after the complaint filing (as Rule 4 requires), you risk potential dismissal of your case.<sup>17</sup> Courts can and often do dismiss cases for failure to meet this deadline absent a showing of good cause.<sup>18</sup>

Rule 6 does not govern all deadline extensions. The rules noted below exclusively govern extensions of deadlines for the following litigation events:

- Motions for judgment as a matter of law (Fed. R. Civ. P. 50(b))
- Motions for a new trial (Fed. R. Civ. P. 50(d), 59(b))
- Motions to amend or make additional findings (Fed. R. Civ. P. 52(b))
- Grant of a new trial on the court’s initiative (Fed. R. Civ. P. 59(d))
- Motions to alter or amend a judgment (Fed. R. Civ. P. 59(e))
- Motions for relief from judgment (Fed. R. Civ. P. 60(b))

When you want to extend a deadline under one of these rules, consult the rule itself for guidance.

<sup>9</sup> See *Fleischhauer v. Feltner*, 3 F.3d 148 (6th Cir. 1993). <sup>10</sup> See Fed. R. Civ. P. 6(b), 6(d). <sup>11</sup> See Fed. R. Civ. P. 5(b)(2). <sup>12</sup> See Fed. R. Civ. P. 6(d). <sup>13</sup> See Fed. R. Civ. P. 6(d). <sup>14</sup> See Fed. R. Civ. P. 29(b).

<sup>15</sup> See *Lopez v. Delta Int’l Mach. Corp.*, No. 15-0193, 2017 U.S. Dist. LEXIS 114656 (D.N.M. July 24, 2017). <sup>16</sup> See *Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd.* P’ship, 507 U.S. 380, 395 (1992). <sup>17</sup> See Fed. R. Civ. P. 4(m). <sup>18</sup> See *Sene v. MBNA Am., Inc.*, 2005 U.S. Dist. LEXIS 20786 (D. Del. Sept. 20, 2005).



Strategic Considerations

As soon as you learn of an event that requires you to meet a deadline, use the process described above to immediately:

- Ascertain when the deadline falls
- Calendar the deadline on a physical or electronic calendar

You may also want to calendar intermediate dates to warn you that the actual deadline is approaching. For example, you could set a calendar reminder for one week before your filing deadline.

If possible, start working immediately to meet the deadline. Doing so minimizes the risk of other obligations impeding your ability to meet the deadline.

As soon as you recognize that you will need a deadline extension, take steps to secure one, whether by agreement with opposing counsel or by court order. Make every attempt to secure an extension before the original deadline passes; your chances for an extension drop if your time period has already expired.

If opposing counsel asks you to extend a deadline, you should consent unless it would substantially harm your client’s interests. Do not attempt to use procedural deadlines to gain an advantage. If the court becomes involved, the judge may perceive you as wasting the court’s time on a petty dispute. Also, keep in mind that later in the litigation you may have to request an extension from the very adversary whose extension request you refused.

Be sure to build in ample time for any ministerial tasks you must complete before filing or service, such as obtaining a check request for any filing fees or arranging for a messenger service to hand delivery your papers. Try to coordinate filing and service logistics well in advance of your deadline. **L**

**Randi-Lynn Smallheer** is a Content Manager for the Lexis Practice Advisor Civil Litigation team. In this role, Randi-Lynn helped launch Civil Litigation’s New York jurisdictional content and currently focuses on expanding the practice area’s existing arbitration and federal and state litigation content. Randi-Lynn brings to LexisNexis 18 years of legal experience as a seasoned litigator in federal and state court working at various national and local law firms, including Proskauer Rose, LLP.


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Laura D. Richman and Michael L. Hermesen MAYER BROWN LLP

# COVID-19 Ramifications for Public Companies— SEC Disclosures, SEC Filings, and Shareholder Meeting Logistics

This article discusses some key ramifications of the coronavirus outbreak for public companies. In addition to a host of significant general business concerns, such as those relating to liquidity and financing opportunities, revenues, supply chain, and employee and community health and welfare, the novel coronavirus known as COVID-19 has raised a number of issues specific to public companies that file reports with the U.S. Securities and Exchange Commission (SEC). These matters include the application of SEC disclosure requirements, logistics for upcoming shareholder meetings, and administrative challenges in complying with SEC requirements.

## SEC Disclosures and Related Requirements

To a large degree, SEC disclosure requirements are principles-based. Applying the concept of materiality to the impact of COVID-19, there are many areas where existing SEC rules, while not expressly mentioning pandemics, could require disclosure. Such disclosure considerations could arise in the context of a regularly scheduled periodic report, such as an annual or quarterly report. Or, there could be an issue that requires more immediate disclosure through a current report on Form 8-K, Form 6-K, or in a press release. Depending on the circumstance, COVID-19 disclosures also may need to be discussed in registration statements, prospectuses, proxy statements, or information statements. However, as discussed further below, disclosures should be specific, not generic, and should be tailored to the particular facts and circumstances applicable to the issuer.



Companies may also want to expressly include the impact of COVID-19 as a factor that could impact actual results in their more general discussions of forward-looking information.

**Risk Factors.** With the impact from COVID-19 intensifying rapidly, companies may become increasingly aware of additional ways in which the pandemic poses specific risks beyond what they may have previously disclosed. It would be useful for companies to begin drafting more detailed risk factors relating to COVID-19 for inclusion in their next SEC filing that requires risk factor disclosure. If a company determines that a particular risk or development relating to COVID-19 is sufficiently material that it should be disclosed prior to its next periodic report or registration statement filed with the SEC, such as might be the case if it is currently in the market buying or selling its securities, it may decide to disclose a new COVID-19 risk factor through a current report filing.

**Forward-Looking Statements.** Companies disclosing how COVID-19 may affect their future performance should consider framing their discussions to take advantage of the safe harbor for forward-looking statements set forth in Section 21E of the Securities Exchange Act of 1934, as amended (Exchange Act). For example, when discussing COVID-19 matters, companies may want to include an explanation regarding the use of forward-looking statements, indicating that actual results of the impact of COVID-19 may be materially different and identifying forward-looking remarks with words such as “believes,” “expects,” or “hopes.” Companies may also want to expressly include the impact of COVID-19 as a factor that could impact actual results in their more general discussions of forward-looking information.

**Management’s Discussion and Analysis.** Management’s discussion and analysis (MD&A) must include information that a company “believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations.” With COVID-19 impacting so many companies, often negatively, but in some cases providing opportunities, it is important for the MD&A to not only disclose COVID-19 as a known trend or uncertainty but also management’s perspective on the type and extent of COVID-19’s effect on the company, to the extent material. There are many possible questions for

companies to assess for materiality in the COVID-19 context as they prepare their MD&A. For example:

- Has the company experienced supply chain issues?
- Are these supply chain issues anticipated to be ongoing?
- How has COVID-19 affected liquidity?
- Has the company drawn down on bank facilities for any reason, including because it has not been able to finance in the capital markets?
- Has the company needed to close any locations?
- If the company switched its workforce to telecommuting, has there been any reduction in productivity?
- Is the company party to contracts with force majeure provisions that are or may be triggered by the COVID-19 pandemic, and if so, is that having a material impact on the company’s business?
- Is the company having a dispute with its insurance carrier regarding business continuity coverage?

**Financial Statement Footnotes.** Companies should discuss with their accountants whether COVID-19 disclosure is needed as part of their financial statement footnotes. This could include a subsequent event footnote.

**Business Descriptions.** To the extent a company is filing a report or registration statement with the SEC that requires a business description, the company will need to consider whether additional or revised disclosure is needed to the extent that COVID-19 has materially changed its business. For example:

- Did the company exit any business line?
- Did the company close any facility?
- Is the company having difficulty sourcing inventory and considering alternative sources than those previously used?
- Are some segments of the company’s business impacted more than others?
- Did the company lay off workers as a result of a business slowdown?
- Were any acquisitions or organic growth initiatives put on hold?

**Litigation.** Litigation arising out of COVID-19 may also require disclosure. For instance, it is possible that some companies might face class action lawsuits alleging failure to protect customers or workers from the virus.

**Earnings Releases, Earnings Calls, and Guidance.** Because of the widespread impact of COVID-19, companies should consider addressing, to the extent material, the impact of

COVID-19 in upcoming earnings releases. They should also be prepared to answer analysts’ questions about the effect of COVID-19 on their earnings calls. It may be useful to script and practice answers to such questions in advance. Although the federal securities laws do not mandate a specific duty to update prior statements, including guidance, some courts have recognized a duty to update in certain situations. Consequently, companies that have provided guidance to investors should consider updating that guidance, or advising investors to no longer rely on that guidance, to the extent their guidance has materially changed.

**Regulation FD.** Companies may be fielding many questions regarding COVID-19 because of its pervasive effect on the global economy. Public companies must be careful to avoid selective disclosure of material non-public information about how COVID-19 is affecting them by disseminating such information in a Regulation FD-compliant manner, such as a press release or an Item 7.01 Form 8-K.


**Insider Trading; Stock Repurchases.** Directors, officers, and employees of public companies should not be trading in securities while in possession of material, non-public information. The COVID-19 pandemic is a rapidly evolving situation. If a company becomes aware of a COVID-19 development that may have material ramifications for the company, the company, as well as its directors, officers, and employees should avoid trading in the company’s securities until that development has been publicly disclosed, unless such trading is accomplished pursuant to a Rule 10b5-1 trading plan entered into while not in possession of material non-public information regarding the company. Companies may need to consider whether any special blackout period should be implemented to prevent insider trading when there is material information that has not been disclosed to the public. Given recent stock price deterioration as a result of generalized market volatility, some companies may be considering effecting stock repurchases. Careful consideration should be given to the company’s quarterly blackout period, as well as to whether all information material to the company has been disclosed.

**Controls and Procedures.** Because the COVID-19 pandemic is affecting so many aspects of business, companies should consider what changes should be made to their disclosure controls and procedures, including making the potential impacts of COVID-19 an express part of their disclosure controls and procedures. Companies may also need to assess whether COVID-19 is having any impact on their internal controls over financial reporting.

Related Content


For guidance in locating detailed practice notes, forms, and checklists/charts on financial statements and reporting matters in Lexis Practice Advisor, see

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For an overview of the periodic and current reporting obligations of companies that are subject to the reporting requirements of Section 13 of the Securities Exchange Act of 1934, see

> [PERIODIC AND CURRENT REPORTING RESOURCE KIT](#)

 **RESEARCH PATH:** Capital Markets & Corporate Governance > Public Company Reporting > Periodic Reports > Practice Notes

For information about Regulation FD, see

> [REGULATION FD](#)

 **RESEARCH PATH:** Capital Markets & Corporate Governance > Disclosure Issues for Public Companies > Practice Notes

**Effecting Securities Offerings.** All of the considerations discussed above become particularly timely should a company be contemplating issuing securities.

Shareholder Meeting Logistics

Companies planning for shareholder meetings should consider whether they should change the date or location of their annual meeting in response to COVID-19, either as a precautionary measure or as a result of local prohibitions on large gatherings. In addition to concerns about the ability of officers, directors, and shareholders to attend annual meetings in person, a number of service providers that are part of the annual meeting process, including inspectors of election, already have sent



notices alerting companies that their personnel will not travel to be present physically at annual meetings.

If the law of the jurisdiction of formation permits a company to conduct a virtual meeting, it may want to replace or supplement an in-person meeting with an online meeting that shareholders may attend remotely. Companies considering a virtual meeting should also confirm that nothing in their governing documents restricts their ability to convene a virtual meeting.

On March 13, 2020, the SEC staff issued guidance (Guidance) for conducting annual meetings in light of COVID-19 concerns. According to the Guidance, the staff takes the position that if a company has already mailed and filed its definitive proxy materials, it may notify shareholders of a changed date, time, or location for its annual meeting without mailing additional soliciting materials or amending its proxy materials if, promptly after making its decision, the company:

- Issues a press release announcing the change
- Files the announcement as definitive additional soliciting material on EDGAR
- Takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as proxy service providers) and other relevant market participants (such as appropriate securities exchanges) of such change


The Guidance also suggests that companies that have not yet mailed and filed their definitive proxy materials should consider, based on their particular facts and circumstances, whether to include disclosure regarding the possibility that the date, time, or location of the annual meeting may change due to COVID-19.

The Guidance indicates that if a company plans to conduct its shareholder meeting either as a virtual meeting (conducted solely through the internet or other electronic means) or as hybrid meeting (allowing shareholders to participate either in person or through electronic means), the company should notify shareholders, intermediaries, and other market participants of such plans in a timely manner. Companies need to provide clear directions as to the logistical details of the virtual or the hybrid meeting, specifying how shareholders can remotely access, participate in, and vote at the annual meeting. To the extent that the company has not yet filed and delivered its definitive proxy materials, such disclosures should be in the definitive proxy statement and other soliciting materials. Companies that have already filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a virtual or hybrid meeting if they follow the steps specified for announcing a change in the meeting date, time, or location.

### Related Content


For a discussion of forward-looking statements, see

[> SAFE HARBORS FOR FORWARD-LOOKING STATEMENTS](#)

 **RESEARCH PATH:** *Capital Markets & Corporate Governance > Disclosure Issues for Public Companies > Practice Notes*

For a summary of issues facing attorneys advising clients about safe harbor requirements, see

[> FORWARD-LOOKING STATEMENTS SAFE HARBOR CHECKLIST](#)

 **RESEARCH PATH:** *Capital Markets & Corporate Governance > Disclosure Issues for Public Companies > Checklists*


For an overview of public companies' obligations to report on financial performance and operations, see

[> MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS](#)

 **RESEARCH PATH:** *Capital Markets & Corporate Governance > Public Company Reporting > Periodic Reports > Practice Notes*

For additional information on drafting risk factors, see

[> RISK FACTOR DRAFTING FOR A REGISTRATION STATEMENT](#) and [TOP 10 PRACTICE TIPS: DRAFTING A REGISTRATION STATEMENT](#)

 **RESEARCH PATH:** *Capital Markets & Corporate Governance > IPOs > Drafting the Registration Statement > Practice Notes*

Some companies are already including disclosures in proxy statements advising of the possibility of changes from in-person meetings and where information about any such changes will be made available so precedent language is available to review as a starting place for such disclosures.

Companies that use e-proxy to make proxy materials available through the internet must post definitive additional proxy solicitation materials, including those addressing changes in meeting logistics, on their proxy voting websites. Companies making such changes after filing and mailing their definitive proxy statements should also consider whether their governing documents or the laws of their jurisdictions of formation have any additional notice requirements.



With respect to the presentation of shareholder proposals, the Guidance also encourages companies to permit the proponents or their representatives to present their proposals through alternative means, such as by phone, during the 2020 proxy season if feasible under governing law. In addition, if the proponent or representative is unable to attend the annual meeting and present the proposal as a result of COVID-19, the SEC staff would consider this failure to appear and present the shareholder proposal to be “good cause” for the purposes of Rule 14a-8(h). This means companies would not be able to assert Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

### SEC Exemptive Order

On March 4, 2020, the SEC issued an exemptive order (Order) under the Exchange Act to provide relief to public companies and persons required to make filings with respect to public companies that are unable to meet an SEC filing deadline as a result of circumstances related to COVID-19. The Order covers the period from March 1, 2020, to April 30, 2020, and the SEC indicated that it may extend the time period if necessary, with any additional conditions it deems appropriate.

Any company relying on the Order must furnish to the SEC a current report on Form 8-K or, if eligible, a Form 6-K, by the later of March 16, 2020, or the original filing deadline for the report. This interim disclosure must state that the company is relying on the Order and briefly describe the reasons why the company could not file the report, schedule, or form (Required Document) on a timely basis. In addition, the Form 8-K or Form 6-K must state the estimated date by which the company expects to file the Required Document and, if material, include a risk factor explaining the impact of COVID-19 on the company's business. If the Required Document cannot be filed on time because of the inability of a third person to furnish a necessary opinion, report, or certification, the Form 8-K or Form 6-K must attach as an exhibit a statement signed by such person explaining the reason for the delay. The company or the person relying on the Order must file the Required Document

with the SEC no later than 45 days after its original due date and must disclose that the Order is being relied on and the reasons why the Required Document could not be filed on a timely basis.

Any company meeting the requirements of the Order will be considered current and timely in its Exchange Act filing requirements, and therefore eligible to use Form S-3, if it was current and timely as of the first day of the relief period and it files the Required Document that was due during the relief period within 45 days of its original filing deadline. A company relying on the Order will be deemed to satisfy Form S-8 and Rule 144(c) requirements if it was current as of the first day of the relief period and it files the Required Document that was due during the relief period within 45 days of its original filing deadline. Companies will be permitted to rely on Rule 12b-25 if they are unable to file the required reports on or before the extended due date.

The Order also provides relief relating to the obligations under the SEC's proxy rules to furnish materials to security holders when mail delivery is not possible, as long as certain conditions are satisfied. For this exemption to apply, the company's security holder must have a mailing address located in an area where the common carrier has suspended delivery of service of the type or class usually used for the solicitation as a result of COVID-19 and the company or other person making the solicitation must have made a good faith effort to furnish the soliciting materials to the security holder.

### Looking Ahead

Investors and the SEC are likely to review COVID-19 disclosures carefully. Therefore, public companies should start thinking now about upcoming COVID-19 disclosures in order to allow time for drafting and internal review of appropriate language. For example, it would be useful for companies to begin drafting more detailed risk factors relating to COVID-19 for inclusion in their next SEC filing for which risk factor disclosure is required or otherwise appropriate. Similarly, companies may want to start preparing and discussing the COVID-19 disclosure for their MD&A in advance of their next SEC filing requiring it.

Companies should also coordinate responses they are providing when responding to COVID-19 inquiries. It is important not to selectively disclose material non-public information to any investor. To the extent a company has material information to disclose relating to COVID-19, that information should be disclosed in a Regulation FD-compliant method. If there has been an inadvertent selective material disclosure regarding COVID-19, the company must promptly disseminate such information by a press release or a Form 8-K.

As the COVID-19 pandemic continues and governments and companies take additional precautionary measures that may impact business, more disclosure-related and filing or compliance issues may arise.

Because of the swiftly moving changes in the COVID-19 situation and related impacts on companies, it is especially important for companies to take into account all aspects of their business, including reaching out to areas that may not normally be part of their disclosure controls and procedures, to ascertain whether anything is happening that could require disclosure.

Companies for which virtual meetings are permissible statutorily and by governing documents and that are considering switching in-person annual meetings to virtual meetings should be familiarizing themselves with the necessary technical logistics as far in advance of the meeting as practical, especially if this would be their first experience conducting a virtual shareholder meeting. It would be worthwhile to reach out to third-party providers that have experience hosting virtual meetings to get their input and to check their availability. Companies that are not planning to conduct virtual annual meetings may want to investigate the technical requirements, and applicable legal constraints from their jurisdiction of formation or their governing documents, for telephonic participation by officers and directors who may not be able to attend the shareholder meeting in person. Companies not conducting virtual meetings may also want to consider making their annual meetings available for shareholders to listen to via telephone or webcast, even if voting is only available through proxy or in-person attendance. In these situations, companies that are using technology for their annual meetings should be familiarizing themselves in advance with the tools to be used at the meeting.

Companies that decide to host a virtual meeting after filing their definitive proxy statement must file definitive additional proxy solicitation materials with the SEC, providing the details for participation in the virtual meeting, no later than the date first used. Similarly, companies using e-proxy must also post such material on their proxy voting website no later than the date such materials are first made public.

The SEC has publicized its willingness to discuss on a case-by-case basis administrative issues in complying with federal securities laws that may arise in connection with COVID-19 in addition to the ones addressed in the Order. Companies that

have particular concerns should reach out to the SEC staff to discuss how to handle issues that may arise.

As the COVID-19 pandemic continues and governments and companies take additional precautionary measures that may impact business, more disclosure-related and filing or compliance issues may arise. It is possible that the SEC may issue additional guidance or orders in this area, so companies should monitor any further SEC developments.

The Order and Guidance are part of an evolving COVID-19 response that is moving across regulatory agencies. Companies might find the SEC's COVID-19 Response webpage to be a helpful resource. **L**

*Laura D. Richman's wide-ranging corporate and securities practice at Mayer Brown, LLP has a strong focus on corporate governance issues and public disclosure obligations. Laura's practice includes Securities and Exchange Commission reports, such as proxy statements and annual, quarterly, and current reports. She advises on executive compensation disclosure, insider trading regulation and Dodd-Frank and Sarbanes-Oxley compliance. Laura represents listed company clients with respect to stock exchange compliance matters. She advises clients on governance policies and other board and shareholder matters. Michael L. Hermesen has an extensive practice at Mayer Brown, LLP, that focuses on securities matters. He represents issuers, investment banking firms, and security holders in connection with issuances of equity and debt securities. Mike also represents corporate clients in connection with compliance and reporting matters and counsels companies, boards of directors, and management on stock purchases, liability management, executive compensation reporting and corporate governance matters. Assistance provided by Jennifer J. Carlson, Robert F. Gray, Jr., Phyllis G. Korff, Anna T. Pinedo, Elizabeth A. Raymond, and Jodi A. Simala, Mayer Brown LLP.*



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**Mark S. Bergman, John C. Kennedy, and Christopher J. Cummings**

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

# SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations

## Introduction

This article discusses some key areas of focus regarding the coronavirus outbreak. It also highlights conditional relief issued by the Securities and Exchange Commission (SEC) on March 4, 2020, for reporting companies affected by the coronavirus that have SEC filings due between March 1 and April 30, 2020.<sup>1</sup>

## Background

In December 2019, an outbreak of a new strain of coronavirus, COVID-19, emerged in Wuhan, China. Within weeks, despite efforts to contain the virus in China that included widespread shutdowns of cities and businesses, the number of those infected grew significantly, and beyond China's borders. As of early March, the coronavirus is reported to have spread to over 80 countries, and the list is expected to continue to grow. As the virus continues to spread and affect business operations, supply chains, business and leisure travel, commodity prices, consumer confidence, and business sentiment, and as companies ponder the impact on their businesses of employees working from home and consumers shunning air travel, stores, restaurants, sports events, and other venues, it is hard to imagine a business or a sector that will be unaffected. SEC reporting companies need to consider not only the impact of



the coronavirus on their operations from business continuity and risk management perspectives, but also on their public disclosure and SEC filing obligations.

The coronavirus outbreak is still evolving, and its effects remain unknown. As SEC Chairman Jay Clayton noted in a January statement<sup>2</sup>, the SEC recognizes “that [the current and potential effects of the coronavirus] may be difficult to assess or predict with meaningful precision both generally and [on] an

<sup>1</sup> The Conditional Relief Release is available at <https://www.sec.gov/news/press-release/2020-53> and the related order (the Order) is available at <https://www.sec.gov/rules/other/2020/34-88318.pdf>.  
<sup>2</sup> <https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30>.



industry- or issuer-specific basis.” While it may be impossible to predict the ultimate impact of the coronavirus, what is clear today is that SEC reporting companies need to consider their disclosure obligations as events unfold. The coronavirus will impact public statements generally (including earnings releases), SEC reports (including financial statements), disclosure controls and procedures (DCP), and internal control over financial reporting (ICFR). The disclosure effort could require the attention of the audit committee, senior management, the financial reporting function, the legal/compliance function, and internal audit. Presumably most, if not all, of these functions are represented on a company’s disclosure committee. And all of this will likely be taking place in the context of broader business continuity efforts, governmental actions, and market turbulence.

## Initial Guidance

### Disclosure Considerations

Speaking in March 2019, Director of the Division of Corporation Finance William Hinman used the example of Brexit as a disclosure topic that is complex, associated with uncertain risk, and rapidly evolving. He noted that the SEC disclosure system, which in recent years has evolved to a more principles-based regime, emphasizes materiality and its requirements “articulate an objective and look to management to exercise judgment in satisfying that objective by providing appropriate disclosure when necessary. Management’s Discussion and Analysis of Financial Condition and Results of Operations (MD&A) and Risk Factors are examples of such disclosure requirements and are well-suited to elicit disclosure about complex and evolving areas.” He could have been speaking of the coronavirus as well.

■ **Risk factors.** Management should consider whether existing risk factors in the most recently filed Form 10-K, Form 20-F, or Form 40-F annual report are adequate or need to be updated to address the coronavirus outbreak. To the extent that the coronavirus outbreak has caused material changes that make updates to the risk factors appropriate following the release of the annual report, reporting companies should consider updating risk factors in their quarterly reports (Form 10-Q) or by supplementing them in a Form 8-K. Non-U.S. reporting companies should consider how best to update their risk factors, including by supplementing their risk factors in a Form 6-K submission. Reporting companies that have already filed reports with the SEC that contain risk factors related to the coronavirus have tended to include disclosure related to developments within existing risk factors related to natural disasters, public health, or uncertainty regarding global macroeconomic conditions.

The SEC staff (the Staff) has stressed repeatedly that risk factors should not simply consist of boilerplate language and should not present risks in the hypothetical when the risks, in fact, have occurred. In light of this, reporting companies should ensure that risk factor disclosures related to the coronavirus speak to the specific risks to their business, rather than merely offer an overly broad account of recent events and general economic impacts. In recent public statements, the Staff also has reminded reporting companies that they should communicate with the board when preparing risk factor disclosure about emerging risks so that investors have knowledge of the same risks as are discussed at the board level.

Management should, concurrently with any review of risk factors, also review the risks listed in the disclosure regarding forward-looking statements. This list tends to appear in a variety of places, and care should be taken to ensure that updates are carried across the various disclosures. Recall too that boilerplate language will not satisfy the meaningful cautionary language prong of the safe harbor under the Private Securities Litigation Reform Act (PSLRA).

■ **MD&A.** A properly drafted MD&A is intended to provide investors with the information “necessary to an understanding of [a company’s] financial condition, changes in financial condition and results of operations.” Simply put, the MD&A, in the words of a former SEC commissioner, is where “management discusses and analyses where it has been and where it is going.” The SEC requires the identification of any known trends, demands, commitments, events, and uncertainties that will, or that are reasonably likely to, impact a reporting company’s financial condition and results of operations. The Staff regularly emphasizes the need for reporting companies to focus on the importance of early warning disclosures, particularly where known trends and uncertainties are reasonably likely to create a significant disconnect between historical and future financial performance, to avoid later surprise disclosures.

In the context of the evolving and fast-spreading public health emergency, the challenge will be to address the trends and uncertainties with any degree of precision. The effects of the spread of the coronavirus and the myriad of responses could impact results of operations, as well as balance sheet items and cash flow. Management should consider whether unexpected cash needs could result in a stress on liquidity. To the extent that access to the capital markets is impaired, liquidity could become a significant issue (for example, for retailers and those in the travel and leisure sector). This, in turn, could present refinancing risks.

Recent market conditions have presented opportunities for corporate share buybacks and individual purchases by officers and directors, and many companies and individuals are taking advantage of these opportunities. While the coronavirus is common knowledge, its evolving impact on a particular company may constitute material non-public information.

■ **Accounting Impact.** Reporting companies should ensure that their accounting and financial reporting takes into account the current uncertainties and market volatility. Key assumptions and sensitivities should be re-evaluated. In addition, reporting companies should consider the adequacy of their disclosures regarding:

- Potential inventory write-downs and impairment losses
- Loan defaults or covenant breaches, or amendments or waivers in lending agreements
- Changes in credit risk of customers or others negatively impacted by current developments
- Insurance recoveries
- Changes in business or economic circumstances that affect the fair value of financial and nonfinancial assets and liabilities
- Changes in growth forecasts that may impact impairment evaluations (e.g., goodwill, other intangible assets)
- Strategies and policies to manage evolving developments

■ **Subsequent Events (ASC 855).** In a recent joint public statement<sup>3</sup> regarding coronavirus reporting considerations, SEC Chairman Jay Clayton, Director Hinman, SEC Chief Accountant Sagar Teotia, and Public Company Accounting Oversight Board Chairman William D. Duhnke III emphasized the “need to consider disclosure of subsequent events in the notes to the financial statements, in accordance with the guidance” included in Accounting Standards Codification (ASC) 855-10, Subsequent Events. The standard requires evaluation of events subsequent to the balance sheet date through the date the financial statements are issued.

■ **Access to Information.** Reporting companies need to have access to their own control locations for purposes of preparing consolidated financial statements as well as financial or other information from equity method investees (Regulation S-X Rule 3-09), guarantors (Regulation S-X Rule 3-10), and acquired/to be acquired businesses (Regulation S-X Rule 3-05 or 3-14). If a reporting company will have challenges accessing control locations, it should consider the effects any such limitations will have on the preparation of its audited financial statements.

### Internal Controls

If a reporting company were to experience significant disruptions to operations, access to offices, and travel, internal controls may need to be modified or replaced as the business implements emergency measures. These changes to internal controls could include, for example, changes to personnel or functions, shifting of reporting lines, or altering access to IT systems to enable a remote workforce to operate virtually. A partial or complete evacuation of physical premises to remote home offices, by definition, has the potential to increase the pressure on the efficacy of existing internal controls.

In addition to the need to evaluate the many disruptions caused by the coronavirus in the context of ICFR, reporting companies will also need to consider the potential increase in cybersecurity risk. The spread of the coronavirus, with the attendant uncertainty and internal changes to controls and reporting, is an ideal opportunity for cyber criminals to unleash phishing and other scams, whether as part of alerts purporting to provide updates on the spread of the virus or emails purporting to be from internal sources requesting changes in procedures (or wire transfers) on an emergency basis. Press reports already note a spike in suspicious emails seeking to exploit the coronavirus, including what appears to be emails coming from the World Health Organization. Malicious emails also may be used to spread panic among business partners, employees, vendors, suppliers, and others.

As the SEC noted in the context of cybersecurity, it is critical that reporting companies take all required actions to inform the market about material risks and incidents in a timely fashion, and crucial to a company’s ability to make required disclosures of risks and incidents in a timely manner are DCPs. DCPs must provide an appropriate means of discerning the impact of significant risks on the business, financial condition, and results of operations, and a protocol for assessing materiality. To the extent a reporting company suffers a cybersecurity breach, it will also need to consider its disclosure obligations in respect of that incident.

<sup>3</sup>. <https://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19>.

Market Updates

In light of the recent spread of the coronavirus beyond China, a number of reporting companies that issued earnings releases in the past few weeks (as part of their regularly scheduled earnings updates) are assessing whether previously issued guidance now needs to be revised. An increasing number of reporting companies are disclosing revisions to previously issued guidance or otherwise addressing in greater detail specific effects of the spread of the coronavirus on their businesses and operations. Some reporting companies may withdraw guidance and not provide any update due to the current level of uncertainty.

The SEC, in the Conditional Relief Release, suggests that reporting companies may need to consider whether previous disclosure needs to be revisited, refreshed, or updated to the extent that prior disclosures have become materially inaccurate. It also has reminded reporting companies providing forward-looking information to keep the market informed of material developments, including known trends or uncertainties regarding the spread of the coronavirus, that they can take steps to avail themselves of the safe harbor under the PSLRA.

Regulation FD

U.S. reporting companies should be mindful of their obligations under Regulation FD. Shareholders and analysts will be keen to understand as much as they can, and in the crucible of a fast-moving crisis, things may be said that, in fact, constitute material non-public information, the disclosure of which may constitute selective disclosure for purposes of Regulation FD. In the Conditional Relief Release, the SEC has reminded reporting companies of their obligations in respect of selective disclosure.

While the SEC has for some time recognized social media as an appropriate method for U.S. reporting companies to announce key information in compliance with Regulation FD, use of social media for this purpose has its limitations. All reporting companies should also remind employees of their social media policies, as statements could well be attributed to companies and their managements for liability purposes.

Restrictions on Trading

Officers, directors, and other corporate insiders should be mindful of applicable restrictions on trading in connection with developments related to the coronavirus. Recent market conditions have presented opportunities for corporate share buybacks and individual purchases by officers and directors, and many companies and individuals are taking advantage of these opportunities. While the coronavirus is common knowledge, its evolving impact on a particular company may

Related Content

For practical guidance on the coronavirus in a number of practice areas, see

> [CORONAVIRUS \(COVID-19\) RESOURCE KIT](#)

 **RESEARCH PATH:** *Capital Markets & Corporate Governance > Corporate Governance and Compliance Requirements for Public Companies > Corporate Governance > Practice Notes*


For a checklist that may be used in preparing an annual report on Form 10-K, see

> [FORM 10-K FORM CHECK: CHECKLIST](#)

 **RESEARCH PATH:** *Capital Markets & Corporate Governance > Public Company Reporting > Periodic Reports > Checklists*


For assistance in completing the final review of Form 20-F to ensure that it has complied with all rules and requirements, see

> [FORM 20-F ANNUAL REPORT CHECKLIST](#)

 **RESEARCH PATH:** *Capital Markets & Corporate Governance > Public Company Reporting > Periodic Reports > Checklists*

For a discussion of the regulatory considerations that counsel should consider when advising companies that are communicating material information externally, see

> [REGULATION FD](#)

 **RESEARCH PATH:** *Capital Markets & Corporate Governance > Disclosure Issues for Public Companies > Practice Notes*

constitute material non-public information. As a result, any trading activity—whether involving share purchases or sales of shares, including in the case of employees following option exercises, and whether or not occurring during an open trading window—should be carefully evaluated to ensure that the company or individual is not in possession of material non-public information (and otherwise complies with applicable rules).

The SEC, in the Conditional Relief Release, reminds reporting companies that, if they have become aware of a risk related to the coronavirus that would be material to investors, they should refrain from engaging in securities transactions with the public and should take steps to prevent directors and officers (and other insiders) from trading until the material risks have

been disclosed. This reminder is particularly important in light of the fact that corporate securities trading policies tend to tie trading windows to the release of earnings and that reporting companies, under the Order, may delay SEC filings for up to 45 days.

The Role of the Board

Directors of reporting companies should remain mindful that the SEC is of the view that Item 407(h) of Regulation S-K and Item 7 of Schedule 14A require disclosure of a board’s role in risk oversight. The SEC has, from time to time, highlighted that this disclosure is intended to provide investors with information about the role of the board, and the relationship between the board and senior management, in managing material risks. The SEC also has said that where a matter presents a material risk to the business, disclosure should address the nature of the board’s role in overseeing the management of that risk. The SEC has noted this most recently in the context of cybersecurity, and since then has suggested that this principle could apply to other areas where reporting companies face emerging or uncertain risks and that the cybersecurity guidance may well be useful when preparing disclosures about other similar themes. The SEC specifically had sustainability in mind, but this applies equally to the spread of the coronavirus.

Conditional Relief

In recognition of the fact that the effects of the coronavirus may present challenges for certain reporting companies to timely meet their SEC filing obligations, the SEC has issued the Order that, subject to certain conditions, provides reporting companies with an additional 45 days to file certain reports, schedules, and forms that otherwise would have been due between March 1 and April 30, 2020. The SEC has indicated it may extend the time for the relief or provide additional relief as circumstances warrant. In the absence of the relief, reporting companies would have been subject to existing deadlines and otherwise would have been able to avail themselves of a 15-calendar day extension for annual reports (on Form 10-K, Form 20-F or Form 11-K) or a five-calendar day extension for quarterly reports (on Form 10-Q), in each case by relying on

Rule 12b-25 under the Securities Exchange Act of 1934 (the Exchange Act).

To take advantage of the relief, a reporting company must be unable to meet a filing deadline due to circumstances related to the coronavirus and must furnish a Form 8-K or, if eligible, a Form 6-K by the later of March 16 and the original filing deadline, which:

- States that the reporting company is relying on the Order
- Provides a brief description of the reasons why the reporting company is unable to file the report, schedule, or form on a timely basis
- Discloses the estimated date by which the report, schedule, or form is expected to be filed
- Provides, if appropriate, a risk factor explaining, if material, the impact of the coronavirus on the reporting company’s business

If the reason the report cannot be filed timely relates to the inability of any person, other than the reporting company, to furnish any required opinion, report, or certification, the Form 8-K or Form 6-K must have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report, or certification on or before the date such report must be filed.

The delayed filing must be made no later than 45 days after the original due date. The filing when made must disclose that the reporting company is relying on the Order and must state the reasons why it could not file the report, schedule, or form on a timely basis.

The Order also provides relief from the requirement to make available a proxy statement, annual report, and other soliciting materials (Soliciting Materials) or to furnish an information statement and annual report (Information Materials), in each case under the Exchange Act, provided:

- The reporting company’s securityholder has a mailing address in an area where, as a result of the coronavirus, common carriers have suspended delivery service of the type or class customarily used by the reporting company or other person making the solicitation.
- The reporting company or other person making a solicitation has made a good faith effort to furnish the Soliciting Materials to the securityholder, as required by the rules applicable to the particular method of delivering Soliciting Materials to the securityholder or, in the case of Information Materials, the registrant has made a good faith effort to furnish the Information Materials to the securityholder in accordance with the rules applicable to Information Materials.






The Conditional Relief Release sets forth various Staff positions regarding eligibility to use Form S-3 (and well-known seasoned issuer status) and Form S-8 eligibility (and the current public information eligibility requirement of Rule 144(c)), in each case if the reporting company is current as of the first day of the relief period and it files any report due during the relief period within 45 days of the filing deadline of the report. The Conditional Relief Release also states that reporting companies relying on the Order will be deemed to have a due date 45 days after the original filing deadline for an annual or quarterly report and, as such, will be permitted to rely on Rule 12b-25 if they are unable to file the annual or quarterly report on or before the extended due date.

The SEC has indicated in the Conditional Relief Release that reporting companies facing administrative or other challenges in complying with their obligations under the securities laws by reason of the coronavirus should contact the Staff, which will address issues raised on a case-by-basis in light of their fact-specific nature. Staff members have reiterated in various conversations with us that the Staff stands ready to provide assistance where possible.

### Looking Ahead

The Staff is on record as monitoring the effects of the coronavirus. Staff statements have been made largely in the context of a willingness to provide guidance and other assistance to reporting companies. The Order is one example of that willingness. At the same time, the Staff has been clear in reminding reporting companies of their ongoing disclosure obligations and the importance of internal processes. In the Conditional Relief Release, Chairman Clayton states:

We also remind all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments. How companies plan and respond to the events as they unfold can be material to an investment decision, and I urge companies to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements.

This is a useful reminder of the importance of transparency, accuracy, and precision of public disclosure and of maintaining proper internal controls. A critical component of these efforts will be internal coordination to ensure that all of the dots are connected. 

**Mark S. Bergman** is co-head of the Global Securities and Capital Markets group at Paul, Weiss, Rifkind, Wharton & Garrison LLP and is resident in their London office. Mr. Bergman has extensive experience in corporate finance and securities transactions. Offerings in which he has been involved range from traditional offerings of equity and debt (including high yield instruments) to offerings of structured finance products and hybrid securities, principally for financial institutions. He has been involved in global capital markets transactions and other securities offerings for issuers in a number of countries. **John C. Kennedy** is a partner in the Corporate Department and co-head of the North American Capital Markets and Securities Practice group at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Mr. Kennedy focuses primarily on corporate finance and securities transactions. He has represented both issuers and underwriters in a broad range of public and private securities offerings, and has handled many complex securities and financing transactions, such as initial public offerings, high yield debt offerings, convertible debt offerings, cross border securities offerings, exchange offers, and debt tender offers. **Christopher J. Cummings** is a partner in the Corporate Department and a member of the Capital Markets and Securities and Canadian Practice groups at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Based in Toronto, he practices U.S. securities law with a particular emphasis on cross-border capital markets and mergers and acquisitions. He has worked on a broad range of public and private transactions for investment banks and companies in a number of industries, including oil and gas, mining, financial services, transportation, technology, and telecommunications.



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**Mark S. Bergman** PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

# SEC Issues Statement on Coronavirus Reporting Considerations and Potential Relief

## Introduction

This article discusses the joint Public Statement<sup>1</sup> issued by the U.S. Securities and Exchange Commission (the SEC) Chairman Jay Clayton, SEC Division of Corporation Finance Director Bill Hinman, SEC Chief Accountant Sagar Teotia and PCAOB Chairman William D. Duhnke III (the Statement), addressing financial reporting considerations and potential SEC relief in light of the current and potential effects of the coronavirus.

The Statement follows coronavirus-related comments provided by Clayton in his speech on January 30.<sup>2</sup> At that time, Clayton noted that the SEC staff would monitor coronavirus-related developments and provide guidance to companies and other market participants regarding any required disclosures relating to reporting companies' potential exposure to the effects of the coronavirus and the impact of such exposure on financial disclosures and audit quality. Clayton also noted that, despite the uncertainty surrounding the impact of the coronavirus, how reporting companies plan for the uncertainty and how they respond to events as they evolve can be material to an investment decision.



## Background

As noted in the Statement, the coronavirus effects may be of significance to a number of SEC reporting companies (including those based in the United States, in China or elsewhere in the world) that have business operations, or depend on companies (for example, suppliers, distributors and/or customers) that have operations, in China or other countries affected by the virus. As the situation continues to develop, its effects on individual reporting companies remain "difficult to assess or predict with meaningful precision" due to existence of a number of factors beyond their control and knowledge.

<sup>1</sup> <https://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19> <sup>2</sup> <https://www.sec.gov/news/public-statement/clayton-mds-2020-01-30>



From the perspective of a reporting company, the coronavirus may have a range of effects on operations, internal processes and controls, and operating results. There may be administrative challenges for reporting companies with a calendar year-end that could affect audit quality and the timeliness of the completion of the annual audit (e.g., access by auditors to information and company personnel). There may well also be challenges for reporting companies as they

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prepare disclosures to be included in annual or quarterly reports on Form 10-K or Form 10-Q, or annual reports on Form 20-F or Form 40-F, due to the difficulty in quantifying how they will need to respond to the consequences of the coronavirus as it continues to spread, and quantifying the impact of such consequences, as well as any mitigating actions, on prospects, financial condition, results of operations and cash flows. These consequences will also need to be factored into decisions made around financial reporting (accounting conclusions and reporting/recognition of subsequent events). Access to financial and other information from equity method investees and acquired/to be acquired businesses, as well as from consolidated entities, affected by the coronavirus may also be impacted. Finally, reporting companies headquartered, or with operations, in China, or with supply chain or other material relationships with companies in China, may need to consider the impact of coronavirus consequences on their disclosure controls and procedures and (particularly if controls need to be modified or temporarily replaced) internal control over financial reporting.

### Initial Guidance

As result of the uncertainty, the SEC urges reporting companies to engage with their audit committees and auditors to ensure that “their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances” as this will enable them to better respond to events as they unfold and to meet any applicable requirements. In particular:

- The Statement underscores the need for reporting companies to consider potential disclosure of “subsequent events” in the notes to their financial statements in accordance with guidance included in Accounting Standards Codification (ASC) 855, Subsequent Events.
- The Statement is also a reminder of the SEC’s general policy of granting relief from filing deadlines in situations where, in light of circumstances beyond the control of a reporting company, filings cannot be completed on time with appropriate review and attention. The Statement cross-references the SEC release<sup>3</sup> issued following Hurricane Michael in 2018, at which time the SEC issued both an order<sup>4</sup> under the Securities Exchange Act of 1934 (the Exchange Act) and the Investment Company Act of 1940 and an interim final temporary rule,<sup>5</sup> and provided no-action relief on related filing obligations under the Securities Act of 1933, the Exchange Act, and the Investment Advisers Act of 1940. The 2018 actions underscore the importance for affected reporting companies of complying with any new deadlines that may be set and being in a position to state the reasons why reports, schedules or forms could not be filed with the SEC on a timely basis.

<sup>3</sup> <https://www.sec.gov/news/press-release/2018-237> <sup>4</sup> <https://www.sec.gov/rules/other/2018/34-84440.pdf> <sup>5</sup> <https://www.sec.gov/rules/interim/2018/33-10567.pdf>



### Looking Ahead

The SEC staff expects to engage with registrants on questions they may have in relation to reporting of the potential effects of the coronavirus and encourages reporting companies to contact the SEC staff if they require specific relief or guidance. Based on the circumstances and on the continued monitoring of coronavirus-related developments, the SEC staff will decide whether it would be appropriate to provide relief or additional guidance on a case-by-case or broader basis. In the absence of such relief, reporting companies will only have the limited extensions available as provided in, and upon compliance with, Rule 12b-25 under the Exchange Act. 

**Mark S. Bergman** is co-head of the Global Securities and Capital Markets Group at Paul, Weiss, Rifkind, Wharton & Garrison LLP and is resident in the London office. Mr. Bergman has extensive experience in corporate finance and securities transactions. Offerings in which he has been involved range from traditional offerings of equity and debt (including high yield instruments) to offerings of structured finance products and hybrid securities, principally for financial institutions. He has been involved in global capital markets transactions and other securities offerings for issuers

in a number of countries. Among other offerings, he represented the underwriters on the first direct listing by a Chinese company in the United States, and has represented issuers issuing and listing securities on the NYSE, Nasdaq, the London Stock Exchange, the ASX, the Frankfurt Stock Exchange, the Hong Kong Stock Exchange, the Johannesburg Stock Exchange, the Luxembourg Stock Exchange, and the SIX Swiss Exchange. Mr. Bergman is recognized for his work in capital markets transactions by *The Legal Media Group Guides to the World's Leading Capital Markets Lawyers* and in *The Legal 500*. As part of the firm's general representation of U.S. and non-U.S. companies listed in the United States, Mr. Bergman advises a range of listed companies on reporting and other obligations under the securities laws, establishment of corporate compliance programs, and compliance with corporate governance standards under the securities laws and stock exchange rules. He has advised companies in connection with SEC and other U.S. regulatory investigations, and stock exchange proceedings.

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**Evan Hudson,  
Jeffrey S. Lowenthal,  
Jeffrey D. Uffner, and  
Michelle M. Jewett**

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# Navigating Coronavirus: A Guide for REIT General Counsel

The World Health Organization declared COVID-19 a pandemic, then markets continued a steep decline, as the coronavirus morphed from a public health crisis to a financial black swan event. As owners of much of the real estate that supports the U.S. economy, real estate investment trusts (REITs) face unique exposures and their general counsel (GC) face unique challenges. Some key considerations for REIT general counsel are set forth in this article.

## The GC as Leader

The general counsel is not just the chief legal officer of the company. The general counsel is a leader in every sense of the word. In times of crisis, leadership requires presence, equanimity, and communication.<sup>1</sup>

Presence means mindfulness and situational awareness. Keeping abreast of evolving threats is paramount. In working with others in senior management to guide the ship, the general counsel must readily assimilate, evaluate, and act on fluid and imperfect information about public health, biology, the capital markets, NGOs, governments, politics, and human reactions.

Equanimity means setting the right tone. Presenting a calm and informed demeanor before the board, the CEO, and the employees is critical in helping the organization weather the crisis.

Communication is something to be done proactively, and it ties in with situational awareness. By communicating inside



and outside the firm, the GC can gather the information needed to make informed decisions. Especially as the REITwise conference and other industry meetups get canceled, now is a good time to reach out to your law school classmates, your law firm alumni network, and your colleagues at other REITs to better understand the lay of the land.

## The REIT as Public Company

On the topic of communication, investor relations take on heightened importance during a fast-moving crisis. Some REITs have issued letters to investors outlining the steps they are taking in response to the coronavirus pandemic and the implications of the crisis for the real estate portfolio and the REIT's securities. GCs should take care to ensure everyone is receiving the same information when investors call with questions and concerns, paying particular attention to the requirements of SEC Regulation FD.

REITs engaged in stock buybacks or securities offerings should ensure that their disclosures are up to date. In particular, GCs should see that the risk factors and forward-looking statements legends in '34 Act and '33 Act disclosure documents continue to evolve in appropriate ways.

Ongoing offerings, both private and public, may require the preparation and distribution of a disclosure supplement. We are also seeing non-traded REITs revise their disclaimers about the limitations of their net asset value (NAV) calculations given new uncertainty in NAVs.

The GC may have observed that on March 4, 2020, the Securities and Exchange Commission (SEC) issued an order that, subject to certain conditions, provides publicly traded companies with an additional 45 days to file certain disclosure reports that would otherwise have been due between March 1 and April 30, 2020. The SEC reserves the right to extend the time period for the relief, although as of the time of writing has not done so.

Non-traded REITs that allow repurchases should carefully review their repurchase plans and decide whether any actions are needed. Managers should prepare for the possibility of increased redemptions in coming months, consider the REIT's liquidity levels, and review the documents with an eye toward potential suspensions.

Unfortunately, certain publicly traded REITs may need to consider withdrawing their earlier earnings guidance. We are seeing this become a reality right now for hotel operators faced with declining demand for rooms. The GC of a hotel REIT also should be in close contact with the CEO, the CFO, and the board as they consider how the pandemic will affect the company's dividend policy and how any change to the policy will be communicated to stockholders. To the extent that the firm's liquidity is at issue, the GC should consider discussing the pandemic's impact in the Management's Discussion and Analysis of Financial Position and Results of Operations portions of relevant disclosure documents.

At the same time, some REITs view the market decline as a buying opportunity, both for their own stock and for the securities of other REITs. Issuers should be cognizant of all relevant securities law considerations and should coordinate with outside counsel on sensitive questions about public disclosures and the timing of repurchases. The relationship between NAVs and public market values should be monitored closely. Whether REITs continue to trade at a discount to NAV, as they have for years, remains a question mark while the equity capital markets are this unsettled and the commercial real estate markets have not yet had time to digest the full implications of the pandemic.

It would be reasonable to expect the IPO window, such as it was, to close for the time being, and for follow-on offerings to be put on hold. Proposed at-the-market programs are getting delayed at the moment, in our experience—generally because issuers view current market conditions as more conducive to buying rather than selling equity securities.

Lastly, we are seeing REITs notify investors that the annual stockholder meeting will be held by remote communication. We have every reason to expect that this will become the new normal for the spring of 2020.

## The REIT as Real Estate Owner

Equity REITs share some of the concerns common to all owners of commercial real estate.<sup>2</sup> The GC of an equity REIT should collaborate with the CEO, asset managers, property managers, and acquisition underwriters in evaluating real estate-related risks. The risk level largely depends on the asset class. For example, nursing home owners face special risks, both operational and market-driven. So do hotel owners and owners of retail venues, including certain asset classes previously considered relatively immune to retail woes, like event spaces and grocery-anchored centers. Moreover, REITs holding European or Asian real estate must contend with travel restrictions, which impose myriad complications on property management and supply chain efficiency.

Wearing the landlord hat, the GC should consider reviewing leases to determine potential responses to rent abatement requests. Property managers might inquire with tenants regarding whether scaling back utility usage is feasible given the move toward remote work. Asset management and acquisition teams should take a fresh look at underwriting assumptions for projects in light of an anticipated economic slowdown.


1. Derived from the March 12, 2020 Stroock Special Bulletin, which includes notes specific to the role of GC.

2. Derived from the March 3, 2020, Stroock Special Bulletin titled "Steps for Businesses to Consider as Coronavirus Spreads."

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Other items for the GC’s consideration apply to mortgage REITs and specialty REITs just as much as they pertain to traditional-asset equity REITs.

Regarding the credit markets, the impacts of the coronavirus on mortgage rates, corporate credit ratings, and U.S. Treasuries are uncertain and changing quickly. GCs should communicate with other members of the management team about the legions of threats and opportunities presented.

Some clients are asking for a review of their insurance policies to determine whether the policies cover losses from a pandemic. This includes business interruption and key man insurance. Additionally, counsel can help to determine whether and when notices must be given to insurers.

Lastly, the GC or the appropriate designees should consider whether the pandemic constitutes a *force majeure* or a material adverse event (MAE) under existing purchase and sale agreements, financing agreements and dealer agreements.

The REIT may be the party declaring a *force majeure* or MAE or the party receiving such notice. In either case, as in a chess game, potential responses need to be mapped out before notices are given or received.

The REIT as Tax Creature

A REIT must meet a number of statutory requirements in order to maintain its status as a REIT. For instance, and generally speaking, at least 75% of a REIT’s assets must consist of real estate and real estate-related assets; at least 75% of a REIT’s gross income must consist of items such as rents, mortgage interest, and gain from the sale of real property interests; and 95% of a REIT’s income must consist of those items as well as certain passive income. In addition, a REIT must distribute 90% of its taxable income to its stockholders in order to avoid punitive excise taxes and income taxes.

In times when economic contraction seems likely, the GC of an equity REIT must be mindful of the impact of slumping prices, tenant defaults, and liquidity shortages on satisfying the relevant REIT requirements. As the composition of a REIT portfolio changes, swings in the value of its assets could affect its ability to meet the necessary asset tests. Tenant defaults could affect the dependability of a REIT’s rental revenue and reduce the magnitude of its qualified income basket. Declining profits could also impair a REIT’s ability to satisfy its distribution requirements and, absent bank financing (which may not be readily available), may cause it to resort to “consent dividends,” which would result in taxable income without corresponding cash distributions for stockholders. While responsibility for monitoring these tests is often left to tax and accounting professionals, the GC is still the person in charge and the one with the most immediate access to the information that will drive REIT compliance. Moreover, the GC will be responsible for communicating these risks to management and the stockholders and considering whether relief measures for failure to comply with certain of these requirements should be sought from the Internal Revenue Service.

The REIT as Employer

REITs, like other employers, need to think about employment law issues. The thoughts below are derived from previous Stroock alerts relating to the coronavirus outbreak. (See the full list at the end of the article.)


Returning to the now-familiar topic of communication, the GC should ensure that the REIT is communicating with employees about the coronavirus, including steps that the employer is taking in response. With the assistance of outside counsel, the GC should evaluate company policies relating to remote working, sick leave, and family leave and determine whether any revisions are necessary. As always, GCs should be careful

not to ask employees about their medical condition and should not single out any particular groups of employees for any policy based on their national origin, ethnicity, or other protected status.

Some firms have adopted a pandemic preparedness plan. In addition to business continuity, the plan might encourage employees to stay home when sick, include protocols for quarantine situations, and require increased frequency of environmental surface cleaning. A pandemic preparedness task force, if constituted, should either include or closely coordinate with the GC.


Putting the pandemic preparedness plan into action, REITs with substantial employee headcounts might perform stress tests on remote working infrastructure to ensure that it can bear the load of all or most of the firm’s employees working remotely at the same time. This can be critical to not making the REIT a liar with respect to its long-touted business continuity plan.

Supervision of employees while they work remotely presents unique challenges. The fact of a pandemic does not absolve a REIT of its fiduciary responsibilities to investors, securities law liabilities, or legal obligations as an employer. Therefore, the proverbial machinery of the office needs to keep moving even when the workforce has dispersed to remote locations. Work-from-home protocols need to be designed, communicated, and enforced so the REIT can continue delivering high-quality product to its tenants and preserve and grow the capital that public investors have entrusted to it. In this, the GC has a crucial role and can help the REIT ensure that no weapon launched against it, even the coronavirus, will hit the mark.<sup>3</sup>

The GC should assume that the pandemic will continue to spread and that things will get worse before they get better. Communication with colleagues, investors, and outside counsel is critical during the course of this fast-moving crisis.<sup>4</sup> 

*Evan Hudson is an acknowledged leader among a new generation of real estate capital markets lawyers. He draws on skills honed over more than a decade of concentration in the structuring of real estate investment vehicles, including private funds, DSTs and REITs (publicly traded, non-traded and private). With respect to asset management, on the institutional side, Evan represents some of the largest private REITs in the world. On the retail side, Evan helps sponsors tap the large and growing pool of capital controlled by “mass affluent” and high-net-worth private clients. Jeffrey S. Lowenthal is co-chair of Stroock’s Corporate Practice*

*Group. He concentrates in corporate finance, securities, corporate reorganizations, acquisitions and joint ventures, and general corporate law. Jeffrey counsels issuers, investment banking firms and selling security holders involved in public offerings and private placements of debt and equity securities. He regularly advises public companies on disclosure requirements and other issues arising under federal securities laws. He also represents buyers, sellers and investors in purchases and sales of assets and businesses and other types of business combinations, including joint ventures and similar arrangements. In the credit arena, Jeffrey represents bondholder committees, banks, insurance companies, and other financial institutions and investors in the restructuring of debt facilities and other financing arrangements. Jeffrey D. Uffner, chair of Stroock’s Tax Practice and co-chair of its Private Funds Group, represents prominent securities, real estate, distressed debt and infrastructure fund sponsors, and global, national and regional private funds, in all aspects of domestic, foreign and cross-border tax planning. Jeffrey has extensive experience in a wide range of transactional and commercial tax matters, having structured highly complex, tax-efficient investment platforms for taxable and tax-exempt institutions, high net worth individuals, and non-U.S. investors. He advises clients on the taxation of partnership entities; real estate investment trusts; qualified opportunity zone funds; cross-border acquisitions and investments; mergers and acquisitions; structured and derivative products; investment and energy tax credits; real estate investment and exchanges; and the investment activities of pension plans, tax-exempt organizations, venture capital funds and non-U.S. investors such as sovereign and sovereign wealth funds. Michelle M. Jewett, a partner in Stroock’s New York office, focuses on all areas of federal income taxation, offering deep experience in corporate, mergers and acquisitions, partnership, financial instruments, private fund structures, insurance and reinsurance transactions, intellectual property and real estate investment trusts, both domestically and internationally. Michelle has advised on structuring cross-border taxable and tax-free mergers, acquisitions and dispositions, domestic and foreign private equity investments, real estate investments by taxable and tax-exempt entities, mortgage-backed securities and other securitization transactions, leveraged leases, various international investments and transactions, bankruptcy and debt workouts, renewable energy investments and corporate transactions in the insurance industry. She has structured numerous cross-border arrangements, including U.S. and foreign private equity funds, real estate funds, timber funds, energy and infrastructure funds, credit funds, and hedge funds.*

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3. Additional Stroock alerts identifying additional issues to consider: “What a General Counsel of a Private Fund Advisor Should Be Doing Today to Manage the Coronavirus Crisis” (March 12, 2020). “The Possible Impact of COVID-19 on the OTC Derivatives Markets” (March 6, 2020).

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# LexisNexis Provides Free Access to Coronavirus News, Analysis Across the Globe

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LexisNexis is taking steps to keep the public informed during the coronavirus/COVID-19 pandemic by providing free access to information and resources around the world through company platforms and outlets.

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Key among the resources are the Lexis Practice Advisor Coronavirus (COVID-19) Resource Kits and Law 360's free access to breaking news about the virus.

The Resource Kits, repositories of practical guidance for attorneys in a number of practice areas—including links to related content about the virus—are updated regularly and are available to attorneys in the United States and Canada. Existing customers can access the content online; non-customers can download the content.

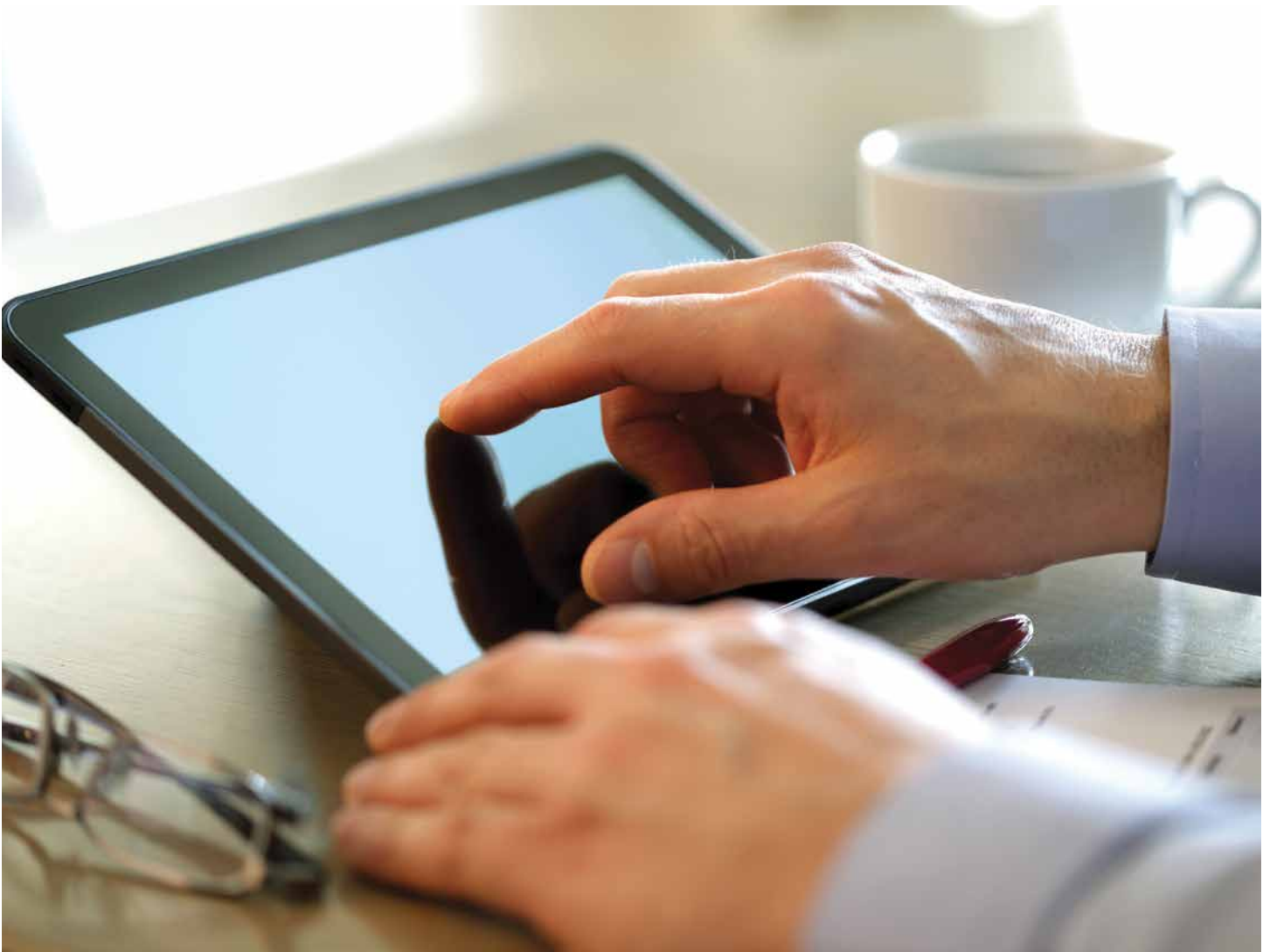
Law 360 has launched a dedicated COVID-19 page containing breaking news, in-depth features, and expert analysis and commentary on all things relating to COVID-19 and the law. Hundreds of news items are available, with updates provided every day. The Lawyer's Daily, LexisNexis' Canadian legal news service, is providing free coverage on the virus, including news, analysis, and opinion.

"In this moment of fluid change and uncertainty, we couldn't think of a better way to help our customers and the community than by offering full access to breaking news and analysis on COVID-19 from our award-winning Law360 newsroom and the Lexis Practice Advisor Coronavirus Resource Kit that helps lawyers practice and provide better counsel to their clients," said Sean Fitzpatrick, CEO, North American Research Solutions at LexisNexis.

Intelligize, LexisNexis' securities content product, is delivering free insights and analysis on the corporate response to the virus. A news tracker is expected to be released shortly by Nexis Solutions.

In the United Kingdom, PSL subscribers have access to a COVID-19 toolkit. Non-subscribers can access free resources via a dedicated coronavirus blog. A similar COVID-19 information resource hub is available to Australian attorneys and an international module that will allow users to navigate freely between content from the United States, Canada, Australia, New Zealand, and the United Kingdom is expected soon. In France, LexisNexis has provided free access to a dedicated COVID-19 news stream on LexisActu.fr.

While providing practical solutions to customers' needs, LexisNexis has continued its emphasis on the rule of law. In a recent blog post entitled "Coronavirus and the Rule of Law: A Warning from History," Ian McDougall, executive vice president and general counsel for LexisNexis Legal & Professional and president of the LexisNexis Rule of Law Foundation, said, "Let us remember the lessons of history: Even in the midst of the most serious of crises there is no need to abandon the Rule of Law. Society is not benefited in the long run by removing the foundations upon which it is built. The taking of extraordinary powers should be a mechanism to bypass bureaucracy not the Rule of Law! We should remember that in a crisis, the people who are affected most by the abandonment of the Rule of Law are the most vulnerable. Sticking to important principles is not always easy but they are the foundation of civilized society and a crisis should not take away our civilization."



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