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Summer 2020

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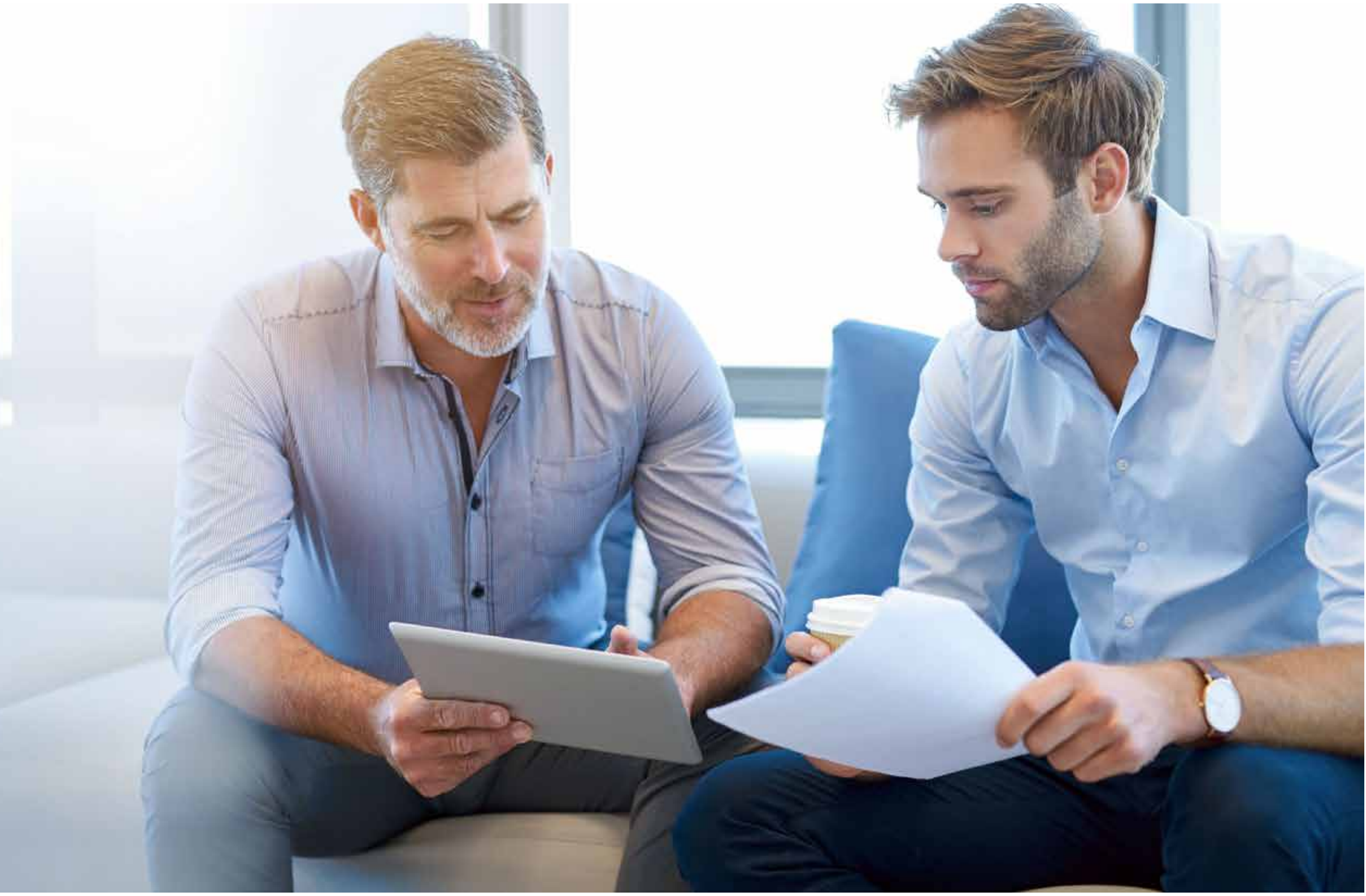

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Eric Bourget, Editor-in-Chief

AS THE ECONOMY IS SLOWLY reopening and companies begin to bring some employees back into the workplace, guidance is essential for facing the challenges of a rapidly changing business environment. In this edition of the Lexis Practice Advisor Journal, we bring you insights to help you prepare clients and companies for the adjustments required as business moves forward.

The coronavirus outbreak is the type of unexpected event that force majeure clauses are designed to protect against. As companies and businesses experience temporary shutdowns and quarantine-related restrictions, they are invoking these clauses to determine whether they may be excused from certain contractual obligations because of impossibility of performance or frustration of a contract's purpose. Read about how the pandemic might impact future force majeure clauses and gain insight into how courts may handle the inevitable onslaught of contract disputes caused by COVID-19-related closures, shutdowns and quarantines.

As the COVID-19 pandemic spread, employers quickly implemented new health and safety measures to protect their employees, customers, and the general public. Businesses deemed essential scrambled to make immediate changes and continue to enhance these safeguards. As the economy reopens, the need for heightened health and safety measures remains a top priority. This edition offers guidance on creating safe workplaces and reviews new measures designed to curb the spread or resurgence of COVID-19.

An unfortunate consequence of shutdowns and quarantines is the uncertain future facing many businesses. This edition includes guidance for distressed companies seeking loan workouts to restructure loan and bond debt. We also review how COVID-19 has changed retail bankruptcy proceedings, and provide insights into the Small Business Reorganization Act of 2019 (SBRA,) which was designed to lower the costs and improve the bankruptcy process for small businesses. The SBRA may provide a lifeline for small businesses struggling through coronavirus impacts and it went into effect at the beginning of the COVID-19 pandemic. Learn more about the SBRA, the revisions made to it by the Coronavirus Aid, Relief and Economic Security Act (CARES Act), and how small business owners can reorganize their debts efficiently and effectively with the goal of saving their operations and livelihoods.

Another industry hit hard by the pandemic is real estate. As offices are vacated and retail establishments close their doors, the CARES Act offers temporary relief. Learn more about business loans designed to help employers pay rents and mortgages, forbearance and foreclosure moratoriums to assist residential owners and tenants, and other benefits for the real estate industry under the CARES Act.

We hope you will find this guidance valuable as you and your clients work through the devastating impacts of the COVID-19 pandemic and attempt to move forward. We offer our most sincere concern for everyone impacted by the virus. Please stay safe and healthy.

Our mission

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Practice News

Is there a Future for Retail after COVID-19: A Look at Modell's and Pier 1 and Their Bankruptcy Proceedings

Heike M. Vogel and Eric H. Horn A.Y. STRAUSS

THIS ARTICLE DISCUSSES THE IMPACT OF THE COVID-19 pandemic on the retail industry and retail bankruptcy cases. Even before COVID-19, the retail industry was at the top of the bankruptcy watchlist. It was widely known that retailers were facing financial difficulties as they were unable to meet projected income targets partly because of tough competition by online giants like Amazon. While Amazon is also leasing the majority of its warehouses, it obviously is not dependent on customer foot traffic the way most retailers are since Amazon is essentially operating as a shipping company. The majority of large and small retailers are burdened with high monthly rents for their many stores located in shopping malls or strip centers that are dependent on customers visiting and purchasing goods within the shops.

While already struggling to attract customers into their stores, shops, malls, and shopping strips have been forced by the COVID-19 shutdown to close their doors, bringing retailers' struggle to total capitulation.

Before COVID-19, Retailers Were Assisted by the Bankruptcy Code

Prior to COVID-19, retailers might still have had hope that filing for bankruptcy could have assisted them in restructuring their debts by allowing them to reject expensive store leases, close down non-profitable stores, and renegotiate lease payments for profitable stores. In short, the plan would be to downsize, restructure, and re-emerge as a smaller, but ongoing business, and the Bankruptcy Code would have assisted in accomplishing all that.

How COVID-19 has Changed Retail Bankruptcy Proceedings

COVID-19 not only changed previous retail bankruptcy proceedings, it is forcing bankruptcy judges, debtors, landlords, lenders, and creditors into an entirely new and unexpected arena. Generally, bankruptcy proceedings are marked by important timelines and milestones that must be met by debtors, or debtors must seek approval from the bankruptcy court to extend these deadlines.

For example, debtors have 60 days from the date of the petition to reject or assume and assign retail leases, have an exclusive period of 120 days to file their plans for restructuring or liquidation, and have 180 days after the filing of their plans to solicit acceptance from creditors of their plans (the foregoing dates may be extended to a certain point). These timelines are given to debtors to provide them with the time needed to successfully restructure their debts, often through sales of some, or substantially all, of their assets and by obtaining debtor-in-possession financing or being allowed to use their lenders' cash collateral.

Along with the bankruptcy petition and first-day motions, corporations filing for Chapter 11 file a declaration from either their chief executive officer, chief restructuring officer, or any other person in charge of running the company. The declaration explains, *inter alia*, the reasons for the bankruptcy filing and the debtor's strategies of restructuring or liquidating its business. For the majority of retailers, one strategy includes having going-out-of-business sales in either all of their stores if the retailer is liquidating all of its assets, or only the ones that will be closed permanently if the retailer is trying to continue to operate but on a downsized scale.

How Modell's Sporting Goods' Bankruptcy Action is Proceeding During this Pandemic

On March 11, 2020, Modell's Sporting Goods, Inc. and 13 affiliated debtors filed for Chapter 11 in the U.S. Bankruptcy Court for the District of New Jersey. Modell's is a family-owned retailer of sporting goods, athletic footwear, and active apparel. It was founded in 1889 by Morris A. Modell, making it the oldest family-owned retailer in the United States. Modell's has 134 stores located in strip centers and shopping malls throughout the northeastern and mid-Atlantic United States.

In his declaration, the chief restructuring officer of Modell's set forth the proposed course of the Chapter 11 cases, which included, among other measures, the use of cash collateral required to continue operations during the liquidating process and generating further revenue from store closing sales. On March 16, 2020, only five days after submitting the proposal, the governor of New Jersey, due to the outbreak of COVID-19, ordered a near-shutdown of the entire state, where 33 of Modell's stores are located. This mandate closed all movie theaters, casinos, and gyms, and within a few days of this order, the New Jersey governor extended it to include indoor malls and all other non-essential, public gathering places. Multiple other states followed suit with orders to enforce social distancing to prevent the spread of COVID-19 infections.

Less than a week after this national shutdown, Modell's filed a motion with the bankruptcy court, seeking a suspension of its Chapter 11 cases.

Can a Retail Bankruptcy Matter be Suspended?

Pursuant to Section 305 of the Bankruptcy Code, the bankruptcy judge, after notice and a hearing, may "suspend all proceedings in a case under this title, at any time if ... the interests of creditors and the debtor would be better served by such dismissal or suspensions."[1] Bankruptcy courts have noted that a suspension of a bankruptcy proceeding is an "extraordinary remedy."

What could be more extraordinary than the current COVID-19 pandemic that has caused entire countries to shut down? In the motion asking the bankruptcy judge to suspend its Chapter 11 proceeding, Modell's pointed out to the court that "[t]he cornerstone of these cases is the liquidation of the Debtors' 134 stores and e-commerce site through store closing sales."[2] On March 27, 2020, the court entered the order suspending the case.

The COVID-19 shutdown orders throughout the United States simply make it impossible for Modell's to liquidate its inventory through going-out-of-business sales, and Modell's was subsequently forced to cease all operations and to terminate all of its employees. One of the reasons a suspension is an "extraordinary remedy" is that while the debtor is continuously protected by the automatic stay, its creditors' and landlords' protections are also suspended. In other words, the usual timelines that Modell's would have to adhere to, including but not limited to, the time to decide which store leases will be rejected or assumed and assigned, are put on hold. The landlords are being asked to forego their rent payments for the time being—until the pandemic has been brought under control—but how long will it take to accomplish such a monumental task?

Under normal circumstances, when a debtor rejects a commercial lease, the landlord is entitled to a rejection damage claim against the bankruptcy estate, and the debtor is required to surrender the premises after rejecting the lease. A debtor is only permitted to assume and assign a lease to a new tenant after fulfilling any outstanding rent payments. Without the ability to hold store closing sales, Modell's is not only unable to generate revenue, it also will be incapable of clearing out the inventory within the stores and to surrender the premises to the landlords as it would be required to do after rejection. Of course, with the current suspension, Modell's is not even considering which store leases to reject and which ones to assume (the assumed leases will be the leases that Modell's is able to sell to a purchaser of the lease rights). In a bankruptcy proceeding, a debtor's decision to reject or assume leases or executory contracts is a very valuable one not only because it can terminate leases or contracts with unfavorable terms, but also because it could assume and assign a lease to another tenant for a higher value and retain the difference.

1. 11 U.S.C.S.§ 305(a)(1). 2. *See* Modell's Sporting Goods, Inc., Docket No. 115, Case No. 20-14179-VFP, Debtors' Emergency Motion for Entry of an Order Temporarily Suspending their Chapter 11 Cases.

A Retail Apocalypse—How Pier 1 Obtained a Suspension

Interestingly, Pier 1 Imports, Inc., another large retailer that filed for Chapter 11 on February 17, 2020, recently obtained a similar suspension order that specifically addressed abandoned inventory in its stores in connection with suspending its deadline to decide whether to reject or assume leases.

Pier 1 is a retailer of home furnishings and home accessories that at its peak operated close to 1,000 stores in Canada and throughout the United States. Pier 1's restructuring efforts began in 2018 and 2019 when its revenues continuously declined due to online competitors such as Amazon and Wayfair.

Related Content

For guidance on legal issues related to the coronavirus pandemic, see

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

RESEARCH PATH: *Bankruptcy > Trends & Insights > First Analysis > Practice Notes*

For an overview of topics of interest to attorneys representing parties in a Chapter 11 retail bankruptcy case, see

> **RETAIL INDUSTRY BANKRUPTCY RESOURCE KIT**

RESEARCH PATH: *Bankruptcy > Asset Purchase Agreement > Sale Process > Practice Notes*

For a general discussion of retail Chapter 11 bankruptcies, see

> **RETAIL BANKRUPTCIES**

RESEARCH PATH: *Bankruptcy > Asset Purchase Agreement > Sale Process > Practice Notes*

For a discussion of conducting a going-out-of-business sale in a bankruptcy case, see

> **GOING OUT OF BUSINESS SALES IN BANKRUPTCY**

RESEARCH PATH: *Bankruptcy > Asset Purchase Agreement > Sale Process > Practice Notes*

For information on a debtor tenant's obligations in connection with a sale under Section 363 of the Bankruptcy Code, see

> **SECTION 363 SALES WITH REGARD TO SHOPPING CENTER LEASES**

RESEARCH PATH: *Bankruptcy > Asset Purchase Agreement > Sale Process > Practice Notes*

Indeed, in his first-day declaration, Pier 1's Chief Executive Officer and Chief Financial Officer opened with "[t]he so-called 'retail apocalypse' has truly taken on a life of its own… No retail company or consumer in the United States has been immune from its reach over the last several years."[3] His "retail apocalypse" reference pre-dated the COVID-19 crisis. It is not surprising that by the time of its bankruptcy filing on February 17, 2020, Pier 1 had already commenced the process of closing up to 450 of its stores and was planning to continue operating only 540 stores.

While Pier 1's suspension order was similar to that granted to Modell's, it interestingly also contains a provision that for the store leases that the debtors had already rejected but from which they were unable to remove all inventory, the landlords cannot claim that the lease was not timely rejected because of the remaining abandoned property in the store. Again, this relief was granted to the debtors because of the current extraordinary situation of COVID-19. Due to being closed down, Pier 1 is prevented from clearing out its inventory from its stores through going-out-of-business sales.

In its emergency motion seeking the suspension order, Pier 1 argued that COVID-19 measures triggered certain lease provisions that entitle it to an abatement of rent. For example, Pier 1 noted that its "leases provide, in relevant part, that in the event any part of the leased premises or a substantial portion of the shopping center in which the leased premises is located is taken by any competent authority, Debtors shall have the right to continue the lease in full force and effect with a reduced fixed rent commensurate with the reduced area and/or reduced utility of the shopping center—which reduced rental will become effective upon the date of such taking."[4]

Pier 1 continues to assert that the government-ordered lockdown in response to the COVID-19 outbreak constitutes an execution of police powers to protect the public from a pandemic and as such meets one of the two elements of the takings doctrine, namely, the taking by the government must be for public use. The second element is that the government that took the property, even for public use, must compensate the owner of the property that was taken. Pier 1 does not assert that the government must compensate the landlord for mandating the closing of all unnecessary stores to protect the public from the spread of COVID-19. Rather, it asserts that it is entitled under the terms of its leases to an abatement of rent commensurate with the reduced utility of the leased premises.

3. *See* Pier 1 Imports, Inc., Docket No. 30, Case No. 20-30805, Declaration of Robert J. Riesbeck. 4. *See* Pier 1 Imports, Inc., Docket No. 438, Case No. 20-30805-KRH, Debtors' Emergency Motion.

Extraordinary Times and Extraordinary Suspensions with Novel Arguments

These are novel arguments and actions that are called for during this extraordinary and unique time. It is extraordinary to suspend not one, but several bankruptcy proceedings.

It is novel to:

- Allow debtors to park their inventory in stores for which they rejected their leases
- Put bankruptcy proceedings and its timelines on hold during this pandemic, thereby essentially asking debtors' landlords to forego collecting rents
- Invoke the takings doctrine in connection with store leases for retail debtors to be granted an abatement of rent

But these are only temporary measures, complying with the government stay-in-shelter mandates.

What Will Happen to Not Just Modell's and Pier 1 But to All Retailers When the Lockdown Is Lifted?

Pier 1 remains optimistic that once it can resume its initial plan of reorganization, a successful restructuring and liquidation should still be possible through going-out-of-business sales and the sale of its assets. However, at this time it remains to be seen if customers will be emotionally and financially in a position to return to malls, strip centers, and stores for a shopping spree of non-essential items. These are unprecedented times, with questions unseen before, such as:

- Will the fear of contracting a potentially deadly virus keep people from going to large public places like shopping malls?
- Will the financial burden due to unemployment prevent customers from spending money on retail goods?
- Is it possible that all retailers will become casualties of this pandemic—the reality of the so-called retail apocalypse?
- Is it also possible that this time of quarantine and isolation will bring a newfound appreciation for going to stores to purchase non-essential products rather than ordering online from home?

When the large bookstore chain Borders permanently closed its doors because books were replaced by Kindles, e-readers, and iPads, it seemed to have been the end of all bookstores. And yet, smaller bookstores survived because readers appreciate their atmosphere of being surrounded by books and people who enjoy reading, touching, and browsing through them. With all the convenience of online shopping at home, consumers lose the social aspect of going to a store, being assisted by and interacting with store employees, trying on new clothes, sitting on couches, and lying on mattresses.

Yes, these are dire times for retailers and for everyone as the economy is collapsing worldwide, but crisis also brings people together and can create new opportunities. Modell's and Pier 1 are currently asking their landlords, among other creditors, to be patient, to recognize that everyone is in this situation together. The filing for bankruptcy has always been an attempt to bring all parties together, giving debtors some breathing space to restructure or liquidate in the hopes that debtors will emerge as a going concern. The majority of interested parties in a corporate restructuring knew that if a debtor were able to continue as an ongoing business, it would be beneficial for everyone involved. COVID-19 has caused a precarious situation that is not only putting retailers in a dire financial position, but also putting landlords in troubled waters. Not only are landlords now asked to wait for either rent payments or return of their leased property, but what other tenants will be in a position to rent the empty stores? What can landlords do to protect their assets? Will landlords, particularly those highly leveraged, be the next wave of bankruptcy filers? Only time will tell which retailers will survive and which ones will fail. We will continue to watch the marketplace and share insight as this impact on retailers unfolds L.

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RESEARCH PATH: Bankruptcy > Trends & Insights > First Analysis > Articles

Compliance Tips for Running Clinical Trials During COVID-19

Jill E. Anderson, Linda A. Malek, and Nora Lawrence Schmitt MOSES & SINGER LLP

NAVIGATING THE PATH FORWARD TO CONDUCT CLINICAL research in the midst of the COVID-19 pandemic has introduced unique challenges for sponsors and research institutions alike.

Industry sponsors and institutions are facing unprecedented issues resulting from the COVID-19 outbreak, such as clinical trial site closures, travel restrictions, limitations on the availability of investigational products, and threats to the health and well-being of research personnel and study participants. Sponsors and institutions are struggling to address the impact of COVID-19 on study data, reporting obligations, and various human subject protection requirements. The clinical trial landscape has changed dramatically, and the entire research community has been forced to adapt.

In an effort to assist entities facing such challenges, the U.S. Food and Drug Administration (FDA) and the Office for Human Research Protections (OHRP) have each recently issued guidance documents outlining issues that sponsors and researchers should consider. Taking that guidance into account, this article will provide practical insight for sponsors and institutions regarding the conduct and oversight of clinical trials during COVID-19.

Assess Safety Protocols to Protect Study Participants

Sponsors and institutions, in consultation with institutional review boards, or institutional review boards (IRBs), must determine whether the safety, welfare, and rights of study participants are best protected by continuing the study according to the existing protocol, revising the protocol, or by discontinuing subject participation in the trial altogether.

This is a fact-specific determination and will depend on factors such as the nature of the investigational product, the ability to conduct appropriate safety monitoring, the potential impact on the investigational product supply chain, and the nature of the disease under study in the trial. The inability of study participants to make protocol required in-person visits at investigational sites (e.g., because of shelter in place orders, lack of transportation, or because the study participant is at high risk with respect to COVID-19) must be specifically considered, especially in the context of safety assessments. Alternative communication methods, such as phone calls or virtual visits, must be carefully assessed to determine whether they will suffice to ensure the safety of participants.

Proposed changes to previously approved protocols due to COVID-19 may be submitted to the reviewing IRB at any time. To the extent the changes are necessary to eliminate apparent immediate hazards to study participants, the required changes may be implemented prior to obtaining IRB review and approval, provided such changes are reported to the IRB as soon as possible. For instance, an investigator is entitled, in his or her discretion, to cancel or postpone nonessential study visits or to conduct remote visits instead of in-person visits without prior IRB approval, provided the IRB receives notification as soon as possible.

Note that decisions made by institutions or investigators (as opposed to the IRB) regarding the suspension or termination of approved research are not required to be reported to the OHRP. Only suspensions or terminations of approved research that are mandated by an IRB must be reported to OHRP.

Modify Protocols, Consents, Data Collection, and Analysis to Account for COVID-19 Deviations

Modifications to clinical trial protocols, informed consent documents, and data collection and analysis methods in light of COVID-19-related deviations will necessitate IRB involvement and compliance with institutional policies.

With respect to protocol modification, deviations that may be particularly relevant due to COVID-19 include changes in subject screening, efficacy and safety assessments, and site monitoring, such as the use of virtual technology to interact with study participants.

Sponsors should also consider whether it will be necessary to implement alternative methods for delivering and administering investigational drugs to study participants, particularly in situations where participants do not have access to the health care setting in which the investigational drug is traditionally administered.

Study participants must be informed of changes to the study and monitoring plans that may have an impact on them, and these changes may require amendments to informed consent forms. All amendments to informed consent forms must be submitted to the IRB.

Modification to the collection of efficacy endpoint data may also be required, as well as changes to statistical analysis or data management plans to account for modifications made to the protocol.

Carefully Document all COVID-19 Modifications

Sponsors, institutions, and investigators should carefully ensure proper documentation of all modifications due to COVID-19 on case report forms and other study related documentation. This includes documenting the duration of any modifications, the study participants affected, and the nature of the impact on such participants.

Sponsors, in particular, should account for missing information in case report forms resulting from changes in study visit schedules, missed visits, or patient discontinuations and should be prepared to explain the basis of any missing data to the FDA, including whether and the extent to which COVID-19 is a factor.

Appropriately Distinguish Between Research Activities and Clinical/Public Health Activities

It is important to appropriately distinguish between research activities required under a trial protocol and clinical activities and/or activities related to public health, as different IRB reporting obligations and regulatory requirements apply to each.

Actions taken for public health or clinical purposes, rather than research purposes, are not research procedures and therefore do not require IRB approval before implementation. By way of example, mandatory clinical screening procedures related to COVID-19 for all individuals arriving at an institution, including study participants, would not require IRB review and approval before implementation.

Similarly, because these COVID-19 screening procedures would not constitute research, an institution would arguably not need IRB approval in order to share screening results with public health authorities or the study participants (although other authorizations may be required under state law or institutional policy). Clinical activities and/or public health activities are not required to be submitted to the IRB as an amendment to a protocol (even if they will be performed during a study visit) unless the sponsor intends to incorporate the COVID-19 data as part of its research objectives.

Additionally, because many institutions and researchers are being asked to participate in various public health surveillance activities to assist public health officials in monitoring and managing the COVID-19 outbreak, it is important to understand the different regulatory requirements (and exceptions) that apply to public health activities versus research activities.

For example, if required by law, institutions and investigators may make disclosures of certain information (including individually identifiable information about a study participant) that are inconsistent with the study participant's informed consent and that are otherwise prohibited under federal privacy laws, provided such disclosures are required by law and relate to an individual's COVID-19 status. The investigator should inform the study participant of any such disclosures.

Similarly, certain public health surveillance activities, including collection and testing of information or biospecimens, conducted, supported, requested, ordered, required, or authorized by a public health authority are entirely excluded from the requirements of the Revised Common Rule. However, FDA regulations may continue to apply if the activity involves the use of an investigational drug or in vitro diagnostic device.

Consider Whether Modifications to Existing Institutional Policies and Procedures are Required Moving Forward

Sponsors and institutions should consider revising existing human subject research policies and procedures to the extent they do not already address emergency situations, such as the COVID-19 pandemic. Changes to policies and procedures may be needed to address the impact on the informed consent process, study visits and procedures, data collection, study monitoring, adverse event reporting, and changes in investigator(s) and study staff. Sponsors should also consider training study monitors to assist investigators in addressing the risks presented by COVID-19, as well as any necessary deviations in or adjustments to study protocols or practices.

Conclusion

Ultimately, sponsors and institutions should consider all critical circumstances with a specific focus on the impact on study participants. When considering necessary changes in light of COVID-19, sponsors and institutions should think broadly about the immediate and long-term impact of the pandemic on clinical trial recruitment, investigational product administration, and efficacy and safety monitoring. Sponsors and institutions are encouraged to engage with their IRBs as early as possible when protocol or informed consent changes may be necessary. L

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RESEARCH PATH: Life Sciences > Clinical Trials > Articles

Assisting Small Businesses Impacted by the Coronavirus Pandemic

Mark Haut LEXIS PRACTICE ADVISOR

THIS ARTICLE ANALYZES THE SMALL BUSINESS Reorganization Act of 2019 (SBRA)[1] and the revisions to the SBRA contained in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).[2] The SBRA was enacted into law on August 23, 2019, and became effective on February 19, 2020. The CARES Act was signed into law on March 27, 2020.

The SBRA contains significant changes to the laws governing small business Chapter 11 bankruptcies. The goal of the SBRA is to improve the reorganization process for small business Chapter 11 debtors. The opportune timing of the SBRA may provide much-needed relief for small businesses impacted by the COVID-19 pandemic.

Before 2005, many small business debtors did not take advantage of the benefits of Chapter 11 because of the high costs, lengthy delays, and labor-intensive nature of Chapter 11 cases. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) introduced measures that were meant to alleviate some of these issues for small business debtors. In practice, the BAPCA provisions only partially addressed these issues, and Chapter 11 still remained too costly and time-consuming for many small business debtors. The SBRA addresses these issues by adding a new Subchapter V to Chapter 11 titled Small Business Debtor Reorganization. The CARES Act expanded this relief by making the small debtor Chapter 11 provisions accessible to a greater number of small businesses.

The SBRA does not repeal existing Chapter 11 provisions regarding small business debtors, but instead creates an alternative procedure that small business debtors may elect to use. Thus, small business debtors have the option to proceed under the current small business Chapter 11 laws or under the new Subchapter V.[3] Although the existing Chapter 11 small business debtor provisions remain a viable option, it is difficult to imagine small businesses choosing this option given the significant benefits of proceeding under Subchapter V.

This article is meant as a summary and analysis of the significant revisions contained in the SBRA.

1. 11 U.S.C.S. § 1181-1195. 2. Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020). 3. *See* 11 U.S.C.S. §§ 101(51C), 103(i).

Small Business Debtor Eligibility

The SBRA revises the requirements to qualify as a small business debtor. First, the debtor must be engaged in commercial or business activities (consistent with the pre-SBRA law). Prior to the SBRA, a debtor whose primary activity was the business of owning or operating real estate did not meet this requirement. However, the SBRA revised Section 101(51D) of the Bankruptcy Code to only exclude a debtor whose primary activity is the business of owning single asset real estate.[4]

Second, the debtor's aggregated debts (the total noncontingent, liquidated secured, and unsecured debts) must not exceed $2,725,625 as of the date of the order for relief. The debts that the debtor owes to affiliates or insiders of the debtor are not included in this aggregation. Under the CARES Act, a debtor with aggregate debts up to $7,500,000 can qualify as a small business debtor—up from $2,725,625. This amendment applies to all cases filed on or after the enactment of the CARES Act and lasts for one year. Therefore, a greater number of businesses are now eligible to file as small business debtors because of the CARES Act.

The SBRA replaced the third requirement (concerning an active creditors' committee) with the requirement that not less than 50% of the debt (i.e., $7,500,000 under the CARES Act) arises from commercial or business activities. The SBRA also revised the definition of a small business debtor to exclude any corporate debtor or corporate affiliate of the debtor that is subject to the reporting requirements under Section 13 or 15(d) of the Securities Exchange Act of 1934.[5] The CARES Act contains a technical correction to this part of the definition which now excludes any debtor that "is an affiliate of an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C.S. § 78c)."[6]

Small Business Debtor and Trustee

Under the SBRA, a Chapter 11 small business debtor retains possession of its assets and is permitted to continue business operations during the bankruptcy. However, small business bankruptcy cases will now have a bankruptcy trustee akin to the trustee appointed in Chapter 12 and 13 bankruptcies.

The trustee must perform some of the same tasks as a Chapter 7 trustee (such as objecting to claims) and certain additional tasks.[7] The additional tasks include, among others:

- Collecting plan payments and making distributions to creditors in accordance with the debtor's plan
- Ensuring that the debtor commences making timely payments required under a confirmed plan
- Facilitating the development of a consensual plan of reorganization[8]

In sum, although the trustee must perform certain duties, the trustee's primary responsibility is to guide a Chapter 11 small business debtor through Subchapter V by facilitating a consensual plan among the debtor and its creditors.

Expedited Timeframe and Reduced Cost

The SBRA reduces the costs of and quickens the timeframe for a small business Chapter 11 bankruptcy. The bankruptcy court must hold a status conference within 60 days of the bankruptcy filing "to further the expeditious and economical resolution of a case under this subchapter."[9] The debtor must file the plan within 90 days after the bankruptcy filing (as opposed to the 300-day outside deadline under the existing Chapter 11 provisions regarding small business debtors).[10] The court can extend this deadline if the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.[11] Courts will, therefore, have the discretion to find that the COVID-19 pandemic is a sufficient reason to extend the deadline for filing a plan.

Unless the court orders otherwise, there is no creditors' committee in cases under Subchapter V.[12] In a traditional Chapter 11, the estate pays the fees and expenses of counsel and professionals retained by the creditors' committee. Small business debtors filing under Subchapter V can avoid this additional expense. The small business debtor is also not required to file a disclosure statement unless the court orders otherwise.[13] By removing this requirement, a small business debtor can expeditiously confirm a plan without incurring the time and costs of preparing and disseminating a disclosure statement.

Plan and Confirmation Requirements

The SBRA revises the plan and confirmation requirements for cases under Subchapter V of Chapter 11. The debtor is the exclusive party that can file a plan. Further, the debtor is no longer required to solicit votes on the plan. Instead, creditors have the right to object to the plan. A plan must still be fair and equitable to each class of claims or interests and not discriminate unfairly. However, the definition of fair and equitable has been revised.

The SBRA provides that a plan is fair and equitable if, among other things, the plan provides that the debtor's projected disposable income will be applied to make payments under the plan during a three- to five-year period. Disposable income is defined as debtor income after deducting payments for domestic support, living expenses, and business operation expenses.[14] Unlike a traditional Chapter 11, the debtor can pay administrative expenses over the life of a plan (as opposed to the requirement that such claims be paid on the effective date of the plan).

4. 11 U.S.C.S. § 101(51D)(A). 5. 15 U.S.C. §§ 78m, 78o(d). 6. 11 U.S.C.S. § 101(51D). 7. 11 U.S.C.S. § 1183(b). 8. 11 U.S.C.S. §§ 1183(b), 1194. 9. 11 U.S.C.S. § 1188(a). 10. 11 U.S.C.S. § 1189(b). 11. *Id.* 12. 11 U.S.C.S. § 1181(b). 13. 11 U.S.C.S. §§ 1181(b), 1187(c). 14. 11 U.S.C.S. § 1191(d).

The SBRA allows an individual small business debtor to modify the mortgage on his or her principal residence if the mortgage was primarily used for the small business rather than purchasing a residence. This means that an individual who borrowed against the equity in his or her home to invest in the small business can modify the home equity loan by, for example, proposing a lower interest rate or extending the maturity on the loan. Notably, this relief is not available to individuals who file Chapter 13.

The court must also find that the debtor will be able to make all payments or there is a reasonable likelihood that the debtor will be able to make all payments under the plan. The plan must also provide appropriate remedies to protect the holders of claims or interests in the event that the payments are not made (which may include the liquidation of nonexempt assets).

Under these provisions, the small business debtor can keep its business if the debtor satisfies the confirmation requirements. The debtor receives a discharge of pre-confirmation debts after completing all payments required under the confirmed plan. In sum, the SBRA (1) provides for the appointment of a trustee to assist the small business debtor that remains in possession, (2) requires the debtor to pay its disposable income to creditors over three to five years, and (3) allows the small business debtor to keep its business.

SBRA and Coronavirus

Many small businesses have experienced significant financial losses as a result of the COVID-19 pandemic. As compared to large businesses, small businesses generally have fewer resources to weather a prolonged economic downtown. The new streamlined small business bankruptcy provisions became effective just in time to assist small business debtors dealing with this crisis. Counsel to companies with aggregate debts up to $7,500,000 should explore whether filing under Subchapter V will afford such companies the relief needed to endure the economic conditions caused by the pandemic. The ability to stretch out payments to creditors over a three-to-five-year period, while significantly reducing the costs of a bankruptcy filing, may provide a lifeline for many small businesses. Eligible small businesses can also use the possibility of a bankruptcy filing as leverage in negotiations with creditors.

Related Content

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> **CHAPTER 11 SMALL BUSINESS DEBTOR**

RESEARCH PATH: *Bankruptcy > Commencing a Bankruptcy Proceeding > Bankruptcy Fundamentals > Practice Notes*

For more information on the duties performed by a Chapter 7 trustee, see

> **CHAPTER 7 TRUSTEE DUTIES**

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For a discussion of the provisions applicable to small businesses under the Small Business Reorganization Act, see

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For an analysis of the changes to the U.S. Bankruptcy Code contained in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), see

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For a review of the bankruptcy provisions contained in the CARES Act, see

> **CARES ACT BANKRUPTCY CODE REVISIONS CHART**

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When advising small businesses, counsel must also determine whether the company has applied for or intends to apply for the Paycheck Protection Program (PPP). The PPP is part of the CARES Act. The program is designed to incentivize businesses to keep their workforce during the ongoing pandemic by providing forgivable loans to eligible businesses. Although the CARES Act contains no limitation on providing PPP loans to debtors in bankruptcy, the Small Business Administration (SBA) has released an interim rule saying that companies in bankruptcy are not eligible for PPP loans, and companies with pending PPP applications must cancel their applications if such companies file bankruptcy. Bankruptcy courts are already considering whether to follow this rule. In the Southern District of Texas, the bankruptcy court issued a temporary restraining order enjoining the SBA from preventing the Chapter 11 debtor from receiving a PPP loan.[15] Bankruptcy courts in Vermont, Maine, and New Mexico have issued similar orders.[16] Conversely, the bankruptcy court in the District of Delaware denied a similar request, reasoning that the court lacks the statutory power to enjoin the agency.[17]

Arguably, companies that have already received PPP loans do not appear to be affected by this interim rule. For this reason, a few debtors have moved to voluntarily dismiss their bankruptcy cases and refile after receiving the PPP loans. Thus, the timing of the filing may impact whether the small business debtor is entitled to these loans. Counsel to small businesses should closely monitor these new and evolving issues when advising a company considering applying for a PPP loan and filing for bankruptcy. Some small businesses that received PPP loans may be able to avoid bankruptcy, but others may need to file once the funds are exhausted or if such companies end up unable to meet the loan forgiveness criteria. L

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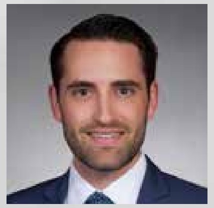
15. Hidalgo Cty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cty. Emergency Serv. Found.), 2020 Bankr. LEXIS 1174 (Bankr. S.D. Tex. Apr. 25, 2020). **16.** Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp., Inc.), 2020 Bankr. LEXIS 1205 (Bankr. D. Vt. May 4, 2020); *In re* Calais Reg'l Hosp., 2020 Bankr. LEXIS 1212 (Bankr. D. Me. May 1, 2020); *In re* Roman Catholic Church of the Archdiocese of Santa Fe, 2020 Bankr. LEXIS 1211 (Bankr. D.N.M. May 1, 2020). **17.** Cosi Inc. v. Small Business Administration et al., Case No. 1:20-ap-50591 (Bankr. D. Del. Apr. 28, 2020).



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Returning to Work during and after COVID-19

While there is no one-size-fits-all solution to creating a safe workplace, employers must carefully monitor guidance from the Centers for Disease Control (CDC), state and local health departments, Occupational Safety and Health Administration (OSHA), and state and local government authorities concerning the various workplace measures they must adopt to curb the spread or resurgence of COVID-19.

Employers should recognize that some cities, counties, and municipalities have taken a much more active role than others in regulating businesses and enacting regulations, and many differ in the forms of regulation they impose. As a result, employers should address such differences when deciding how best to achieve overall compliance within the various jurisdictions in which they operate.

The Trump Administration's Approach to Reopening Businesses

On April 16, 2020, President Trump and the White House Coronavirus Task Force announced a three-phased approach for states to gradually reopen business, titled the "Guidelines for Opening Up America Again" (the April 2020 Guidelines).[1]

In recognition of the fact that each individual state will ultimately decide when and how to reopen the economy, the April 2020 Guidelines provide a roadmap for what the Administration believes the opening up of the country should look like. These guidelines plainly respond to mounting pressures from many segments of the population and the country to reduce the ranks of the jobless and facilitate a revival of the economy. The initial guidelines invite states to evaluate back-to-business programs without mandating that states initiate the actual process before they determine it safe and appropriate to do so.

The Three Conditions of the Phased Reopening Process

Before any state can begin the phased reopening process, the state (or a region within the state), must satisfy the following three preconditions:

- **Symptoms**. A downward trajectory of influenza-like and COVID-like symptoms within a 14-day period
- **Cases**. A downward trajectory of documented cases or positive tests as a percent of total tests within a 14-day period
- **Hospitals**. The ability to treat all patients without crisis care and a robust testing program for at-risk healthcare workers, including emerging antibody testing[2]

In addition to these prerequisites, during each of the three phases, states are expected to (1) maintain sufficient testing and contact tracing for symptomatic individuals; (2) maintain sufficient personal protective equipment (PPE) and critical medical equipment to handle a dramatic surge, along with ICU capacity; and (3) develop and enforce plans covering everything from protecting the health and safety of workers in critical industries to advising residents regarding protocols for social distancing and face coverings.[3] Once states can satisfy these prerequisites and have sufficient plans in place to contain the spread of COVID-19, they can begin phase one.

Each of the three phases has its own unique benchmarks and expectations of what employers should do to help their state complete that phase and move to the next one. Employers can generally expect the following conditions placed on them during each phase (recognizing that states and local governments will invariably augment and expand upon these restrictions):

- **Phase one.** During the initial phase employees are encouraged to telework whenever possible and feasible. When employees do return to the worksite, they will do so "in phases." While at work, employers will enforce strict social distancing policies. Employers must "strongly consider special accommodations" for employees who are members of a "vulnerable population"[4] and will be expected to minimize non-essential travel for all employees.[5] During this phase, schools and youth activities will continue to be closed. However, "large venues" (e.g., houses of worship, sit-down dining, movie theaters, sporting venues, and gyms) can operate "under strict physical distancing protocols."[6]
- **Phase two.** During the second phase, employers will still "encourage telework whenever possible" and enforce "moderate social distancing protocols" in common areas. It is envisioned that non-essential travel can resume. Employers will continue to "strongly consider special accommodations" for employees in vulnerable populations.[7] During this phase, it is expected that schools and organized youth activities will reopen, that "large venues" will be able to operate under "moderate physical distancing protocols," and that bars may operate with "diminished standing-room occupancy" where applicable and appropriate.[8]

1. *See* Guidelines for Opening Up America Again, White House (April 16, 2020) (last visited on April 17, 2020) at https://www.whitehouse.gov/wp-content/uploads/2020/04/Guidelines-for-Opening-Up-America-Again.pdf. 2. *Id*., Slide 2 ("Proposed State or Regional Gating Criteria"). 3. *Id*., Slide 3 ("Core State Preparedness Responsibilities"). 4. The April 2020 Guidelines identify the following people as "vulnerable individuals": (1) elderly individuals and (2) individuals with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy. 5. *Id*., Slide 9 ("Phase One Employers"). 6. *Id*., Slide 10 ("Phase One Specific Types of Employers"). 7. *Id*., Slide 13 ("Phase Two Employers"). 8. *Id*., Slide 14 ("Phase Two Specific Type of Employers").

- **Phase three.** The final phase will see the full reopening of American society and commerce, with the recognition that until there is a COVID-19 vaccine or a readily available cure, vulnerable individuals should minimize their exposure to social settings where social distancing is not practical absent precautionary measures, and even "low-risk populations" should consider minimizing "time spent in crowded environments."[9]

The Role and Responsibilities of Employers in the Process

Consistent with the federal, state, and local guidance and the lifting of stay-at-home/shelter-in-place orders, tens of millions of Americans are returning to their usual workplace (either after being unemployed for a period of time or after working from home). As part of this process, business leaders will need to implement practical workplace policies and procedures that balance business needs with the health and safety of their employees. Following are potential considerations that employers should discuss with legal counsel:

Designation of a COVID-19 Czar

A key component of effective crisis management is centralized communications. A COVID-19 czar or post-crisis czar can serve as an organization's point person responsible for managing the response to the pandemic. In consultation with senior leadership and health and employment law experts, this individual is chiefly responsible for developing and enforcing health and safety policies. Duties will necessarily include revising and implementing the organization's infectious disease preparedness and response plan, as well as unique policies and procedures relating to how employees interact with one another, customers, and other third parties.

Depending on the organization and the future trajectory of the pandemic, the COVID-19 czar may be entrusted with emergency powers to, for example, suspend operations, restrict access to the premises, or, where permissible, force employees to obtain medical clearance before returning to work. Depending on the size of the organization, this leader may be solely responsible for managing this crisis or may take this important task on with his or her other duties.

Social Distancing

As a condition to allowing "non-essential" businesses to reopen during phases one and two of the April 2020 Guidelines, local and state authorities will likely mandate that employees practice some form of social distancing in the workplace. Whether social distancing results from such government directives or informal policing by employees themselves, the public consciousness regarding an easily spread virus likely will not dissipate quickly. This has and will continue to be particularly challenging in those environments where employees have traditionally worked in close proximity to their co-workers and the general public (e.g., classrooms, construction sites, assembly lines, restaurants, gyms, etc.), and impossible in many other environments (e.g., hospitals, airplanes, hair salons, etc.).

Workflow Plans Limiting Physical Proximity

Where feasible, organizations should consider developing workflow plans that, to the extent possible, limit the physical proximity between and among employees and customers. Depending on the environment, this may include physical adaptations, such as erecting permanent plexiglass barriers, well beyond the timeframe suggested by OSHA engineering protective measures. It may also include restrictions on how close employees and customers can stand or sit near one another.

Telework Options

In addition, since organizations have been forced to have many employees work from home during the first few months of this pandemic, as stay-at-home orders are lifted, many companies may either permanently transfer office employees to full-time remote workers, or more likely, schedule days when certain office employees are required to work from home and other days when they need to be in the office. This may take the form of assigning workers to an "A" or "B" designation, and implementing a schedule when "A" employees come to work and "B" employees work from home, and vice versa.

Interpersonal Hygiene Policies

In addition to social distancing, employers should develop policies around interpersonal contact in the workplace. This may include everything from policies that prohibit handshaking and other physical greetings, to rules concerning sharing equipment (e.g., phones, headsets, computer keyboards, etc.). Many state orders explicitly prohibit handshaking and physical contact and discourages employees from sharing phones, desks, tools, and equipment.

Policies on Interpersonal Activities Outside of the Workplace

Employers may also develop policies concerning interpersonal activities outside of the workplace. For example, as discussed above, many local and state stay-at-home orders have been lifted so long as people continue to practice social distancing outside of work (e.g., restrictions on X number of individuals congregating in the same area, restrictions on certain sports and entertainment venues, etc.).

In the event this occurs, employers may consider having lawful policies in place should an employee engage in certain risky behaviors outside of work (e.g., close interactions with strangers, attending large indoor public events, deciding not to wear a mask while in public, traveling to known hotspots, etc.).

9. *Id.*, Slide 16 ("Phase Two Individuals").

Before implementing any such policies, employers should consult with an experienced employment lawyer, as these policies could run afoul of existing laws that prohibit employers from disciplining employees for engaging in lawful activities outside of the workplace, or other discrimination prohibitions.

Employee Personal Protective Equipment (PPE)

The lack of sufficient personal protective equipment (PPE) for healthcare workers was reported widely during the first month of the COVID-19 pandemic. As a condition of returning non-essential employees to work, cities and states are mandating that certain employees wear respirators, surgical masks, or non-respirator cloth or paper face covering in the workplace. In April 2020, Los Angeles[10] and New York[11] state, for example, issued ordinances and executive orders requiring that essential workers don face coverings, particularly if interacting with customers or members of the public. This will pose several challenges for employers.

In addition to the lack of available PPE (where respirators are required), employers will need to ensure that any mouth and nose covering does not interfere with the employee's ability to safely perform his or her job. Wearing a respirator or face covering for an entire shift will be challenging for many employees who are not accustomed to such restrictions.

Depending on whether businesses are required to have their employees don a face covering, or the business decides on their own to require face protection, employers will need to develop policies and procedures around use of PPE in general and cloth/paper face coverings in particular.

These policies may need to take into account several considerations, including:

- The type(s) of masks that are permissible (e.g., N-95 respirators, reusable cloth face coverings, bandanas)
- Whether the masks or face coverings will be provided by the employer or employee (and if provided by the employee the potential wage and hour issues relating to having employees provide their own masks or face coverings)
- For reusable face coverings, policies around how often a face covering needs to be washed, and who is responsible for cleaning/sanitizing the face covering
- Whether employees can wear their work mask/face covering away from work
- Whether employees may take off their mask/face covering during their shift (other than to eat and drink) and where they can take off their masks/face coverings (e.g., open spaces, personal offices, etc.)
- The disciplinary measures in place should an employee refuse or resist wearing a mask/face covering for personal reasons (because they simply do not believe it is necessary, find it to be uncomfortable, or feel that it conflicts with their personal aesthetic); medical reasons (perhaps because it restricts their breathing); or religious reasons (particularly for men with beards)
- Who bears the costs of procuring, and laundering (if applicable) the mask/face covering
- The potential need for reasonable accommodations for persons suffering from a disability who may be unable to properly don PPE or a non-respirator face covering[12]
- The development of training for all of the foregoing

10. http://publichealth.lacounty.gov/media/Coronavirus/HOO_Safer_at_Home_Order_for_Control_of_COVID_04102020.pdf. 11. https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_eo20216employeefacecovering_041420.pdf. 12. *See* What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question G2) (last visited April 24, 2020) at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Customer and Visitor Face Coverings and Personal Protective Equipment (PPE)

Absent a directive from local, state, or federal government regarding the general public wearing face coverings outside of their homes, employers must consider developing PPE policies and procedures with respect to their customers, students, patients, vendors, and the general public that come into contact with the organization's employees. Similar to the "no shirt, no shoes, no service" signs, organizations will need to decide whether to require third parties to wear face masks when engaging with their employees in person. Companies should also consider training their employees on how to safely and appropriately interact with customers who either refuse to wear a mask for political reasons, or don offensive or inappropriate masks that violate the company's values (patrons of a private business do not have a free speech right to wear offensive clothing or paraphernalia or spew hate speech).

- There have been several reports of violent clashes in retail stores where customers refuse to wear a face covering while in the premises.[13]

Increased Cleaning and Sanitization

Workplaces following the COVID-19 pandemic will need to be much more sanitary. Employees and the general public will insist that organizations spend more time and resources on cleaning physical facilities. In addition to supplying hand sanitizer stations (which will require sufficient quantities) and access to hand washing with antimicrobial soap and warm water, organizations may need to train, and likely increase, the number of janitorial staff to regularly clean and disinfect high-touch surfaces in common areas (e.g., tables, chairs, doorknobs, light switches, common phones, touch screens, keyboards, toilets, and sinks).

A designated COVID-19 czar, or other official, should be responsible for ensuring that the employees or third-party contractors responsible for janitorial services are complying with strict coronavirus prevention guidelines. In addition to regular cleaning and sanitizing, organizations will need to work closely with facilities and maintenance to develop best practices concerning proper air circulation.

Medical Testing

It remains to be seen what tools will be available to employers and the general public for use in combatting COVID-19 resurgence in the future. Below are possible tests that may become routinely used in the workplace.

13. See, e.g., The New York Times, Who's Enforcing Mask Rules? Often Retail Workers, and They're Getting Hurt (May 15, 2020) (last visited May 19, 2020) at https://www.nytimes.com/2020/05/15/us/coronavirus-masks-violence.html; The Washington Post, A man wore a KKK hood at a grocery store after San Diego County required face masks (May 4, 2020) (last visited May 19, 2020) at https://www.washingtonpost.com/nation/2020/05/04/kkk-hood-coronavirus-mask/.

> It will take several years for psychologists and social scientists to fully grasp the profound impact the pandemic has had on people's mental health.

COVID-19 Tests

Once there are sufficient and reliable tests available for private sector employers outside of healthcare, employers will be able to regularly test employees to determine whether they are COVID-19 positive. On April 24, 2020, the Equal Employment Opportunity Commission stated that employers may permissibly test workers for COVID-19 before allowing entry into the workplace as doing so will be "job related and consistent with business necessity" under the Americans with Disabilities Act.[14]

In the event that such tests are readily available, employers may need policies to ensure that the testing is done in compliance with existing employment laws, including those pertaining to employee privacy, anti-discrimination, and wage and hour. Provided there are sufficient tests available for the general public, businesses will also need to consider policies and procedures around testing employees based on a risk factor assessment, including for example, employees who recently returned from business or personal travel in an area with known hot spots, employees who have been in contact with individuals who have contracted coronavirus or COVID-19, or individuals who engage in certain risky behaviors outside of work. Recognizing that large scale testing of the general public is not currently feasible in the United States, employers should nevertheless consider how they might test employees should the resources become available during or after the current pandemic.

Thermometer Scans

As of April 2020, the CDC recommended that essential critical infrastructure workers who have been exposed to someone who has COVID-19, or is suspected of having the virus, can return to work provided they abide by a number of guidelines while at work (e.g., wearing a face covering, social distancing, etc.), and are subject to a pre-screen temperature check.[15]

Similar to what has occurred in parts of Asia where stay-at-home orders were lifted in early April 2020, thermometer scans will likely become prevalent across the country. It is entirely possible that in some parts of the country, before people are allowed to walk into a shopping mall or board an airplane, they will need to first pass through a thermometer checkpoint.

Develop Thermometer Scanning Policies

Employers will need to establish clear policies around thermometer scanning that account for, amongst other things:

- Who in the organization is responsible for scanning employees
- Which employees will be scanned (e.g., all employees, only employees in certain departments, only employees who have been in contact with someone who has or is suspected of having COVID-19 symptoms, etc.)
- Whether all employees will be subject to a thermometer scan or whether it will be done randomly (and if random, how will that be determined in a non-discriminatory and statistically significant manner)
- How often employees will be scanned (e.g., daily, weekly, every few hours, etc.)
- The wage and hour implications of having employees waiting to be scanned (e.g., is this time deemed compensable under applicable state and/or federal law)
- Measures to handle an employee who shows an elevated temperature consistent with privacy laws

Antibody Tests

In the event a reliable COVID-19 antibody test is developed, establishing that a person contracted coronavirus and developed sufficient antibodies, it may be possible to determine which employees are no longer susceptible to COVID-19. As of April 2020, it was premature to determine how employers could possibly use the results of an antibody test. There may be opportunities to loosen certain COVID-19 policies for those employees who are immune from contracting and spreading the virus.

Employers should continue to monitor scientific developments in this area. It is entirely possible that if an accurate test were to be developed at some point in the future, employers may be permitted to select employees to work in certain jobs based on whether or not the employee is immune from this virus. Giving preference to employees who have a COVID-19 immunity will likely raise a host of employment law issues (e.g., application of EEO and non-discrimination policies for both employees with immunity and those without immunity, seniority and staffing, and wage and hour concerns regarding whether the employer or employee should pay for the cost of the antibody test and certification).

14. *See* What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question A6) (last visited on April 24, 2020) at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. 15. Centers for Disease Control, Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 (last visited Apr. 14, 2020) at https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf.

It will take several years for psychologists and social scientists to fully grasp the profound impact the pandemic has had on people's mental health. While the pandemic has affected every person on the planet, its impact has certainly not been equal. When the economy begins to open, and remote workers return to the workplace and companies actively rehire many employees who were furloughed or laid off during the apex of the crisis, employers will need to be responsive to the mental health toll that this crisis has had on their employees—particularly those employees who are grieving the loss of family and friends as well as those employees who are under significant financial stress. Organizations should be mindful of these challenges and consider providing additional mental health resources to support their employees during this unprecedented time.[16]

The article is current as of June 5, 2020. L

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RESEARCH PATH: *Workplace Safety and Health > Policies and Procedures > Articles*

Related Content

For guidance on a wide variety of COVID-19 legal issues, see

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

RESEARCH PATH: *Labor & Employment > Workplace Safety and Health > Policies and Procedures > Practice Notes*

For an overview of key federal, state, and local developments in general labor and employment law, see

> **LABOR & EMPLOYMENT KEY LEGAL DEVELOPMENT TRACKER**

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

For a discussion of health and safety considerations related to business travel, see

> **CORONAVIRUS (COVID-19) CONSIDERATIONS FOR TRAVELING EMPLOYEES**

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For assistance on preparing for and responding to pandemic outbreaks, see

> **PANDEMIC FLU/INFLUENZA/CORONAVIRUS (COVID-19) PREVENTION AND RESPONSE CHECKLIST (BEST PRACTICES FOR EMPLOYERS)**

RESEARCH PATH: *Labor & Employment > Workplace Safety and Health > Policies and Procedures > Checklists*

16. This article is an excerpt from Castle Publications' eBook entitled *Employer's Guide to COVID-19 and Emerging Workplace Issues* by Sheppard Mullin Labor & Employment partners Richard J. Simmons, Brian D. Murphy, and Adam R. Rosenthal, available for preorder on the LexisNexis Store here.



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Best Practices for Preventing and Responding to **Flu/Coronavirus Outbreaks in the Workplace**

Although the Occupational Safety and Health Administration (OSHA) has not adopted a standard addressing employers' obligations to safeguard employees during a pandemic, OSHA has issued general guidance for employers as a direct result of the COVID-19 outbreak in the United States.[1]

BELOW WE SUMMARIZE KEY OSHA PANDEMIC AND coronavirus recommendations and provide guidance on handling health and safety issues during pandemics and COVID-19.

Assessment of Risk

Employers should determine the exposure their employees may have to a pandemic disease. The exposure risk per employee will vary based on the nature of the disease, as well as the responsibilities of the employee. Even if employers determine that risk of infection during the course of employment is low, all employers should consider implementing a policy, customized to their work environment, with the goal of protecting employees (as well as visitors to the employers' facilities) from contracting and spreading a pandemic disease.

The best way to lessen the risk of exposure is to follow the latest guidance from federal, state, and local governmental health authorities (Health Authorities), including, but not limited to, the Centers for Disease Control and Prevention (CDC). Conflicting guidance provided by Health Authorities should supersede guidance that employers issue.

1. *See* COVID-19 (OSHA) at https://www.osha.gov/SLTC/covid-19/, Prevent Worker Exposure to Coronavirus (COVID-19) at https://www.osha.gov/Publications/OSHA3989.pdf, and Guidance on Preparing Workplaces for COVID-19 at https://www.osha.gov/Publications/OSHA3990.pdf.

Prevention and Flexible Work Arrangements

In most pandemic situations, good hygiene and infection control habits can help minimize the risk of exposure. Based on the latest guidance from the CDC for COVID-19, employers should consider observing the following practices:

- **Wash hands.** Require employees to wash hands frequently and thoroughly.
  - Employers should, to the extent possible, make soap and hand sanitizer available to all employees.
- **Employees who display symptoms.** Require employees who feel ill or display symptoms associated with a pandemic disease to stay home or, if at work when symptoms arise, notify their manager and leave work immediately.
- **Coughs and sneezes.** Require employees to cover their mouths when coughing and their noses when sneezing.
- **Clean office equipment.** Prohibit the sharing of phones, desks, offices, or work tools and equipment used by other employees without appropriate cleaning measures.
- **Enforce good housekeeping practices.** Emphasize and require good housekeeping practices in all work areas, including cleaning and disinfecting surfaces, equipment, and other elements of the work environment (as recommended by Health Authorities).
- **Enforce travel restrictions.** Require employees to follow the recommendations issued by Health Authorities regarding travel, such as limiting personal travel or avoiding certain geographic areas.
- **Implement social distancing.** Require social distancing recommended by Health Authorities.

Based upon guidance provided by Health Authorities, employers also should consider allowing employees to work from home as feasible, provide flexible schedules, and/or reduce work hours.

If an employee cannot work from home and cannot attend work due to being quarantined (whether required by law or as a best practice), employers may allow employees to use paid time off benefits to reduce the financial impact.

> No two pandemic diseases are identical or call for the same protective measures. As such, employers should consider the Health Authorities' guidelines and periodically update their policies consistent with those guidelines.

Identification and Isolation of Infected Individuals

Another priority during a pandemic is to identify employees, customers, visitors, or others at the employer's facilities who may have contracted a pandemic disease. Employers may address this issue by observing the following CDC recommendations:

- **Employee self-monitoring of symptoms.** Employers should require employees to self-monitor for signs and symptoms of the disease (flu, COVID-19, etc.) if the employees suspect possible exposure or infection.
- **Report exposure to Human Resources (HR).** Employers should require employees who suspect exposure or infection to report their symptoms to a designated management or HR representative. However, employers also should consider and address the following issues:
  - **Keep medical information confidential.** Information that the employee provides should remain confidential; the employer should only disclose or share it with the employee's written consent or as applicable law permits.
  - **Determine the need to isolate the employee.** The employer should immediately determine whether to isolate the employee and move him or her to a location distant from other employees, customers, and visitors.
    - **Designate an isolation space.** When isolating an employee, the employer should designate a room or other space where it can potentially isolate an infected employee.
    - **Ensure privacy in an isolation space**. To protect the employee's confidentiality, a designated isolation space should, if feasible, have closeable doors and be as far away as possible from areas where other employees, customers, and visitors may congregate.
    - **Train management personnel on pandemic issues**. Employers also should train management personnel designated to address pandemic issues so that they understand precautions to take, both to ensure their own safety and to account for confidentiality concerns.
  - **Consider the need for face masks.** The employer should determine whether to provide and require employees to wear face masks (if available).
  - **Assess the need to restrict access to isolation areas.** The employer should think about whether to restrict access to isolation areas and require authorized individuals to maintain at least six feet of space (or follow more stringent social distancing recommendations made by Health Authorities) between themselves and the isolated employee.
- **Identify those exposed to the isolated employee.** An employer's designated management or HR representative should identify other employees, customers, or visitors who may have come into close contact (within six feet or less stringently than as recommended by Health Authorities) of the isolated employee and take steps to inform those individuals of potential exposure.
  - **Maintain privacy of an isolated employee.** Employers should avoid revealing the isolated employee's identity.
  - **Determine the need for more employees to isolate.** Depending on the circumstances, employers may require additional employees to isolate until further notice or they obtain appropriate documentation indicating they are able to return to work.

Controlling the Work Environment

No two pandemic diseases are identical or call for the same protective measures. As such, employers should consider the Health Authorities' guidelines and periodically update their policies consistent with those guidelines. For example, if a Health Authority recommends increasing airflow in an indoor facility or the use of personal protective equipment (PPE) (e.g., gloves, face masks, or goggles) in certain industries, then employers should consider implementing those measures.

Employers should communicate to employees any additional or revised and implemented environmental controls, requirements, or recommendations.

Compliance with Existing OSHA Standards

Employers should continue to comply with all applicable OSHA standards. For example, healthcare employers should continue to enforce policies addressing bloodborne pathogens and required PPE, just as manufacturing employers should continue to observe lockout/tagout and guarding requirements. All employers should also consider implementing additional measures to maintain a clean and sanitary workplace and should continue to comply with OSHA's recordkeeping requirements (e.g., OSHA 300 log), especially now for workplace exposures to COVID-19.[2]

OSHA also provides posters stating how employers can reduce the risk of exposure to coronavirus.[3]

COVID-19 Exposure Issues and Temporary Suspension of Recording Requirements for Most Employers and Subsequent Rescission of This Temporary Suspension

A COVID-19 exposure may be a recordable illness if the employee contracted the infection as a result of performing his or her work-related duties. Employers should analyze each exposure in light of the impacted employees' job duties and the resulting effects of the infection (e.g., medical treatment received, days away from work, and restrictions posed by the infection). In many cases, it will not be possible to determine where an employee contracted COVID-19.

Recognizing that it is difficult for employers to determine whether an employee's exposure to COVID-19 occurred at work and is thus recordable, OSHA suspended enforcement of its recordkeeping requirements for COVID-19 cases for most employers until May 26, 2020.[4] However, employers must still record COVID 19 cases if (1) they have objective evidence that a COVID-19 case may be work-related and (2) the evidence was reasonably available to the employer.

This temporary suspension of recording requirements was not applicable to (1) healthcare employers; (2) emergency response organizations (e.g., emergency medical, firefighting and law enforcement services); and (3) correctional institutions. Employers in these industries must make work-relatedness determinations pursuant to 29 C.F.R. Pt. 1904.

Rescinding of Suspension of Recordkeeping Standard

OSHA rescinded the suspension of the recordkeeping standard as summarized above effective May 26, 2020.[5] Under the new guidance, "OSHA is exercising discretion to assess employers' efforts in making work-related determinations." As part of this analysis, OSHA will consider the following issues:

- **The reasonableness of the employer's investigation into work-relatedness.** OSHA does not expect employers, especially small employers, to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. In most circumstances, OSHA will consider it sufficient for the employer to do the following when it learns of an employee's COVID-19 illness:
  - Ask the employee how he or she believes he or she contracted COVID-19
  - Discuss (taking into account privacy considerations) with the employee his or her work and out-of-work activities that may have led to contracting COVID-19 –and–
  - Review the employee's work environment for potential virus exposure, which review should be informed by any other instances of workers in that environment contracting COVID-19
- **The evidence available to the employer.** Employers should consider the evidence that a COVID-19 illness was work-related based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then the employer should take that information into account as well in determining whether an employer made a reasonable work-relatedness determination.
- **The evidence that a COVID-19 illness was contracted at work.** OSHA has directed its compliance officers to take into account all reasonably available evidence, in the manner described above, to determine whether an employer has complied with its recording obligation. This cannot be reduced to a ready formula, but certain types of evidence may weigh in favor of or against work-relatedness. OSHA provides the following example:
  - COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
  - An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or co-worker who has a confirmed case of COVID-19 and there is no alternative explanation.
  - An employee's COVID-19 illness is likely work-related if his/her job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
  - An employee's COVID-19 illness is likely not work-related if he/she is the only worker to contract COVID-19 in his or her vicinity and his or her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
  - An employee's COVID-19 illness is likely not work-related if he or she, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who:
    - Has COVID-19
    - Is not a co-worker –and–
    - Exposes the employee during the period in which the individual is likely infectious.
  - OSHA has directed its compliance officers to give due weight to any evidence of causation, pertaining to the employee illness, at issue provided by medical providers, public health authorities, or the employee him or herself.

Updated Interim Enforcement Response Plan

Also effective May 26, 2020 and pursuant to its May 19, 2020 Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19),[6] OSHA will operate under the following framework:

- In geographic areas where community spread of COVID-19 has significantly decreased, OSHA will return to the inspection planning policy that OSHA relied on prior to the start of the COVID-19 health crises, as outlined in the OSHA Field Operations Manual (FOM), CPL 02-00-164, Chapter 2, when prioritizing reported events for inspections. However, OSHA will continue to prioritize COVID-19 cases.
- In geographic areas experiencing either sustained elevated community transmission or a resurgence in community transmission of COVID-19, Area Directors will exercise discretion, including consideration of available resources, to prioritize COVID-19 fatalities and imminent danger exposures for inspection (e.g., limit on-site inspections to high-risk workplaces, such as hospitals and other healthcare providers treating patients with COVID-19 and workplaces with high numbers of complaints or known COVID-19 cases).

In either circumstance, OSHA will:

- Use informal phone/fax investigations or rapid response investigations in circumstances where OSHA has historically performed such inspections or where doing so can address the relevant hazard(s) –and–
- Ensure (though Area Directors) that compliance officers use the appropriate precautions and personal protective equipment (PPE) when performing inspections related to COVID-19
- Because OSHA is continuing to revise its guidance based on the developing circumstances, employers should monitor OSHA's website regularly to stay abreast of the latest developments.

2. For a detailed summary of existing OSHA standards that may be directly relevant to COVID-19, visit OSHA's COVID-19 Standards website at https://www.osha.gov/SLTC/covid-19/standards.html. *See also* OSHA Guidance on Preparing Workplaces for COVID-19 at https://www.osha.gov/Publications/OSHA3990.pdf and Prevent Worker Exposure to Coronavirus (COVID-19) at https://www.osha.gov/Publications/OSHA3989.pdf. 3. *See* Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus (English Version) at https://www.osha.gov/Publications/OSHA3994.pdf and Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus (Spanish Version) at https://www.osha.gov/Publications/OSHA3995.pdf. 4. *See* Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), Occ. Safety & Health Admin. (Apr. 10, 2020) at https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19. See Updated Enforcement Guidance for Recording Cases of Coronavirus Disease (COVID-19) on May 19, 2020 at https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19. 5. *See* Updated Enforcement Guidance for Recording Cases of Coronavirus Disease (COVID-19) on May 19, 2020 at https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

6. See https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19.

Retaliation Prohibition

Employers should bear in mind that section 11(c) of the Occupational Safety and Health Act of 1970,[7] prohibits employers from retaliating against workers for raising concerns about safety and health conditions. OSHA's Whistleblower Protection Program protects employees from retaliation for raising or reporting concerns about violations of certain industry-specific federal laws, including those relating to airlines, commercial motor carriers, consumer products, environmental hazards, financial reforms, food safety, health insurance reforms, motor vehicle safety, nuclear facilities, pipeline companies, public transportation agencies, railroads, maritime businesses, securities, and tax laws.

On April 8, 2020, the Department of Labor issued a news release reminding employers that "[e]mployees have the right to safe and healthy workplaces," and encouraging employees to contact OSHA if they "believe[] that their employer is retaliating against them for reporting unsafe working conditions[.]"[8] Employers should carefully consider the risks of an adverse employment action against an employee who has raised health and safety concerns related to coronavirus, including concerns over work-related travel requirements.

Key Health and Safety-Related and Return to Work Employer Questions and Answers re: COVID-19 and Pandemics

This section addresses additional health and safety-related and return to work questions that employers may have.

What if Employees Are Hesitant to Come to or Return to Work during COVID-19 or Another Pandemic?

Employers should anticipate that, under certain circumstances, employees may refuse to work based on concerns over COVID-19 or other pandemic conditions. As explained above in the subsection entitled Retaliation Prohibition, 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. For more information related to this question, see the question directly below.

If an Employee Does Not Qualify for Leave under the FFCRA, but Is Concerned about Returning to Work due to Safety Concerns (Precautions at Workplace / Possible Sick Employees), Can the Employer Require the Employee to Use Vacation Time/PTO for Missing Workdays?

Even if the FFCRA does not apply, there may be other protections for employees who are scared to return to work. As stated above, the OSH Act allows employees to refuse to work if they reasonably believe there is a threat of death or serious physical harm likely to occur immediately or within a short period. The National Labor Relations Act grants employees the right to join together to engage in protected concerted activity, including joining together to refuse to work in unsafe conditions. Additionally, the ADA may permit an employee to request an accommodation that includes changes to the work environment to reduce contact with others. There may be additional local or state protections for employees, as well. In many states, an employer's PTO/vacation policy will govern and whether the employer may force the employee to use vacation time or PTO may depend on the language of the employer's policy. Note that the FFCRA generally prohibits employers from requiring that employees use employer-provided vacation time, sick time, or other paid time off before using leave under the Act.

Can an Employer Tell Employees that if They Come to or Return to Work Sick, or with Knowledge that They Might Be Sick and/or Contagious (e.g., They Live with Someone Who Is Sick or Tested Positive), that They Will Be Subject to Disciplinary Action and/or Termination?

There may be certain state and local laws and guidance that impact an employer's ability to take the disciplinary action that this question suggests. In general, however, EEOC guidance suggests that an employer can send a sick employee home.[9] Additionally, employers can require employees to report their symptoms to HR or another member of management before coming to work, especially where the employee or employer suspects there has been COVID-19 exposure or infection.

As for employees with knowledge that they might be sick and/or contagious (e.g., they live with someone who is sick or tested positive), disciplining or terminating them is generally risky. The employer may instead want to use a health questionnaire to determine whether the employee has knowledge he or she is sick or a risk to the workplace. If the employee lies on the health questionnaire then it would be less risky for the employer to discipline or terminate the employee. Otherwise, the employer should be the one monitoring the responses to the health questionnaire and determining if an employee should stay home.

Related Content

For a discussion on the impact of the Occupational Safety and Health Act on an employer's maintenance of a safe workplace in view of the COVID-19 pandemic, see

> **COVID-19 AND OSHA**

RESEARCH PATH: *Labor & Employment > Wage and Hour > Compensation > Articles*

For assistance in complying with Occupational Safety and Health Act requirements and inspections, see

> **OSH ACT REQUIREMENTS, INSPECTIONS, CITATIONS, AND DEFENSES**

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

For an analysis of health and safety considerations related to business travel, see

> **CORONAVIRUS (COVID-19) CONSIDERATIONS FOR TRAVELING EMPLOYEES**

RESEARCH PATH: *Labor & Employment > Workplace Safety and Health > Policies and Procedures > Articles*

For an outline of the various legal and practical issues facing employers with respect to telecommuting, see

> **TELECOMMUTING EMPLOYEES: BEST PRACTICES CHECKLIST**

RESEARCH PATH: *Labor & Employment > Employment Policies > Safety and Health > Checklists*

7. 29 U.S.C.S. § 660(c). 8. *See* U.S. Dep't of Lab. Reminds Employers that they Cannot Retaliate Against Workers Reporting Unsafe Conditions During Coronavirus Pandemic (Apr. 8, 2020) at https://content.govdelivery.com/accounts/USDOL/bulletins/2858415.

9. See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question A.4.) at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

> It is necessary to check applicable state law to determine whether an employee who rejects an offer to return to his or her previous job would still be eligible for unemployment benefits.

What If an Employee Declines to Come Back to Work Because He or She Is Making More Money in Unemployment While the Extra CARES Act Unemployment Benefits Are Available?

The Federal Pandemic Unemployment Compensation (FPUC) part of the CARES Act provides that employees who are eligible for unemployment benefits will receive an additional $600 per week during unemployment between April 5, 2020 and July 31, 2020. Generally speaking, an employee is not eligible for unemployment benefits if an employer offers his or her job back. Most states require employees receiving unemployment benefits to search for "suitable employment" while receiving benefits and to indicate periodically that they have been doing so. If an employee declines to return to work because he or she is receiving unemployment compensation in excess of his or her compensation when previously employed, his or her employer should inform the employee in writing that his or her job is available again and confirm that the employee has declined to accept it. The offer of the employee's job back likely would amount to "suitable employment." Having said that, state law governs and some states have diminished the job search requirement during the COVID-19 pandemic. It is therefore necessary to check applicable state law to determine whether an employee who rejects an offer to return to his or her previous job would still be eligible for unemployment benefits.

What Questions Should Employers Ask Employees Suspected of Being Sick with COVID-19 or the Flu?

Just as employees may have concerns about continuing to work or a return to work during a pandemic, employers also may have concerns about employees at work who may be sick with a pandemic disease. When addressing these situations, employers should balance the need to take measures that keep employees safe with employment laws their actions may implicate. Employers should review the latest guidance provided by OSHA, the Equal Employment Opportunity Commission (EEOC), the CDC, and any other government agencies addressing a pandemic or a local or regional health concern.[10]

For purposes of combatting COVID-19, the EEOC has given employers leeway to make medical inquiries that the Americans with Disabilities Act (ADA) otherwise might prohibit.[11]

Below is a list of questions employers should consider asking employees suspected of having COVID-19:

- Are you experiencing symptoms associated with COVID-19, including fever (over 100.4°F), chills, cough, shortness of breath, sore throat, loss of smell or taste, or gastrointestinal problems, such as nausea, diarrhea, or vomiting?
- Have you tested positive for or been diagnosed with COVID-19?
- Have you been in close contact (i.e., within six feet or a recommended distance as updated by the CDC) with any person who has tested positive for, or been diagnosed with, COVID-19 within the past 14 days?
- Has your doctor, other medical professional, or health official asked you to self-quarantine within the past 14 days?
- Have you recently traveled to or been in any location for which the CDC has issued a Level 3 travel health notice?[12]
- Do you require an accommodation due to an existing condition that may put you at high risk for COVID-19, as per the CDC's guidance?[13]

Can Employers Prevent Employees from Coming to or Returning to Work during COVID-19 or Another Pandemic?

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 or a flu.

10. For COVID-19 guidance from these agencies, *see* COVID-19 (OSHA) at https://www.osha.gov/SLTC/covid-19/, Coronavirus and COVID-19 (EEOC) at https://www.eeoc.gov/coronavirus/, and Interim Guidance for Businesses and Employers (CDC) at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html. *Also see* CDC: COVID-19 Employer Information for Office Buildings, which includes a section with guidance on employees returning to work called "Administrative controls: Change the way people work" at https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html, CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again at https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf, CDC: When You Can be Around Others After You Had or Likely Had COVID-19 at https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprevent-getting-sick%2Fwhen-its-safe.html, and CDC: Criteria for Return to Work for Healthcare Personnel with Suspected or Confirmed COVID-19 (Interim Guidance) at https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html. 11. *See* What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus at https://www1.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?renderforprint=1. 12. See CDC's Coronavirus Disease 2019 Travel Health Notices at https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html. 13. See CDC's Coronavirus Disease 2019 People Who are at Higher Risk at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

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

What Steps Should Employers Take before Allowing a Previously Infected Employee to Return to Work?

Before allowing employees who test positive for COVID-19 or another pandemic disease or who displayed symptoms associated with a pandemic disease to return to work, employers may require employees to:

- Provide a doctor's note clearing the employee to return to the workplace
- Submit to a medical examination
- Remain symptom-free for a specific period of time (as recommended by Health Authorities) before returning to work[14]

Pursuant to CDC guidelines, employers should advise sick employees that they should not leave home and return to work until:

- An untested employee has no fever for three days or more (without medicine), other symptoms improved (cough, etc.), and at least 10 days have passed since he or she first had symptoms
- A tested employee has no fever (without medicine), other symptoms improved, and two tests 24 hours apart are both negative[15]

Can Employers Administer Mandatory COVID-19 Testing for Their Employees before They Return to Work or Enter the Workplace?

Yes. On April 23, 2020, the EEOC stated employers can test their employees to determine if they have COVID-19 before they enter the workplace because employees who have the coronavirus will pose a direct threat to the health of others.[16] The EEOC will not deem such testing by employers to be a violation of the Americans with Disabilities Act (ADA).[17] The EEOC also added that employers should (1) ensure the reliability and accuracy of the tests, (2) consider potential false-positives or false-negatives, and (3) understand testing can only show whether the employee has the virus at the time of the test and cannot predict whether the employee will be susceptible to the virus at a later time.[18]

14. *Also see* CDC: Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 at https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html and CDC: Return to Work for Healthcare Personnel with Confirmed or Suspected COVID-19 at https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html. 15. See CDC: When You Can be Around Others After You Had or Likely Had COVID-19 at https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprevent-getting-sick%2Fwhen-its-safe.html and CDC: Criteria for Return to Work for Healthcare Personnel with Suspected or Confirmed COVID-19 (Interim Guidance) at https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html. *Also see* CDC: COVID-19 Employer Information for Office Buildings, which includes a section with guidance on employees returning to work called "Administrative controls: Change the way people work" at https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html, CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again at https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf and CDC: Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 at https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html. 16. *See* What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question A.6.) at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. 17. *Id*. 18. *Id*.

The EEOC does well to caution employers about the reliability and accuracy of tests currently available in the United States, especially because the Food and Drug Administration (FDA) has yet to approve or clear a test for COVID-19.[19] However, the FDA believes that the molecular tests for which it has issued Emergency Use Authorizations are highly accurate.[20] On the other hand, the FDA states that COVID-19 antibody tests should not be used alone to diagnose COVID-19 due to their potential for false negative and false positive results.[21]

Even if accurate tests become widely available, employers will need to consider both the costs associated with and the practical limitations of such tests. As the EEOC indicates, a negative test result for an employee in the morning means nothing by lunchtime. To rely on testing effectively, employers would need to consider the frequency of such tests, the costs of which could easily become prohibitive and their implementation disruptive. Health questionnaires and vigilant monitoring for symptoms associated with COVID-19 may serve as useful, cost-effective, and less disruptive alternatives to testing. For additional guidance, see the subsection above entitled "What Questions Should Employers Ask Employees Suspected of Being Sick with COVID-19 or the Flu?"

As tests become more widely available both to employers and employees, employers will need to consider additional issues, which neither the EEOC, FDA, OSHA, nor any other federal agency have explicitly addressed as of May, 2020, including:

- Who are qualified testing vendors
- Whether antibody testing is reliable, permissible, or useful
- Potential employer liability for failure to test
- Whether employers can decide not to administer tests and instead require employees to get their own tests before coming back to work
- Who bears the costs for the tests that employees obtain themselves
- Whether time spent getting tested is compensable

Is It Recommended to Obtain Any Form of Release before an Employer Requests Medical Information, Including a Health Questionnaire?

The enforceability of a release may be governed by state law, so their effectiveness could vary by state (and there are open questions about their enforceability under various federal statutes). However, given the EEOC's latest guidance permitting employers to use health questionnaires and perform testing, a release is not necessary, particularly if employers are taking steps to ensure that all medical information is kept confidential.

In Certain States the State OSHA Has Not Made a Specific Finding as to Whether Cloth Face Masks are PPE. What Considerations Should an Employer Make before Adopting a Policy Requiring Face Masks Versus Providing Masks and Strongly Encouraging Employees to Use Masks?

As of May 20, 2020, Federal OSHA has also not taken a position on this issue yet. In general, cloth face masks may be considered PPE because of how OSHA views PPE (e.g., anything that provides protection to employees). The issue is whether an employer must pay for the PPE (in this case masks) or if it falls into an exempt category (e.g., ordinary clothing). There is no definitive answer yet on this issue (but if your state or local government require employers to provide masks, then at least this part is clear).

Employers should certainly consider permitting employees to wear masks voluntarily, as the latest CDC guidance indicates this to be the best practice, particularly when social distancing (keeping at least six feet apart) is not feasible. In light of the CDC guidance, however, employers may be in the best position (from a safety compliance standpoint) if they require the use of masks in the workplace and also provide employees masks (or allow employees to wear their own if they prefer). There are obvious considerations regarding such a policy, including costs and the availability of masks generally.

This article is current as of May 28, 2020.

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

Related Content

For additional return-to-work guidance, including information on bringing back previously infected employees to work, see

> PANDEMIC FLU/INFLUENZA/CORONAVIRUS (COVID-19) PREVENTION AND RESPONSE CHECKLIST (BEST PRACTICES FOR EMPLOYERS)

RESEARCH PATH: *Labor & Employment > Workplace Safety and Health > Policies and Procedures > Checklists*

For a review of paid vacation and paid time off laws across the United States, see

> PAID VACATION AND PTO STATE LAW SURVEY

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

For an examination of the requirements that employers need to know to comply with the Americans with Disabilities Act, see

> AMERICANS WITH DISABILITIES ACT: GUIDANCE FOR EMPLOYERS

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

For guidance on a wide variety of COVID-19 legal issues, see

> CORONAVIRUS (COVID-19) RESOURCE KIT

RESEARCH PATH: *Labor & Employment > Workplace Safety and Health > Policies and Procedures > Practice Notes*

19. *See* Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (FDA) at https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/coronavirus-disease-2019-covid-19-frequently-asked-questions#devices. 20. *Id.* 21. *Id.*

Avi Meyerstein, Stacey Bowman, and Courtney Steelman HUSCH BLACKWELL, LLP

Pandemic Flu/Influenza/Coronavirus (COVID-19) Prevention and Response Checklist (Best Practices for Employers)

This checklist highlights key considerations for private employers to prepare for and respond to influenza (flu) and other potential pandemic outbreaks (including the coronavirus (COVID-19) pandemic). This is a non-jurisdictional checklist; it does not cover all potential federal, state, and local law distinctions.

The guidance below is appropriate for protecting a workplace at any time during a pandemic to the extent facilities are permitted by authorities to operate. This includes periods during a pandemic when some business may operate as essential, while others are closed. It also includes periods when authorities relax stay-at-home orders and allow increased business operations.

When community transmission of a virus is still occurring during a pandemic, many worker roles will qualify as at least medium risk exposure since any direct contact with another person—whether a co-worker, customer, vendor, or member of the public—could present an opportunity for exposure. As a result, workplaces reopening during the pandemic and during continued community transmission should continue to follow the appropriate protective measures addressed below.

Always Check CDC and OSHA Websites

The checklist is based heavily on the U.S. Centers for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA) guidance in response to the COVID-19 pandemic. Because that guidance has evolved over time due to the dynamic situation, employers should consult those primary sources for additional background and to update information when developing plans in accordance with this checklist.

- **Key OSHA COVID-19 Guidance.**
  - ✓ OSHA Guidance on Preparing Workplaces for an Influenza Pandemic[1]
  - ✓ OSHA COVID-19 Overview[2]
  - ✓ OSHA Guidance on Preparing Workplaces for COVID-19[3]
  - ✓ Prevent Worker Exposure to Coronavirus (COVID-19)[4]
  - ✓ Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)[5]
  - ✓ Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), Occ. Safety & Health Admin. (Apr. 10, 2020)[6]

1. https://www.osha.gov/Publications/influenza_pandemic.html. 2. https://www.osha.gov/SLTC/covid-19/. 3. https://www.osha.gov/Publications/OSHA3990.pdf. 4. https://www.osha.gov/Publications/OSHA3989.pdf. 5. https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19. 6. https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

- **Relevant OSHA Pandemic Guidance.** This guidance from OSHA is on flu pandemics and is not limited to COVID-19.
  - ✓ Guidance on Preparing Workplaces for an Influenza Pandemic[7]
  - ✓ Healthcare Workplaces Classified as Very High or High Exposure Risk for Pandemic Influenza: What to Do to Protect Workers[8]
  - ✓ OSHA Laws, Regulations, and Standards[9]
- **Key CDC COVID-19 Guidance.**
  - ✓ CDC: COVID-19 Employer Information for Office Buildings, which includes a section with guidance on employees returning to work called "Administrative controls: Change the way people work"[10]
  - ✓ CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again[11]
  - ✓ Coronavirus (COVID-19) (CDC)[12]
  - ✓ Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)[13]
- **Relevant CDC Pandemic Guidance.** This additional guidance from the CDC is on flu pandemics and is not limited to COVID-19.
  - ✓ Get Your Workplace Ready for Pandemic Flu[14]
  - ✓ Do Your Part to Slow the Spread of Flu[15]

Create a Pandemic Response Team

Employers should meet with the emergency operations coordinator or team to develop a team dedicated to pandemics and a pandemic response plan. For information on pandemic response plans, see the section below entitled "Establish a Pandemic Plan (or Update an Existing One) and Adjust for Worker Absences." If no emergency operations coordinator or team exists, designate one to coordinate a pandemic/flu response.

When developing a pandemic preparedness and response team, consider the following issues:

- **What are the pandemic response team's main responsibilities?**
  - ✓ Communicate essential pandemic information to employees both before and during a pandemic.
  - ✓ Prepare a pandemic response plan.
  - ✓ Coordinate an effective response when a pandemic emergency occurs.
    - See the sections below entitled "Educate Employees on Preventive Health Measures," "Establish a Pandemic Plan (or Update an Existing One) and Adjust for Worker Absences," and "How to Contain the Spread of Illness at Work Once Detected."
- **Who should be on the pandemic task team?** The team should consist of employees from a wide variety of departments and areas of expertise, including:
  - ✓ Emergency operations
  - ✓ Management
  - ✓ Building facilties
  - ✓ IT
  - ✓ HR
  - ✓ Legal

7. https://www.osha.gov/Publications/influenza_pandemic.html. 8. https://www.osha.gov/Publications/exposure-risk-classification-factsheet.html. 9. https://www.osha.gov/laws-regs/interlinking/standards. 10. https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html. 11. https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf. 12. https://www.cdc.gov/coronavirus/2019-ncov/index.html. 13. https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html. 14. https://www.cdc.gov/nonpharmaceutical-interventions/pdf/gr-pan-flu-work-set.pdf. 15. https://www.cdc.gov/nonpharmaceutical-interventions/pdf/do-your-part-slow-spread-flu-item5.pdf.

- **Impact of a pandemic on the workplace.** Make sure to review all aspects of a pandemic's impact on the workplace, including:
  - ✓ Personnel
  - ✓ Systems
  - ✓ Services
  - ✓ Facilities
  - ✓ Customers and suppliers
  - ✓ Other resources
- **Identify key relationships with key community players and collaborate and coordinate with the community.** Understand the pandemic response team's role in the broader community response. Identify roles of, and build relationships with, key community partners and stakeholders, including:
  - ✓ Local public health department
  - ✓ Local boards of education
  - ✓ Other local officials
  - ✓ Local first responders
  - ✓ Local hospital and medical providers
  - ✓ Local suppliers of critical supplies
  - ✓ Other community leaders

Educate Employees on Preventive Health Measures

Every employee has a role in staying healthy and protecting others. To this end, employers should take the following action regarding pandemic health issues for employees.

- **Consult and implement current CDC guidelines for the pertinent illnesses and viruses.**
- **Encourage employees to take the following steps to help assure good health:**
  - ✓ Avoid shaking hands and follow social distancing.
  - ✓ Wash hands often with soap and water for at least 20 seconds.
    - If no soap and water is immediately available, use hand sanitizer (at least 60% alcohol).
  - ✓ Know the symptoms of the particular illness.
    - For instance, COVID-19 often presents with fever, cough, and/or shortness of breath.
  - ✓ Get good rest, nutrition, and exercise to maintain healthy immune systems.
  - ✓ Stay home when sick until meeting return-to-work criteria. See the section below entitled "Steps to Follow for Employees Returning to Work."
  - ✓ Report illness and exposures and cooperate in investigating exposure history.
    - Make sure to establish and communicate protocols for reporting illness and exposure.
    - Seek medical attention in case of severe symptoms.
  - ✓ For COVID-19, severe symptoms include trouble breathing, persistent chest pain or pressure, new confusion or inability to arouse, or bluish lips or face.
  - ✓ When sick, wear a cloth covering when around other people or animals.
  - ✓ Cover coughs and sneezes with a tissue and throw it away immediately.
    - If you do not have a tissue, use your sleeve or elbow, not hands.
  - ✓ Wash or sanitize your hands after coughing or sneezing.
  - ✓ Clean high-touch surfaces (per CDC cleaning and personal protective equipment (PPE) precautions).
  - ✓ When sick, avoid sharing household items and disinfect them.
  - ✓ Practice social distancing (i.e., keep 6+ feet from others) if indicated by the CDC.
  - ✓ Refrain from touching the eyes, nose, or mouth; wash hands first.
  - ✓ Get vaccinated and/or tested, if possible.[16]

Consider Key Vaccination Issues

If there is a vaccine available for the pandemic illness at issue, consider the following vaccination issues.

- Develop policies and documents related to vaccinations.
- Encourage voluntary participation in flu vaccination clinics. Take the following steps to encourage employees to get proper vaccinations:
  - ✓ Provide vaccinations for free (or low cost).
  - ✓ Provide vaccinations at the office or have employees receive vaccinations at a clinic in a convenient location.
  - ✓ Make it easy for employees to schedule their vaccinations.
  - ✓ Communicate clearly about the availability of vaccinations.
- **Privacy issues.** Consider the following privacy issues related to vaccinations:
  - ✓ Consider whether employees can decline to get vaccinations.
  - ✓ Keep the names of employees who receive vaccinations private.
  - ✓ Ensure that clinics providing vaccinations to employees are keeping the employees' medical information and their names private.

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16. *See* CDC: COVID-19 Employer Information for Office Buildings at https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html, CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again at https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf, Get Your Workplace Ready for Pandemic Flu at https://www.cdc.gov/nonpharmaceutical-interventions/pdf/gr-pan-flu-work-set.pdf, Do Your Part to Slow the Spread of Flu at https://www.cdc.gov/nonpharmaceutical-interventions/pdf/do-your-part-slow-spread-flu-item5.pdf, Coronavirus (COVID-19) (CDC) at https://www.cdc.gov/coronavirus/2019-ncov/index.html, and Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19) at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

Assess the Workplace, Employee Exposures, and Applicable OSHA Guidelines/Standards

Employers must follow OSHA standards applicable to each workplace/employee. During a pandemic, OSHA's existing rules—and any additional specific guidance—will most likely not be a perfect fit. Use judgment and care.[17]

Consider these OSHA guidelines and standards:

- **OSHA's General Duty Clause.** OSHA's catchall General Duty Clause requires a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[18]
- **General OSHA industry standards often related to pandemics include:**
  - ✓ Hazard communication for cleaning chemicals[19]
  - ✓ Bloodborne pathogens standard (does not strictly apply to COVID-19, but OSHA states it provides a helpful example framework)[20]
- **Additional standards in construction include:**
  - ✓ Training impacted employees to avoid bloodborne hazards[21]
  - ✓ Identifying medical personnel available to advise/consult[22]
  - ✓ Ensuring trash containers have appropriate lids and collection[23]
- **OSHA healthcare worker guidance.** For the healthcare industry, follow any special OSHA guidance for healthcare workers.[24]
- **Recording and reporting requirements for employee illnesses.**
  - ✓ **Record and report.** Record/report illnesses for (1) new cases that (2) lead to days away from work (or worse), and (3) are work-related (more likely than not caused by work exposure).[25]
  - ✓ **Review special OSHA guidance for pandemics.** Follow any special OSHA guidance issued for particular pandemics. See the section entitled "Always Check CDC and OSHA Websites" above.
  - ✓ **COVID-19 guidance.** For COVID-19, employers in healthcare, emergency response, and corrections must make work-relatedness evaluations as usual. For other employers, in areas where community transmission is occurring, employee infections are only work-related and recordable if there is objective evidence, reasonably available to the employer, that a COVID-19 case may be work-related.[26]

17. For more on assessing exposures and preparing the workplace, *see* OSHA Guidance on Preparing Workplaces for an Influenza Pandemic at https://www.osha.gov/Publications/influenza_pandemic.html and OSHA Guidance on Preparing Workplaces for COVID-19 at https://www.osha.gov/Publications/OSHA3990.pdf. 18. 29 U.S.C.S. § 654(a). 19. 29 C.F.R. §§ 1926.59 and 1910.1200. 20. 29 C.F.R. § 1910.1030. 21. 29 C.F.R. § 1926.21(b). 22. 29 C.F.R. § 1926.50(a). 23. 29 C.F.R. § 1926.25. 24. *See, e.g.*, COVID-19 Control and Prevention – Healthcare section at https://www.osha.gov/SLTC/covid-19/controlprevention.html#healthcare. 25. Follow OSHA rules at 29 C.F.R. § 1904. 26. *See* Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), Occ. Safety & Health Admin. (Apr. 10, 2020) at https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

- **Level of exposure/risk.** Employers should characterize each employee/role based on level of exposure/risk as follows:
  - ✓ **Very high.** An employee has direct exposure to known/suspected pandemic patients involving:
    - Exposure to their bodily fluids and respiratory secretions
    - Aerosol-generating procedures (healthcare)[27]
    - Collecting/handling specimens (healthcare/lab workers)[28]
  - ✓ **High.** Employees, such as other healthcare staff, are exposed to such patients for:
    - Patient transport in enclosed vehicles
    - Autopsies
  - ✓ **Medium.** An employee has frequent and/or close contact with people who may be infected. In case of community transmission, this means direct/close contact with anyone.
  - ✓ **Low.** An employee has no contact with known/suspected cases and in times of community transmission, no close contact with other workers or the public.[29]

27. COVID-19 Control and Prevention – Healthcare section at https://www.osha.gov/SLTC/covid-19/controlprevention.html#healthcare. 28. *Id.* 29. *See* Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) at https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19.

Related Content

For practical guidance to prepare for and respond to pandemic diseases, including COVID-19 or other widespread illnesses, see

> PANDEMIC FLU/INFLUENZA/CORONAVIRUS (COVID-19): KEY EMPLOYMENT LAW ISSUES, PREVENTION, AND RESPONSE

RESEARCH PATH: *Labor & Employment > Employment Policies > Safety and Health > Practice Notes*

For assistance in developing emergency planning and business continuity plans, including planning for COVID-19, see

> BUSINESS CONTINUITY AND EMERGENCY PLANNING

RESEARCH PATH: *Labor & Employment > Employment Policies > Safety and Health > Practice Notes*

For an annotated vaccine declination form to be used to draft a policy allowing employees to decline a flu/influenza vaccination, including a future COVID-19 vaccination, see

> DECLINATION OF FLU/INFLUENZA VACCINATION FOR MEDICAL CONTRAINDICATION

RESEARCH PATH: *Labor & Employment > Employment Policies > Safety and Health > Forms*

For an outline of the various legal and practical issues facing employers with respect to telecommuting, see

> TELECOMMUTING EMPLOYEES: BEST PRACTICES CHECKLIST

RESEARCH PATH: *Labor & Employment > Employment Policies > Safety and Health > Checklists*

Adopt Precautions and Preventive Measures for Each Role Based on Exposure

Based upon the level of exposure/risk of the employee, employers should consider the following precautions and measures.[30]

- **Low exposure (implement these measures for all exposure levels).** For low exposure employees, employers should take the following measures:
  - ✓ Train employees on health measures for both work and home.
  - ✓ Post/distribute CDC/local health department educational materials.
  - ✓ Post hygiene reminders in bathrooms and high-traffic areas throughout.
  - ✓ **For COVID-19.** Post OSHA coronavirus posters.[31]
  - ✓ Provide ample sanitation materials throughout workplace: soap/water, sanitizer, tissues, and trash cans.
    - Increase trash collection (following CDC guidelines).
  - ✓ Stockpile reasonable supplies and plan to re-supply in the event of a pandemic.
  - ✓ Inform employees where supplies are located for hygiene.
  - ✓ Communicate physical/mental health resources to employees.
  - ✓ Encourage/establish medical screening/monitoring for symptoms.
  - ✓ Post signs for employees and visitors regarding hazards/prevention.
  - ✓ Communicate policies for office leave, pay, day care, and transportation.
  - ✓ Communicate options for teleworking where appropriate.
  - ✓ Limit and adjust travel (follow travel alerts, limit exposure to others, practice hygiene, self-monitor for symptoms, and seek medical care as needed).
  - ✓ Monitor local/federal public health recommendations.
  - ✓ Consider encouraging/requiring vaccination and providing vaccination clinics.
  - ✓ **PPE standards**. Follow local/federal health recommendations and consider allowing/providing/requiring face masks accordingly.
  - ✓ **Face mask guidance.** When employees where face masks (not respirators) at work, consult governmental orders that may require masks in certain cases and/or require employers to provide masks. Communicate the benefits and limitations so employees understand what protections face masks offer and what protections they do not. Key points to communicate for COVID-19 include:
- Face masks or coverings (whether cloth or surgical masks) are relatively loose-fitting (compared with tight-fitting respirators).
- A face mask primarily contains your coughs and sneezes and helps prevent you from infecting others and/or contaminating the surrounding area.
- They can also help you avoid accidentally touching your mouth and nose.
- In addition, face masks can also provide some barrier protection against splashes, sprays, and respiratory droplets reaching your nose and mouth. However, cloth face masks do not effectively filter small particles from the air and do not prevent leakage around the edge of the mask when the user inhales.

30. For more information, *also see* OSHA Guidance on Preparing Workplaces for an Influenza Pandemic at https://www.osha.gov/Publications/influenza_pandemic.html and OSHA Guidance on Preparing Workplaces for COVID-19 at https://www.osha.gov/Publications/OSHA3990.pdf. 31. *See* Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus (English Version) at https://www.osha.gov/Publications/OSHA3994.pdf and Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus (Spanish Version) at https://www.osha.gov/Publications/OSHA3995.pdf.

- Do not use a face covering if it will be hazardous. For example, do not place cloth face coverings on children under age 2, on anyone who has trouble breathing, or on anyone who is unconscious, incapacitated, or otherwise unable to remove the mask without assistance.
- Unlike with respirators, cloth face masks do not require fit-testing or seal checks since they do not fit tightly.
- Unless respirators are required for a particular workplace risk, CDC recommends that most people use cloth face masks to preserve the critical supply of respirators for health care workers.
- NIOSH-certified N95 masks are different. They are respirators that can filter the air you breathe when worn properly, reducing your exposure to airborne particles, from small particle aerosols to large droplets. N95 respirators are tight-fitting respirators that filter out at least 95% of particles in the air.
- Not everyone is able to wear a respirator due to medical conditions that may be made worse when breathing through a respirator.
- Achieving an adequate seal to the face is essential with a respirator for it to be effective.
- A CDC infographic[32] provides a great illustration of the differences between face masks and respirators.
- Many employers are providing information like this in writing and having employees sign a form to confirm receipt. This could help employees understand the information while also providing documentation of the employer's health and safety training, communication, and efforts.

32. https://clicktime.symantec.com/3B4Cq8VSqzN3BdEFKh2jiUA7Vc?u=https%3A%2F%2Fwww.cdc.gov%2Fniosh%2Fnpptl%2Fpdfs%2FUnderstandDifferenceInfographic-508.pdf.

- **Medium exposure**. Employers should add the measures below for medium exposure employees in addition to the low exposure measures. Keep in mind, in areas of community transmission, these measures apply.
  - ✓ Implement social distancing.
  - ✓ Limit all workplace contact between people.
  - ✓ Follow CDC and local guidance/orders.
  - ✓ Promote telework and remote work.
  - ✓ Increase spacing of workstations.
  - ✓ Shift to off-site/delivery/drive-through/curbside services.
  - ✓ Install sneeze guards and other physical barriers.
  - ✓ Close or limit occupancy/increase spacing in break/lunch/meeting rooms.
  - ✓ Reduce/stagger schedules to reduce number of simultaneous employees.
  - ✓ Downsize/suspend operations as necessary.
  - ✓ Adjust foot traffic to limit close contact (one-way hallways, barriers, etc.).
  - ✓ Limit exposure to outside visitors (customers, vendors, contractors, etc.).
  - ✓ Keep any necessary visitors separate from most workers.
  - ✓ Postpone non-essential meetings (especially in-person) and travel.
  - ✓ Conduct meetings electronically, even within the workplace.
  - ✓ Screen employees and visitors for symptoms upon entry.
  - ✓ Check in with employees regarding self-monitoring.
  - ✓ **PPE standards**. Follow guidance based on (1) particular tasks/exposures and (2) general CDC guidance for close contact between people.
    - For example, for COVID-19, CDC has recommended that all employees wear cloth masks when in close contact to reduce spread of germs.

- **Very high and high exposure.** Employers should add the measures below for very high and high exposure employees in addition to low and medium measures.
  - ✓ Use isolation rooms for COVID-19 patient aerosol-generating procedures.
  - ✓ Process their specimens only in Biosafety Level 2 or 3 lab facilities.
  - ✓ Install physical barriers in reception and intake areas (sneeze guards).
  - ✓ Increase housekeeping vigilance, cleaning, and waste disposal.
  - ✓ Install appropriate engineering controls (ventilation systems, etc.).
  - ✓ Monitor for, and post signs asking patients and family to immediately report, symptoms of respiratory illness on arrival at the facility and to use disposable tissues to cover the nose and mouth when coughing.
  - ✓ Follow all PPE, disinfection, and hygiene recommendations.
  - ✓ **PPE standards.**
    - NIOSH-certified respirators that are N95 or greater.
    - Consider elastomeric or powered air-purifying respirators.
    - Update and follow your respiratory protection program including medical evaluation, fit-testing, and employee training for respirators.
    - Provide gloves made of latex, vinyl, nitrile, or other synthetic materials.
    - Provide isolation gowns if clothes may soil.
    - Provide eye and face protection if there may be possible sprays of infectious material.

How to Contain the Spread of Illness at Work Once Detected

If an employer detects illness in the workplace, implement the following measures:

- Designate space to isolate sick and exposed employees.
- Immediately send home or isolate employees upon symptoms/exposure.
- Deep-clean (per CDC guidance) all areas visited by sick/exposed employees.
- Have sick and exposed employees self-isolate at home per CDC guidance.
- Promptly investigate cases.
  - ✓ Trace areas the sick employee visited, and people exposed to direct contact (within six feet) with the sick employee for prior 48 hours or more.
- Notify those directly exposed of potential exposure, while protecting privacy, to isolate at home (per CDC), self-monitor, and report illness.
- Notify all employees at the facility of a confirmed (anonymous) case. Reassure about isolation of those exposed and cleaning. Remind all employees of health measures.
- If evidence suggests infection occurred at work, consult the latest OSHA guidelines on whether to record/report per OSHA rules.[33]
- **COVID-19 measures.** For COVID-19:
  - ✓ Employers in healthcare, emergency response, and corrections must determine whether exposure more likely than not occurred at work.[34]
  - ✓ For other industries, where there is community transmission, only record/report if objective evidence, reasonably available to employer, indicates the case was more likely work-related.[35]

33. *See* Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), Occ. Safety & Health Admin. (Apr. 10, 2020) at https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19. **34.** Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), Occ. Safety & Health Admin. (Apr. 10, 2020) at https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19. **35.** *Id.*

Establish a Pandemic Plan (or Update an Existing One) and Adjust for Worker Absences

An optimal response during crisis and pandemic conditions requires planning. The CDC recommends creating or updating an existing pandemic response plan.

Remember:

- **Be proactive.** Make these plans before a crisis arises. If not, make them as a first response step.
- **Develop a plan to implement the preventive measures as discussed below.**
- **Continue to develop and update the plan as conditions and needs evolve.**

The pandemic response plan should include the following measures:

- **Support employee absences.** Plan to support employee absences and to continue business operations.
- **Remember an employee's need to care for other family members.** Consider employees who care for others (i.e., children, disabled, or elderly family).
  - ✓ **Note on workplace policies.** Employers should make sure their policies comply with applicable federal, state, and local laws—including temporary local and federal legislation/orders created in times of pandemic (e.g., the Families First Coronavirus Response Act (FFCRA), which includes the Emergency Family and Medical Leave Expansion Act (also known as the EFMLEA) and the Emergency Paid Sick Leave Act (also known as the EPSLA).[36]
- **Create flexible attendance and sick leave policies.** Develop flexible attendance and sick leave policies and guidelines for a pandemic. Remove barriers to sick employees staying home.[37]
- **Communicate how employees can access policies related to the pandemic.** Explain that employees can find policies posted on bulletin boards and/or on the employer's intranet. Also tell employees which designated individuals will be able to provide relevant policies to them.
- **Advise employees on telecommuting issues.** Should employees need to work at home during a pandemic, instruct employee's on the employer's telecommuting policy and make sure they have the proper technology to effectively work remotely.
- **Keep in mind school and other organization closures.** Consider employee limitations due to school and other organizational closures.
- **Consider child care issues of employees.** Become familiar with the local education system pandemic plans; encourage employees to plan early for alternative child care arrangements when possible.
- **Track flu-related absences.** Develop a method for monitoring and tracking flu-related absences.
- **Determine how absences will affect production.** Determine if/when absences may disrupt operations, and develop measures to compensate (i.e., reducing on-site operations/services, re-configuring processes, shifting services/production to non-impacted locations, etc.).
- **Create a business contingency plan.** Develop contingency plans for transportation, facility access/minimum maintenance, security, supplies and deliveries, work-from-home support, and production changes.
- **Recognize critical jobs and plan accordingly.** Identify critical job positions/functions. Plan alternative coverage. Cross-train staff.

36. For DOL guidance on COVID-19 and the expanded FMLA, *see* DOL Guidance: Families First Coronavirus Response Act: Questions and Answers. See also COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers. **37.** *Also see* DOL Guidance: Families First Coronavirus Response Act: Questions and Answers.

Steps to Follow for Employees Returning to Work

Employers should take the following steps when employees can return to work during or after a pandemic, including the COVID-19 pandemic:

- **Review local and CDC guidance.** Follow local and CDC guidance regarding limitations and recommendations to reopen.
- **Make certain the employer's return-to-work plan is in place.** Ensure that the employer's plan and the appropriate preventive measures addressed above are in place, including engineering controls, social distancing, hygiene, schedule changes. Make sure these plans are appropriate depending on the level of exposure risk.
  - ✓ **Community transmission requires heightened protective measures.** Always remember that in times and places of community transmission most employees may have at least medium exposure risk, requiring social distancing and similar measures.
- **Keep employees up to date on work practices.** Communicate changes to work practices, assignments, schedules, and policies (including support for CDC-recommended practices like cloth masks).
- **Maintain necessary disinfection and deep cleaning of workplace.** Conduct all necessary disinfection and deep cleaning of the workplace before reopening.
- **Keep sick employees home.** Sick employees should not come to work.
- **Monitor federal, state, and local guidance on permitted medical screening of employees**. Consult CDC and Equal Employment Opportunity Commission (EEOC) guidance for pandemic-specific information on permitted screening/testing/collection of medical information.[38]
- **Screening employees.** Screen returning employees with interviews/forms/testing for (1) prior exposure to the virus, including travel and known/suspected cases; and (2) previous/continuing symptoms.
- **Testing employees**. If tests are reasonably available, conduct testing upon return to confirm that employees are already recovered from infection and/or not infected. Provide the same screening and testing to employees of the same job type to avoid discrimination claims.
- **Keep medical documents private.** Maintain any medical documentation confidentially, separate from personnel files.
- **For COVID-19, determine need for return-to-work notes.** The CDC and EEOC advise against requiring return-to-work notes from doctors to avoid unnecessary exposures to, or strains on, the health care system.[39]
- **For COVID-19, review return-to-work policies for infected employees**. Employers should advise sick employees that they should not leave home and return to work until:
  - ✓ An untested employee has no fever for 72+ hours (without medicine), other symptoms improved (cough, etc.), and 10+ days since he or she first had symptoms
  - ✓ A tested employee has no fever (without medicine), other symptoms improved, and two tests 24 hours apart are both negative[40]

38. *See* Coronavirus and COVID-19 (EEOC) at https://www.eeoc.gov/coronavirus/, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws at https://www1.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?renderforprint=1, CDC: COVID-19 Employer Information for Office Buildings at https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html, CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again at https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf, and Interim Guidance for Businesses and Employers (CDC) at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html. 39. *See* Coronavirus and COVID-19 (EEOC) at https://www.eeoc.gov/coronavirus/, CDC: COVID-19 Employer Information for Office Buildings at https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html, CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again at https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf, and Interim Guidance for Businesses and Employers (CDC) at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html. 40. *See* CDC: Return to Work for Healthcare Personnel with Confirmed or Suspected COVID-19 at https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html. *See also* CDC: COVID-19 Employer Information for Office Buildings at https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html, which includes a section with guidance on employees returning to work called "Administrative controls: Change the way people work," CDC: Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 at https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html and CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again at https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf.

- **EEOC COVID-19 testing guidance.** The EEOC stated on April 23, 2020 that it will not deem testing employees for COVID-19 before they enter the workplace to be a violation of the Americans with Disabilities Act (ADA).[41]

This checklist is current as of May 28, 2020.

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For a discussion on providing and requiring the use of face masks in a workplace, see

> **EMPLOYERS PROVIDING FACE MASKS SHOULD REVIEW THEIR HEALTH AND SAFETY OBLIGATIONS**

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

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41. *See* What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question A.6.) at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

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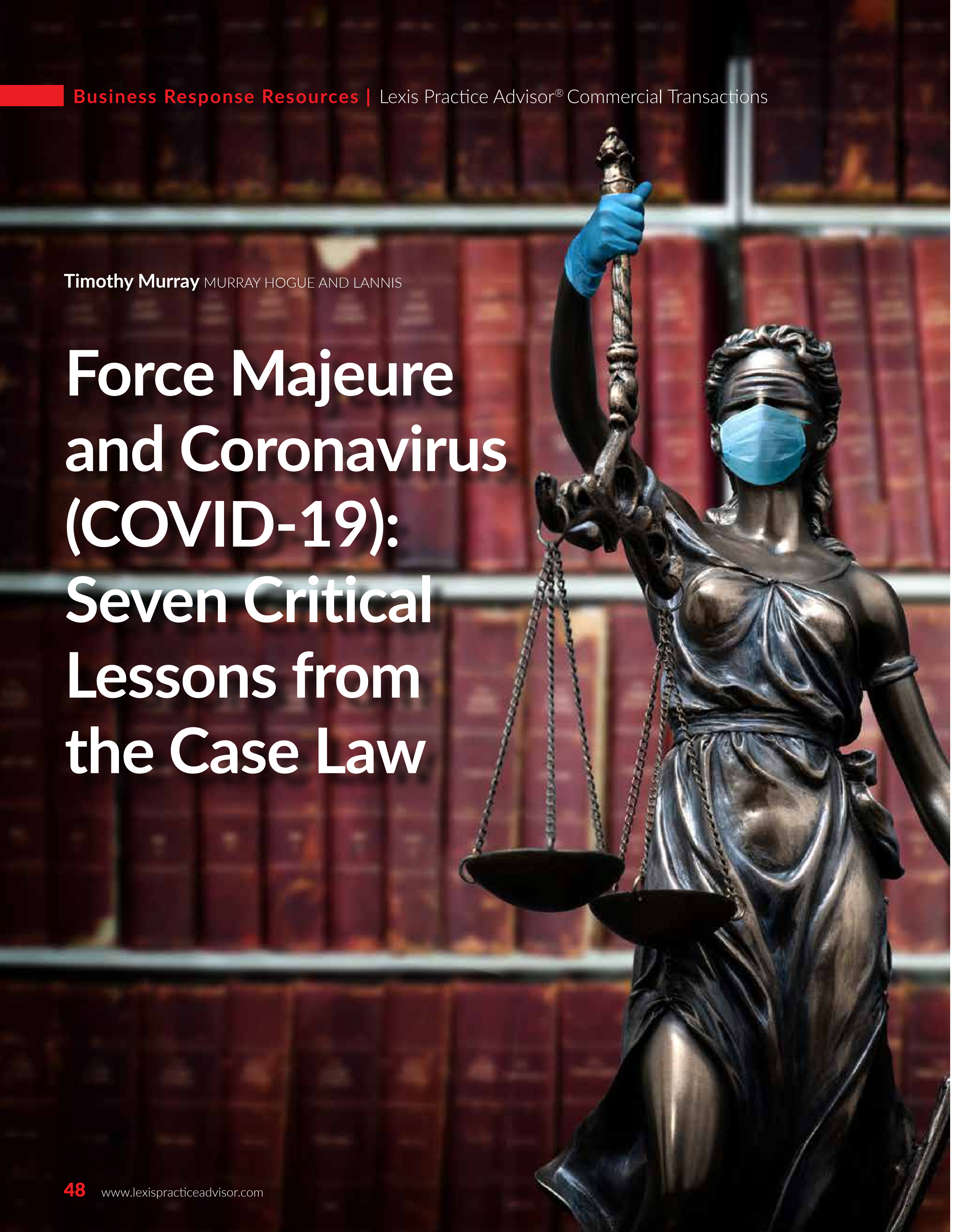


Timothy Murray MURRAY HOGUE AND LANNIS

Force Majeure and Coronavirus (COVID-19): Seven Critical Lessons from the Case Law

There is a veritable pandemic raging, and I'm not referring to COVID-19. It's a pandemic of webinars and legal articles about force majeure and COVID-19. Sadly, no lawyer is immune from it. In force majeure article after article, we are told that the COVID-19 pandemic is unprecedented, but the only thing unprecedented may be the use of the word itself.

In fact, there is nothing novel about the novel coronavirus—at least so far as contract law is concerned. Certainly, the scope of the federal and state governments' shutdown of businesses has been unprecedented, causing massive disruptions to the supply chain, prompting innumerable commercial tenants to declare force majeure on their rental obligations, and impelling parties to back out of all manner of deals due to economic uncertainty. But contracts are disrupted by force majeure events of all kinds, and we won't have to wait until the COVID-19 cases meander their way through the judicial process to predict what the law will look like after it is all over. There is nothing about the pandemic that is going to shake the sturdy foundations of contract law.

One of the changes we should expect is a COVID-19-inspired term in force majeure clauses—perhaps one that mentions pandemics, epidemics, or viral outbreaks or similar terms, just as terrorism became a standard term in force majeure provisions after the September 11 terrorist attacks, and earthquakes became a standard term after the 1989 Loma Prieta quake.[1] Otherwise, force majeure clauses will still be interpreted and construed the way they are now, and the doctrines of impracticability, impossibility, and frustration of purpose will not change. And, yes, we'll still have handshake deals, perhaps without the actual handshaking—though I confess that every night I pray that someone doesn't start calling them elbow bump deals.

In the latest edition of the *Corbin on Contracts Desk Edition*, which I revised last year, we devote five chapters to these matters. In my practice, I find that these cases can be factually intense and that they allow the judge much discretion—there's less certainty here than in other areas of contract law. In this short article, rather than present a generic laundry list of black letter legal principles, I will posit seven critical lessons that every lawyer should consider in tackling force majeure and COVID-19, and I will show that the judicial precedents dealing with past force majeure events provide critical lessons for this one—lessons that we ignore at our peril.

In a Nutshell

First, it is important to ensure that we share the same underlying premises. Excusing a party from its contractual obligations for a force majeure event is the exception. "Contract liability is strict liability. It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he or she is without fault and even if circumstances have made the contract more burdensome or less desirable than he or she had anticipated."[2] But when a post-contract formation supervening event occurs, sometimes performance is excused. Here are the principal legal bases for excusing performance.

Impossibility/Impracticability

The law of impossibility, dating from the mid-19th century, required literal impossibility to excuse a party's performance (e.g., death of the promisor or destruction of the subject matter).[3] Contracting parties sought to skirt the harsh doctrine by adding force majeure clauses to their agreements that expanded the reasons to be excused from performance.

Under modern contract law, impossibility has morphed into impracticability in many states, and under the modern rule, literal impossibility is no longer required. Impracticability is described in many ways, but essentially it is when a party is excused of its responsibilities because (1) performance has been made excessively burdensome—impracticable, not necessarily impossible—by a supervening event; (2) the event must not have been caused by the party seeking to be excused; (3) the event must be inconsistent with a basic assumption of the parties at the time the contract was made (instead of basic assumption, some cases—especially older cases—say that there is an implied term of the contract that the supervening event will not occur); (4) the supervening event must be, in some sense, unforeseeable—but not inconceivable[4]—in the sense that it must have been so unlikely to occur that a reasonable party would not have guarded against it in the contract; and (5) the party seeking to be excused of its obligation to perform must not have expressly or impliedly agreed to perform despite the event and that it did not assume the risk of it.

Not all states accept the modern trend, and even in some states that do, courts sometimes still call it impossibility.[5] The Uniform Commercial Code (U.C.C.) has adopted the more progressive impracticability standard.[6]

1. *See* Lisa Girion, *Businesses Seek a Legal Escape From Terrorism*, Los Angeles Times, Oct. 14, 2001, at C1. 2. Restatement (Second) of Contracts, Ch. 11, Introductory Note. 3. *E.g.*, Taylor v. Caldwell, 3B. & S. 826, 32 L.J., Q.B. 164 [1863] (owner of a music hall was excused of liability for failing to make the hall available due to an accidental fire that destroyed the building). 4. Specialty Tires of Am., Inc. v. CIT Group/Equipment Fin., Inc., 82 F. Supp. 2d 434, 438–439 (W.D. Pa. 2000). 5. City of Starkville v. 4-County Elec. Power Ass'n, 819 So. 2d 1216, 1224 (Miss. 2002) ("[M]any courts even use the terms [impracticability and impossibility] interchangeably.") 6. U.C.C. § 2-615 ("Excuse by Failure of Presupposed Conditions").

Frustration of Purpose

The other extra-contractual defense is frustration of purpose. This aptly named doctrine focuses on the parties' purpose in making their contract and has nothing to do with a party's inability to perform. It applies where a supervening event fundamentally changes the nature of a contract and makes one party's performance worthless to the other. The best explanation for it is an example. In the landmark case of *Krell v. Henry*,[7] Henry rented a room from Krell for the purpose of viewing the coronation of King Edward VII. But the King fell ill, and the coronation was postponed. The very purpose of the contract—a room with a view of the coronation—was frustrated, and performance was excused.

In the wake of COVID-19, innumerable events around the world were postponed or cancelled. Every cancellation might affect other contracts. A simple frustration of purpose example: suppose a vendor rented a booth to sell T-shirts next to a large venue where a major sporting event was supposed to occur, but the sporting event is canceled due to COVID-19. The very purpose of the vendor's contract was to capitalize on the major event, and the contract makes no sense without it. The question is, was the occurrence of the major event a basic assumption of the parties to the vendor's rental contract?

Force Majeure Clauses in Contracts

Parties generally can allocate the risks in their contract in whatever manner they choose. The contract—not extra-contractual legal bases such as impracticability—is the starting point for discovering whether a post-formation supervening event excuses performance. "If . . . the parties include a force majeure clause in the contract, the clause supersedes the [impossibility] doctrine . . . [L]ike most contract doctrines, the doctrine of impossibility is an 'off-the-rack' provision that governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the provision."[8] Most courts seem to agree that "[w]hen parties specify certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable."[9] When the event is not specifically listed but a party seeks to rely on the catch-all provision of a force majeure provision, (e.g., "any other cause not enumerated herein but which is beyond the reasonable control of the party whose performance is affected"), it has been held that the event that purportedly falls within the catch-all must be unforeseeable.[10]

The Lessons from the Judicial Precedents About Force Majeure Events

Here are seven lessons that we should consider in dealing with questions about force majeure and COVID-19.

LESSON I: The express provisions of the contract—not extra-contractual defenses—generally will determine whether a party can be excused of its contractual obligations. If the parties expressly allocated the risks in their contract, that allocation generally will govern the parties' rights as to that risk. If a contract spells out government action as a force majeure event, the party seeking to be excused probably will have a good argument that delays in its performance directly caused by a government-mandated closure are excused. Here are two important examples of likely scenarios we will see in the aftermath of COVID-19:

7. 2 K.B. 740 [1903]. 8. Commonwealth Edison Co. v. Allied-General Nuclear Services, 731 F. Supp. 850, 855 (N.D. Ill. 1990). In Aquila, Inc. v. C. W. Mining, 2007 U.S. Dist. LEXIS 80276, *16 (D. Utah Oct. 30, 2007), C. W. Mining sought to be excused of its contractual obligation to supply coal, but the court held that it could not invoke the extra-contractual gap-filler doctrines because the parties' contract contained a force majeure clause that expressly spelled out when supervening events would excuse performance. The terms of the force majeure clause—including a notice requirement—had not been satisfied, so "CWM cannot rely on common law defenses and the U.C.C., thereby circumventing the terms and limitations that the parties negotiated in the Contract." 9. TEC Olmos, LLC v. Conocophillips Co., 555 S.W.3d 176, 183 (Tex. App. 2018). *See* Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 992 (5th Cir. 1976) ("[W]hen the promisor has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable."); Perlman v. Pioneer P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990) ("Because the clause labelled 'force majeure' in the Lease does not mandate that the force majeure event be unforeseeable or beyond the control of Perlman before performance is excused, the district court erred when it supplied those terms as a rule of law."). *See* Sabine Corp. v. ONG Western, Inc., 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) ("Plaintiff's argument that an event of force majeure must be unforeseeable must be rejected. Nowhere does the force majeure clause specify that an event or cause must be . . . unforeseeable to be a force majeure event."). 10. *TEC Olmos*, 555 S.W.3d 176.

> … don't forget that trade usage, course of dealing, and course of performance are used to interpret and even supplement the express terms of a contract…

- **Case study: Commercial tenant seeking to be excused from paying rent.** The government shutdowns in the wake of the COVID-19 outbreak caused innumerable commercial tenants to seek to be excused from rent and other payment obligations. In commercial leases that contain force majeure clauses, it is common to make clear that the obligation to pay rent is not excused by the occurrence of a force majeure event. In *476 Grand, LLC v. Dodge of Englewood, Inc.*,[11] the plaintiff landlord and defendant car dealer entered into a five-year lease that contained a force majeure provision that included this sentence: "Nothing herein shall be deemed to relieve Tenant of its obligation to pay Rent when due." The court refused to entertain defendant's extra-contractual defenses of impracticability and frustration of purpose. The parties had expressly allocated the risk of paying the rent, regardless of the circumstances.
- **Case study: Supplier unable to perform a contract because of a breakdown elsewhere in the supply chain.** The mammoth disruptions to the supply chain due to the COVID-19 pandemic caused all manner of delays in countless contracts. A problem with one link in the chain can affect many other contracts. But a supplier's inability to obtain necessary parts or components due to a failure somewhere else in the supply chain does not necessarily excuse the supplier from its own contractual obligations. The question often is whether the parties mutually contemplated at the time the contract was formed that the supplier's performance depended upon another party performing a critical part of the contract. Did the parties mutually contemplate that the supplier was relying on a specific source to provide a critical component? This mutual understanding generally is spelled out in the contract and not left to chance.

A simple and vivid illustration: Sunshine, which was in the business of procuring automobiles for resale, paid Luxury over $100,000 for the latter to obtain a Mercedes for it, but Luxury failed to obtain the Mercedes and never returned Sunshine's money. Luxury claimed that it had given Sunshine's funds to another party, B2K, to procure the vehicle, and that, for its part, B2K had entrusted the funds to yet another party to procure the vehicle—this last party absconded with the funds. Luxury refused to refund Sunshine's money, claiming impossibility and frustration of commercial purpose. The court rejected these defenses, explaining: "Luxury reasonably should or could have considered the possibility that B2K would fail to obtain the vehicle, but Luxury nonetheless contracted to supply the vehicle to Sunshine without any contingencies."[12] The court refused to allocate the risk for the parties since their contract did not do it.

But wait, it can get complicated—as shown by the next paragraph:

- **Case study: Disruption to supply chain due to Hurricanes Katrina and Rita.** Dynegy supplied natural gas to Ergon. The parties' contract contained a provision stating that a party may invoke force majeure only if that party "remedied with all reasonable dispatch" the force majeure event. Hurricanes Katrina and Rita caused extensive damage to the gas industry's infrastructure, and Dynegy's own upstream suppliers declared force majeure. Dynegy, in turn, declared force majeure itself, reduced its supply to Ergon, and did not attempt to secure replacement gas (instead, it maintained contact with its upstream suppliers). The court held that Dynegy had the right to declare force majeure—its response was reasonable—and it had no duty to search for replacement gas. The court noted that Dynegy's upstream suppliers had been designated in the parties' initial contract, but the court did not base its holding on this fact. Rather, credible expert testimony showed that in the natural gas industry, it is reasonable for a seller to pass on force majeure in the event its own upstream suppliers have declared force majeure.[13] The lesson: don't forget that trade usage, course of dealing, and course of performance are used to interpret and even supplement the express terms of a contract (though it is widely agreed that at least trade usage and course of dealing can be expressly disclaimed in the contract since these refer to pre-formation facts).

11. 2012 N.J. Super. Unpub. LEXIS 457 (Mar. 2, 2012). 12. Sunshine Imp & Exp Corp. v. Luxury Car Concierge, Inc., 2015 U.S. Dist. LEXIS 60034 (N.D. Ill. May 7, 2015). 13. Ergon-West Va., Inc. v. Dynegy Mktg. & Trade, 706 F.3d 419 (5th Cir. 2013).

LESSON II: **The non-occurrence of the supervening circumstance must have been a basic assumption of the parties at the time of contracting.** This requirement is at the core of many of these cases—it gives rise to numerous disputes, and it is easy to overlook in drafting:

- **Case study: Disruption to business caused by Hurricane Harvey**. In August 2017, Hurricane Harvey swept through Texas and Louisiana, causing catastrophic flooding and deaths. In Houston, the storm caused significant damage to a restaurant and to the nearby theater district. The restaurant was able to reopen in late September 2018, but it failed to pay rent to its landlord for three years after reopening. The landlord sued the tenant for more than half-a-million dollars in unpaid rent and late charges. Tenant claimed that it should be excused from paying rent due to frustration of purpose since the location of the theater district was one of the "biggest considerations" in entering the lease. The court rejected this argument due to the absence of evidence that the parties bargained "on the basic assumption" that an interruption would not occur—or that tenant's restaurant would remain profitable. In fact, tenant was contractually required to obtain business interruption insurance sufficient to provide for 12 months' rent—an indication that the parties anticipated the possibility of the kind of interruption that occurred, and that they allocated the risk of it.[14]
- **Case study: Disruption to contract due to Avian flu.** Rembrandt, a producer of egg products, sought to expand its role as a supplier to Kellogg so it planned to build a new egg processing plant. It needed an industrial egg dryer for the new plant, so it entered into an agreement to buy one from Dahmes. But then, due to an outbreak of the Avian Flu, Rembrandt put a temporary halt on the new plant—including its contract with Dahmes. Rembrandt invoked frustration of purpose, but the court held that there was a fact dispute as to whether Dahmes understood that the principal purpose of the contract was to serve the new facility in connection with Rembrandt's anticipated expansion.[15] The lesson: all parties to the contract have to share an understanding of its purpose in order for it to be a basic assumption of the contract.
- **Case study: Change in government program that deprived a party of substantial revenue.** In *ARHC NVWELFL01, LLC v. Chatsworth At Wellington Green, LLC*,[16] defendant operated a skilled nursing and assisted living facility on property it leased from plaintiff. Defendant fell in arrears on the rent because, it claimed, the Centers for Medicare and Medicaid Services modified a program that deprived defendant of substantial revenue. In the ensuing litigation, defendant declared force majeure, but the court doubted that defendant's reliance on the government program "was a fundamental tenet of the Lease Agreement, and that, in essence, its duty to pay rent was conditioned on its revenue."[17] The court added: "If a certain contractual provision is of critical importance to a contracting party—as Defendant contends regarding protection from policy-driven revenue fluctuations—it is incumbent on that party to draft the contract in such a way that the contract unambiguously reflects the desired provision." That did not happen in this case.[18]

14. Bayou Place Ltd. P'ship v. Alleppo's Grill, Inc., 2020 U.S. Dist. LEXIS 43960 (D. Md. Mar. 13, 2020). 15. Rembrandt Enters. v. Dahmes Stainless, Inc., 2017 U.S. Dist. LEXIS 144636 (D. Iowa 2017). 16. 2019 U.S. Dist. LEXIS 19264 (S.D. Fla. Feb. 5, 2008). 17. *ARHC NVWELFL01*, 2019 U.S. Dist. LEXIS 19264, *13. 18. *ARHC NVWELFL01*, 2019 U.S. Dist. LEXIS 19264, *14, n.1.

LESSON III: **Even severe cost increases or significant market fluctuations, in and of themselves, generally do not excuse performance.** This is a major theme in this area of the law. While non-performance directly caused by government closures in many cases will be enough to excuse performance, a court is far less likely to excuse performance based on more general claims that the pandemic and attendant closures made performing contracts economically burdensome or undesirable due to changed markets or economic risk.[19] Even significant increased costs or market uncertainty generally are not enough to excuse a party of its obligations. While parties are free to expressly allocate in their contract increased costs or the risks of market fluctuations, the default principles of impossibility, impracticability, and frustration of purpose hardly ever does it for them:

- **Case study: Disruption due to 9/11 terrorist attacks.** In late 2000, OWBR contracted with Urban Network for OWBR to host a large music industry conference in mid-February 2002 at OWBR's resort in Wailea, Hawaii. Less than 30 days prior to the event, Urban Network cancelled the event and invoked the contract's force majeure clause, citing consumer skittishness following the September 11th terrorist attacks on America. The contract's force majeure clause stated, *inter alia*: "The parties' performance under this Agreement is subject to . . . terrorism, disaster . . . or any other emergency beyond the parties' control, making it inadvisable . . . to perform their obligations under this Agreement." OWBR filed suit, and the court held that the force majeure clause did not excuse performance. The court looked to the extra-contractual doctrine of impracticability for guidance and explained that "nonperformance dictated by economic hardship is not enough to fall within a force majeure provision."[20] The music industry conference was "economically inadvisable," the court conceded—and even though that economic inadvisability was the product of a force majeure event, it did not constitute objective inadvisability but was based on people's subjective "fear and uncertainty" about flying some five months after the attacks. That is not enough to excuse contractual performance—if it were, it would render commercial transactions unpredictable.[21]
- **Case study: Disruption due to the Suez Crisis in 1956.** In the fall of 1956, Egypt nationalized the Suez Canal, touching off an international crisis that led to the canal's closure. This spawned a number of Suez Canal cases because ships that normally would have traveled through the canal were forced to extend their voyages by thousands of miles around the Cape

of Good Hope. In one celebrated case, the operator sought additional compensation for the cost of the extended voyage. The court rejected the claim, noting that given the pre-contract climate surrounding the Canal Zone, the operator was aware of potential hostilities and was willing to assume abnormal risks. The hostilities caused the operator to add $43,972.00 beyond the contract price of $305,842.92 and extending a 10,000-mile voyage by approximately 3,000 miles. Judge Skelly Wright wrote that this did not arise to the level of impracticability:

> While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone.[22]

- **Case study: Disruption due to tariff wars.** A producer of solar panels contracted under a take-or-pay arrangement to purchase polysilicon. The contract contained a force majeure clause that excised performance arising out of or resulting from "acts of the Government." The producer claimed that China provided illegal subsidies to Chinese companies and engaged in large-scale dumping, the United States reciprocated with tariffs, and the result was that the price of polysilicon that the parties had agreed to was significantly higher than the market price. Despite the reference to "acts of the Government" in the force majeure clause, the court held that the risk of such a change in market prices—no matter the cause—was expressly assumed by the producer in its take-or-pay contract.[23] Any other holding would undermine the purpose of contracting. Parties to a fixed price contract take market unpredictability into account in their agreed price.

19. The increase in cost would have to be catastrophic: "In contracting for the manufacture and delivery of goods at a price fixed in the contract, . . . the seller assumes the risk of increased costs within the normal range. If, however, a disaster results in an abrupt tenfold increase in cost to the seller, a court might determine that the seller did not assume this risk by concluding that the non-occurrence of the disaster was a 'basic assumption' on which the contract was made. In making such determinations, a court will look at all circumstances, including the terms of the contract." Restatement (Second) of Contracts, Ch. 11, Introductory Note. 20. OWBR LLC v. Clear Channel Communs., Inc., 266 F. Supp. 2d 1214, 1223 (D. Haw. 2003). 21. *Id.* Subjective impossibility—impossibility personal to the promisor due to, for example, its financial inability to perform—does not excuse performance. E. Capitol View Cmty. Dev. Corp. v. Denean, 941 A.2d 1036 (D.C. 2008). 22. Transatlantic Financing Corp. v. United States, 363 F.2d 312, 319 (D.C. Cir. 1966). 23. Kyocera Corp. v. Hemlock Semiconductor, LLC, 886 N.W.2d 445, 455 (Mich. Ct. App. 2015). The court noted that "if plaintiff had wished to protect itself from artificial market deflation because of government action (or, for that matter, excessive market downturns of any kind), it could have done so." *See also* TPL, Inc. v. United States, 118 Fed. Cl. 434 (2014) (party assumed the risk in its contracts that changes in market conditions might occur and make its performance more expensive).

LESSON IV: **A temporary disability only suspends a contractual obligation; it does not permanently excuse it.** When the thing that prevents performance no longer prevents it, performance generally is no longer excused. A dizzying number of cases hinge on this simple principle:

- **Case study: Disruption due to bank holiday in the Great Depression**. In early 1933, the Great Depression ravaged America and hysteria gripped the nation. There was a run on the banks—a frightening occurrence at a time when bank deposits were not FDIC-insured, and many banks failed. In response, federal and state governments ordered banks to close for periods ranging from a few days to a few weeks to help stabilize the banking system. In one case, when a bank closure prevented performance that was due under a contract, the court held that performance was suspended only temporarily, for the extent of the delay caused by the closure.[24]

Related Content

For detailed advice on determining the applicability of the coronavirus with respect to force majeure clauses in commercial contracts, see

> **CORONAVIRUS AND FORCE MAJEURE CHECKLIST**

RESEARCH PATH: *Commercial Transactions > General Commercial and Contract Boilerplate > Contract Boilerplate and Clauses > Checklists*

For a discussion on force majeure clauses and issues to consider when drafting such clauses, see

> **FORCE MAJEURE CLAUSE DRAFTING**

RESEARCH PATH: *Commercial Transactions > General Commercial and Contract Boilerplate > Contract Boilerplate and Clauses > Practice Notes*

For a selection of sample force majeure clauses, see

> **FORCE MAJEURE CLAUSES**

RESEARCH PATH: *Commercial Transactions > General Commercial and Contract Boilerplate > Contract Boilerplate and Clauses > Clauses*

For assistance in avoiding the misuse of force majeure clauses, see

> **DRAFTING ADVICE: AVOIDING DISASTROUS FORCE MAJEURE CLAUSES**

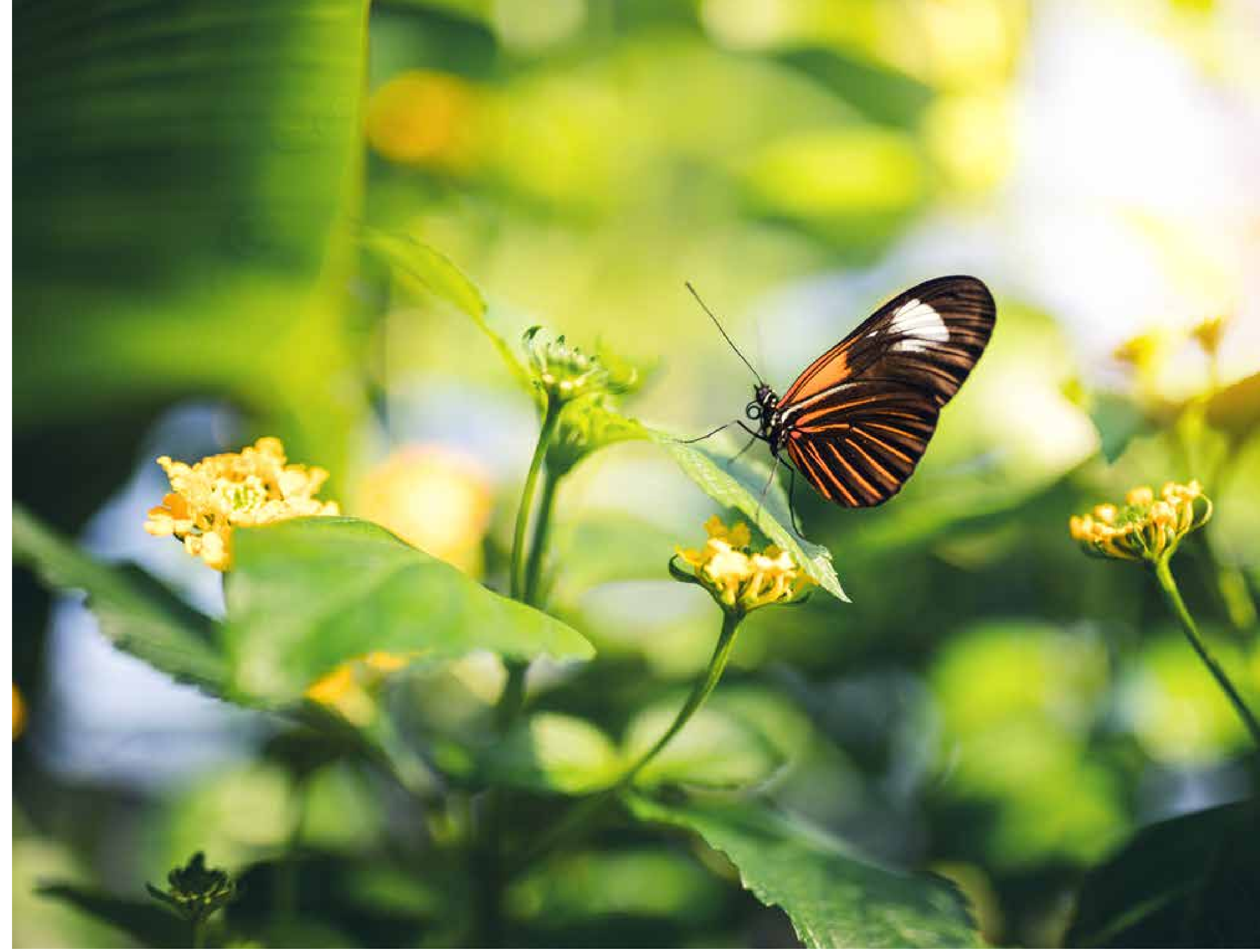
RESEARCH PATH: *Commercial Transactions > General Commercial and Contract Boilerplate > Contract Boilerplate and Clauses > Articles*

LESSON V: **A partial disability may not suspend or excuse performance.** Depending on the jurisdiction and the circumstances, it may be difficult for a business that has not been shut down completely to be excused of its obligations merely because the business was somehow hampered or restricted by a government order. Consider a manufacturer that is able to produce but at limited capacity due to the government shutdowns. Or a restaurant that is allowed to serve take-out food as opposed to full sit-down service. At what point short of a complete shutdown is performance impracticable:

- **Case study: Disruption due to government restrictions on business in WW II.** The celebrated case of *Lloyd v. Murphy*[25] involved the lease of property in the heart of Los Angeles signed just before the United States entered World War II. The lease restricted the lessee to sell only new automobiles. The court refused to excuse the lessee of its lease obligations, noting that it was clearly foreseeable at the time the lease was signed that new automobiles may not be available for sale. Beyond that, the court cited the lessor's willingness to waive the lease restrictions and allow the lessee to sell used automobiles and to repair automobiles. The lessee had not been totally shut down—the value of the lease had not been totally destroyed, so the lessee was not excused.

- **Case study: Disruption to television series due to writers' strike.** In 1960, television and film star James Garner was under contract with Warner Bros. to star in the studio's television series *Maverick*. The contract contained a force majeure clause that excused Warner Bros.'s obligation to pay Garner if its production of shows was "prevented or materially hampered or interrupted by reason of . . . strike . . . ." In January 1960, the Writers Guild went on strike for several months, and Jack Warner, the head of the studio, declared force majeure under Garner's contract and stopped paying Garner. In the ensuing litigation, the court found that the force majeure clause had no application because production of the *Maverick* series was not shut down by the strike. For example, Warner Bros. had a group of writers who continued to write anonymously during the strike under the name "W. Hermanos"—the name was an inside joke.[26] Moreover, Warner Bros. put out a press release insisting that production during the strike "continued at a high level." At the trial, Jack Warner was asked if he was familiar with the press release—he bragged that he "virtually wrote it." But he added that much of it was just "good propaganda."[27] The court apparently believed the press release.

24. Slaughter v. C. I. T. Corp., 26 Ala. App. 234 (1934). 25. 25 Cal. 2d 48 (1944). 26. "[I]ndustry insiders knew [this] meant 'Warner Brothers' (W. for Warner, and Hermanos is Spanish for Brothers)." http://www.imdb.com/name/nm1149112/. 27. Warner Bros. Pictures, Inc. v. Bumgarner, 197 Cal. App. 2d 331.



LESSON VI: **The party seeking to be excused must prove that it acted with diligence and in good faith to overcome the force majeure event.** If a supplier finds it difficult to perform a contract due to a COVID-19 disruption, it will need to prove that it could not reasonably work around the disruption to perform the contract. Consider a simple COVID-19 example: if a government order prevented restaurants from conducting sit-down service but allowed take-out orders, suppose a restaurant opted not to do take-outs—can it argue that it should be excused of its rent obligation due to a force majeure event? Or if a business was shut down because it was non-essential, would it have been reasonable to attempt to obtain an exemption:

- **Case study: Inability to obtain government permit because land inhabited by endangered species.** The plaintiffs assigned oil and gas leases to Continental that were scheduled to expire on their own if Continental did not produce oil or gas in paying quantities by October 2015. Continental had applied for a drilling permit more than three years earlier, but the permit was delayed because the land was inhabited by the Dakota Skipper butterfly, which was listed under the Endangered Species Act. A force majeure provision in the leases stated that the leases would not terminate if drilling operations did not occur because of Continental's inability to obtain permits due to, among other things, regulatory delay. Shortly before the October 2015 deadline, Continental sought to obtain approval to drill on a smaller unit of land that avoided the Dakota Skipper habitat. The approval was granted the following month, but plaintiffs alleged that the leases had expired in October due to Continental's failure to drill. The court held that there was a fact issue as to whether Continental acted with diligence and in good faith in pursuing the permit to drill the land.[28] This case illustrates the fact-specific nature of these inquiries.

28. Pennington v. Cont'l Res., Inc., 932 N.W.2d 897 (N.D. 2019).

> Sometimes, courts reach results that they think are fair without regard for the niceties of contract law...

LESSON VII: **A caution: there is little certainty in this area of the law.** Mounting a successful defense to be excused of a contractual obligation due to a supervening event is often difficult. As discussed above, being excused is the exception—promises are supposed to be kept. Clients need to be counseled: force majeure should not be invoked lightly—if the party declaring force majeure gets it wrong, it may be in breach.[29] Beyond that, as the cases above illustrate, courts look very carefully at the contract to assess how the parties allocated the risk and do not freely excuse parties from their obligations. The cases are often very fact-specific and leave courts a great deal of discretion. Sometimes, courts reach results that they think are fair without regard for the niceties of contract law:

- **Case study: Contract disruptions due to the 1918 Spanish flu pandemic.** During the Spanish flu pandemic of 1918, state health departments closed schools for a time, and later, there was a wave of contract disputes where teachers and school bus drivers sued the school districts for their wages. The school districts argued that they were excused from paying due to impossibility. Some courts held that the school district was obliged to honor their employees' contracts;[30] others held it was not.[31] The results sometimes seemed to be result-oriented based on a belief that the school district is better able to sustain such risk than the employee. This is not a criticism of the results—just a caution that such factors are sometimes at play in the case law. L

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RESEARCH PATH: *Commercial Transactions > Trends & Insights > First Analysis > Articles*

Related Content

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

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

RESEARCH PATH: *Commercial Transactions > General Commercial and Contract Boilerplate > Contract Boilerplate and Clauses > Practice Notes*

For an overview on the affirmative defenses that a party to a contract can rely on to justifiably avoid performance, see

> **EXCUSES FOR NONPERFORMANCE: CONDITIONS FOLLOWING CONTRACT FORMATION**

RESEARCH PATH: *Commercial Transactions > General Commercial and Contract Boilerplate > Contract Boilerplate and Clauses > Practice Notes*

For more information on the obligation of a party to mitigate damages in the event of a breach of a sale of goods agreement governed by the Uniform Commercial Code, see

> **MITIGATION OF DAMAGES IN SALE OF GOODS CONTRACTS**

RESEARCH PATH: *Commercial Transactions > Supply of Goods and Services > Contract Formation, Breach, and Remedies under the UCC > Practice Notes*

29. *See, e.g.*, Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 321 (2d Cir. 1985) ("Phillips' . . . refusal to pay on the grounds of force majeure constituted an anticipatory breach of the contract."); Lazin v. Pavilion, 1995 U.S. Dist. LEXIS 15255 (E.D. Pa. Oct. 12, 1995) (repudiation may constitute a total or material breach that discharges the non-breaching party's obligations). 30. Phelps v. School Dist., 302 Ill. 193 (1922) (the pandemic was unforeseen, and the school district could have inserted a clause excusing it of its obligations but did not); Montgomery v. Board of Educ., 102 Ohio St. 189, 193 (1921) ("The contingency which here occurred was one which might well have been foreseen and provided against in the contract, but was not."); Crane v. School Dist., 95 Ore. 644, 655 (1920) ("'Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement, it is a general rule of construction . . . that the promisor remains responsible for damages, notwithstanding the supervening impossibility or hardship.'") (Citation omitted). 31. Gregg Sch. Tp. v. Hinshaw, 76 Ind. App. 503, 506 (1921) ("After the contract was entered into, and when the exigency arose, the health board, in the exercise of the police power delegated to it, closed the school, and the contract, for the time that the order was in force, was impossible of performance, and hence unenforceable, and there could be no recovery for such time."); Sandry v. Brooklyn Sch. Dist., 47 N.D. 444, 449 (1921) ("Either party is excused if, without his fault, performance for a period becomes impossible. Such impossibility may arise upon the sickness or death of either party, or the inability of one party to give or receive performance, occasioned by the prevalence of an epidemic.")

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COVID-19 Update:
Q&A for Public Companies

This Q&A addresses some of the most frequently asked questions of public companies on how to navigate the challenges posed by COVID-19. The Securities and Exchange Commission (SEC) has provided conditional regulatory relief regarding filing deadlines and has issued guidance regarding annual meetings to assist public companies impacted by COVID-19. All recent SEC guidance can be found on the SEC's Coronavirus (COVID-19) website.[1]

COMPANIES SHOULD REVIEW AND update, if appropriate, their 10-K or 10-Q disclosures to address material impacts of COVID-19, including with respect to risk factors, forward-looking statements, management discussion and analysis (MD&A) (including known trends and uncertainties), liquidity and capital resources, and subsequent events, and be mindful that actions taken in response to COVID-19 may also trigger disclosure requirements on Form 8-K. Companies should also refer to Disclosure Guidance Topic No. 9,[2] issued by the Division of Corporation Finance on March 25, 2020, providing the staff's current views regarding disclosure and securities law obligations with respect to the impact of COVID-19.

Companies should also consider disclosure approaches and obligations under different scenarios in light of the risks posed by COVID-19 (including, for example, the potential impact of COVID-19 on business operations and key management).

The SEC has provided public companies with an additional 45 days, subject to certain conditions, to file certain disclosure reports, schedules, and forms that would otherwise have been due between March 1 and July 1, 2020, as well as guidance to public companies contemplating changes to date, location, or format of annual meetings in response to COVID-19.

1. https://www.sec.gov/sec-coronavirus-covid-19-response. 2. https://www.sec.gov/corpfin/coronavirus-covid-19.

Initial Guidance

Does a Company Need to Update Its Disclosure to Disclose the Impact of COVID-19 on Its Business or in Light of New Information Affecting the Company Related to COVID-19?

There is no general disclosure obligation. However, there may be specific situations where a company is obligated to update its disclosure or where a company may wish to update its disclosure. See below for examples and possible disclosure approaches.

What Should a Company Disclose in Its 10-K or 10-Q Regarding COVID-19?

A company should consider any material impacts of COVID-19 on its business and financial condition. Areas where disclosure will likely be needed or updated include the following.

Risk Factors

Many companies often do not update risk factors after the 10-K, particularly in the first 10-Q, as there may not be any material updates needed from the risk factors discussed in the 10-K. However, particularly for calendar year-end companies, we expect that most, if not all, companies will add or expand their risk factor disclosures in light of COVID-19.

Risk factor updates may include the impact of COVID-19 on the company's business and its customers and suppliers, the ability to pay and receive payments, the impact on business relationships due to restrictions on travel and otherwise, liquidity, compliance with financial and operating covenants, the impact on key management, the impact of the invocation of the Defense Production Act, and the impact on employees and operations (including any requirement by federal or state governments to close operations to the extent not considered essential).

Keep in mind that risks should be accurate and not hypothetical if the risk has in fact occurred. For example, if a company has experienced significant delays in customer payments or in its supply chain, the risk should disclose that this has happened and could happen in the future and should not be phrased as a hypothetical risk.

Forward-Looking Statements

As with risk factors, consider whether specific COVID-19 effects should be added to the cautionary statements accompanying forward-looking statements.

MD&A

Consider the impact of COVID-19 on historical results as well as known trends and uncertainties.

Liquidity and Capital Resources

Consider the impact on liquidity and capital resources, including the impact of COVID-19 on customers and timing of payments; the sufficiency of credit facilities, including compliance with lender covenants such as liquidity ratios; any impairment charges; and any need to increase drawdowns of credit facilities. In addition, if a company incurs additional indebtedness or has liquidity issues as a result of COVID-19, consider whether the company is in compliance with lender financial or operating covenants and whether there is risk of non-compliance or default or if notice requirements are triggered. Companies should continue to monitor compliance with covenants in lending agreements, particularly for any impact as a result of actions taken in response to COVID-19. Also see below regarding disclosure obligations which may be triggered as a result of actions taken in response to COVID-19.

Subsequent Events

Disclose any material events subsequent to the period covered by the financial statements in the relevant report.

Should a Company Update or Withdraw Earnings Guidance?

Whether a company should update or withdraw guidance depends on the facts and what the company's business is experiencing. A company may want to wait until it has more information or visibility.

Future guidance. If the company has not previously given guidance, consider not issuing guidance due to the ongoing uncertainty and rapidly changing situation. If the company has given guidance in the past, consider not providing new guidance for upcoming quarters or annual guidance until the company has sufficient visibility.

Existing guidance. While there is no affirmative obligation to update guidance, many companies will update if they have sufficient visibility to do so, for obvious reasons. If a company believes that guidance will change, or is likely to change, the company should consider whether to update or withdraw. In the current environment, it may be better to withdraw guidance rather than issue new guidance, particularly as the situation is fluid and the company may not have sufficient visibility to update. Keep in mind that if a company discloses any information, it should be materially complete and accurate, and the company does not need to provide information that it does not know.

Are There Disclosure Requirements under Form 8-K Because of COVID-19?

There is no general 8-K disclosure obligation triggered by COVID-19. However, if a company takes actions in response to the impact of COVID-19, the company should consider the triggering events under Form 8-K. For example, if the company enters into a material loan agreement or drawdown on a credit facility due to the need for additional liquidity as a result of COVID-19, the company may trigger a disclosure obligation under Item 2.03: Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement. Similarly, other actions taken in response to COVID-19 may trigger reportable events, such as under Item 2.04: Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement, Item 2.05: Costs Associated with Exit or Disposal Activities, or Item 2.06: Material Impairments. In short, the analysis of whether there is a reporting obligation is the same as it would be for any of the 8-K disclosure items, but companies should be particularly mindful if they are taking actions outside the ordinary course in response to COVID-19. A company may also wish to provide material information via Item 7.01 or 8.01. A company should also ensure that its disclosure controls and procedures are robust, and that the disclosure committee is well-positioned to evaluate disclosure obligations and triggering events to ensure the company can meet its disclosure obligations in a timely manner.

What Other Situations May Require a Company to Update Disclosure Due to COVID-19?

In addition to the matters discussed above, if a company has a pending transaction, such as a capital raise, the company will likely need to update disclosures regarding the impact and risk to the company due to COVID-19. In the context of a merger or acquisition, a company should consider whether any of the representations, covenants, or other deal terms should be amended in light of COVID-19. In addition, if there are specific events due to COVID-19 impacting the company, it may wish to disclose those events and impacts even if there is no specific obligation or disclosure requirement. For example, if key members of management test positive for COVID-19 or are quarantined, a company generally does not have any obligation to disclose that fact. However, for market and optics reasons, the company may wish to disclose and, in general, to have a contingency plan in place for these types of developments. If the company takes action in response to the impact of COVID-19, as noted above, this action may also trigger specific disclosure obligations. Further, if the company is speaking publicly, it should be sure it is providing current, complete, and accurate information. In addition, if the trading window is open and the company becomes aware of material non-public information, whether due to COVID-19 or otherwise, the company should update its public disclosures or close the trading window.

What if Members of Key Management Test Positive for COVID-19 and/or Must Be Quarantined or Take a Leave of Absence?

As noted above, a company does not have a specific obligation to disclose if a member of management tests positive for COVID-19, but we expect that many companies will opt to provide disclosure for market, optics, and investor relations reasons. In addition, as discussed below, if certain individuals must be quarantined or take a leave of absence, or any individual is appointed to take on certain responsibilities, even if on a temporary basis, a company should review the disclosure requirements under Item 5.02 of Form 8-K.

If a company elects to disclose, it should do so in a manner compliant with Regulation FD. Some disclosure approaches may include:

- Issuing a press release
- Issuing a letter to employees and posting it on the company's website
- Furnishing the information under Item 7.01 of Form 8-K
- Posting the information on the company's website
- Some combination of the above

Note that posting to the website alone may not satisfy the requirements of Regulation FD. Whether a website posting alone is sufficient depends on whether the company routinely posts information to the website and publicizes the website to investors so that investors are aware that the company uses the website as a means of disseminating material information. Some companies will provide disclosure in their Forms 10-K or press releases to indicate that they intend to use the company website as a means of disclosing material non-public information and for complying with Regulation FD and will note where the information may be found on the website (e.g., under the Investor Relations tab), and advise investors to check the website in addition to the company's SEC filings, press releases, and public conference calls/webcasts.

As highlighted above, if any of the enumerated officers under Item 5.02 of Form 8-K takes a leave of absence due to COVID-19 or other reasons, or is otherwise unable to perform the functions of their position, or an individual is appointed to fill such function, even if on a temporary basis, an Item 5.02 disclosure may be triggered. For example, Item 5.02(b) applies to a principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or persons performing similar functions, or any named executive officer or director, and Item 5.02(c) applies to a principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or persons performing similar functions.

As discussed above, a similar disclosure analysis would apply to any significant development in the company's business and operations due to the impact of COVID-19, even if a specific disclosure obligation is not initially triggered.

Should a Company Close Its Trading Window?

As discussed above, the same analysis normally taken in considering whether to close a trading window would apply here. If there is material non-public information regarding the company, the trading window should be closed or the company should update its public disclosures, and there should be no trading until such disclosure is made. If a company is aware of a risk related to COVID-19 that would be material to investors, it should refrain from engaging in securities transactions with the public and take steps to prevent directors, officers, and other company insiders who are aware of the risk from trading until the company has made adequate public disclosure of the risk.

Can a Company Answer Questions from Investors and Others about How It Is Responding to COVID-19?

Yes, but a company must avoid selective disclosure prohibited by Regulation FD and instead appropriately communicate any material information through press releases and not in one-off discussions. See below regarding general communications principles to keep in mind.

Are There General Principles a Company Should Keep in Mind Regarding Disclosures?

The same principles apply to any external communications made by the company. Keep in mind:

- A company does not need to disclose what it does not know.
- Anything disclosed must be materially complete, accurate, and not misleading.
- If a company discloses material information about the impact of COVID-19, it should be broadly disseminated and in compliance with Regulation FD and any applicable SEC or stock exchange requirements as per standard practice.
- Consider whether a company needs to revisit, refresh, or update any previous disclosure that may have become materially inaccurate.
- A company may wish to disclose material events via press release and/or Item 7.01 or 8.01 of Form 8-K.
- Any forward-looking disclosures should also be specifically identified to take advantage of the forward-looking statement safe harbor.

As the Situation is Fluid, are There Additional Guidelines Public Companies Should Keep in Mind as They Continue to Assess the Impact of COVID-19?

The Division of Corporation Finance issued guidance on March 25, 2020, regarding disclosure and other securities law obligations of public companies in light of COVID-19, including insider trading and Regulation G.

Disclosure Considerations

The guidance discusses the following possible disclosure considerations, many of which are also discussed above, including:

1. How COVID-19 has impacted a company's:
   a) Financial condition and results of operations, including expectations regarding the impact on future operating results and financial condition, both near-term and long-term, in light of the overall economic outlook and changing trends, and whether COVID-19 will impact future operations differently than in the current period
   b) Capital and financial resources, including a company's overall liquidity position and outlook, any changes, or reasonably expected changes, to the company's cost of, or access to, capital and funding sources, and any material impact to its sources or uses of cash
   c) Ongoing ability to meet the covenants of a company's credit agreements, including any material liquidity deficiency and a company's current or proposed course of action to remedy any such deficiency
2. Known trends and uncertainties as to a company's ability to service its debt or other financial obligations or access debt markets
3. Whether the company expects to disclose or incur any material COVID-19-related contingencies
4. Expectations as to the impact of COVID-19 on a company's assets on the balance sheet and a company's ability to timely account for those assets (e.g., any significant changes in judgments in determining the fair-value of assets measured in accordance with U.S. GAAP)
5. Material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, etc.), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had, or are reasonably likely to have, a material impact on a company's financial statements
6. Whether COVID-19-related circumstances such as remote work arrangements have adversely affected a company's ability to maintain operations, including:
   a) financial reporting systems, internal controls, and disclosure controls and procedures;
   b) changes, if any, in a company's controls during the current period that materially affect, or are reasonably likely to materially affect, its internal control over financial reporting; and
   c) any challenges COVID-19 will have on a company's ability to maintain these systems and controls
7. Challenges in implementing a company's business continuity plans, any anticipated material expenditures required to do so, and expectations regarding any material resource constraints in implementing these plans
8. Expectations as to any material impact of COVID-19 on demand for a company's products or services, supply chain, or distribution of products or services
9. Expectations as to whether COVID-19 will materially change the relationship between a company's costs and its revenue
10. Material impact on a company's operations due to constraints or other impacts on human capital resources and productivity
11. Whether travel restrictions and border closures are expected to have a material impact on a company's ability to operate and achieve its business goals

The guidance encourages each company to assess the impact of COVID-19 on its specific business, tailor material disclosure obligations, and provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management. The guidance further encourages companies to proactively revise and update their disclosures as facts and circumstances change, taking into account the safe harbor for forward-looking statements.

Insider Trading

In addition to disclosure obligations, the guidance reminds companies and related persons of the need to refrain from trading prior to the dissemination of material non-public information, including where COVID-19 has impacted the company in a material way or the company becomes aware of a material risk related to COVID-19. The guidance also reminds companies of the need to avoid selective disclosure issues and that, depending on a company's particular circumstances, it may need to revisit, refresh, or update previous disclosure to the extent such information becomes materially inaccurate.

Regulation G

The guidance also reminds companies of their obligations under Regulation G. For example, where a company presents a non-GAAP financial measure or performance metric to adjust for the impact of COVID-19, management should highlight why it finds such measure or metric useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations. The guidance also notes that where a GAAP financial measure is not available at the time of an earnings release because the measure may be impacted by COVID-19-related adjustments that may require additional information and analysis, the staff would not object if a company reconciles a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results. The provisional amount or range should reflect a reasonable estimate of COVID-19-related charges not yet finalized. The company should also explain, to the extent practicable, why the line item or accounting is not yet complete and what additional information or analysis is needed. Further, if a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures in reliance on the guidance, it should limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to the company's board of directors. The guidance notes that non-GAAP financial measures and performance metrics should be used for the purpose of indicating how management and the board are analyzing the current and potential impact of COVID-19 on the company's financial condition and operating results (and not for the sole purpose of presenting a morefavorable view of the company). In addition, in filings where GAAP financial statements are required (e.g., Form 10-K or 10-Q), companies should reconcile to GAAP results and not include provisional amounts or a range of estimated results. As is currently the case, non-GAAP financial measure should not be disclosed more prominently than the most directly comparable GAAP financial measure or range of GAAP measures.

What If a Company Cannot File its SEC Reports on Time Due to COVID-19?

The SEC issued an exemptive order on March 4, 2020, that, subject to certain conditions, provided public companies with a 45-day extension to file certain SEC reports, schedules, and forms that would otherwise have been due between March 1 and April 30, 2020. On March 25, 2020, the SEC extended the relief period to July 1, 2020. Among other things, the SEC order provides that if a company cannot meet a filing deadline:

1. The company must furnish a Form 8-K by the later of March 16 or the original filing deadline for the report, schedule, or form.
2. The Form 8-K must include:
    - A statement that the company is relying on the SEC order
    - The reasons why the company could not file the report, schedule, or form on a timely basis
    - The estimated date by which it expects to file the report, schedule, or form
    - If appropriate, a risk factor explaining, if material, the impact of COVID-19 on its business
    - If the reason the filing cannot be made on a timely basis relates to the inability of any person (other than the company) to furnish any required opinion, report, or certification, an exhibit consisting of a statement signed by that person stating the specific reasons why that person is unable to furnish the required opinion, report, or certification on or before the required filing date
3. If a company furnishes the Form 8-K by the applicable deadline, the new filing deadline will be 45 days after the original due date.
4. The company must disclose in the filing made after the original filing deadline that it is relying on the SEC order and state the reasons why it could not file the report, schedule, or form on a timely basis.
5. If a company furnishes the Form 8-K by the applicable deadline, it is not required to file a Form 12b-25 with respect to a late filing if the report, schedule, or form is filed within the time period prescribed by the order.
6. However, if the company is still unable to file by the 45-day extended deadline, the company may then file a Form 12b-25 and further extend its filing deadline.
7. Risk factor disclosures explaining material impacts of COVID-19 on a company's business, to the extent they contain "forward-looking statements," will be subject to the safe harbor for forward-looking statements under Section 21E of the Securities Exchange Act of 1934.
8. If a company relies on the exemptive order and furnishes the Form 8-K on time, the company will be deemed current for purposes of a well-known seasoned issuer status and eligibility under Form S-3, Form S-8, and Rule 144 (if the company was current as of the first day of the relief period under the SEC order and it files the required reports by the applicable deadlines).
9. The current exemptive order does not apply to Schedule 13D and Section 16 filers/filings.

> The SEC staff is encouraging companies to be flexible this proxy season, to the extent feasible under state law and the company's bylaws, by facilitating the ability of shareholder proponents to present their proposals by phone or through other alternative means.

Can a Company Contact the SEC if Needed?

Yes, the SEC is open, with the staff working remotely.

Are There Any Issues Relating to COVID-19 that a Company Should Address with Its Auditor?

Yes. Issues that should be discussed include the matters noted above, including regarding liquidity, impairments, known trends and uncertainties, subsequent events, and any potential delays in completion of the audit or quarterly review which would impact the ability of the company to meet its filing deadlines. In addition, a company may wish to discuss the practical implications of COVID-19 on the conduct of the audit, such as management interviews and other audit processes and assessments which are typically otherwise done in person.

Does a Company Need to Notify Its Lender of a Change in Circumstances Due to COVID-19?

Possibly. As discussed above in connection with disclosure obligations, a company should confirm compliance with existing covenants, such as required liquidity ratios, and any notice requirements which may be triggered.

What are a Company's Options for Holding the Annual Meeting?

A company should check applicable state law (including recent pronouncements by state officials) and its bylaw provisions and any current local, state, or federal restrictions regarding types of meetings, accessibility and voting, size of gatherings, and social distancing. Subject to compliance with these requirements, a company's annual meeting alternatives include:

- A physical meeting, but strongly encourage shareholders to vote early and to not attend in person and provide for a webcast or other means of listening in remotely (note that a webcast or listen-only accommodation may not meet state law or other requirements including recent pronouncements by state officials for an annual meeting, depending on whether it provides shareholders a means to participate in the meeting and vote, as would be the case in a virtual-only or hybrid meeting)
- A virtual-only meeting (entirely remote and providing shareholders the means to attend, raise proposals in accordance with proper procedures, and vote remotely)
- A hybrid meeting (i.e., a bare bones physical meeting/location and a virtual component which allows shareholders to attend, raise proposals in accordance with proper procedures, and vote remotely)

If a company holds a virtual-only or hybrid meeting, it must comply with the applicable rules and requirements, including those discussed below, and work with its proxy intermediaries to coordinate all technical and logistical matters well in advance.

A company's proxy materials should also provide sufficient notice, information, and flexibility to change annual meeting logistics, including on short notice (subject to notice requirements). For example, if a company is holding a physical meeting, it may wish to include disclosure that (a) it is subject to local, state, and federal restrictions on size of gatherings and social distancing; (b) it may switch to a virtual-only or hybrid annual meeting; and (c) if it does so, it will disclose the change and provide information regarding how to access the meeting in a press release and by filing the information as additional soliciting material. The company should also include a deadline by which it will announce any such change, in compliance with applicable notice requirements under state law (including recent pronouncements by state officials) and the company's bylaws. If a company chooses to hold a virtual-only or hybrid meeting due to COVID-19 or otherwise, but may hold physical meetings in the future, the company should consider disclosing whether the company intends to do so for this proxy season only or, more practically, that the company has not decided what it will do for future meetings and may hold a virtual-only or hybrid meeting in the future as circumstances warrant.

What If the Company Already Filed Its Proxy Materials and Needs to Change to a Virtual-Only or Hybrid Meeting?

The SEC has issued guidance providing that companies that have filed their proxy materials may notify shareholders of a change in date, time, and location of the annual meeting without mailing additional soliciting materials or amending proxy materials.

1. Under the guidance, the company must:
   - Issue a press release announcing such change.
   - File the announcement as definitive additional soliciting material on EDGAR.
   - Take all reasonable steps to inform other intermediaries (such as a proxy service provider) and other relevant market participants (such as the appropriate stock exchange) of such change.
2. The company should also, to extent feasible under state law, provide shareholder proponents or their representatives the ability to present their proposals via alternate means, such as via telephone.
3. Companies should keep in mind applicable notice requirements under state law and their bylaws.

If a company has already mailed its proxy materials and wishes to change to a virtual-only or hybrid meeting, it should also check for any limitations or requirements under state law and bylaw provisions, in addition to complying with SEC guidance.

What are the SEC Requirements Regarding Virtual-Only or Hybrid Meetings?

The SEC permits virtual-only or hybrid meetings if the company provides:

1. Advance notice to shareholders, proxy service providers, and other interested parties
2. Adequate means for shareholders to participate to same extent as if they were physically present
3. Full disclosure regarding logistics, including:
   - How to access the meeting remotely
   - How shareholders can listen, participate, and vote
   - How shareholder identity will be verified
   - How shareholder proposals can be presented
   - What rules of procedure will apply to the conduct of the meeting
   - How the company plans to address technical difficulties

What Other Considerations are There with Respect to Holding Virtual-Only or Hybrid Meetings?

A company should confirm such meetings are permitted under state law and its bylaws and what the applicable requirements are under those provisions.

What Type of Meeting Should a Company Hold in Light of the SEC Guidance and COVID-19?

While the type of annual meeting a company should hold depends in part on the company and its shareholder base, in general, we expect that some companies that have already mailed their proxy materials for a physical meeting may wish to (1) continue to hold it at a physical location (subject to complying with applicable restrictions on gatherings and social distancing) but with minimal representatives at the meeting; (2) discourage shareholder attendance and encourage the return of proxy cards in advance; and (3) provide streaming or telephonic coverage (note that streaming or telephonic coverage alone may not provide for full shareholder participation as it would in a virtual-only or hybrid model, unless the company provides a means by which shareholders can participate and vote remotely). If taking this approach, a company should (a) make a public announcement to this effect and note

that these measures are being taken in response to COVID-19 restrictions and the need to protect shareholders, employees, and the community; and (b) clearly describe how shareholders are able to cast or change their votes or otherwise participate in the meeting (e.g., even if the company arranges for audio call-in or similar means to permit a Q&A session, it should clarify how shareholders may vote if they do not attend the meeting in person). Alternatively, a company may elect to switch to a virtual-only or hybrid meeting and, if it elects to do so, it should follow the SEC guidance summarized above. In either case, the announcement should be issued in accordance with the SEC guidance, including via press release and filing the announcement as additional soliciting materials. If a company has already mailed its proxy materials and wishes to change to a virtual-only or hybrid meeting, it should also check for any restrictions or requirements under state law and bylaw provisions, in addition to complying with SEC guidance.

For companies that have not yet mailed their proxy materials, we expect that a virtual-only meeting, if permitted by state law and the company's bylaws, will be preferable, or a hybrid meeting in which a physical location is provided but attendance is discouraged, the chair and secretary attend but the rest of management and board members attend remotely, and all remote participants are able to participate fully (including with the ability to vote) as they would in a virtual-only meeting. For cost and logistics reasons, we expect most companies, to the extent permitted, to elect to hold a virtual-only meeting. As discussed above, companies that elect to hold a virtual-only or hybrid meeting due to COVID-19 concerns should: (a) disclose that the decision was made in response to COVID-19 and the need to protect shareholders, employees, and the community; (b) note, if true, that the company has not decided whether it will hold virtual-only or hybrid meetings in the future; and (c) clearly describe how shareholders may participate and vote. In addition, companies that initially elected to hold a hybrid meeting (or physical meeting) may, subject to state law and bylaw restrictions, switch to a virtual-only meeting in accordance with the SEC guidance discussed above.

What Practical Steps Should a Company Take for the Annual Meeting?

In addition to confirming bylaw and state law requirements for annual meetings and local, state, and federal restrictions in light of COVID-19:

1. Contact vendors to start the planning process and obtain quotes.
2. Draft proxy disclosure to provide flexibility and instruction if conducting virtual-only or hybrid meetings and for the ability to change annual meeting logistics on short notice.
3. Establish a contingency plan:
   - Delegate authority to a board committee to approve changes and/or designate an alternate chair and secretary to conduct the meeting if needed.
   - If holding a physical meeting, consider alternative or backup locations.

- Plan a communications strategy.
- Be aware of notice requirements in the event of a change. Delaware law requires at least 10 days, and companies also need to consider requirements for notice and access.
- Consider alternative approaches, such as a pre-recorded CEO presentation, locations permitting greater social distancing (including outdoor venues to the extent not subject to restrictions in light of COVID-19), and a CEO letter encouraging virtual-only participation.
- Consider an adjournment or postponement if needed. Note that an adjournment under Delaware law generally does not require a company to re-send the notice or reset the record date, but a postponement of greater than 60 days after the record date may require the company to set a new record date.
- Keep in mind minimum annual meeting requirements. A company is required to hold a meeting at which shareholders may attend, raise proposals, and vote. A company is not required to have the board and management attend, have a management/CEO presentation, or conduct a Q&A session.

Are a Company's Directors and Officers Required to Attend the Annual Meeting if the Company Decides to Have an In-Person Meeting?

Generally, no, but the company's bylaws and state law should be checked to determine who is required to be present (e.g., chair and secretary).

Can a Shareholder be Excused from Presenting at This Year's Annual Meeting Due to the Inability to Travel or Other Hardships Related to COVID-19?

Generally, yes. The staff of the SEC would consider this to be "good cause" under Rule 14a-8(h), but the company's bylaws and state law should be checked. The SEC staff is encouraging companies to be flexible this proxy season, to the extent feasible under state law and the company's bylaws, by facilitating the ability of shareholder proponents to present their proposals by phone or through other alternative means.

Should a Company's Compensation Committee Reassess Bonus Plan Targets in Light of COVID-19?

Possibly. If a compensation committee determines it is appropriate to reassess bonus targets in light of COVID-19, consider 8-K and proxy disclosure implications.

Are There Other Matters Not Directly Related to Disclosure Obligations and SEC Matters a Company Should Be Considering?

Yes. The issues raised by COVID-19 and the rapidly changing responses thereto encompass a wide range of issues. These include workplace and HR matters, business continuity, strategic planning, insurance, privacy, data protection, cybersecurity, commercial and operational matters, access to capital, and many other aspects affected or implicated by COVID-19.

Public companies should also consider planning for remote board, committee, management, and employee meetings, and assess the sufficiency of their contingency planning, backup systems, the infrastructure to support a fully remote workforce and operations, internal controls, and disclosure controls and procedures, as well as employee communications and related matters, communications protocol, insider trading policy, HR policies, compensation policies (including performance targets), and other policies and procedures implicated by the impact of COVID-19. L

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



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A National Registry of COVID-19 Patients:
The Legal Implications

Medical data companies are reportedly[1] volunteering to join the fight against COVID-19 by offering to broadly share confidential, Health Insurance Portability and Accountability Act (HIPAA)-protected patient medical information they possess, including patient demographics, symptoms, testing results, treatment, and outcomes.

The creation of a national repository of health-related information and a potential registry of COVID-19 patients and patient information for use by government agencies and healthcare researchers would be without precedent. The privacy issues and concerns implicated by such sharing, while significant, are being considered in the greater context of a worldwide state of medical emergency and the need for medical and demographic data evaluation and research studies.

National Repository of COVID-19 Data

The data to be shared, almost without a doubt, would include protected health information about patients, including data that may have been collected prior to the relaxing of certain of HIPAA's requirements. However, the Global Privacy Assembly (GPA) executive committee acknowledged that the challenge of slowing the outbreak "requires coordinated responses at national and global levels, including the sharing of personal information as necessary by organizations and governments, as well as across borders." Understanding the way COVID-19 is being transmitted, the symptom development over time after initial exposure, the efficacy of specific treatments utilized and efforts to contain spread of the virus, the existence of area hot spots, and ultimately patient outcomes, can be analyzed through the use of protected medical and related data contained in provider medical records and insurance and government reimbursement documentation.

1. https://www.wsj.com/articles/companies-seek-to-pool-medical-records-to-create-coronavirus-patient-registry-11586381102.

HIPAA

While HIPAA currently permits providers and healthcare researchers to use health data/information to assure quality of care within limited guidelines, the creation of a national bank of COVID-19-related medical data accessible to the government and healthcare scientists and researchers presents an entirely new circumstance challenging our existing laws and regulations. We are in uncharted territory for the businesses charged with holding and storing such data; the medical providers and insurance payers generating such data; and the government entities, scientists, and researchers looking to access and utilize such national data. And, while there is a demonstrated relaxing of federal regulatory enforcement and requirements, this does not offer protection against breach of contract actions or potential tort actions from patients or other interested parties asserting improvident use of specific health information. Business associates and covered entities who intend to rely upon the relaxed regulatory enforcement should be counseled to ensure that their compliance team considers contractual obligations, litigation risks, business issues, and coordination with operations, in addition to state and federal regulatory concerns.

Other Practical Considerations

Other practical considerations emanate from the creation of such a national repository of COVID-19 data and include the potential use of such data in evaluating the safety of having at least a portion of our workforce return, especially when a potential requirement of clean testing as a predicate for worker return is being discussed. Employers hopeful of soon seeing a return of at least a portion of their workers must also seek guidance and counsel to make sure they are acting responsibly and reasonably[2] under the circumstances. While the medical community has experience in use of data research in the world of clinical trials, such trials require the advance consent of patients, who enter the trial agreeing that the information about their progress will be studied and researched. But, can business associates, healthcare providers, and insurers freely provide and exchange such patient medical information, even without some type of informed consent?

Legal Precedent

There is legal precedent for special consideration of the emergency circumstances presented by COVID-19. While securing and protecting patient medical records and sensitive health information is an elemental precept acknowledged by virtually everyone in civilized society, there is also a recognition among lawmakers, public officials, courts, and healthcare

> The use of national medical data, while essential as part of the fight against COVID-19, must be done with care and sensitivity to the unprecedented nature of the circumstances and the medical emergency which continues to unfold.

leaders that existing rules and regulations need to be relaxed in times of an emergency. Even before the COVID-19 pandemic, many states had existing statutes that granted healthcare workers immunity for ordinary negligence when providing medical care in aid of disaster services or a declared public health emergency.[3]

The use of an emergency doctrine to allow a relaxing/bending of existing rules finds support in our history and even in our current law. In the aftermath of the 9/11 attack, for example, several cleanup workers seeking redress for respiratory injuries sustained at the World Trade Center brought claims for negligence and wrongful death against the City of New York, its Port Authority, and various general contractors and private entities. As noted by the court, "for when an emergent disaster threatens society as a whole, the doctrine of *salus populi supreme lex* (the welfare of the people is the highest law) requires the government to act, enlisting persons, firms, and corporations in the private sector to eliminate the threat to society and restore society's ability to function."[4]

During the Civil War, President Abraham Lincoln suspended *habeas corpus* as an avenue of judicial review because of the emergency circumstances presented by the war. The war analogy has been invoked with COVID-19. Additionally, when healthcare systems are unable to meet patients' needs at the level normally expected because of a public health crisis, providers may need to transition from prioritizing optimum care to every patient and reallocate resources with the objective of doing the most good for the most people. This latter concept, providing additional latitude in the healthcare decision maker, is known under the law as a crisis standard of care.

Conclusion

The use of national medical data, while essential as part of the fight against COVID-19, must be done with care and sensitivity to the unprecedented nature of the circumstances and the medical emergency which continues to unfold. Reasonable efforts to protect, where possible, the privacy of the individual patient, consistent with allowing the sharing of the information in the context of a national and indeed worldwide medical emergency, is the current direction of the federal regulatory environment. Specific evaluation and reasonable efforts of front-line healthcare providers, including telehealth providers, insurers, and their associate businesses should ultimately find protection under the law as the government and regulators address these issues. L

Related Content

For a discussion on the privacy and security requirements of the Health Insurance Portability and Accountability Act (HIPAA), see

> **HIPAA PRIVACY, SECURITY, BREACH NOTIFICATION, AND OTHER ADMINISTRATIVE SIMPLIFICATION RULES**

RESEARCH PATH: *Data Security & Privacy > Industry Compliance > Healthcare > Practice Notes*

For a review of the guidance from the Department of Health and Human Services (HHS) on complying with HIPAA when sharing protected health information, see

> **HHS ADDRESSES HIPAA PRIVACY AND SECURITY RULE ISSUES IN COMBATTING CORONAVIRUS**

RESEARCH PATH: *Employee Benefits & Executive Compensation > Trends & Insights > First Analysis > Articles*

For information on the enforcement of the privacy rule, security rule, breach notification rule, and transaction rule under HIPAA, see

> **HIPAA ENFORCEMENT AND PENALTIES**

RESEARCH PATH: *Employee Benefits & Executive Compensation > Health and Welfare Plans > HIPAA > Practice Notes*

For an overview of practical guidance on COVID-19, see

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

RESEARCH PATH: *Data Security & Privacy > Trends & Insights > Practice Notes*

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RESEARCH PATH: *Data Security & Privacy > Industry Compliance > Healthcare > Articles*

2. https://www.reuters.com/article/us-health-coronavirus-walmart-lawsuit/estate-of-walmart-worker-who-died-from-covid-19-sues-for-wrongful-death-idUSKBN21P2AG. 3. *See, e.g.*, in Pennsylvania, 35 Pa. Con. Stat. Ann. § 7101 et. seq. and in New Jersey, N.J. Stat. § 26:13-19, et. seq. 4. In re World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 550 (S.D.N.Y. 2006).

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Coronavirus (COVID-19) Legal Issues for **Healthcare Organizations**

This article provides an overview of significant legal issues facing healthcare organizations as a result of the coronavirus disease (COVID-19) and provides practical guidance for effectively managing those issues.

Immigration

Your clients in the healthcare industry that employ individuals pursuant to immigrant and non-immigrant visas must monitor and comply with applicable coronavirus-related travel restrictions, U.S. Citizenship and Immigration Services (USCIS), and Department of State (DOS) closures and suspensions of specific services.

Travel Restrictions

Several travel suspensions since the beginning of the COVID-19 pandemic have resulted in tremendous chaos for healthcare workers, businesses, and many individuals and families with non-immigrant visas and those at various stages of immigrant visa processing—resulting in a race to re-enter prior to being barred. Among the travel suspensions that you should consider when advising your clients in the healthcare industry are the following:

- On Jan. 31, 2020, President Donald J. Trump signed a proclamation generally suspending entry to the United States by foreign nationals who had traveled to China during the previous 14 days. The China travel suspension excludes U.S. citizens returning to the United States though it may require them to undergo a 14-day quarantine upon arrival.

- On Feb. 29, 2020, President Trump expanded the restrictions to include all foreign nationals who had traveled to Iran during the 14-day period prior to applying for admission to the United States.
- On March 11, 2020, President Trump announced the suspension of travel from the European Schengen area to the United States (updated on March 14, 2020, to include the United Kingdom and Ireland). The European/United Kingdom/Ireland travel suspension excludes U.S. citizens and Lawful Permanent Residents (Green Card holders) who may return to the United States and will undergo screening upon arrival.

USCIS and DOS Temporary Suspensions

Temporary suspensions by USCIS and DOS since the start of the COVID-19 pandemic have wreaked havoc on healthcare organizations, with doctors and other healthcare professionals stuck abroad and unable to apply for and/or renew their immigrant and non-immigrant visas, and those in the United States who cannot attend a basic InfoPass appointment or interview for their green card.

Effective March 18, 2020, USCIS suspended all in-person services at its field offices, asylum offices, and Application Support Centers until at least April 7, 2020. The USCIS suspension includes all interviews, naturalization ceremonies, and biometric collection. Applicants and petitioners with scheduled appointments are receiving cancellation notices subject to rescheduling when operations resume. You should periodically review the USCIS website for any updates to this suspension timeline.

Likewise, the DOS has temporarily suspended visa services at all U.S. embassies and consulates around the world. The embassies and consulates cancelled all immigrant and non-immigrant visa appointments as of March 20, 2020. You should review individual embassy or consulate websites for specifics about the temporary closure.

I-9 Compliance Changes

As of March 20, 2020, the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), announced temporary flexibility relating to Form I-9 rules requiring employers to review workers' identity and employment authorization in their physical presence. This DHS announcement provides huge relief to healthcare employers, including health systems and others, by allowing for flexibility in onboarding (or the reverification process) while recognizing the reality that many employers and employees are taking (sometimes required) physical proximity precautions due to COVID-19. You and your clients must understand the requirements for remote onboarding, which are generally summarized below.

For employers and employees operating remotely due to COVID-19, the employer may generally inspect the Section 2 documents remotely, via video, email, etc., and must obtain copies of these documents within three business days for purposes of timely completing Section 2.

Among other requirements, once normal operations resume, employees onboarded using remote verification procedures must report to the employer within three business days for the employer to conduct an in-person examination of the original documents. It is important to note the above provision only applies to businesses operating remotely. In other words, there are no exceptions to the Form I-9 in-person verification of identity and employment eligibility requirements if there are employees physically present at the workplace unless the newly hired employee is subject to COVID-19 quarantine or shelter-in-place orders.

Healthcare Delivery and Public Charge Considerations

Earlier this year, the Inadmissibility on Public Charge Grounds final rule (the Public Charge rule) became effective and applicable to certain filings received by USCIS on or after February 24, 2020. The Public Charge rule directly affects Applications for Adjustment of Status (I-485) along with many filings by or on behalf of foreign nationals who are in the United States seeking an extension of stay or change of status.

Specifically, the Public Charge rule requires USCIS to assess a foreign national's receipt of certain public benefits in determining whether the individual will become a public charge and therefore be deemed inadmissible and ineligible for admission or adjustment of status.

As counsel to healthcare organizations, you should understand that these changes to the definitions of public charge and public benefits will affect your clients during the current pandemic because they will leave many foreign nationals leery of seeking medical care for COVID-19 due to the potential impact on their immigration status. In response to mounting concerns within the immigrant community, and a hesitation by those impacted by COVID-19 to seek necessary medical care, USCIS formally clarified that it will not consider screening, testing, treatment, or preventive care related to COVID-19 as part of the public charge inadmissibility determination applicable to immigrants or in relation to the public benefit condition applicable to certain non-immigrants, even where the medical care is provided or paid for by one or more public benefits such as Medicaid. This USCIS announcement should provide some relief to affected foreign nationals who may have otherwise hesitated in seeking proper healthcare in reaction to COVID-19. The government also reminds affected individuals that receipt of public benefits is only one consideration among many that the USCIS assesses when analyzing the totality of circumstances for an applicant over a period of time. No single factor is determinative, meaning medical treatment related to COVID-19 alone will not lead to a negative determination.

In order to assist foreign nationals within the purview of the Public Charge rule, your client may recommend that they maintain comprehensive documentation of any medical care sought or received related to COVID-19 for submission, as relevant, with their immigrant or non-immigrant application.

Emergency Medical Treatment and Labor Act (EMTALA)

EMTALA is a federal law that requires Medicare-participating hospitals and critical access hospitals that have a dedicated emergency department to, at a minimum:

- Provide a medical screening exam to every individual who comes to the emergency department for examination or treatment for a medical condition to determine if they have an emergency medical condition
- Provide necessary stabilizing treatment for individuals with an emergency medical condition within the hospital's capability and capacity
- Provide for transfers of individuals with emergency medical conditions, when appropriate

An emergency medical condition is present when there are acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in serious impairment or dysfunction.

On March 9, 2020, the Centers for Medicare and Medicaid (CMS) issued a statement clarifying the EMTALA obligations in the context of the COVID-19 pandemic.[1] Essentially, the statement reinforced the basic EMTALA obligations of medical screening, stabilization, and ability to transfer or discharge when patient is stabilized.

Medicare-participating hospitals and critical access hospitals with dedicated emergency departments may not use signage that presents barriers to individuals who are suspected of having COVID-19 from coming to the emergency department. They may not refuse to provide an appropriate medical screening examination to anyone who has come to the emergency department for examination or treatment of a medical condition. However, they may use signage designed to direct individuals to various locations on the hospital property, in accordance with the regulations for their medical screening examination.

Subsequently, on March 13, 2020, Health and Human Services (HHS) waived EMTALA sanctions for the inappropriate re-direction, relocation, or transfer of an individual if the re-direction, relocation, or transfer is necessitated by the circumstances of the declared federal public health emergency (PHE) for the COVID-19 pandemic. This EMTALA waiver will terminate either upon the termination of the national emergency, or 60 days from the date of the waiver, which may be extended by HHS.

Food and Drug Administration and Covid-19 Testing

Under the federal Food, Drug, and Cosmetic Act (FDCA), drug treatments, vaccinations, and diagnostic equipment testing for the presence of the virus must, by default, undergo the traditional FDA approval process. However, in certain emergency circumstances, the FDA has the authority to issue an Emergency Use Authorization (EUA) in order to adequately respond to a public health crisis.

Specifically, under Section 564 of the FDCA, the FDA may allow unapproved medical products or unapproved uses of approved medical products to be used in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions caused by chemical, biological, radiological, or nuclear threat agents when there are no adequate, approved, and available alternatives. On February 4, 2020, in accordance with EUA requirements, the HHS Secretary determined that there is a PHE and that circumstances exist that justify the authorization of emergency for a COVID-19 testing kit, which is considered to be a medical device. On February 29, 2020, FDA issued a guidance that allowed certain laboratories to begin to use validated COVID-19 testing before concluding its review for its issuance of an EUA.

The FDA further updated its policies to achieve more rapid testing capacity for COVID-19 during the PHE in its Policy for Diagnostic Tests for Coronavirus Disease-2019, published March 16, 2020 (Policy).

This policy specifically addresses options for laboratories and commercial manufacturers to help accelerate the use of tests developed in order to achieve more widespread testing capacity in the United States. In particular, the policy provides the following:

- The FDA does not intend to object to commercial manufacturers distributing and labs using new commercially developed tests prior to the FDA granting an EUA, under certain circumstances.
- A state or territory choosing to authorize laboratories within that state or territory to develop and perform a test for COVID-19 may do so under authority of its own state law, and under a process that it establishes, without any engagement with the FDA. The FDA does not intend to object to the use of such tests and does not require that test validation be submitted to the FDA, nor does it require that an EUA be submitted to the FDA.
- There are two options for commercial manufacturers developing COVID-19 testing for clinical laboratories or for point-of-care settings:
  - First, if the test is a serological test (i.e., it measures the amount of antibodies or proteins present in the blood when the body is responding to a specific infection), the FDA has taken the position that it will not object to the distribution, so long as (1) the test has been validated, (2) notification has been provided to the FDA, and (3) disclaimer language is included on the test noting that the test has not been reviewed by the FDA.
  - Second, if the test is anything other than a serological test (i.e., antigen detection, molecular, etc.), the distributor must provide assay validation with their notification to the FDA, then submit a complete EUA within 15 business days.

If the FDA is not able to authorize an EUA, the FDA intends to notify the manufacturer and the manufacturer must suspend distribution and conduct a recall of the test.

You should review the FDA's website to track ongoing developments with respect to the FDA's EUA policy.

Federal Waivers for Healthcare Payment Programs

When the President declares a disaster or emergency under the Stafford Act or National Emergencies Act, and the HHS Secretary declares a PHE under Section 319 of the Public Health Service Act, the Secretary is authorized to take certain actions in addition to his regular authorities.

In addition, under Section 1135 of the Social Security Act, HHS may grant waivers, commonly referred to as 1135 waivers, from certain regulatory requirements. These waivers typically end no later than the termination of the emergency period, or 60 days from the date the waiver or modification is first published, unless the HHS Secretary extends the waiver by notice for additional periods of up to 60 days, until the end of the emergency period.

The 1135 waiver authority applies only to federal requirements and does not apply to state requirements for licensure or conditions of participation. There are blanket waivers that apply without need of a formal request and justification by the respective state governor. All other waivers must be requested by the respective state's governor with justification.[2]

On March 13, 2020, CMS released information on the blanket waivers available to providers. These include, among other things, waivers of:

- The three-day prior hospitalization requirement for coverage of a skilled nursing facility stay
- Face-to-face visits, new physician's order, or medical necessity requirements for replacement of durable medical equipment, prosthetics, orthotics, or supplies (DMEPOS) when the DMEPOS is lost, destroyed, or damaged

The March 13 waiver, effective on March 15, 2020, applies nationwide and its applicability is retroactive to March 1, 2020. It applies for a period of 60 days, subject to extension by the Secretary for successive 60-day periods or for the duration of the COVID-19 national emergency (if earlier).

In addition, and importantly for healthcare organizations, states can request permission for the following:

- To waive prior authorization requirements in fee-for-service programs
- To permit providers located out of state/territory to provide care to another state's Medicaid enrollees impacted by the emergency
- To temporarily suspend certain provider enrollment and revalidation requirements to increase access to care
- To temporarily waive requirements that physicians and other healthcare professionals be licensed in the state in which they are providing services, so long as they have an equivalent licensing in another state
- To temporarily suspend requirements for certain pre-admission and annual screenings for nursing home residents[3]

1. https://www.cms.gov/files/document/qso-20-15-hospitalcahemtala.pdf.

2. For further information about these waivers, *see* this CMS At-a-Glance publication: https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/1135-Waivers-At-A-Glance.pdf. 3. For additional information about the March 13 waiver, *see* this CMS Fact Sheet: https://www.cms.gov/files/document/covid19-emergency-declaration-health-care-providers-fact-sheet.pdf.

Health Insurance Portability and Accountability Act (HIPAA)

HIPAA is a federal law that among other things, protects the confidentiality of protected health information (PHI) in the hands of healthcare providers, health insurance organizations, and medical information clearinghouses that conduct electronic transactions (together, Covered Entities).

On February 3, 2020, HHS released a bulletin entitled HIPAA Privacy and Novel Coronavirus, in which it outlined the various ways that PHI related to COVID-19 may be disclosed without patient authorization.

More notably, however, on March 17, 2020, the HHS Office for Civil Rights (OCR), the enforcement agency for HIPAA, published a Notice of Enforcement Discretion relating to the use of telehealth remote communications by healthcare providers.[4]

Although HIPAA requires all Covered Entities to ensure the confidentiality and security of patient information, HIPAA does not specifically require encryption or explicitly prohibit use of certain technologies. Nevertheless, most HIPAA Covered Entities recognize that the lack of encryption and other security protections strongly discourage the use of unsecured audio/video communications apps. In other words, while it is not technically true that HIPAA prohibits the use of Skype, FaceTime, and similar modalities, most providers have determined that their HIPAA safeguards and standards would not allow it.

Under its March 17th notice, OCR will "exercise enforcement discretion and not impose penalties for noncompliance with regulatory requirements under the HIPAA rules against covered healthcare providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency." In other words, while the OCR is exercising its enforcement discretion (i.e., during the time the COVID-19 national PHE is in effect), healthcare providers may use Skype, FaceTime, Zoom, Doxy.me, Updox, VSee, Google G Suite Hangouts Meet, and similar technologies for real-time audio/video communications with their patients, without fear that OCR might levy a penalty.

It is important for you and your clients to note that communication need not be about treatment of COVID-19; a provider can use Skype to see a patient with anxiety, a sprain, etc. The goal of OCR's exercise of enforcement discretion is to keep patients out of emergency rooms. Your client should also be aware of the following:

- Providers should get the consent of patients before using the technology. The consent should be obtained only after the provider advises the patient of the risks involved in using less-secure technologies.
- The decision to use the technology must be in good faith, which means after considering the availability of safer alternatives.
- The technology must be private and cannot be public-facing; Facebook Live, Twitch, TikTok, and the like are not covered by this enforcement discretion.
- Providers who use these apps should enable encryption and set privacy settings to the highest practical level.
- While the requirement to obtain a HIPAA-compliant business associate agreement (BAA) with the app provider is also waived, covered entities should obtain BAAs with those app providers if possible.

The general rule remains that HIPAA does not go away during a crisis or emergency. To seasoned HIPAA professionals, OCR's action highlights the flexibility that is inherent in HIPAA: what is a reasonable safeguard in normal times might be too tight a restriction during an emergency. While providers could have been using Skype in certain circumstances (i.e., telehealth communication was extremely urgent and no other safer technology could be reasonably implemented), OCR's action allows more providers to at least feel comfortable with using these technologies.

OCR's March 17th notice followed an announcement by HHS on March 16 that provided all relief from certain other HIPAA requirements in limited situations. Unlike the OCR's March 17th notice, however, HHS's announcement was specifically limited to HIPAA-covered hospitals that (1) are in the emergency area identified in the PHE declaration, (2) institute a disaster protocol, and (3) for up to 72 hours from the time the hospital implements its disaster protocol. Additionally, the HHS announcement only waives five specific HIPAA obligations:

- The requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care[5]
- The requirement to honor a request to opt out of the facility directory[6]
- The requirement to distribute a notice of privacy practices[7]
- The patient's right to request privacy restrictions[8]
- The patient's right to request confidential communications[9]

4. https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html. 5. 45 C.F.R. § 164.510(b). 6. 45 C.F.R. § 164.510(a). 7. 45 C.F.R. § 164.520. 8. 45 C.F.R. § 164.522(a). 9. 45 C.F.R. § 164.522(b).

Telehealth and Prescribing

On March 17, 2020, CMS released a fact sheet in which it broadened access to Medicare telehealth services when it allowed Medicare patients to receive more services from their doctors without travel to a healthcare facility.[10] This benefit is available on a temporary and emergency basis under the 1135 waiver authority and the Coronavirus Preparedness and Response Supplemental Appropriations Act to provide telemedicine services during the national emergency declared regarding COVID-19.

Before this CMS waiver, Medicare paid only for telehealth when the patient was in a designated rural area and left the home and went to a clinic, hospital, or certain other types of medical facilities for the service.

During the pendency of the declaration of the PHE declared by the HHS Secretary, Medicare can pay for office, hospital, and other visits furnished via telehealth across the country including in patient's places of residence, retroactive to March 6, 2020. The PHE will last until the earlier of the following: (1) the Secretary declares that the PHE no longer exists or (2) the expiration of the 90-day period beginning on the date the Secretary declared a PHE exists or any subsequent renewal periods. You should periodically check to determine whether the PHE is still in effect.

As a result of the Medicare telemedicine payment policy, a range of providers, such as doctors, nurse practitioners, clinical psychologists, and licensed clinical social workers, will be able to offer telehealth to their patients. Additionally, the HHS Office of Inspector General is providing flexibility for healthcare providers to reduce or waive cost-sharing for telehealth visits paid by federal healthcare programs.

Also, effective immediately, the OCR will exercise enforcement discretion and waive penalties for HIPAA violations against healthcare providers that serve patients in good faith through communications technologies, such as FaceTime or Skype, during the COVID-19 nationwide PHE.

One day earlier, on March 16, 2020, the requirements of the Ryan Haight Pharmacy Consumer Protection Act of 2008[11] (Ryan Haight Act) that relate to telemedicine and opioid prescribing, were suspended based upon the public emergency exception contained within the act. Accordingly, the determination that a PHE exists that allows this exception must be made by the HHS Secretary with the concurrence of the Administrator of the Drug Enforcement Agency (DEA). The DEA published a Q&A that included COVID-19 guidance on its website.[12]

Related Content

For additional information about telehealth transactions, see

> **TELEMEDICINE AND DIGITAL HEALTH: STRATEGIC OPPORTUNITIES AND LEGAL CONSIDERATIONS FOR PRIVATE EQUITY INVESTMENT**

RESEARCH PATH: *Corporate and M&A > Trends & Insights > First Analysis > Practice Notes*

For a discussion of the Emergency Use Authorization process, see

> **FDA EMERGENCY USE AUTHORIZATIONS**

RESEARCH PATH: *Life Sciences > FDA Approval Process > Practice Notes*

For an overview of guidance from the U. S. Department of Health and Human Services on complying with rules related to protected health information, see

> **HHS ADDRESSES HIPAA PRIVACY AND SECURITY RULES ISSUES IN COMBATTING CORONAVIRUS**

RESEARCH PATH: *Life Sciences > Regulatory Enforcement > Articles*

For practical guidance on a wide variety of COVID-19 legal issues, see

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

RESEARCH PATH: *Life Sciences > Corporate Transactions > Practice Notes*

10. https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet. 11. 21 U.S.C.S. § 802. 12. https://www.deadiversion.usdoj.gov/coronavirus.html#TELE.

Practitioners should check their respective state executive orders or changes in law during the emergency to ascertain the existence and extent of any liability immunity provisions.

The Ryan Haight Act was intended to stop the selling of controlled substances through online pharmacies by generally requiring a provider to conduct an in-person examination of any person seeking a prescription for such substances.

The action by HHS suspends the requirements for all schedule II-V controlled substances in all areas of the United States. Accordingly, as of March 16, 2020, and continuing for as long as the HHS Secretary's designation of a PHE remains in effect, DEA-registered practitioners in all areas of the United States may issue prescriptions for all schedule II-V controlled substances to patients for whom they have not conducted an in-person medical evaluation, provided all of the following conditions are met:

- The prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice
- The telemedicine communication is conducted using an audio-visual, real-time, two-way interactive communication system
- The practitioner is acting in accordance with applicable Federal and State laws

Provided the practitioner satisfies the above requirements, the practitioner may issue the prescription using any of the methods of prescribing currently available and in the manner set forth in the DEA regulations. Thus, the practitioner may issue a prescription either electronically (for schedules II-V), by calling in an emergency schedule II prescription to the pharmacy, or by calling in a schedule III-V prescription to the pharmacy.

The term practitioner in this context includes a physician, dentist, veterinarian, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which s/he practices, to prescribe controlled substances in the course of his/her professional practice.[13]

Licensure of Healthcare Providers

Given limitations on a patient's ability to travel (sometimes out of state) for medical care and the projected need for additional healthcare providers during the COVID-19 pandemic, CMS determined in its March 17th Fact Sheet that it would "[t]emporarily waive requirements that out-of-state providers be licensed in the state where they are providing services when they are licensed in another state. This applies to Medicare and Medicaid."

The Federation of State Medical Boards (FSMB), through which by way of its Physician Data Center (PDC), states are able to instantly verify licensure information and disciplinary history for licensed physicians and physician assistants, released a statement on March 13, 2020 offering its assistance to verify licenses and credentials for physicians and other healthcare professionals wishing to practice across state lines to treat patients in areas heavily impacted by the COVID-19 virus:

> The PDC is continuously updated and is the most comprehensive repository of physician licensure information in the country. With an increase of physicians moving into impacted areas and practicing remotely through telehealth, the PDC is a resource to expedite care while ensuring patients are receiving high-quality care.

Some states have substantially loosened requirements to encourage healthcare providers to be available for that state's citizens. For example, the Florida Surgeon General of the Florida Department of Health issued Emergency Order 20-002 on March 16, 2020, which relaxes certain licensure and practice standards for 30 days (which may be extended). It allows healthcare professionals, advanced life support professionals, and basic life support professionals with valid unrestricted licenses in states outside Florida to provide care for patients in Florida without Florida licensure. It allows medical doctors, osteopathic physicians, physician assistants, and nurse practitioners with valid unrestricted licenses in other states to provide care to Florida residents via telehealth, although Florida's telehealth practice standards requirements in Fla. Stat. § 456.47 must still be met.

The FSMB has published a list of States Waiving Licensure Requirements/Renewals in Response to COVID-19 on its website, and the list shows the status in the various states as to licensure of healthcare professionals.[14]

Legal Immunity from Claims of Loss

Federal Immunity

On March 17, 2020, the HHS Secretary issued a declaration under the Public Readiness and Emergency Preparedness (PREP) Act to provide immunity to certain individuals and entities (Covered Persons) for any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures (Covered Countermeasures) used to fight COVID-19, except for claims involving willful misconduct (the Declaration). Although issued on March 17, 2020, the Declaration was stated to be effective as of February 4, 2020, with protections in place until October 1, 2024.[15]

This Declaration was issued to support innovation by healthcare, pharmaceutical, medical device, and public health professionals to combat COVID-19, as there is a concern that action taken now could be questioned later after the crisis has passed. Covered Persons under the PREP Act includes manufacturers, distributors, program planners, and qualified persons, and their officials, agents, and employees, and the United States. To also protect healthcare workers, the Declaration expands the PREP Act's definition of qualified person to include:

- Any person authorized in accordance with the public health and medical emergency response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasures, and their officials, agents, employees, contractors, and volunteers, following a Declaration of an emergency
- Any person authorized to prescribe, administer, or dispense the Covered Countermeasures or who is otherwise authorized to perform an activity under an Emergency Use Authorization in accordance with Section 564 of the FD&C Act
- Any person authorized to prescribe, administer, or dispense Covered Countermeasures in accordance with Section 564A of the FD&C Act

Covered Persons are covered with regard to use of Covered Countermeasures, which are any antiviral, any other drug or biologic, any diagnostic, any other device, or any vaccine used to treat, diagnose, cure, prevent, or mitigate COVID-19 or a virus mutating therefrom, including any device or component part or its constituent materials of any such product.

However, immunity only applies to activities conducted pursuant to either:

- Present or future federal contracts, cooperative agreements, grants, other transactions, or other federal agreements
- Activities authorized in accordance with the authority having jurisdiction to prescribe, administer, deliver, distribute, or dispense the Covered Countermeasures

Scrutiny as to whether immunity exists will be determined on a case-by-case basis. There is a rebuttable presumption that the administration or use of a covered countermeasure was for the threat covered by the Declaration, and thus, to succeed, a plaintiff will have to produce evidence to overcome the presumption that the covered person is not entitled to immunity.

13. 21 U.S.C.S. § 802(21).

14. https://www.fsmb.org/siteassets/advocacy/pdf/state-emergency-declarations-licensures-requirementscovid-19.pdf. 15. https://www.phe.gov/Preparedness/legal/prepact/Pages/COVID19.aspx.

State Immunity

Keep in mind that it is possible for states to also give immunity against actions that may be brought under state law. For example, in New York, the New York Governor's Executive Order No. 202.10, issued on March 7, 2020, provided greater immunity through its waiver of certain sections of the New York State Education Law "to the extent necessary to provide that all physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurse and license practical nurses shall be immune from civil lability for any injury or death alleged to have been sustained directly as a restful of an at or omission by such medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such medical professional." Practitioners should check their respective state executive orders or changes in law during the emergency to ascertain the existence and extent of any liability immunity provisions.

Clinical Trials

Many healthcare providers, particularly academic medical centers, are involved in clinical trials. Recognizing that quarantines, travel limitations, and interruptions to the supply chain, among other factors, may impact clinical trials, the FDA, on March 18, 2020, issued a Guidance entitled FDA Guidance on Conduct of Clinical Trials of Medical Products during the COVID-19 Pandemic.[16]

The Guidance had a number of considerations for going trials, including the following:

- Any modifications of study conduct should be based upon the safety of the participants, whether continuing trial recruitment, continuing use of the investigational product for patients already participating in the trial, and the need to change patient monitoring during the trial.
- Sponsors should evaluate whether it is necessary for a trial participant to come in person to the trial site, or whether safety assessments may be conducted through other means such as phone contact, virtual visit, or alternative location for assessment.
- In some cases, trial participants who no longer have access to investigational product or the investigational site may need additional safety monitoring (e.g., withdrawal of an active investigational treatment).
- The Institutional Review Board/Independent Ethics Committee should be engaged as early as possible when urgent or emergent changes to the protocol or informed consent are anticipated as a result of COVID-19. However, COVID-19 screening procedures that may be mandated by the healthcare system in which a clinical trial is being conducted do not need to be reported as an amendment to the protocol unless the sponsor is incorporating the data collected as part of a new research objective.
- Documentation of the basis for any missing information (e.g., due to missed visits) is key.

For all trials impacted by the COVID-19 pandemic, sponsors should describe the following in appropriate sections of the clinical study report (or in a separate study-specific document):

- Contingency measures to manage the study
- All participants affected
- The impact of implemented contingency measures on the safety and efficacy results reported for the study

16. https://www.fda.gov/regulatory-information/search-fda-guidance-documents/fda-guidance-conduct-clinical-trials-medical-products-during-covid-19-pandemic. 17. https://www.fda.gov/media/136318/download.

Governmental Actions Regarding Ventilators

Given that one of the most serious symptoms of COVID-19 (in a small percentage of cases) is shortness of breath and ability to maintain normal oxygen levels, the federal government has taken action to ensure that a sufficient number of ventilators exist for patients that may need them.

The FDA on March 22, 2020 issued a policy entitled Enforcement Policy for Ventilators and Accessories and Other Respiratory Devices During the COVID-19 Public Health Emergency – Guidance for Industry and Food and Drug Administration Staff. The policy is in effect during the PHE related to COVID-19, as determined and renewed by HHS.[17]

Wherever possible, healthcare facilities should use FDA-cleared conventional/standard full-featured ventilators when necessary to support patients with respiratory failure, or a device subject to an EUA, if any.

However, to help ensure the availability of the greatest possible number of devices for this purpose, the FDA does not intend to object to limited modifications to the indications, claims, functionality, or to the hardware, software, or materials of FDA-cleared devices used to support patients with respiratory failure or respiratory insufficiency. This allows use of ventilators outside their cleared environment of use—for example, use of a ventilator in a healthcare facility when it is only cleared for use at home or during transport, or use of devices indicated for sleep apnea, including noncontinuous ventilators delivering continuous positive airway pressure or bilevel positive airway pressure to treat patients with respiratory insufficiency—provided that appropriate design mitigations are in place to minimize aerosolization. Other modifications notified as allowed are introduction of filtration to minimize aerosolization, or hardware and/or software modifications implementing the capability for remote monitoring and remote adjustment of ventilator parameters (i.e., adjustment of parameters by trained healthcare providers from outside an isolation unit to avoid unnecessary exposures).

The FDA also stated that strategic stockpilers of authorized expired filtering facepiece respirators do not need to submit a request to the FDA to request authorization, and to allow use of decontaminated respirators that have been decontaminated in accordance with the terms and conditions of an authorized decontamination system.

With respect to the availability of ventilators, it should also be noted that although there have been no documented instances of a shortage of ventilators at the time of writing of this article, there is a concern that such could occur. The law as to end of life care differs from state to state, but an interesting reference point is a November 2015 report by the New York State Task Force on Life & the Law New York State Department of Health called Ventilator Allocation Guidelines.[18]

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RESEARCH PATH: Life Sciences > Regulatory Enforcement > Practice Notes

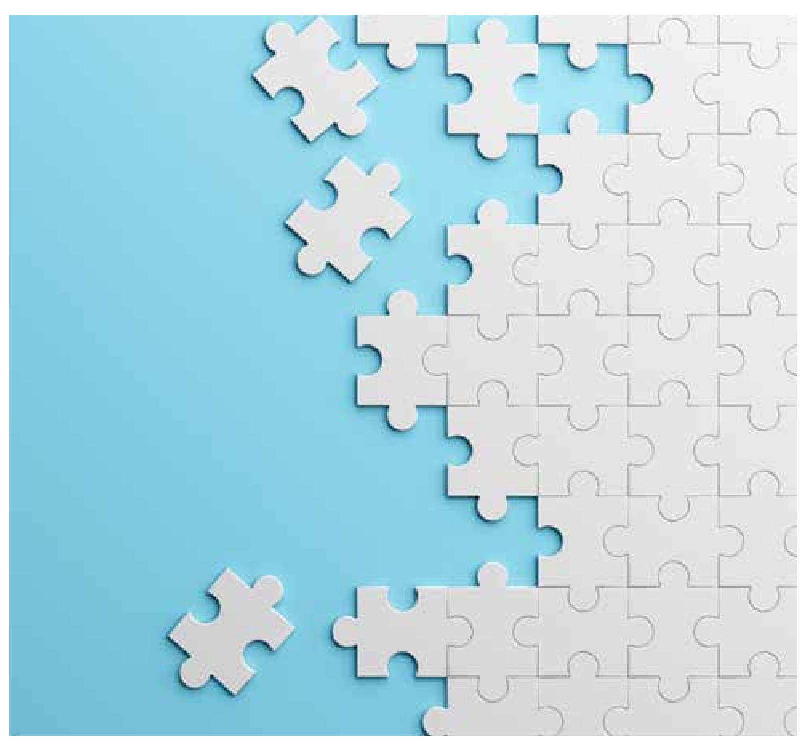
18. https://protect-us.mimecast.com/s/0GAECM8EJ4u7zDjDiJ_lxk?domain=health.ny.gov.

Daniel G. Egan ROPES & GRAY LLP with updates by the Lexis Practice Advisor Attorney Team

Guidance for Distressed Companies: **Loan Workouts and Exchange Offers**

As the Coronavirus pandemic continues to impact our economy, many companies will need to consider whether to pursue a loan workout. This article examines considerations that affect whether and in what manner a company may restructure its loans and bond debt. A workout in the context of a financially distressed company generally means an attempt to negotiate a consensual solution to a company's financial troubles with that company's lenders (and/or other creditors).

WHEN CONSIDERING A WORKOUT, THE COMPANY WILL typically analyze the types and nature of the company's various obligations, as well as the extent and nature of the company's defaults in respect thereof (i.e., whether the company is currently in default on certain of its obligations or merely anticipates a default in the near future). In a loan workout, the lender and the borrower often negotiate a solution to a defaulted loan to avoid a bankruptcy proceeding. A company and its lender(s) may restructure the loan by, among other things, amending its existing agreements or entering into a forbearance or waiver agreement. Before making any agreement, the company will need to consider the potential tax consequences, any subordination agreements, and potential preference exposure. Companies that have issued public debt securities may initiate an exchange offer for purposes of a workout. In an exchange offer, bondholders are offered an opportunity to exchange their existing bonds for new debt, equity, or some combination of both, in order to reduce the amount or change the timing of the issuer's principal and interest payments.



To the extent that a lender has control over the company's working capital or other bank accounts, the company's access to its own funds may be significantly curtailed following the occurrence of an event of default.

Extent and Nature of Existing and Anticipated Defaults

The company will need to ensure that it addresses the right problems, and it cannot begin to do that until it understands whether, and the extent to which, it is in default under its current loan or other obligations. Once the company has a full and complete understanding of its debt-related defaults (or potential near-term defaults), it can then begin to consider the alternatives for addressing such defaults. In other words, until the company knows what is broken and why, it cannot ask its creditors to help fix its problems.

Potential Borrower Defaults in Loan Documentation

A typical loan agreement will contain numerous covenants and other obligations with which a borrower must comply during the term of the agreement and will often specifically list events that will give rise to a default or event of default. Upon the occurrence and continuation of an event of default, the lender will generally be permitted (following any applicable notice period) to exercise various rights and remedies against the company, which may include an acceleration of the indebtedness, the accrual of interest at a default rate, the right to commence litigation seeking payment on the indebtedness, and the right to foreclose on or exercise rights with respect to collateral securing the indebtedness. Often, a loan agreement will provide that the failure to comply with certain obligations constitutes a default (rather than an event of default). The event of default section of the loan agreement will specify the circumstances in which a default will lead to the occurrence of an event of default. Often, the company will have a period of time to cure the default before it ripens into an event of default. If the default is not timely cured and it becomes an event of default, typically the lender will then be permitted to exercise its remedies against the company.

To the extent that a lender has control over the company's working capital or other bank accounts, the company's access to its own funds may be significantly curtailed following the occurrence of an event of default. Therefore, a company must be thoroughly familiar with its covenants and obligations under the agreement and the rights available to the lender if the company fails to comply with these covenants and obligations in a timely manner. If the company fails to comply with certain of its obligations under the loan agreement, the company should engage the lender in discussions regarding the reasons for the failed compliance, whether the company is able to cure any existing default, and/or whether it believes a waiver, forbearance, or amendment is appropriate. If the lender believes that, under the circumstances, it is not in its best interest to declare an event of default, the parties may then begin negotiating the terms of a waiver, forbearance, or amendment, as appropriate.

The following terms may be included in a loan agreement:

- **Material adverse change clauses (MAC).** Lenders may seek to include material adverse change clauses in a loan agreement. Such a clause typically will provide that a default will occur under the loan agreement if any specified material adverse change occurs in the business or financial condition of the company. In general, such a clause provides protection to the lender against the occurrence of an event that may adversely impact the company's ability to satisfy its obligations under the loan agreement. A high standard for materiality helps to limit the lender's discretion in declaring a default and decreases the level of uncertainty for the company. For example, the company should ensure that the loan agreement provides that the lender's determination as to materiality must be reasonable and that the lender cannot make such determination in its sole discretion. However, even if the lender's determination is required to be reasonable, a dispute could still arise as to whether a particular event constitutes a material adverse change.
- **Covenants.** Any loan agreement typically will contain a number of covenants with which the company will be required to comply during the term of the agreement. These covenants may be affirmative (requiring the company to take certain actions) or negative (requiring the company to refrain from taking certain actions or ensuring that certain actions are not taken against it). Examples of affirmative covenants include promises by the company to (1) comply with financial reporting obligations, (2) keep accurate books and records, (3) comply with applicable law and regulations, (4) maintain appropriate insurance, and (5) pay all taxes and fees when due. Examples of negative covenants include promises by the company not to (1) incur additional indebtedness; (2) pledge or grant a lien on any of the company's assets; and (3) sell, lease, or transfer substantial assets during the term of the loan agreement without the lender's consent. Any material breach of a covenant by the company likely will result in a default under the loan agreement.

- **Representations and warranties.** Loans agreements typically also will contain various representations and warranties by the company regarding its legal, financial, and regulatory affairs. Examples of typical representations and warranties include that (1) the company is duly organized and in good standing under applicable law, (2) the company has the necessary corporate authority to enter into the loan agreement, (3) there are no material defaults on the company's other indebtedness, and (4) the company has good title to any and all collateral securing the indebtedness under the loan agreement. A default may occur under the terms of the loan agreement if any representation or warranty by the company proves to be untrue at the time that it was made or, in some cases, anytime during the term of the agreement. Therefore, it is essential that the company continue to be mindful of its obligations under the various representations and warranties contained in the loan agreement.
- **Events of default section.** A typical loan agreement will include a section listing various events, the occurrence and continuation of which will constitute an event of default under the loan agreement and may permit the lender to pursue its rights and remedies against the company as set forth in the loan agreement and under applicable law. Common events of default include (1) the failure to pay principal or interest when due, (2) the failure to cure a breach of a covenant within a certain period of time, (3) the failure to cure a breach of a representation or warranty within a certain period of time, (4) the appointment of a receiver over the company or its assets, and (5) the occurrence of any material default in the payment of any of the company's other indebtedness.
- **Failure to pay principal, interest, fees, or other amounts.** A loan agreement will specify when principal and any interest, fees, or other amounts will be due and payable by the company to the lender. The company's failure to pay principal, interest, fees, or other amounts when due will constitute a default under the loan agreement. Whether the failure to pay will automatically cause an event of default to occur may depend on whether the loan agreement provides any opportunity for the company to cure its failure to pay. On occasion, a loan agreement will provide the company with a short period of time to pay to the lender any amount that had become payable but that was not timely paid by the company. If the company is able to cure within this period of time, the lender will be precluded from exercising remedies against the company. However, if the company is unable to cure, or if the loan agreement does not provide for a cure period, the failure to timely pay may cause an immediate event of default under the loan agreement, which will allow the lender to immediately pursue its rights and remedies against the company. In addition, the failure to pay required amounts when due may trigger the accrual of interest at a higher default rate under the loan agreement (which is typically 2% or more above the otherwise applicable non-default interest rate).
- **Notice.** Some loan agreements may require the lender to issue a written notice of a default to the company before a default becomes an event of default. The notice will specify the specific event or events giving rise to the alleged default, and typically will inform the company of any opportunity that it may have to cure the default. If possible, the company will need to cure the specified default within the cure period in order to avoid an event of default under the loan agreement. If the company does not believe that it will be able to timely cure the default, it should engage the lender in discussions regarding a potential forbearance, waiver, or other resolution. In such discussions, the company should be prepared to explain to the lender the reason for the alleged default, whether it believes that the default is material, whether it believes that it can cure the default if given more time, and/or whether it believes a modification to the loan documents is necessary and, if so, under what terms.

- **Cross-defaults.** A cross-default provision is one that triggers a default under the terms of one agreement if the company defaults under another agreement. These provisions are intended to protect a lender, as the lender may presume that if the company cannot make payments under one loan agreement, it likely will not be able to make payments under another and, therefore, the lender will need to act quickly to protect its interests. If a company is in default under one loan agreement, the triggering of a cross-default provision in other agreements can have a significantly adverse effect on the company's ability to achieve an overall resolution of its financial issues. Instead of dealing with one lender, the company may be compelled to engage in workout discussions with multiple parties under different agreements, each of which may have different interests, demands, and goals vis-à-vis the company. Therefore, a company must determine the impact that a default under one loan agreement may have on the company's obligations and rights under its other material (including debt) agreements. Often, a loan agreement will include language providing that de minimis or non-material defaults under one agreement will not trigger a cross-default under another agreement. If such limiting language does not exist under a loan agreement, a minor default thereunder may become a major issue if cross-defaults are triggered and parties under other agreements are authorized to pursue rights and remedies against the company. Such an occurrence could, at a minimum, create significant distraction to the company in its efforts to engage in a workout of the loan with the initial default.

Most loan agreements also contain a provision allowing a lender to accelerate and declare all outstanding indebtedness to be immediately due and payable following the occurrence of an event of default (and the expiration of any applicable notice and cure periods) under the terms of the loan agreement. By accelerating the loan, the lender typically can pursue its remedies (such as litigation) and seek payment in full of all amounts owing under the agreement, including the full amount of principal, plus accrued and unpaid interest and any other fees and expenses, and/or a foreclosure on any collateral.

Acceleration is a powerful remedy, and a lender will need to carefully consider whether to accelerate the debt following a default since such an acceleration may force the company to file bankruptcy. In addition, the acceleration of debt may also jeopardize the lender's ability to negotiate and work out a consensual agreement with the company for the repayment of debt. Therefore, if a lender believes that a workout is possible, it likely will be in the best interest of the lender to engage in discussions with the company prior to exercising any right to accelerate. In these discussions with the company, the lender will be looking to determine the reasons that the event of default occurred and whether the company will be able to remedy the event of default in the near future. The lender should also analyze the company's financial information to determine the likelihood of timely receiving debt service payments as and when they become due going forward.

Near Term Anticipated Defaults

Just as important as considering existing defaults is determining whether there are any defaults on the horizon. Therefore, a company should carefully consider, among other things, its current financial situation, impending loan obligations, cash flow and other financial projections, and economic and industry forecasts. It will do little good to fix current defaults only to then have new or the same defaults appear a week, a month, or several months later. The company should try to achieve, if possible, a long-term solution and should not be satisfied with obtaining a temporary, stopgap measure.

Forbearance Agreements

When faced with an existing or impending default under a loan agreement, a company may request that the lender forbear for a limited period of time from taking legal actions that it may otherwise be entitled to take in order to allow the company some time to resolve its financial problems. In such a scenario, the lender will need to analyze the situation to determine if it believes that the company can remedy the defaults (or that a more global restructuring can occur) during the forbearance period and that the lender's interests will be adequately protected during this period. In some cases, the lender may determine that the borrower's financial situation will only worsen and that the lender's prospects of being repaid will only decrease over time. Therefore, it may reject the company's request for a forbearance and proceed with the exercise of its rights and remedies under the loan documents. However, in many cases, the lender will determine that legal action and the enforcement of remedies is a costly and unpredictable option that may further delay repayment or cause more damage to the company's reputation or business. Such damage could lead to a loss of customers, a decrease in sales or other drop in revenues, or an increase in expenses, as applicable. Therefore, the lender may decide that it is more advantageous to its interests to negotiate a forbearance (or standstill) agreement with the company. The lender will need to consider what, if any, changes to the loan agreement or other consideration are warranted in order for such lender to consent to any forbearance. Such changes to the loan agreement may include, among other things, modifications to financial reporting requirements or financial covenants.

Key to negotiating any forbearance agreement is a clear understanding of, among other things, the defaults under the loan agreement, the rights and remedies available to the lender, and what the parties are hoping to accomplish during a forbearance period to address the company's underlying business and/or financial problems. In analyzing these issues, the parties will need to carefully review the loan documentation to determine the nature and scope of the defaults and what remedies are available to the lender. Once the parties understand these issues, they can then analyze the company's performance and financial situation to determine the best way to address the defaults, whether through modifications to the loan documents, a refinancing or other restructuring, or otherwise.

Below is a non-exhaustive checklist of items that parties should consider in determining whether a forbearance agreement is appropriate under the circumstances and the conditions under which the lender will agree to such a forbearance:

- The timing of scheduled principal, interest, and other payments
- The extent and nature of any existing or anticipated defaults
- Applicable cure periods
- The rights and remedies available to creditors
- The identity of creditors to be parties to the forbearance agreement
- Whether any consents are needed from other creditors
- The duration and extent of forbearance
- The steps needed to be taken during the forbearance period to address the company's underlying business and/or financial problems
- Consideration, if any, provided to creditors in exchange for forbearance
- Other terms of the forbearance agreement, including any reporting requirements and milestones to be achieved by the company

Specific Provisions

Forbearance agreements are generally heavily negotiated and may vary significantly from deal to deal depending on the particular circumstances. For example, where there is a payment default, the parties may seek to include provisions that reschedule the payments and provide milestones for the company to address its financial condition. Where there is a default on a covenant to provide financial reports or other information to creditors or comply with financial covenants, the forbearance agreement may contain requirements for the company to engage outside consultants or advisors to assist the company's current management. In some cases, the parties may determine that the best course of action is for the company to seek new financing to repay the indebtedness to the current lender. A forbearance agreement under this scenario would likely contain milestones to ensure that the company is on track towards obtaining the new financing.

A typical forbearance agreement should clearly state the extent of the lender concessions sought, which will include an agreement by the lender to forbear for a specified period of time from accelerating the debt and otherwise exercising or pursuing remedies or other legal actions available to it under the applicable agreements or law. The company may also request additional concessions from the lender, including a modification of certain contractual covenants (such as financial covenants) or other terms of the loan documents. The particular covenants and loan terms addressed in a forbearance will depend on the particular circumstances of the company.

As a condition to entering into a forbearance agreement, a lender will usually require the inclusion of various provisions designed to protect its interests. Typical provisions include, among other things, (1) acknowledgments by the company as to existing defaults and the amount and validity of the indebtedness and the validity and perfection of any liens granted in favor of the lender, (2) a ratification of the loan documents, (3) a waiver by the company of any defenses to repayment of the indebtedness, and (4) a general release of claims by the company against the lender. Many of these provisions are similar to those generally included in a waiver agreement. However, the key difference between the two agreements is that a forbearance will have a fixed expiration date after which the lender will be entitled to exercise rights and remedies, while a waiver is an agreement by the lender that it will not, at any time in the future, exercise rights and remedies in respect of the particular default being waived.

The lender may also require payment of a portion of the overdue debt service to be made by the company during the forbearance period and/or the payment of a forbearance fee as a condition to entering into the forbearance agreement. In addition, the lender may also seek to add additional covenants for the company, including increased financial reporting requirements or monitoring rights in favor of the lender.

Milestones

A primary goal for a company seeking a forbearance from a lender is often to allow the company time to work out a consensual restructuring agreement and/or improve its financial situation through a restructuring transaction. Accordingly, a lender may require that the forbearance agreement contain various milestones that the company is required to achieve within a specified period of time to ensure that the company is progressing either financially or operationally. These milestones may include events such as closing on an asset sale, obtaining new capital, or consummating a refinancing transaction, and are designed to help manage the lender's risks and ensure that it is ultimately repaid on the loan. The company's failure to achieve these milestones likely will cause a termination of the forbearance agreement and permit the lender to exercise its rights and remedies under the loan documents and applicable law.

Related Content

For a comprehensive guide to prepackaged bankruptcies, see

> **PREPACKAGED BANKRUPTCY RESOURCE KIT**

RESEARCH PATH: *Bankruptcy > Prepackaged Plans, Workouts and Other Out-of-Court Restructurings > Prepackaged Bankruptcy > Practice Notes*

For information on defaults and the remedies available to a lender, see

> **EVENT OF DEFAULT PROVISIONS IN CREDIT AGREEMENTS**

RESEARCH PATH: *Bankruptcy > Financing the Debtor's Estate > Bankruptcy Issues from a Lender's Perspective > Practice Notes*

For an overview of drafting defaults, events of default, and related provisions, see

> **LOAN AGREEMENT EVENTS OF DEFAULT: LENDERS' REMEDIES RESOURCE KIT**

RESEARCH PATH: *Bankruptcy > Financing the Debtor's Estate > Bankruptcy Issues from a Lender's Perspective > Practice Notes*

For a form forbearance agreement to be executed between a borrower and a lender, see

> **FORBEARANCE AGREEMENT (BANKRUPTCY, LOAN, AND OTHER DEBT WORKOUTS)**

RESEARCH PATH: *Bankruptcy > Prepackaged Plans, Workouts and Other Out-of-Court Restructurings > Workouts > Forms*

For a sample loan agreement amendment, see

> **LOAN AGREEMENT AMENDMENT (BANKRUPTCY, LOAN, AND OTHER DEBT WORKOUTS)**

RESEARCH PATH: *Bankruptcy > Prepackaged Plans, Workouts and Other Out-of-Court Restructurings > Workouts > Forms*

Amending Agreement

When a company experiences financial distress and anticipates a potential default under its loan documents, it should approach its lender(s) to discuss the company's financial condition, performance, and potential ways to avoid a default or event of default under the loan agreement. One option that the parties may consider is to enter into an amendment to the existing loan agreement that addresses potential defaults and other foreseeable issues with the company's ability to comply with its covenants and obligations under the loan agreement. Being proactive in seeking an amendment can help a company avoid a default and, consequently, avoid the need to request a waiver or forbearance from its lender. One note of caution, the company must balance (1) what is often a firmly held belief at many companies that creditors should not be consulted as to the company's potential financial problems until there is no choice but to do so, and (2) the practical realities of the situation and the need to bring creditors into the fold so as to fix the company's financial and other problems as quickly as possible.

Below is a non-exhaustive checklist of items that parties should consider in determining whether an amendment is appropriate under the circumstances and the conditions under which the lender will agree to such an amendment:

- The extent and nature of any anticipated defaults
- Applicable cure periods
- The rights and remedies available to creditors
- The financial condition of the company and the extent to which performance is possible under an amended agreement
- Whether any consents are needed from other creditors
- Consideration, if any, provided to lender in exchange for amendment
- Specific provisions of the existing loan documents that need to be amended

Provisions

Prior to requesting a loan amendment, a company should have a full understanding of potential defaults and the provisions of the existing loan documents with which it believes it will be unable to comply. Once this is determined, the company should approach the lender with a plan regarding a potential amendment to the loan agreement and how the company believes that an amendment is in the best interest of both parties. The provisions to be amended will vary depending on the type of anticipated default or compliance issue but may include such things as a reduction in interest rates, an extension of payment deadlines, an adjustment to loan covenants, or a change in collateral securing the loan. In exchange, a lender may request a fee for agreeing to amend the loan agreement; however, agreeing to pay such fee and amending the documents may be in the company's best interest in order to avoid a default and the potential exercise of remedies by the lender.

In addition, in considering the amendment of loan provisions, the company and the lender should consider addressing not only immediately impending issues but also any foreseeable issues that may arise down the road. That way, the parties can position themselves as best as possible to avoid a situation where the company needs to ask for an additional amendment to the loan documents in the near future. For example, a company may be seeking to address a financial reporting default through a loan agreement, but the company may also be aware that it is unlikely to be able to satisfy certain financial covenants in the loan agreement, such as a debt service coverage ratio that is to be computed in the near future. In such a situation, it may be in the company's best interest to address this potential future default in the current loan amendment.

Waivers

Waiver agreements will most often be used when there is a onetime covenant breach that the lender determines will not materially prejudice its ability to receive payment on the loan. A waiver by the lender of a default or event of default will allow the relationship between the lender and the company to continue unimpeded despite the occurrence of a default under the agreement.

These defaults may include such things as failure to timely deliver financial reports and information or failure to maintain certain required financial ratios over a certain period of time. When these events occur, a lender will analyze the company's financial situation and may determine that, under the particular circumstances, the pursuit of remedies under the loan agreement is not beneficial to the lender. A lender will need to consider what, if any, changes to the loan agreement or other consideration are warranted in order for such lender to consent to a waiver of a default. In determining what changes need to be made, the parties will need to identify the particular covenant or covenants as to which the company is in default and any other covenants with which the company anticipates having trouble complying in the future. The parties may then need to engage in discussions, if necessary, because the default is expected to reoccur in the future, as to how such covenants can be modified in a manner that will reduce the likelihood of a future default. For example, if the particular default relates to the timeliness of satisfying financial reporting obligations, the parties may determine that it is necessary to amend the agreement to extend the time in which the company is required to provide such financial information to the creditor.

Below is a non-exhaustive checklist of items that parties should consider in determining whether a waiver is appropriate under the circumstances and the conditions under which the lender will agree to such a waiver:

- The extent and nature of any existing or anticipated defaults
- The materiality of the existing or anticipated defaults
- The likelihood that subsequent defaults will occur
- Applicable cure periods
- The rights and remedies available to creditors
- The identity of creditors to be parties to the waiver agreement
- Whether any consents are needed from other creditors or parties-in-interest
- Whether any steps will need to be taken by the company (or whether any modifications to the loan agreement are needed) to reduce the likelihood of subsequent or recurring defaults

Provisions

A waiver agreement typically will recite the default or event of default that occurred (or is alleged to have occurred) under the loan agreement and will clearly state that the lender agrees to waive the specified default or event of default and agrees not to pursue its rights and remedies against the company as a result thereof. As a part of the waiver agreement, the lender may require the inclusion of various provisions designed to protect its interests, including, among other things, (1) acknowledgments by the company as to the amount and validity of the indebtedness and the validity and perfection of any liens granted in favor of the lender, (2) a ratification of the loan documents, (3) a waiver by the company of any defenses to repayment of the indebtedness, and (4) a general release of claims by the company against the lender. These provisions are common in waiver agreements and, unless a borrower has a valid reason to dispute any of these items, will generally be part of the final waiver agreement.

The parties may also need to analyze the circumstances that led to the company's request for a waiver in order to determine whether it is appropriate to modify the loan agreement to reduce the likelihood of a similar situation arising in the future. For example, the parties may determine that the current time frame for delivery of financial reports or other information is not feasible for the company and, therefore, it is necessary to modify such time frame.

Subordination Agreements in Workouts

A company engaged in a loan workout or refinancing will need to consider whether there is any subordination agreement in place between the lender and other creditors and what effect this agreement may have on negotiations.

Where there is junior debt issued or obligations incurred by a company, the senior lender may seek to enter into a subordination agreement with the junior creditors in order to define the rights as between the parties. A typical subordination agreement may include provisions providing for (1) payment subordination (i.e., providing that the junior creditors will not receive payments until the senior lender is paid the full amount of what is owing to it), (2) lien subordination (providing that the junior creditors' lien on collateral is subject and subordinate to the senior lender's lien on the collateral), and (3) limiting the junior creditors' ability to pursue remedies against the company or its assets if there is a default.

Such an agreement may provide more flexibility to a company and its senior lender in working out potential default issues since the junior creditors may be significantly limited in the actions that they are permitted to take against the company. However, it is important for a company engaging in workout or refinancing negotiations to fully understand the rights of junior creditors under any such subordination agreement.

The company also will need to properly analyze, among other things, whether the consent of other creditors is required in order to enter into a forbearance, waiver, or other agreement, and whether there are any cross-default issues that need to be addressed by the company. In making this determination, the company will need to review not only the provisions of any intercreditor or subordination agreements, but also any applicable credit and loan documents with other creditors.

If the consent of other creditors is needed in order to consummate a workout or refinancing in connection with a loan agreement, then a company should begin discussions with the appropriate creditors regarding such consent as early in the process as is practicable. Failure to do so could jeopardize the company's ability to complete a workout with its lender within the required time frame. In addition, the company may need to enter into separate agreements with other creditors to waive or forbear on exercising any rights in connection with any cross-defaults that may occur. If such agreements are necessary, the company should consider contacting the appropriate creditors to inform them of the default situation and what effect the workout or refinancing may have on the company's ability to perform under the agreements with such creditors. In many cases, a workout or refinancing of the senior debt will improve the company's ability to satisfy junior debt obligations and to otherwise perform under its agreements with junior creditors. Therefore, such creditors may determine that granting a waiver or forbearance of potential cross-defaults is beneficial to them as well.

Tax Issues in Workouts

Parties engaged in loan workout negotiations must be aware of potential tax consequences of restructuring indebtedness. Therefore, undertake a tax analysis as part of the restructuring and workout process. One of the major tax issues that can arise is the incurrence of cancellation of indebtedness (COD) income by the company, which is expressly included in the definition of gross income under the Internal Revenue Code. COD income will be an issue where there is a modification of the loan that reduces the amount of the indebtedness. For example, if, as part of a loan workout, the lender agrees to reduce the principal amount of indebtedness owing from $5 million to $4 million, the company would realize $1 million of COD income in the year of the loan modification.

There are, however, certain exceptions that may protect a company from having to recognize COD income. Two common exemptions are if the indebtedness is discharged as part of a bankruptcy proceeding or while the company is insolvent. Under these circumstances, the company may be able to exclude COD income from its gross income; however, the company may instead be required to reduce certain tax attributes by the amount of COD income that is excluded from gross income. In order to avoid any unexpected tax consequences as a result of a loan workout or refinancing, the company must analyze any potential tax implications and should engage outside advisors to assist in this process as necessary.

Risks of Preference Exposure

A loan restructuring or workout may involve an agreement pursuant to which the company makes periodic payments to a lender or grants additional liens on otherwise unencumbered assets to the lender as security for the loan. However, if the company subsequently files for bankruptcy, there is a risk that these payments or the grant of the security interest may be subject to avoidance under the applicable provisions of the Bankruptcy Code.

One power that a debtor or trustee possesses in bankruptcy is the power to commence actions to avoid certain prepetition transfers as being preferential to one creditor over another creditor or creditors. The basic elements of a preference include (1) a transfer, (2) of an interest of the debtor in property, (3) to or for the benefit of a creditor, (4) on account of a preexisting debt, (5) made while the debtor was insolvent, (6) made on or within 90 days of the bankruptcy or one year in the case of transfers to insiders, and (7) which enables the creditor to receive more than if the bankruptcy estate was liquidated in a chapter 7 case.

There are certain defenses that may be available to a lender that is a defendant in a preference action. One defense is the ordinary course of business defense, which prohibits the avoidance of a transfer in payment of a debt by the debtor if the transfer was made in the ordinary course of business or financial affairs of the debtor and the transferee or the transfer was made according to ordinary business terms. Some courts have held that payments made pursuant to a workout agreement do not fall within the ordinary course of business exception; however, other courts have found such payments may fall within this exception depending on the particular facts and circumstances.

Related Content

For guidance on exchange offers in a workout and other debt securities restructurings, see

> BUSINESS WORKOUTS

RESEARCH PATH: *Bankruptcy > Prepackaged Plans, Workouts and Other Out-of-Court Restructurings > Workouts > Practice Notes*

For a discussion of considerations related to whether and how a company may restructure its debt securities, see

> DEBT SECURITIES RESTRUCTURING OPTIONS

RESEARCH PATH: *Bankruptcy > Prepackaged Plans, Workouts and Other Out-of-Court Restructurings > Other Out-of-Court Restructurings > Practice Notes*

For a sample waiver document, see

> WAIVER (BANKRUPTCY, LOAN AND OTHER DEBT WORKOUTS)

RESEARCH PATH: *Bankruptcy > Prepackaged Plans, Workouts and Other Out-of-Court Restructurings > Workouts > Forms*

For more information on preferences and defenses to preference actions, see

> PREFERENCES

RESEARCH PATH: *Bankruptcy > Bankruptcy Litigation > Avoidance Actions > Practice Notes*

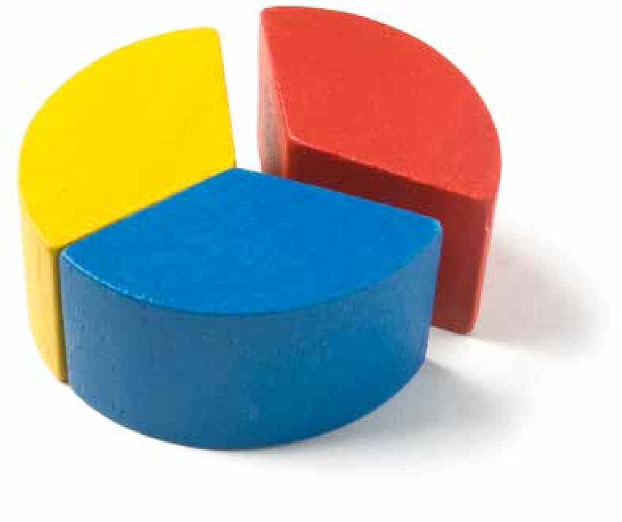
> Often in a workout situation a group of bondholders will band together to form an ad hoc committee of bondholders in order to pool resources to hire advisors and coordinate the negotiations with the company.

Another defense that may be available is the new value defense, which prohibits the avoidance of a transfer that was intended by the debtor and the transferee to be a contemporaneous exchange for new value given to the debtor, and the transfer was in fact a substantially contemporaneous exchange. Several courts have held that a forbearance from exercising remedies does not constitute new value, such that a lender may need to consider providing other concessions and value to the company as part of a loan workout if it wants to fall within the new value defense to an avoidance action. Such concessions may include an adjustment to rates or fees or to certain covenants in the loan documentation that make compliance therewith easier for the company.

Exchange Offers

In the event that the parties with which the company needs to negotiate in order to achieve its restructuring are a small group of creditors, such as one or two lenders under a loan agreement, the holder of a promissory note, a handful of debt security holders, and/or a landlord or trade creditor, the company may find it relatively easy to contact, communicate, and agree upon a resolution with such creditors. However, in the event that the company has issued public debt securities (whether they are regularly traded or not), the company may have a difficult time (1) locating all of the holders and/or (2) obtaining the consent of the requisite holders of such securities in order to achieve approval of the proposed restructuring. In such a case, the company may need to initiate an exchange offer in compliance with federal and state securities laws in order to solicit consent to the company's restructuring proposal. An exchange offer typically involves a company's offer for existing holders of the company's debt securities to exchange such securities for new securities. Often the new securities will have different terms, maturities, and/or face value than does the company's existing securities. Often the indenture or other documents under which a company's debt securities have been issued will provide that certain amendments to the securities can be achieved with less than 100% holder consent.

Moreover, with respect to those amendments that require the consent of each affected security holder (typically any amendment to the amount or maturity of the security will required consent of the affected holders), to the extent that the company can achieve a significant percentage of consents to the proposed amendment (typically more than 90% of existing debt), the company may be willing to leave the remainder of the existing debt that does not consent outstanding. In such a case, the company would need to continue to pay the debt that is not restructured according to its original terms.



Bondholder Committees

Often in a workout situation a group of bondholders will band together to form an ad hoc committee of bondholders in order to pool resources to hire advisors and coordinate the negotiations with the company. Doing so will often give a group of creditors a larger, more coordinated voice in negotiations with the company. From the company's perspective, the formation of such a committee can have positive and negative implications. The positives include that it is often easier for a company to negotiate with one group of creditors that are in sync with one another (assuming that is the case) than it would be to negotiate with many different independent creditors all having a different perspective on the restructuring. However, that positive can also be a negative if the committee is dominated by individuals who the company believes are not being reasonable in their demands. A bondholder committee can be very useful in the company's efforts to achieve a restructuring via an exchange offer as security holders that have not been involved in the pre-exchange offer negotiations may be influenced by the recommendation and support of the proposed restructuring by the bondholder committee. In addition, the members of any such committee typically will enter into a lock-up agreement agreeing to exchange the securities they hold pursuant to the exchange offer.

Simultaneous Solicitation of Chapter 11 Plan

The Bankruptcy Code allows a company to obtain approval of its restructuring plan over the objection of certain creditors so long as at least two-thirds in amount and more than one-half in number of the claims in a particular class accept the plan. Thus, to the extent that a company has the consent of a sufficient number of its bondholders to meet this threshold, the company can obtain approval of its restructuring plan in bankruptcy and bind all bondholders, even those that have not provided their consent. For this reason, a company should consider seeking votes on a bankruptcy plan at the same time that it seeks consents for its exchange offer. In this way, if the company fails to achieve the threshold that it has targeted to accomplish an out-of-court exchange of debt securities (again, typically more than 90%) but does obtain the 66.67%/50.1% threshold noted above, the company could choose to file for bankruptcy and seek to bind all of its bondholders to the proposed restructuring.

Conclusion

During normal economic time, distressed companies will need to explore these options by expending significant time and resources assessing their financial situation and communicating with lenders. These difficult tasks are exacerbated by the Coronavirus pandemic. Companies need to now re-assess their financial condition, analyze their short-term and long-term liquidity needs, re-forecast their projections, and review their loan documents. Given the uncertainty and changing nature of the pandemic response, companies should continuously re-evaluate their financial condition and maintain an open dialogue with their lenders. Companies can maximize their chances of a successful loan workout by starting this process early and understanding the options outlined in this article. L

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RESEARCH PATH: *Bankruptcy > Prepackaged Plans, Workouts and Other Out-of-Court Restructuring > Workouts > Practice Notes*

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Technology will be Key to Real Estate Recovery

IT IS NOW SEVERAL MONTHS SINCE THE COVID-19 HEALTH crisis emerged in the United States, the immediate impacts on the PropTech industry have crystallized. Real estate operations have changed in fundamental ways—office spaces have been vacated; warehouse and distribution centers have continued operations but supply chain issues and employee health concerns are prevalent; retailers, other than the limited spectrum qualifying as essential businesses, have closed brick-and-mortar locations; occupancy at hotels and resorts has hit record-lows; and healthcare facilities have undergone a wave of changes aimed at addressing the severe stress on the healthcare system. But in these changes, which are certainly painful for organizations in the near term, lie long-term opportunities for growth.

The PropTech movement has exploded in the last two-to-three-year period with the rate of growth increasing year-over-year. Record amounts of private capital have been invested in real estate innovation; partnerships between real estate operators and creative technology developers have accelerated; and most importantly, the value derived from the implementation of technologies by real estate operators has been tested and validated by the operators themselves.

As 2020 began, the real estate side of the PropTech equation was making significant progress around self-adoption of technological change. Industry trends had generally shifted from disruptive approaches by tech leaders who had identified business opportunities in real estate operational inefficiencies, to negotiated and welcomed real-estate-tech partnerships driven by demands from real estate buyers, operators, and tenants. This buy-in by real estate was what the industry needed to move to its next stage of growth.

The COVID-19 Tipping Point

Though the health crisis has temporarily slowed momentum—and will continue to do so—when the economic environment stabilizes and rebounds, PropTech will emerge with more explosive growth. While the real estate industry was beginning to embrace change, it was still relatively slow progress. When asked to summarize key aspects of the PropTech industry, experts will describe the industry as a nascent one. The COVID-19 crisis has further exposed vulnerabilities and friction points in real estate, in some cases to a degree that will necessitate complete rebuilding of core business models. This is a time to reflect on key aspects of the PropTech industry's success in recent years and to recognize where real estate companies can capitalize on those proof-of-concept technology-driven models to rebuild for the future.

The following is a real estate asset class-specific overview supporting the vision that PropTech industry growth will pick up pace with tailwinds when the crisis lifts.

Office

U.S. workers are predominantly working from home today, and business is being conducted via digital means more often than ever before. Employees are adapting to working remotely with efficiency, and tenants will examine how much office space is needed for the future. Flexible office models, short-term leases, and a variety of space-as-a-service offerings were already growing in popularity pre-crisis, which will be further accelerated. In the near term, employers may opt to reintegrate employees to the office on a staggered basis in order to limit employee-to-employee exposure, which will require less use of physical space.

In addition, the health and wellness capabilities of office properties will grow significantly. Air quality and ventilation and employee and other occupant safety and health measures and protocols—including biometric technologies, hands-free access, and location tracking—will be expected when employees return to the office, and attention will be paid to balancing the privacy considerations associated with such measures.

Industrial

Warehousing and logistics are segments that have thrived alongside the progression of e-commerce. COVID-19 consumer demands however, have exposed significant supply-chain vulnerabilities of key e-commerce-driven retailers. There is both room for improvement for these existing players and opportunity for retailer diversification in the e-commerce channel. As retailers rebuild and expand with more online presence, fulfillment and last-mile delivery capabilities will involve more space utilization and development of industrial properties. Robotic and other automated outfitting of warehouses, including the ability to coordinate with delivery drones, may also be technological features that are more frequently adopted for employee and customer safety, health considerations, and fulfillment efficiencies.

Lodging

Hotels have suffered record declines in occupancy rates and bookings due to COVID-19's impact, highlighted by social distancing and the rise in unemployment, causing the travel industry to halt. In the near term, some vacant hotel space is being utilized to house healthcare workers in locations close to healthcare facilities, and hotels may do the same for COVID-19 patients. The lodging sector recovery should involve the implementation of software-driven booking platforms that attract consumers with interactive digital means to engage with the hotel and local experience of the destination. The branding and marketing success of Airbnb has captured this web-based accessibility to its rental locations, drawing on the experience that consumers seek when they book travel. Many traditional hotel operators have recently shifted to more technologically-enhanced platforms, which should be more universally adopted for future success.

Hotels will also need to offer clean protocols in order to attract guests who will be concerned about health risks, as travel will be viewed as a luxury rather than a necessity for the immediate future. Predictive maintenance and clean-energy systems, health and wellness standards, smart technologies with occupant sensors, and effective marketing around the associated technologies will be key aspects to guest experience.

Retail

Many non-essential business brick-and-mortar retailers have closed as a result of the pandemic. In order to maintain operations in this environment, these retailers have shifted weight to online operations in efforts to maintain revenues. Retail e-commerce is a phenomenon that has caused significant declines in many retail operations in the last decade, and though some retailers have survived until now, they have suffered from decreased market share. Now, customer traffic to physical stores is virtually zero. The consumer behaviors that are developing will have some permanent impact, and retailers should forecast with this assumption and resume operations with either a mix of physical and online presence or a shift to an e-commerce focused model.

If retailers are perceptive to these trends, there is significant opportunity for the sector to emerge with more competitive balance opposite Amazon, which has showed supply-chain vulnerabilities. As a result of conditioning its customers to expect virtually immediate delivery of goods, and sometimes failing to deliver on its core promise in a crucial period, some customers have turned elsewhere. Many customers will form loyalties with other staple retailers like Walmart, Target, and wholesalers BJs and Costco, which have all wisely and rapidly ramped-up tech-driven logistics capabilities in order to regain market share.

Consumers are also developing online buying habits for groceries during this period due to social distancing and other health considerations. While these buyers will eventually return to physical stores, many have now placed grocery orders online for the first time. The expansion of consumer knowledge of online access capabilities will result in an increase in grocery e-commerce post-pandemic, which will impact grocery retailers that fail to innovate.

Restaurants have also suffered tremendous losses. Most restaurants have closed (or have been ordered to close), and patrons are opting to prepare their own food versus takeout for health concerns. When dine-in operations resume, ensuring that food is prepared, served, and consumed under clean protocols will be the subject of high scrutiny. Ghost kitchens and delivery-only models will likely be in high demand.

Residential

The residential market remains relatively stable. Homeowners and renters are staying in place during the current period of uncertainty, which may change based on the economic climate going forward. For residential transactions that are occurring, real estate brokerage firms are utilizing virtual touring technology rather than open houses or other physical tours of properties for social distancing concerns, and these are technologies that will likely stick when the pandemic subsides.

Smart home technologies are also in high demand as workers set up home office spaces. To the extent that remote working remains prevalent following the pandemic, workers will likely continue to demand (and states may mandate) working conditions that mirror their office experience. Working from home also means that e-commerce sales will comprise the primary channel of retail activity. These transactions may be facilitated through IoT hub devices in the home such as Amazon's Echo and Alexa. In addition, as most in-home services on appliances by third-party providers have been suspended, predictive maintenance technologies are becoming attractive to consumers. Sales of home security technologies, which communicate with IoT devices, have also increased significantly since the onset of COVID-19.

Data Centers, Cell Towers, & The 5G Network

Data centers and cell towers are low risk sectors during the pandemic because they have limited negative impact from social distancing. Real estate companies in this category have had high financial returns in recent years and therefore generally enter this challenging economic period with high liquidity and borrowing capacity. Providing the infrastructure to the eventual implementation of 5G has been an event on the horizon correlated to positive impact on operations. Prior to 2020, the rise of the 5G network has been gradual as telecom providers have implemented 5G service on an as-demanded basis, and some consumers have hesitated to adopt due to increases in cost. The pandemic has forced much of the U.S. workforce to work from home, and the remote-work business model has created heightened demand for network capacity, including the demand for entertainment content. 5G is more capable of serving the higher bandwidths that are needed to accommodate the increase in network technologies being utilized. Data centers and towers will serve as the infrastructure to deploy these network services.

Life Science

Life sciences companies have not been immune to the adverse consequences of the pandemic. Fortunately, however, many states that issued stay-at-home orders carved out exceptions that have allowed many life sciences companies to continue their operations during this pandemic. While there have been significant business interruptions resulting from the COVID-19 outbreak as life sciences companies have considered the safety and well-being of their employees and accordingly restricted access to their facilities mostly to personnel and third parties who must perform critical activities on site and limited the number of such personnel that can be present at the facilities at any one time, operations have largely continued. The research and development, preclinical, and clinical activities of life sciences companies require facilities and onsite access remains paramount. The real estate needs of biotech, medical device, digital health, and pharmaceutical companies consist of laboratories; storage facilities for specimens, reagents, and patient samples; and manufacturing facilities. As global pharmaceutical research and development spending is increasing, so is the demand for high-end biotech space to accommodate growing lab and office needs. The global health crisis has further highlighted the necessity for continued innovation in the life sciences industry to address evolving healthcare needs. There will be an abundance of opportunities for commercial real estate to design, develop, and operate the specialized facilities required by these companies' unique space needs.

Conclusions

COVID-19 has put unprecedented stress on real estate operations. But the industry will recover, and being forced into a rebuilding phase provides the opportunity for real estate leaders to reflect on how to re-position real estate business with strength for the future. The well-reported narrative has been that real estate is both the planet's largest industry and the last industry to embrace technology. Some of this delay has been attributable to the fact that the view of many real estate operations is that their business does not need fixing. The health crisis has brought the slow adopters in the industry along with the rest of the economy to a point where fixing will be required for survival. The paths to technological change for real estate were paved in the last several years of the PropTech industry's accelerated growth, and now is the time for full immersion. Much of this will be mandated by the technological demands surfaced by the health crisis, but forward-looking real estate leaders will understand that tech adoption will position the business for sustainable long-term growth well beyond recovery from the pandemic.

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

RESEARCH PATH: *Real Estate > Trends & Insights > Practice Notes*

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RESEARCH PATH: *Real Estate > Trends & Insights > First Analysis > Articles*

For practical guidance for property owners regarding how they can protect their assets during the COVID-19 pandemic, see

> **STEPS THAT PROPERTY OWNERS SHOULD CONSIDER TAKING DURING THE COVID-19 PANDEMIC TO PROTECT THEIR REAL ESTATE ASSETS**

RESEARCH PATH: *Real Estate > Trends & Insights > First Analysis > Articles*

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> **TURBULENT TIMES AHEAD—REMEMBER THE REAL ESTATE WORKOUT?**

RESEARCH PATH: *Real Estate > Trends & Insights > First Analysis > Articles*

RESEARCH PATH: *Real Estate > Commercial Purchase and Sales > Miscellaneous Ownership Issues > Articles*

Deborah Yoon Jones ALSTON & BIRD LLP

Force Majeure Clauses in the Face of COVID-19: **Commercial Leasing Guidance**

This article explains what a force majeure clause is and how and under what circumstances a force majeure clause in a commercial lease may be invoked due to the novel coronavirus (COVID-19).

THE ARTICLE ADDRESSES THE LIKELIHOOD THAT A FORCE majeure clause will be enforced in California, other related impossibility defenses, and considerations for commercial lessors and lessees going forward. Have no doubt about it—if you are a lessor or a lessee (or their counsel), you will be forced to understand the concept of force majeure in the months or even years ahead.

California Commercial Real Estate Leases and COVID-19

Remember when the 2008 financial crisis seemed like the worst thing that could happen to a generation? Or perhaps in the past, your client's business was interrupted by bad weather, earthquake damage, or even an outbreak of norovirus or other sickness halting or disrupting operations for a short while. No one could have imagined the situation that the world finds itself in now, and we are undoubtedly just beginning to see the ripple effect that the COVID-19 pandemic will have on businesses around the world.

California is one of the states with the highest numbers of infected individuals in the country. Governor Gavin Newsom has ordered all residents of California to stay at home "except as needed to maintain the continuity of operations of the federal critical infrastructure sectors."[1]

The Safer at Home Order permits only specified essential businesses to remain open, which includes businesses in the commercial facilities sector. As a result, commercial real estate lessors and lessees have been closely reviewing their leases for a contractual basis to consider the likely mounting requests for rent relief, abatement, waivers, excused performance, or even notices of termination. Undoubtedly, force majeure clauses are being carefully considered to determine next steps.

1. Safer at Home Order for Control of COVID-19 (Safer at Home Order), Executive Order N-33-20 (March 21, 2020).

What Is a Force Majeure Clause?

General commercial contracts (including commercial real estate leases) often contain a force majeure clause that excuses performance of the contract under certain specified conditions. While some may equate force majeure with only excusing acts of God, such as extreme weather events (e.g., tornadoes, hurricanes, earthquakes, etc.), force majeure also extends to those impossibilities caused by human acts as well.[2] Human acts, as distinguished from acts of God, include governmental actions, acts of war, economic downturn, and terrorism.

In California, the test for determining if performance can be excused based on a force majeure event is "whether under the particular circumstances there is such an insuperable interference occurring without the parties' intervention as could not have been prevented by prudence, diligence and care."[3]

What Does a Force Majeure Clause Do (or Not Do)?

A force majeure clause is not intended to buffer a party against the normal risks of a contract, and a court will not interpret a force majeure clause to excuse a party from the consequences of a risk that it expressly assumed if it would nullify a central term of the contract.[4]

In California, a party seeking to invoke a force majeure clause has to show "that in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive."[5] In fact, just because performance of a contract obligation will be more costly than anticipated, it will not be excused by a force majeure provision unless there "exists extreme and unreasonable difficulty, expense, injury or loss involved."[6]

In addition, unless a contract explicitly identifies an event as force majeure, the event must be unforeseeable at the time of contracting to qualify as such.[7] Absent agreement to the contrary, responsibility for reasonably foreseeable force majeure delays generally falls on the party responsible for performing the work.[8]

Furthermore, the nonperforming party has the burden to prove impossibility of performance under a force majeure clause.[9] If there is substantial evidence in the record that a force majeure clause does not excuse performance, a court will find the nonperforming party in breach of the contract.[10] In addition, to constitute a force majeure, a qualifying event must be the proximate cause of nonperformance of the contract.[11]

In other words, a force majeure is not a get-out-of-jail-free ard that can be used for every act of God or other unforeseeable event to excuse performance, and it will not automatically excuse performance because of COVID-19 or the Safer at Home Order. If you are a lessor, the provision may not protect you if you fail to perform the duties and obligations owed under the lease terms (e.g., making premises available, providing for utilities, etc.). For a lessee, despite the unprecedented and outrageous nature of our current circumstances, you may not be excused from your rent payment obligations or other duties owed under the lease terms.

Does Your Force Majeure Provision Excuse Performance of the Lease?

Whether you are a lessor or lessee, and whether you are trying to determine if your or the other party's performance is excused under the force majeure provision (or other defense), the first thing to figure out is whether the force majeure provision in your lease excuses the specific performance that concerns you. Assuming such a provision exists in your agreement, consider the following questions:

- What events are specifically identified?
- Is the language general and overbroad?
- Does the language specifically excuse the relevant performance? (e.g., is there language that excuses payment of rent due to a specified force majeure event?)
- Does it excuse a lessor from providing access to real estate in the event of a force majeure event?
- Is the language ambiguous or overly broad?

Note that California courts have scrutinized the language of force majeure provisions and generally require that they excuse performance by a party only if the terms unambiguously excuse the specific performance at issue. In *Vanguard Integrity Professionals, Inc. v. Team Gordon, Inc.*,[12] for example, the plaintiff tried to cancel its sponsorship obligations for an international off-road race due to terrorist threats. The contract allowed

2. Mathes v. Long Beach, 121 Cal. App. 2d 473 (1953); *see also* Emelianenko v. Affliction Clothing, 2011 U.S. Dist. LEXIS 165598 (C.D. Cal. July 28, 2011). 3. Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn., 4 Cal. App. 4th 1538, 1564–65 (1992); *see* Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal. 2d 228, 238 (1946). 4. *Horsemen's Benevolent & Protective Assn.*, 4 Cal. App. 4th at 1565. 5. Oosten v. Hay Haulers Dairy Employees & Helpers Union, 45 Cal. 2d 784 (1955) (buyer refused to accept seller's milk because buyer's employees threatened to go on strike if they had to handle milk; however threatened strike did not render performance impossible under the force majeure clause); *see also* Jin Rui Group, Inc. v. Societe Kamel Bekdache & Fils S.A.L., 621 Fed. App'x 511 (9th Cir. 2015) (force majeure clause did not excuse plaintiff from performing contract even though contract excused it from non-delivery "arising from any event beyond its reasonable control" where plaintiff promised to deliver paper to defendant without securing assurance from third-party supplier); and Nissho-Iwai Co., Ltd. V. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540–42 (5th Cir. 1984) (noting California law reads into force majeure provisions a good faith requirement that the party invoking the defense did not cause the excusing event and took diligent and reasonable steps to ensure performance). 6. Butler v. Nepple, 54 Cal. 2d 589, 599 (1960). 7. Watson Labs. Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1111 (C.D. Cal. 2011) (FDA shut down of plant was foreseeable and thus not a force majeure event excusing performance); Free Range Content, Inc. v. Google, Inc., 2016 U.S. Dist. LEXIS 64365 (N.D. Cal. May 13, 2016) (given that burden was explicitly placed on the plaintiff and did not identify the invalid activity as a qualifying force majeure event, performance was not excused). 8. McCulloch v. Liguori, 88 Cal. App. 2d 366, 372 (1948). 9. *Butler*, 54 Cal. 2d 598 (1960). 10. Warner Bros. Pictures, Inc. v. Bumgarner, 197 Cal. App. 2d 331 (1961). 11. Hong Kong Islands Line America S.A. v. Distribution Servs. Ltd., 795 F. Supp. 983, 989 (C.D. Cal. 1991). 12. 2008 U.S. Dist. LEXIS 127188 (C.D. Cal. Nov. 10, 2008).

> Take a close look at your force majeure provision because this is the first place the courts look to determine whether performance under your lease is excused.

the plaintiff to terminate if the defendant failed to perform any of the material obligations without cure. The contract specifically assigned the risk of loss to the defendant if it failed or refused to provide a race vehicle for three races for any reason, whether or not due to factors within or beyond the defendant's reasonable control. The race was cancelled due to a terrorist risk. Because the force majeure language did not clearly state that the defendant assumed the risk of race cancellation due to an event like a terrorist threat, the court found that the defendant was not in breach even though the race was cancelled due to factors beyond defendant's control. Accordingly, given the ambiguity, there was a triable issue on the applicability of the force majeure provision.

If a force majeure provision is broadly worded, a court may also find that it could possibly cover an event that prevents performance. In *Rio Properties v. Armstrong Hirsch Hackoway Tyerman & Wertheimer*,[13] for example, the force majeure provision broadly stated that it applied if "any party's performance became impossible by any [] cause" (except for any cause that either party had knowledge of). The court found that Rod Stewart's performance could be considered impossible due to his illness, even though the contract did not explicitly identify that as a force majeure event.

Take a close look at your force majeure provision because this is the first place the courts look to determine whether performance under your lease is excused. Is it possible that the language would excuse performance under the lease due to the COVID-19 or the Safer at Home Order? Or is the language so ambiguous and/or overbroad as to potentially include it as a force majeure event?

What Events Qualify as Force Majeure Event?

As for events that may or may not qualify as force majeure events, there is no California case law that addresses a situation even remotely similar to the COVID-19 pandemic. The closest events that could be applicable here are those involving world wars or governmental actions that prevent performance. Given that commercial leases vary greatly as to types of properties, uses, and contract language, it is important to understand the existing legal authority interpreting force majeure.

The following events have been held to be force majeure events that excused performance:

- **Wars.** *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*,[14] (World War II excused performance under a force majeure clause).
- **Illness.** *Rio Properties v. Armstrong Hirsch Hackoway Tyerman & Wertheimer*,[15] (Rod Stewart's illness rendered his performance impossible, and broadly phrased force majeure applied).
- **New laws/ unlawfulness.** *Industrial Development & Land Co. v. Goldschmidt*,[16] (after signing lease for a winery and liquor business, the prohibition law came into effect making it unlawful to operate; lessee not bound for remainder of the lease term).
- **Specifically identified event.** *InterPetrol Bermuda Limited v. Kaiser Aluminum International Corp.*,[17] (failure or delay of seller's supplier of product and transportation was a force majeure event because it was specifically called for in the force majeure language agreed upon).

The following events have not been sufficient force majeure events to excuse performance:

- **Limiting or restricting government regulation.** *County of Yuba v. Mattoon*,[18] (lessee agreed to lease land for percent of rice grown (or minimum rent) but did not use the land because it had to grow rice on other land; lessee was ordered by Department of Agriculture to limit rice production but performance was not impossible and lessor was entitled to minimum rent); see also *San Mateo Community College Dist. v. Half Moon Bay Ltd. P'ship*,[19] (air quality regulations impeded drilling but did not render performance impossible).

13. 94 F. App'x 519 (9th Cir. 2004). 14. 29 Cal. 2d 228, 238 (1946). 15. 94 F. App'x 519. 16. 56 Cal. App. 507 (1922). 17. 719 F.2d 992 (9th Cir. 1984). 18. 160 Cal. App. 2d 456 (1958). 19. 65 Cal. App. 4th 401 (1998).

- **Threatened strike.** *Oosten v. Hay Haulers Dairy Employees & Helpers Union*,[20] (force majeure language referenced strike; threatened strike was not enough).
- **Non-impacting strike.** *Butler v. Nepple*,[21] (although a force majeure clause in an oil drilling lease excused performance while the lessee was prevented from complying with its oil drilling obligations, in whole or in part, by strikes, the court of appeal upheld the trial court's decision that the lessee could have drilled for oil despite a steel strike because substantial evidence in the record showed that lessee had a list of casing companies willing to perform and it was not an excuse that lessee would have to pay premium prices for the casing due to the steel strike); see also *Warner Bros. Pictures, Inc. v. Bumgarner*,[22] (despite a force majeure clause in an employment contract that excused performance (paying of an actor's salary) if the preparation, production, or completion of motion pictures was prevented or materially hampered or interrupted by reason of strike, a writer's strike did not suspend production because there was substantial evidence in the record that production was scheduled to start subsequent to the writer's strike, and in years past scripts were not needed until right before production).
- **Increased expense/economic impact.** *Butler v. Nepple*,[23] (increased prices of oil drilling casing due to a steel strike did not absolve a lessee's performance despite a force majeure clause that excused performance from strikes because there was no evidence that the expense was extreme or unreasonable); *Horsemen's Benevolent & Protective Assn. v. Valley Racing Association*,[24] (force majeure provision could not be construed "to countenance a unilateral modification of payouts merely because the revenues were not as projected"); *Hong Kong Islands Line America S.A. v. Distribution Services Limited*,[25] (force majeure provision required nonperforming party to prove that the claimed events made shipments impossible or unprofitable; however nonperforming party chose not to comply with the contractual obligations and instead chose another carrier to ship cargo; claimed force majeure events did not proximately cause the nonperformance); *San Mateo Community College Dist. v. Half Moon Bay Ltd. P'ship*,[26] (force majeure did not apply because market was poor and did not show impossibility); *Citizens of Humanity, LLC v. Caitac Intern., Inc.*,[27] (nonperforming party was aware of decline in Japanese market at the time agreement was signed and could not rely on any force majeure to excuse performance; in addition, contract provided, "[f]orce majeure shall not, however, excuse the obligation of a party to make any payments required under this Agreement.").
- **Normal risks.** *Emelianenko v. Affliction Clothing*,[28] (defendant was unable to rely on doctrine of force majeure because plaintiff's opponent became ineligible to fight as a result of testing positive for steroid use, given that plaintiff had presented evidence from which a jury could have reasonably concluded that the opponent's ineligibility was one of the normal risks of a bout contract).

20. 45 Cal. 2d 784 (1955). 21. 54 Cal. 2d 589 (1960). 22. 197 Cal. App. 2d 331 (1960). 23. 54 Cal. 2d 589 (1960). 24. 4 Cal. App. 4th 1564-65 (1992). 25. 795 F. Supp. 989 (C.D. Cal. 1991). 26. 65 Cal. App. 4th 401 (1998). 27. 2010 Cal. App. Unpub. LEXIS 6194, at *44–45 (Aug. 3, 2010). 28. 2011 U.S. Dist. LEXIS 165598.

Other Principles Related to Excused Performance of Contractual Obligations

In addition to the force majeure provisions in your lease, the principles of impossibility, impracticability, and frustration of purpose can also come into play and excuse performance for parties to a lease.

- **Impossibility.** The doctrine of impossibility excuses performance that becomes impossible to perform or impractical because of extreme and unreasonable difficulty, expense, injury, or loss involved. Impossibility also requires that the event causing it is not foreseeable at the time the contract was entered into. Like force majeure, impossibility can also be based on an act of God. Cal. Civ. Code § 1511, for example, excuses performance of a contract when a party "is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary."[29]
- **Impracticability.** The doctrine of impracticability excuses performance that becomes impractical due to "excessive and unreasonable expense" but does not include "mere difficult, or unusual or unexpected expense."
- **Frustration of purpose.** The doctrine of frustration will excuse performance if the purpose of the contract has been frustrated by "a supervening circumstance that was unanticipated such that performance is substantially destroyed."

Like a force majeure provision, these doctrines can be used to excuse performance; however, they, too, have their limitations.

General Case Law

Impossibility excuses performance when it has literally become impossible. In *Collins Hotel Co. v. Collins*,[30] for example, a building height ordinance prevented the builder from building the promised hotel, which would have exceeded the height limits.[31]

Alternatively, if there are increased costs associated with performance or one that could have been reasonably anticipated, the doctrine of impossibility will not apply.[32]

Case Law That Might Provide Guidance for COVID-19 Situations

Lessors and lessees of commercial real estate should pay particular attention to the following decision which, while old, may provide guidance to courts in dealing with the issues and claims arising out of the COVID-19 situation and Safer at Home Order.

In *Mitchell v. Ceazan Tires, Ltd.*,[33] the California Supreme Court did not invalidate a lease by commercial frustration where the United States' involvement in a war was imminent and the federal government imposed a war time restriction on the sale of new automobile tires. The lessee had rented space in a building for the purpose of operating a tire wholesale outlet store, and the court held that the value of the lease was not completely destroyed. The lessee was still free to operate a business related to the sale of tires or sublease the premises.[34]

29. *See also* Cal. Civ. Code § 1441 (holding that a contract that is impossible or unlawful to fulfill is void); Cal. Civ. Code § 1596 (the object of a contract must be lawful when the contract is made and possible and ascertainable by the time the contract is to be performed). **30.** 4 Cal. App. 379 (1906). **31.** *See also* Dairy Food Store, Inc. v. Alpert, 116 Cal. App. 670 (1931) (street widening prevented erection of building with certain frontage dimensions because it became impossible to do); Miranda v. Williams, 2008 Cal. App. Unpub. LEXIS 9239 (Oct. 21, 2008) (city refused to issue permit to build house and builder excused from performance). **32.** *See* Kennedy v. Reece, 225 Cal. App. 2d 717, 724–25 (1964); Ellison v. City of San Buenaventura, 48 Cal. App. 3d 952, 962 (1975) (If a governmental act or law makes the performance either more expensive or unprofitable but still possible, then performance will also not be excused). *See* McCulloch v. Liguori, 88 Cal. App. 2d 366 (1948) (delay in construction caused by government regulations was reasonably foreseeable and did not excuse performance); Connick v. Teachers Ins. & Annuity Assoc., 784 F. 2d 1018 (9th Cir. 1986) (retired employee could not get lump sum payment because IRS code change did not constitute changed circumstances to justify voiding the contract). **33.** 25 Cal. 2d 45 (1944). **34.** *See also* Rose v. Long, 128 Cal. App. 2d 824 (1954) (even though county building department posted notice that building was unsafe for occupancy, lessee still required to pay rent because lessee could have taken steps to test right to occupy building, did not make any repairs before abandoning property, and did not wait to see whether the proposed ban on use would be enforced).

If courts follow this ruling in response to attempts to excuse performance as a result of COVID-19 or the Safer at Home Order, it is possible that if leased premises can still operate as an essential service, there may be little relief.

Thus, similar to force majeure authority, the doctrines of impossibility, impracticability, and frustration of purpose are fact-specific and dependent on the language of the lease.

Does the COVID-19 Pandemic or California's Safer at Home Order Constitute a Force Majeure Event?

Examine the Lease's Language

Whether the COVID-19 pandemic or the Safer at Home Order constitute a qualified force majeure event under your lease will depend, in large part, on the language of your lease. Does the force majeure provision:

- Specifically identify epidemics, pandemics, health crises, viruses, illnesses, or governmental actions as qualifying events?
- Have broad language that could encompass any of the above events or anything outside of the parties' control?
- State the exact performance that will be excused?
- Give guidance on what remedies exist if performance is excused?

Ask These Questions about Actions You Can Take

You will still need to take all measures within your reasonable control to perform under the lease. Whether you are a lessor or lessee, consider what you can still perform. Consider the following questions:

- Is the property still open for use, and is it considered an essential business?
- Is there any requirement that the property be closed down?
- If you have a mixed-use property where some businesses are considered essential and can remain open while others cannot, will that excuse the performance for those portions that are required to close?
- What if a business is capable of being open (e.g., a bar that is capable of serving take-out delivery) but is not in operation by choice?
- What if the leased premises are not necessarily essential for the operation of the business (e.g., online businesses)?
- Will any performance for those leases be excused?

Related Content

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> CORONAVIRUS (COVID-19) RESOURCE KIT

RESEARCH PATH: *Real Estate > Trends & Insights > Practice Notes*

For a discussion of the applicability of the coronavirus to force majeure clauses, see

> CORONAVIRUS AND FORCE MAJEURE CHECKLIST

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For California office lease forms, see

> OFFICE LEASE AGREEMENT (LONG FORM) (CA)

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For a sample California retail lease agreement, see

> RETAIL LEASE AGREEMENT (LONG FORM) (CA)

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Considering these facts along with the Safer at Home Order and specific city or county level ordinances is essential to determine whether performance will be excused. Putting aside the possibility that the legislature may provide relief, the legal authority suggests that courts conduct a case-by-case analysis to determine whether performance has been excused.

Consider the Possible Long-Term Implications of COVID-19

Given the amount of uncertainty that surrounds the duration of the Safer at Home Order and the continued spread and duration of COVID-19, it is difficult to predict the long-lasting impact for commercial real estate. Options and issues that lessors and lessees should consider and address include:

- Whether premises will be abandoned
- Whether premises are permitted to remain open
- Whether businesses located at the premises have any chance of surviving and if so, for how long
  - Does the business rely on consumer/retail operations?
  - Is the business one that can continue to operate at a profit during the Safer at Home Order?
- Whether monthly lease payments should be halted, reduced, waived for a specified period, abated, and/or amortized
- Whether the lease term should be extended
- Whether any improvement obligations should be excused, enforced, or extended
- Whether business interruption insurance plays a role in covering losses of lessors and lessees
- Whether the COVID-19 pandemic impacts the negotiation and drafting of force majeure provisions and commercial real estate leases more generally

Whether you are a lessor or a lessee (or their counsel), navigating the legal complexities and unknowns surrounding COVID-19 can seem daunting, and new case law will certainly arise during this unbelievable time. The considerations discussed above should, however, give you a foundation and understanding of how force majeure and the related doctrines of impossibility, impracticability, and frustration of purpose will impact performance of commercial real estate leases in California. L

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Seven Ways the CARES Act Impacts the Real Estate Industry

The coronavirus, also known as COVID-19, has impacted, and will continue to impact, the health of Americans and the strength of our economy for the foreseeable future. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act,[1] was signed into law, and on April 2, 2020, the Small Business Administration (SBA) released interim final guidance on the Paycheck Protection Program.

ALTHOUGH THE REAL ESTATE INDUSTRY DID NOT receive the same types of direct economic dollars as the airline and healthcare industries, the law will help tenants, landlords, and businesses meet their basic financial obligations. Business loans will help companies pay their employees, rents, and mortgages. Forbearance and foreclosure moratoriums will provide relief to landlords and tenants alike. However, despite this aid, leases, loans, and other arrangements will likely need to be renegotiated, requiring cooperation from all stakeholders.

Below, we have summarized key provisions of the CARES Act that directly benefit the real estate industry.

Relief for Businesses and Employees

Paycheck Protection Program (PPP)

The CARES Act allocates nearly $350 billion for business loans to companies and non-profits with 500 or fewer employees. The loans—which are also available to sole proprietorships, independent contractors, certain self-employed individuals, and businesses in the food services and accommodation

1. Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

sector with fewer than 500 employees per location—may be used to cover payroll costs, healthcare costs, rent, mortgage interest payments (but not principal), utilities, and interest on any other pre-existing debt obligations. The maximum loan amount is 2.5 times the average monthly payroll during the year prior to the loan, up to a maximum of $10 million. The guidance clarifies that independent contractors do not count as employees for purposes of calculating payroll or forgiveness, as they have the ability to apply for their own loans. These loans are available to eligible borrowers through June 30, 2020. Pursuant to the SBA's guidance, the loans will bear interest at 100 basis points, or 1%, will have a two-year term, and payments under the loans (but not accrual of interest) will be deferred for six months. In addition, the SBA's requirement to obtain funding from other sources without undue hardship is waived. Note, however, that certain businesses, including certain passive real estate businesses, are ineligible for a PPP loan.

The loans and any accrued interest can be forgiven up to the total amount of payroll, rent, mortgage interest (but not principal), and utility payments made during the eight-week period following loan origination; however, according to the guidance, not more than 25% of the loan forgiveness may be attributable to non-payroll costs. The total amount forgiven is subject to decrease for reductions in full-time employment and certain salary reductions. A borrower must apply for forgiveness and provide proof that the loan was properly used. Amounts forgiven will not give rise to taxable cancellation of indebtedness income.

Relief for Residential Owners and Residents

Consumer Right to Request Forbearance

Borrowers of federally backed mortgage loans designed principally for the occupancy of from one to four families that are experiencing hardship due to the COVID-19 emergency may request forbearance on the loan for up to 360 days. Borrowers can submit a request for forbearance until the sooner of the end of the coronavirus national emergency or December 31, 2020. No fees, penalties, or interest beyond what would accrue if paid on schedule will accrue during the forbearance. The borrower is only required to attest to financial hardship and need not submit additional proof.

Foreclosure Moratorium

A servicer of a federally backed mortgage loan designed principally for the occupancy of from one to four families may not initiate foreclosure or execute a foreclosure-related eviction or sale for the 60-day period beginning on March 18, 2020. This moratorium does not apply to vacant or abandoned property.

Loan Forbearance for Multifamily Landlords

A multifamily borrower with a federally backed multifamily mortgage loan that was current on its payments as of February 1, 2020, and is experiencing financial hardship due to the COVID-19 emergency, may request a forbearance on the loan for up to 90 days. Borrowers can submit a request for forbearance until the sooner of the end of the coronavirus national emergency or December 31, 2020. The borrower is only required to affirm to the servicer that the borrower is experiencing a financial hardship during the COVID-19 emergency and need not submit additional proof.

A borrower receiving a forbearance may not evict, or initiate the eviction of, a tenant solely for nonpayment of rent or other fees or charges; charge any late fees, penalties, or other charges to such tenants; or require a tenant to vacate a unit before 30 days after the date on which the borrower provides a notice to vacate, and may not provide a notice to vacate until after the expiration of the forbearance period.

120-day Moratorium on Evictions of Residential Renters

The CARES Act prohibits landlords from seeking to recover possession of a rental unit, or charging fees, penalties, or other charges related to nonpayment of rent, for 120 days from the passage of the CARES Act, where the landlord's mortgage is insured, guaranteed, supplemented, or assisted in any way, in connection with a HUD program, or by Fannie Mae, Freddie Mac, or where the property participates in a covered housing program under the Violence Against Women Act or the rural housing voucher program. In addition, a covered landlord may not issue a notice to vacate until after the 120-day period.

Other Aspects of The CARES Act

Credit Protection During COVID-19

The CARES Act modifies the Fair Credit Reporting Act to provide that if a furnisher to credit reporting agencies makes an accommodation to payments on a credit obligation of a consumer affected by COVID-19, including waiving payment, the furnisher is required to report the credit obligation as current. Landlords and others reporting to a credit reporting agency should be aware of these changes when reporting delinquent tenants and when reviewing credit reports of new tenants.

Technical Amendments Regarding Qualified Improvement Property

The CARES Act also fixed a drafting error in The Tax Cuts and Jobs Act of 2017 to change the depreciation period from 39 to 15 years for improvements made to the interiors of commercial buildings. As a result of this fix, the cost of any such improvement is now eligible for an immediate write-off as bonus depreciation, if the improvement was, or will be, placed in service after September 27, 2017, and before January 1, 2023.

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> CARES ACT, EVICTION RESTRICTIONS AND MORTGAGE RELIEF

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IP Licensing in the Age of Coronavirus

While there have been no changes to U.S. intellectual property law as a direct result of the coronavirus crisis, the pandemic has changed the world in which intellectual property licenses operate. This article examines licensing issues that intellectual property counsel will need to consider now and in the future.

Supervening Events May Impact IP Licenses

The best way to protect a party to a contract against the risk of supervening events that may delay the performance of the contract or make performance impossible is to address the events expressly in the contract. The coronavirus pandemic highlights some supervening events relevant to IP licensing agreements.

The following risks should be considered during licensing negotiations and, if necessary, covered in the licensing agreement:

- That the licensee will be unable to meet royalty minimums due to manufacturing and supply chain disruptions caused by an epidemic or pandemic
- That the licensor will bow to pressure to license to other parties a technology that is vital in a public health emergency at a lower royalty rate or even for free
- That the licensor will be reluctant to enforce a licensed patent on technology that is vital in a public health emergency
- That the licensor's technology will be subject to compulsory patent licensing during a public health emergency in a country that has such provisions

- That a licensor who has licensed a trademark will fail to enforce its trademark against a surge of counterfeit products in short supply during a pandemic

During the urgent medical research and experimental use of drugs that may occur during a pandemic, counsel for life sciences companies also need to be aware of strategic patenting tactics that may be used to obtain leverage in licensing negotiations, as explained below.

Minimum Royalty Provisions and Force Majeure

Licensing agreements often include minimum royalty provisions to address the risk to the licensor that the license will not generate adequate running royalty income. The current pandemic highlights the risk that a licensee may fail to make or sell sufficient product to meet its minimum royalty obligations due to events beyond its control. A licensee may be forced to cease manufacturing the licensed product during an epidemic or a government-ordered shutdown or when a foreign manufacturer on which it relies for parts is forced to cease operations for similar reasons.

A force majeure clause may help mitigate this risk to the licensee. This type of clause typically provides that neither party shall be liable to the other for delay in any performance or for the failure to perform under the agreement when such delay or failure is occasioned by enumerated events beyond its control. In trying to streamline and simplify license agreements, it is often tempting to omit provisions that address seemingly far-fetched scenarios. Clients may demand a short form license agreement or resist the inclusion of what they regard as excessive legalese or boilerplate. It is not uncommon for intellectual property licenses to omit a force majeure clause entirely or to include one that does not list epidemics or pandemics.

Force majeure is a concept borrowed from French law. While force majeure is codified as a defense against breach of contract in many civil law systems, in common law countries, the availability of the defense generally depends on the wording of the contract. Even in an international licensing agreement in which one or more parties is domiciled in a civil law country, if the agreement is subject to the laws of a common-law country, you should consider including a force majeure clause.

The interpretation of a force majeure clause in the United States is dictated by the state law that governs the contract. Generally, force majeure clauses are narrowly construed. For example, under New York law, a force majeure clause must include the specific unforeseeable event that is claimed to have prevented performance.[1]

As illustrated by recent events, in drafting a force majeure clause, you should list epidemics, pandemics, states of emergency, business shutdowns, and stay-at-home directives issued by local or national governments. Be aware of the potential differences between an epidemic and a pandemic. The coronavirus was an epidemic in some parts of the world months before it was declared a pandemic by the World Health Organization.

It is also a good idea to include a catchall category (e.g., "other events or circumstances not within the reasonable control of the party affected"). However, the effectiveness of a catchall category depends on the contract law of the state. Also, using the phrase "including but not limited to" before the list of specific force majeure events, rather than merely "including," may decrease the risk that a court will limit the clause to the specifically enumerated events.[2]

A party seeking to enforce a force majeure clause will need to give the required notice under the clause and establish causation (i.e., that an event listed in the force majeure clause caused the nonperformance of the contract obligation). Counsel will also need to gather evidence that the relevant event listed in the force majeure clause existed during the relevant time. Establishing that an epidemic or other emergency in another country prevented necessary product manufacturing or supply of parts may be challenging. Be aware that in civil law countries, local or national governments may declare that the event in question constitutes force majeure under national law. The declaration may take the form of a certificate or other official document. While not, of course, binding on U.S. courts, such evidence may be persuasive.

Most Favored Licensee and IP Enforcement Provisions

In non-exclusive licenses, the licensee may negotiate a most favored licensee provision. This type of clause protects against the risk that the intellectual property owner may license a subsequent licensee to practice the licensed subject matter at a significantly lower royalty rate or on other more favorable terms.

A most favored licensee clause typically provides that if a future license to a different licensee contains terms that are more favorable to the licensee, then the first licensee has the option to adopt those terms in its license. The clause may be limited to the royalty rate or may include other license terms.

The risk that others will receive more favorable license terms is a substantial threat to any licensee who relies on licensed rights in a competitive environment.[3] A competitor with lower royalty costs may damage the licensee's business by eroding its sales volume or prices for the licensed products.

The same risk underlies another common provision in intellectual property licenses, namely, a provision obliging the licensor to enforce the licensed intellectual property against

1. *See* Kel Kim Corp. v. Cent. Mkts., Inc., 70 N.Y.2d 900, 902-03 (1987). 2. *See* 14 Corbin on Contracts § 74.19. 3. *See* JP Morgan Chase Bank, N.A. v. DataTreasury Corp., 823 F.3d 1006, 1012 (5th Cir. 2016) (enforcing a most favored licensee clause).

infringers. Infringement of the licensed intellectual property, unless stopped, allows the infringer to make use of the licensed intellectual property at no cost and, thus, potentially eat into the licensee's sales or force it to lower its prices. In the case of trademark or trade dress infringement, infringers may also dilute the value of the brand that the licensee has paid to use.

The coronavirus pandemic serves to highlight the importance of including a most favored licensee clause and a robust enforcement provision in a non-exclusive IP license for products that may be vital in a public health emergency. In the current crisis, owners of intellectual property on medical equipment, personal protective equipment (PPE), drugs, vaccine technology, and diagnostic tests may face pressure to license their patents at low or no cost or refrain from enforcing their patents.

For example, a patent owner who filed an infringement suit against a company that was developing coronavirus tests ended up having to offer a royalty-free license for pandemic-related uses.[4] Also noted is the fact that Gilead Sciences Inc., maker of the experimental antiviral drug Remdesivir (originally targeted at Ebola but found to have potential in treating the coronavirus), abandoned its bid for orphan drug exclusivity after critics accused it of trying to profit from the pandemic. In addition, the pandemic has prompted temporary open-source licensing of patent portfolios held by some large technology companies and research institutions.[5]

Patent licenses that extend to countries that have provisions for compulsory licensing of patents raise similar concerns. For example, in response to the coronavirus pandemic, Canada introduced a new amendment[6] to its patent law that provides for compulsory licensing of a patented invention to the extent necessary to respond to a public health emergency.

Whether as a result of altruism, public pressure, or fear of reputational damage, many patent owners will be reluctant to enforce patents on vital equipment, drugs, or diagnostic tests amid a pandemic. A possible solution is to include in the IP enforcement clause, a provision that:

- Permits nonenforcement or royalty-free licensing to third parties during a public health emergency
- Suspends or reduces the licensee's royalty payments for the duration of the period of nonenforcement or royalty-free or compulsory licensing
- Provides other compensation to the licensee (e.g., providing public credit to the licensee for permitting the nonenforcement or royalty-free licensing during the emergency)

While patents may be seen as a hindrance in addressing a public health emergency, the opposite is true of trademarks. Trademarks are a designation of source. Being able to trust the source of PPE and medical equipment is vital.

In the coronavirus pandemic, substandard and counterfeit PPE and disinfectants have proliferated to meet increased demand. This underscores the importance of including a robust enforcement provision in a trademark license agreement for these kinds of products, requiring the licensor to pursue counterfeiters in a timely fashion. In these circumstances, courts are likely to be receptive to granting temporary restraining orders and preliminary injunctions based on the need to protect the public from the dangers of using a counterfeit product.

Strategic Patenting and Licensing Tactics in an Epidemic

Counsel for life sciences companies need to be alert to strategic patenting and licensing tactics that may be employed as a result of the accelerated research and experimental use of drugs that occur during an epidemic.

Normally, research on a potential new use of an investigational drug by an entity other than the company that has sought FDA approval for the drug would take place under the protection of a joint venture or collaboration agreement. Such agreements typically contain provisions that govern the filing and ownership of patents resulting from the research. However, the urgency of treating patients in an epidemic may not allow for the prior negotiation of an elaborate agreement of this type.

Gilead's experience with its investigational antiviral drug Remdesivir illustrates some important considerations. Gilead provided its drug to treat coronavirus patients in China. Then a Chinese research institute announced that it had applied for a patent on the drug as a coronavirus treatment. It is too soon to say whether the institute's application will ever be granted. Gilead, no doubt, has earlier patents and patent applications on the drug compound and methods of use that likely qualify as prior art that may prevent the institute from obtaining a patent.

There has been speculation as to the institute's motive for seemingly rushing to file a patent application on the use of Gilead's drug to treat the coronavirus. The most obvious explanation is that it is simply standard operating procedure.. Researchers generally file a patent application before publishing the research that led to the invention. If they publish their research before filing a patent application, the publication will usually constitute anticipating prior art that prevents the grant of a patent. (While the United States has a limited one-year grace period during which inventors may publish their work without sacrificing a patent filing, this grace period does not exist for patent applications filed in other countries.)

In the coronavirus pandemic, researchers are publishing their results on the use of drugs to treat the illness as soon as possible to share potentially life-saving information with the worldwide medical community. Early publication inevitably accelerates any patent application filing resulting from the research.

However, another possible reason for the institute's patent filing may be to obtain leverage in negotiating a patent license with Gilead. If the institute obtains its own patent, it may then have something valuable to offer Gilead in a cross-license.

Drug companies that provide investigational drugs for compassionate use in response to an urgent medical need to treat a new disease should consider how to protect against preemptive patenting of a new use for the drug. At a minimum, they should consider providing the drug only on the condition that neither the entity to which the drug is provided nor its related entities will seek to patent or help third parties to patent the use of the drug to treat the new disease.

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For details on key patent license agreement provisions and terms, see

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For essential information and guidance for patent prosecutors on what qualifies as prior art, see

> PRIOR ART FUNDAMENTALS

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4. *See* How COVID-19 Could Shake Up Patent Strategies. 5. *See* Open Covid Pledge at https://opencovidpledge.org/. 6. https://www.parl.ca/DocumentViewer/en/43-1/bill/C-13/royal-assent.


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COVID-19 Ramifications in **Loan Documents**

This article provides an overview of certain key provisions of credit agreements that will need to be reviewed to determine how the novel coronavirus (COVID-19) crisis—and the economic turmoil in its wake—affects a borrower's ability to meet its ongoing obligations under such agreements and how borrowers and lenders may protect themselves going forward. It also considers provisions of credit agreements that may be utilized for cash preservation and liquidity purposes or to access alternative funding.

THE COVID-19 PANDEMIC CRISIS CONTINUES TO ADVERSELY affect and impact the results of operations and financial condition of businesses across almost every industry and sector globally. As a result of this, borrowers and lenders will need to consider multiple issues under their existing loan documents and any new loan facilities. Below we describe these issues and how they relate to specific provisions of a credit agreement.

Introduction: Drawdown, Amend, or Enter a New Deal?

Since the beginning of the crisis, borrowers have taken different approaches to accessing liquidity. These can include drawing down on an existing facility, amending their facilities, or entering into new facilities, taking into account the new landscape. As described below, each approach raises distinct, and in some cases overlapping issues.

Many borrowers have accessed their revolving facilities and other committed undrawn facilities to maximize their liquidity position. The key conditions that a borrower must usually satisfy in order to borrow under these types of facilities are (1) there is no default or event of default and (2) the representations and warranties are true and correct, in each case, on the date of, and after giving effect to, such borrowing. These representations and warranties may also need to be

repeated by borrowers at the time of granting waivers by lenders or amending existing loan documents. Given the widespread and varied impacts of COVID-19 on businesses, certain borrowers may be apprehensive about bringing down representations without certain carve-outs for known or unknown impacts of COVID-19. The impacts on a particular borrower and the specific terms of the relevant representations in the loan documents will need to be considered in order to determine the approach to making such representations.

In addition to concerns in the context of bringing down representations, many borrowers impacted by the COVID-19 pandemic have begun to seek amendments to their existing loan documents to provide covenant relief, covenant or amortization suspensions, and/or increases in commitments or incremental facilities and/or have sought to obtain needed liquidity through new facilities. In this context, the terms of the applicable loan documentation will need to be considered carefully to accommodate the impact of COVID-19 on the borrower, while lenders facing their own fallouts from the impacts of COVID-19 also seek to protect their position and priority.

These issues are taken in turn below.

Representations and Warranties

The specific language of representations and warranties varies widely, but most credit agreements contain the below representations and warranties that may need to be considered by borrowers and lenders on a case-by-case basis.

Material Adverse Effect

Most credit agreements contain some form of material adverse effect (or material adverse change) representation. There have been numerous questions raised by borrowers and lenders alike about whether the current lockdown restrictions that have been widely imposed throughout the United States and in many other countries, and the resulting impact (in terms of closures and suspensions of many businesses and related drops in revenue), have caused a material adverse effect to occur that would allow lenders to refuse a drawdown or accelerate a loan.

What constitutes a material adverse effect is not specifically defined in any New York statute, and there is limited judicial guidance available under New York law interpreting whether a material adverse effect has occurred. Based on judicial interpretations of similar provisions in acquisition agreements (which are primarily governed by Delaware law, but New York courts have looked to the Delaware cases on this subject in providing guidance in interpreting these provisions), it is generally considered that for a material adverse effect to occur in relation to a borrower's business or financial condition:

- The adverse impact must be sufficiently material (e.g., a large reduction in revenue; earnings before interest, taxes, depreciation, and amortization (EBITDA); or assets that are not substantially covered by insurance or available relief programs or offset by a corresponding reduction in costs).
- The adverse impact must be expected to last for a durationally significant period of time.

While there is no bright-line test, it is generally understood that lenders seeking to rely on the impacts of an economic downturn as a drawstop or default will have to meet a high burden of proof in evidencing that there has been a material adverse effect. Such determination must be made on a fact-specific basis, based on the wording in the credit agreement and the specific factors affecting the borrower. This is a difficult determination in light of the current uncertainty over how long lockdown restrictions may remain in place and their resulting impact on financial statements and balance sheets, and how quickly business operations will be able to resume as normal. Given this uncertainty, lenders in practice have been cautious of invoking the occurrence of a material adverse effect as an excuse not to fund a draw request as a lender that does not fulfill its obligations under a credit agreement faces the risk of litigation for a breach of contract claim and potential reputational damage.

The definition of what constitutes a material adverse effect will vary widely across credit agreements and should be reviewed carefully. Customarily, material adverse effect refers to materially adverse impacts on (1) the borrower's business or financial condition, (2) the borrower's obligations, and/or (3) the agent's rights and remedies. In some cases, one or more of these limbs may not apply, thereby the limiting the scope of analysis. Other items to consider include:

- Does the definition cover all obligations of the borrower or is it limited to payment obligations only, which limits the scope of obligations to which the material adverse effect representation relates?
- Does the definition refer to prospects or contain a similar forward-looking element, which is especially relevant in light of the uncertainty around how long lockdown restrictions may continue to affect the borrower's business, its employees, and its supply chains?
- Does the definition apply an objective standard (has caused) or a more subjective forward-looking standard (could reasonably be expected to)?
- Does the credit agreement include carve-outs for any previous public disclosures or for other information provided by the borrower to the lenders? If so, are they drafted broadly enough to capture broadly drafted risk factors in securities offering documents or information included in periodic public reporting?

Generally, the more forward-looking and subjective elements there are in the representation and the broader the scope of the obligations to which the representation applies, the greater difficulty a borrower may have in determining its ability to make the representation.

Notwithstanding the high bar for determining that a material adverse effect on a business has occurred, due to the significant, unprecedented, and ongoing nature of the COVID-19 pandemic and its aftermath, it has not been uncommon for borrowers to seek to carve out COVID-19's effects from bringing down material adverse effect representations in a drawdown, waiver, or amendment agreement, or more generally from the material adverse effect definition in its loan documents. Issues to consider for any such carve-out include:

- Whether the exclusion of the material adverse impacts on the financial condition of the borrower is limited to the effects of COVID-19 or extends to other viruses, flus, and pandemics
- Whether the limitation applies only to impacts disclosed to the lenders (including the scope and any cut-off date for such disclosures) or to general economic impacts of COVID-19 (including the scope and any durational limit of such impacts)
- Any limbs of the material adverse effect definition or specific representations to which the carve-out should not apply
- The period during which the carve-out applies
- Whether any specified ongoing event whose impact is not ascertainable at such time should be carved out

Examples of Carve-Outs in Publicly Filed Deals

The context and timing of the material adverse effect carve-out may make certain considerations more relevant than others. For instance, the period during which a carve-out applies may not need to be defined in a proviso to a one-off bring down representation made as of a draw-down date, whereas lenders may seek to specify a period during which the proviso applies if it is to apply to the material adverse effect representations and covenants under the loan documents generally. Some recent examples of both types of carve-out include:

Intest Corporation[1]

"Material Adverse Change means (a) a material adverse change in the business, operations, results of operations, assets, liabilities or condition (financial or otherwise) of any Obligor…; provided, however, that until the fiscal quarter ending September 30, 2020, and thereafter for such period or periods as may be agreed to in writing by the Bank in its sole discretion, the declaration on March 13, 2020, of the national emergency relating to COVID-19 and related measures and the financial impact thereof on the Borrower and the Obligors shall not constitute a material adverse change in the condition (financial or otherwise) or operations of the Borrower and the Obligors."

Quorum Health Corporation[2]

"'Material Adverse Effect' shall mean (a) a materially adverse effect on the business, assets, operations, financial condition or operating results of the Borrower and the Subsidiaries, taken as a whole, (b) a material impairment of the ability of the Loan Parties, taken as a whole, to perform their obligations under the Loan Document to which they are or will be a party or (c) a material impairment of the rights and remedies of or benefits available to the Lenders under the Loan Documents, other than, in each case, as a result of the events leading up to, and following the commencement of a proceeding under Chapter 11 and the continuation and prosecution thereof, including circumstances or conditions resulting from, or incidental to, such events, commencement, continuation and prosecution, which shall not, individually or in the aggregate, constitute a Material Adverse Effect; provided that no effect on the business, assets, operations, financial condition or operating results of the Borrower and the Subsidiaries as a result of the Coronavirus Disease 2019 (COVID-19) shall constitute a Material Adverse Effect under clause (a) of the definition thereof."

Marriot International Inc.[3]

"…The Company additionally represents and warrants (which representations and warranties shall survive the execution and delivery hereof) to the Administrative Agent and the Lenders that: …No Material Adverse Change has occurred since December 31, 2019; provided, that the impacts of COVID-19 on the business, condition (financial or otherwise), operations or properties of the Company or any of its Subsidiaries will be disregarded; …"

(Note: This proviso applied to the material adverse effect representation in the amendment agreement only. The material adverse change definition in the loan documents was not modified in this amendment.)

Keurig Dr. Pepper Inc.[4]

"'Material Adverse Change' means any material adverse change in the business, business operations, property or financial condition of the Borrower and its Subsidiaries taken as a whole; provided that the impacts of COVID-19 on the business, business operations, property or financial condition of the Borrower or any of its Subsidiaries that occurred and were disclosed in the Borrower's Prospectus Supplement filed on April 9, 2020 or the transcripts of investor calls posted to the Lenders on April 10, 2020 will be disregarded."

United Fire Group Inc.[5]

"'Material Adverse Effect' …provided, however, that current financial and market conditions engendered by the COVID-19 pandemic shall not be given effect in determining whether a Material Adverse Effect has occurred with respect to the Borrower and its Subsidiaries unless such conditions result in a meaningful decline after the Closing Date specific to the Borrower's business."

1. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12108594. 2. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12104968. 3. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12106324. 4. https://apps.intelligize.comAgreementsAndOtherExhibits/View/Exhibits/12108516. 5. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12097163.

> It is anticipated that lenders will receive requests for extensions of deadlines (or waivers for missed deadlines) due to the impact on operations caused by ongoing lockdown restrictions in many locations and by the subsequent general downturn.

No Default

This representation typically pertains to defaults under the loan documents as well as defaults or termination events under other material agreements. This representation could be relevant where a company's performance under third-party contracts (including supply and commercial contracts) is materially adversely affected by the COVID-19 outbreak.

Disputes

Depending on the facts and circumstances of a particular borrower, the representations relating to litigation and judgments may need to be reviewed. In particular, careful review should be made for businesses that are subject to litigation as a result of the failure to perform under material contracts (for instance, litigation relating to assertion that COVID-19 constitutes a force majeure event under the relevant contract).

Solvency

Borrowers may also need to bring down their solvency representation in connection with a new borrowing. Borrowers and lenders will need to check the credit agreement to confirm whether such representation needs to be brought down to each borrowing date or is limited to just the closing date. Solvency representations may vary among credit agreements but in general they require a borrower to certify:

- The fair value of its assets exceeds the total amount of its debt and other liabilities.
- The present fair saleable value of its property is greater than the amount that will be required to pay the probable liabilities of its debt and other liabilities.
- It is not engaged in business for which it has unreasonably small capital.
- It will be able to pay its debts and liabilities as they become due.

Reporting Obligations

The impact of the pandemic and the resulting economic downturn, coupled with the borrower's need to draw under a facility, may trigger ongoing reporting requirements under a credit agreement. Reporting and notification obligations to lenders vary between credit agreements but typically include, among other things:

- Periodic financial statements and related financial information, and, where applicable, accompanying auditors reports
- Compliance certificates and/or borrowing base certificates
- Notices of defaults and events of default
- Matters relating to litigation and material contracts and/or developments expected to have a material adverse effect
- Catch-all requirements for other information requested by lenders

Borrowers and lenders will need to monitor compliance with these ongoing obligations to provide notices under their debt documents and any deadlines by which the borrower is required to deliver any required information and notices. Even where a grace period applies, a notice may still be required.

It is anticipated that lenders will receive requests for extensions of deadlines (or waivers for missed deadlines) due to the impact on operations caused by ongoing lockdown restrictions in many locations and by the subsequent general downturn. For instance, many borrowers may be unable to meet deadlines for obligations to deliver annual audited financial statements and accompanying auditor reports because their auditors have been unable to complete audit procedures (in particular those that require site visits) on their clients' financial statements on a timely basis.

Lenders will need to consider the length of an extension and how to address any knock-on impact on calculations of financial covenants and negative covenants in credit agreements that may occur as a result of any delay in delivery of financial information. The basis for any calculations and/or requirements for interim or supplemental reporting obligations may be included as terms or conditions in any such waiver. For example, in the FS Energy & Power Fund amendment,[6] the lenders granted a waiver as a result of a failure of the borrower and its subsidiaries to deliver audited consolidated financial statements for the year ended December 31, 2019 (among waivers of other specified defaults).

6. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12103780.

Lenders may also seek to impose additional interim reporting obligations during any applicable waiver period, for instance, to monitor the borrower's liquidity.

Financial Maintenance Covenants

Lenders and borrowers will need to assess the impact of the COVID-19 pandemic and its aftermath on borrowers' ability to comply with their financial covenants, which usually are either a leverage ratio test or an interest or fixed charge coverage test, measured at the end of each fiscal quarter. In covenant-lite deals, many borrowers may need to test springing financial covenants as of the end of any applicable fiscal quarter in the event that the springing trigger occurred by such dates due to revolver drawings above the applicable threshold made prior to quarter end. Each of these tests typically measure EBITDA over a last-four fiscal-quarter period, so, as a result, the negative impact of the COVID-19 pandemic on a borrower's ability to comply with financial maintenance covenants could last well into 2021.

To the extent that a borrower engages in discussions with its lenders for covenant relief (which may take several different forms, including a covenant suspension for a period of time or re-setting the covenant to provide additional cushion), lenders will need to consider what credit enhancements they should seek in return as a condition and whether such changes should apply only during a certain period. Based on several recent filings, borrowers have obtained covenant relief in exchange for a myriad of concessions, including:

- Increased pricing
- Alternative maintenance tests, such as debt-to-capitalization ratios, interest coverage ratios, and/or minimum liquidity tests
- Capping and/or tightening ratios for incurrence and restricted payments baskets (e.g., by restricting pari passu and/or secured debt incurrence, liens, junior debt payments and other opportunities for priming, and limiting investments (including to unrestricted subsidiaries) and asset dispositions to limit value leakage)
- Mandatory prepayment, cash sweep, and/or other cash control requirements
- Additional guarantees and collateral
- Additional reporting requirements, including supporting certifications and/or opinions
- Additional use of proceeds restrictions

There is an increasing number of examples and formulations of such trade-offs. A cursory cross-section of examples include:

- Marriott International Inc. amended its existing credit agreement to suspend its leverage through Q1 2021, which resets the covenant with additional headroom and step-downs once the covenant is reinstated. During the waiver period, pricing is increased and tied to credit ratings, a $400 million liquidity covenant will be tested monthly, and certain new covenants limiting debt, disposals, investments, and discretionary capital expenditures will apply. Other amendments tightening certain covenants relating to liens, dividends, share repurchases, and distributions will continue to apply after the waiver period.[7]
- Spirit AeroSystems amended its secured credit agreement to permit it to incur second priority secured debt and to provide covenant flexibility (including its financial covenants) through Q4 2022. During the relaxation period, the existing financial covenants are loosened and a new first-lien leverage ratio applies. The company is also required to maintain a minimum liquidity of $1 billion through Q4 2021.[8]
- United Airlines entered into a new $2 billion 364-day term loan A facility, with step-up pricing increasing from the London Interbank Offered Rate (LIBOR) plus 2.0% to LIBOR plus 2.5% after 270 days and requiring the company to maintain unrestricted cash and cash equivalents and unused commitments available under all revolving credit facilities aggregating not less than $2 billion and to maintain a minimum ratio of appraised value of collateral to outstanding obligations under the credit agreement of 1.6x.[9]

7. The amendment can be found at https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12106324. 8. The amendment can be found at https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12112223. 9. The amendment can be found at https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12105707.

The approach to amending documentation may depend on the required lender consent for such amendments. Borrowers and pro rata and/or revolving lenders that are parties to covenant-lite credit agreements may be reluctant to make changes that may require consent of term lenders that could extend the negotiation process and expense. Borrowers may instead seek alternative sources of funding or cash preservation methods.

EBITDA and Consolidated Net Income Add-backs and Exceptions

The difficulty imposed by COVID-19 has also cast a light on the definitions underlying financial covenants, as borrowers and their counsel analyze these provisions to find some leeway to meet the ratios while lenders conversely may look for ways to tighten these add-backs. Lenders and borrowers will need to scrutinize these financial definitions (such as consolidated net income and consolidated EBITDA and similar terms) in loan documents. Such definitions are highly negotiated and will vary widely between different credit agreements; however, parties may need to consider the impact of certain add-backs, pro forma calculations, and borrower-friendly drafting on financial covenant compliance and access to ratio baskets or EBITDA-based growers resulting from decreased net income or EBITDA as a result of COVID-19. For example, an additional add-back to EBITDA may increase the incremental debt available to the borrower, which lenders should be careful of. The areas to focus on include:

- Add-backs for extraordinary, unusual, and non-recurring expenses (often uncapped in covenant-lite credit agreements)
- Add-backs for lost earnings or revenues
- Add-backs for cost savings, synergies, restructurings, and business optimization activities
- Add-backs for insurance proceeds expected to be received
- Of-the-type or business judgment add-backs or similarly broad language
- Length of look-forward periods for prospective cost savings and amounts not yet realized (including for insurance proceeds)

While changes to EBITDA calculations will be heavily negotiated and fine-tuned, lenders may consider tightening calculations by capping add-backs for synergies, restructuring, and decreased revenues; limiting add-backs to amounts actually realized; tightening broad language; and/or requiring certifications or third-party opinions with respect to such add-backs. One-off COVID-19 add-backs limited to specific actions, periods, and/or amounts may also be included. Below are examples of how these are handled in selected publicly filed amendments. These demonstrate borrower-friendly add-backs but with caps to protect lenders.

Columbia Sportswear Company[10]

> "'EBITDA' means, as of the end of a quarter, Borrower's consolidated net income after taxes for the twelve months ending with such quarter plus .... (ii) plus, for purposes of determining Borrower's compliance with the financial covenants set forth in Article VIII (and not for determining Applicable Rate), and solely to the extent deducted in the calculation of Borrower's net income, Restructuring Expenses, less (iii) ..."

> "'Restructuring Expenses' means all costs, expenses, losses and charges arising out of or related to COVID-19, including, without limitation, costs, expenses and losses relating to restructures, scaling of operations, modification of cost structures, any cost, expenses and charges for terminations, severance, furloughs, catastrophic paid leave, store closings, lease cancellations, and contract modifications and terminations, in an aggregate amount not to exceed $50,000,000, in each case to the extent paid prior to the Closing Date or within twelve (12) months after the Closing Date and approved by Administrative Agent in its reasonable discretion."

Ruth's Hospitality Group, Inc.[11]

> "'Consolidated EBITDA' in Section 1.1 of the Credit Agreement is hereby amended in its entirety to read as follows: ... (ix) nonrecurring costs and expenses in connection with permanent restaurant closures and lease terminations in an aggregate amount not to exceed $10,000,000 during such period..."

Blonder Tongue Laboratories, Inc.[12]

> "'Permitted EBITDA Add-Back Amount' means... plus (vi) one-time restructuring charges (including severance payments) incurred by Borrower that are associated with the implementation of cost reduction programs from June 30, 2019 through Fiscal Year 2020, so long as incurred on or prior to March 31, 2021 and in an aggregate amount not exceeding $600,000,..."

Lenders should be aware that adjustments to financial definitions will likely have implications beyond financial covenant compliance, including step-downs for asset sale and excess cash flow mandatory prepayment provisions and ratio-based covenant baskets (such as additional debt and lien incurrences, investments, restricted payments, and restricted debt payments) which may grow as EBITDA increases. Therefore, even where there is a wholesale financial covenant suspension, treatment of EBITDA calculations for periods during the suspension period may need to be considered as well, since calculations for such quarters could impact adjusted calculations that include such prior quarters which are made following the suspension period. For example:

- Live Nation Entertainment disclosed that the amendments to its credit agreement (to facilitate increased incremental revolver capacity) permit an EBITDA substitution, "allowing the company the flexibility to manage its business through the disruption it will experience in 2020." Additionally, following a financial covenant waiver period (during which a minimum liquidity covenant applies), for the purposes of calculating the consolidated net leverage ratio covenant for Q4 2020 through Q2 2021, consolidated EBITDA from Q2 and Q3 2019 will be used for the corresponding quarters in 2020.[13]
- Marriott International's amended credit agreement provided that once the financial covenant waiver period expired EBITDA would be calculated on an annualized basis for the first three fiscal quarters the financial covenant was tested.[14]
- Under Six Flags' amended credit agreement, once its financial covenant is re-established following a suspension period during 2020, the borrower may use its quarterly consolidated adjusted EBITDA from Q2, Q3, and Q4 2019 to replace the EBITDA for the corresponding quarters of 2020.[15]

Related Content

For more information on amendments, consents, and other modifications for loan documents, including an index of related content, see

> AMENDMENTS, CONSENTS, AND WAIVERS RESOURCE KIT

RESEARCH PATH: *Finance > The Credit Agreement > Credit Agreement Guide > Practice Notes*

For an examination of the form, provisions, and conditions in an amendment to the terms of a credit agreement and the voting rights of lenders, see

> AMENDMENTS AND LENDER VOTING RIGHT ISSUES IN CREDIT AGREEMENTS

RESEARCH PATH: *Finance > The Credit Agreement > Credit Agreement Guide > Practice Notes*

For a description of the standard representations and warranties in a credit agreement, along with negotiation points for both the lender's and borrower's counsel, see

> REPRESENTATIONS AND WARRANTIES IN CREDIT AGREEMENTS

RESEARCH PATH: *Finance > The Credit Agreement > Credit Agreement Guide > Practice Notes*

For a discussion of the use of a multiple tranche structure to permit different lenders to provide different types of loans to a borrower, see

> TRANCHES OF LOANS AND LOAN MECHANICS IN CREDIT AGREEMENTS

RESEARCH PATH: *Finance > The Credit Agreement > Credit Agreement Guide > Practice Notes*

10. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12110030. 11. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12086269. 12. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12102794.

13. The press release can be found at https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12105083. 14. The press release can be found at https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12106324. 15. The 8-K describing this amendment can be found at https://apps.intelligize.com/SECFilings/View/Filings/18430567, and the press release can be found at https://investors.sixflags.com/news-and-events/press-releases/2020/04-15-2020-125952085.

Events of Default

The foregoing amendment provisions will be enough to keep many companies going through the worst of this period, until they can resume close-to-normal operations. However, this temporary relief will inevitably not be enough for all borrowers. A breach of any covenant (after the expiry of any applicable grace periods), including financial and notification covenants, or the failure of any representation to be correct in all material respects when made, could trigger an event of default under the relevant loan documents. Lenders and their counsel should anticipate borrower requests for waivers of such events of default.

The following customary events of default may be particularly relevant in the context of the COVID-19 crisis:

- **Payment defaults.** A borrower's failure to pay principal, interest, and fees when due will generally trigger an immediate event of default (with respect to failures to pay principal) or have very short cure periods.
- **Cross-defaults.** Loan documents also typically contain a cross-default in respect of events of default and/or failures to make payments under other indebtedness above a certain threshold. Borrowers and their lenders, therefore, should be aware of the relevant terms and thresholds across their loan documents and such borrowers' other debt instruments. Additionally, some loan documentation may contain business-specific cross-defaults relating to defaults or suspension in respect of performance under material third-party contracts.
- **Insolvency.** Borrowers and lenders should also carefully review the applicable provisions for the bankruptcy event of default as there may be circumstances other than an actual bankruptcy proceeding that could cause there to be an event of default. For instance, certain loan documents provide that if the borrower admits in writing its inability to pay its debts, such event would constitute an event of default. Another example is that in certain loan documents insolvency proceedings may include negotiations with creditors. Companies with non-U.S. subsidiaries should be especially vigilant about the risk that local subsidiary bankruptcies would be triggered by balance sheet insolvencies.

Applicable grace periods would need to be considered for all events of default. In some cases, the event of default may have no grace period. Lenders and borrowers should also be aware that the notification requirements may be triggered when the grace period commences rather than at its expiry.

Cash Preservation, CARES Act Funds, and Alternative Sources of Financing

Preservation of Cash and Assets

As discussed in various sections above, lenders should anticipate borrower requests under their existing loan documents for payment and covenant holidays, deferral of amortization payments or mandatory prepayment of excess cash flow or asset sale proceeds, and/or requests for conversion of cash interest payments into capitalized payment-in-kind payments, as additional ways of preserving or creating liquidity. Borrowers and lenders under asset-based lending (ABL) facilities may also need to consider the impact of potential defaults or late payments by customers (or borrower inability to pay suppliers) and suspensions or disruptions to its supply chain on its borrowing base and reserves. Borrowers may request waivers of or suspensions of certain eligibility criteria. For example, the FS Energy & Power Fund amended credit agreement[16] provides relief regarding the delivery of assets to be included in the collateral pool and the calculation of the borrowing base. Similarly, the amendment to the credit agreement[17] of Hersha Hospitality Trust relaxes the borrowing base conditions as they relate to COVID-19.

Availability Under Existing Baskets

In addition to drawing funds under a revolving facility, companies may want to seek alternative sources of funding to enhance their liquidity position. Credit agreements of non-investment grade borrowers will generally have restrictive covenants that will, among other things, limit a borrower's and certain of its subsidiaries' ability to incur debt and liens, make investments, and transfer or otherwise dispose of assets. These covenant packages can vary widely and are highly negotiated. However, over the past few years, the baskets negotiated in a substantial number of transactions have loosened significantly.

Even with a material degradation of a borrower's business, using availability under some common baskets, a borrower and its subsidiaries (including subsidiaries that are not guarantors) may be able to incur indebtedness, grant liens on their assets (which may include assets that are not required to be part of the existing lenders' collateral package), make investments in, and transfer assets to, non-guarantor subsidiaries, and prepay certain types of junior debt or buy back loans on the secondary market.

Many companies may seek to utilize debt basket capacity for receivables financing and securitization financing and/or seek to utilize supply chain financing as ways of providing additional liquidity to shore up any temporary shortfalls in revenue caused by the COVID-19 crisis that cannot be covered by other permitted debt or equity financing.

16. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12103780. 17. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12099428.

Borrowers may also seek to raise incremental (or incremental equivalent) debt and/or upsize their incremental capacity permitted by their existing loan documents. For incurrences under incremental debt baskets, borrowers will need to consider whether pricing or other features of the incremental debt would trigger most favored nation (MFN) protections for lenders under the original debt and/or whether it falls within any exceptions to such provisions. In order to avoid triggering MFN provisions, borrowers may be able to structure new debt outside such provisions, such as by incurring such debt using general debt and liens baskets (if there is available capacity to do so) and/or by non-loan parties.

CARES Act Loans and Other Stimulus-Based Proceeds

Borrowers that are eligible for loans or other relief proceeds under the Coronavirus Aid Relief and Economic Security Act (CARES Act)[18] (such as Paycheck Protection Program loans (PPP Loans) or the Main Street Lending Program) or other stimulus-based loans or relief funds (Relief Proceeds) may need to consider whether such Relief Proceeds are permitted under or otherwise conflict with its existing loan documents.

Lenders should anticipate requests from such eligible borrowers in order to waive or amend loan document restrictions to permit incurrence of or waive terms that might otherwise apply to Relief Proceeds. Issues to consider in any such waiver or amendment include:

- Use of proceeds requirements for such Relief Proceeds, including whether PPP Loan proceeds are limited only to forgivable uses under the CARES Act
- Whether such Relief Proceeds should be excluded from mandatory prepayments of cash proceeds or similar concept
- Addressing conflicting provisions between the terms of the Relief Proceeds and senior loan documents (for instance, PPP Loans may require prepayments of proceeds from asset disposals or restrictions on certain distributions and payments)
- Whether caps on debt or lien incurrences related to Relief Proceeds are appropriate
- The impact of Relief Proceeds or forgiveness thereof on financial covenant calculations, including consolidated net income and EBITDA calculations, netting, and cancellation of debt income

- Segregation of Relief Proceeds amounts into a separate account or a controlled account
- Reporting obligations in respect of applications for, receipt of, and use of Relief Proceeds
- Subordination of any repayments (if applicable)
- Cross-default provisions (if applicable)

Other exceptional amendments for COVID-19 relief may need to be made to permit disposals related to relief efforts, such as a carve-out in Crocs' facility amendment permitting the company to donate up to $10 million in inventory to the healthcare industry in response to the COVID-19 pandemic.[19]

For example:

1. The Columbia Sportswear Company credit agreement[20] includes a debt basket for CARES Act loan programs.
2. The Zagg amendment[21] is more extensive in its treatment of PPP Loans, including carve-outs of those loans from leverage ratio calculations and permitted repayments of the PPP Loans.
3. The Quantum amendment[22] similarly allows for PPP Loan indebtedness but attaches several conditions to such allowance (such as a permitted use of PPP Loans and compliance with CARES Act provisions).
4. The Blonder Tongue Laboratories amendment[23] has a simple but capped allowance for PPP Loans.
5. The Tyson Foods credit agreement[24] excludes "COVID-19 Relief Funds" from net cash proceeds and allows the incurrence of such amounts as indebtedness.

18. Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020). 19. The Croc amendment can be found at https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12090204. 20. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12110030. 21. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12110053. 22. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12110094. 23. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12102794. 24. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12096118.

Equity Cures

To the extent its credit agreement permits equity cure rights, a borrower and its owners may consider pre-emptive injections of equity to ensure covenant compliance and designate the same proceeds as cure amounts to equity cure a covenant breach. The long-term adjustment impacts by equity cures may be limited, however, as such cures are typically limited to a maximum during the life of the facility (usually four or five times) and in some cases cannot be used in consecutive quarters.

Liquidity Facilities

Certain lenders might be willing to provide additional liquidity to borrowers in the form of a 364-day facility or other alternative form of loan or note. This may in certain cases trigger a pricing MFN provision under existing credit agreements. Given that pricing in this distressed market may be higher than when the borrower entered into the existing facility, this may prove to be a costly option. However, that may be acceptable to borrowers if such a facility can be documented on a relatively fast timetable without requiring a marketing element and provide liquidity until less expensive options can be accessed. Disney[25] (LIBOR applicable margin ranging from 0.875% to 1.5%), Cigna[26] (LIBOR applicable margin ranging from 1.125% to 1.625%), and Honeywell[27] (LIBOR applicable margin ranging from 0.750% to 1%), among others, have recently entered into such 364-day term facilities. Other facilities entered into during the COVID-19 crisis include Textron,[28] United Fire & Casualty Company,[29] Tyson Foods,[30] and Becton, Dickinson and Company.[31]

Several non-investment grade borrowers have accessed syndicated markets for additional liquidity and had to offer investors favorable call protection and pay a significant premium compared to prior financings. For example:

- Everi's $125 million term loan was launched alongside an amendment to the company's credit agreement, priced at LIBOR plus 10.5%, with a 1% LIBOR floor and an original issue discount (OID) of 98.[32]
- Landry's $300 million senior secured term loan issued to a wholly owned unrestricted subsidiary priced at LIBOR plus 12%, with a 1% LIBOR floor and OID of 96.

Loan Buybacks

The sharp decline in the market prices of loans in the secondary markets may cause borrowers to consider debt repurchases. Prior to the 2008 financial crisis, most credit agreements did not contemplate or permit borrowers or their affiliates to purchase the borrower's loans. However, it is now common to allow such buybacks (usually limited to term loans).

Although the terms of a particular credit agreement may vary, loan documents generally provide that a borrower may carry out a buyback through open market purchases or voluntary discounted prepayments (known as Dutch Auction procedures) so long as no event of default exists and no proceeds from the borrower's revolving credit facility are used to make such purchases. Any loans bought back are then cancelled.

Affiliates of the borrower are also generally permitted to purchase loans of such borrower subject to a cap (generally 25–30% of the loans), and such affiliates will have limitations on their access to information and lender only meetings, voting rights, and certain rights in bankruptcy proceedings. The limitations often do not apply to debt fund affiliates (i.e., debt funds that are affiliated with the sponsor). However, credit agreements will often limit the aggregate voting rights of such debt fund affiliates to 49.9% of the vote.

It should be noted however that loan buybacks do raise a number of issues.

Related Content

For information on the events of default in a financing transaction, including drafting and negotiating the events of default provision, see

> **EVENTS OF DEFAULT RESOURCE KIT**

RESEARCH PATH: *Finance > Fundamentals of Financing Transactions > Credit Facility Basics > Practice Notes*

For a sample borrowing notice form to be used by a borrower in a loan transaction as a condition precedent to the closing of a loan transaction or making a subsequent borrowing, see

> **BORROWING NOTICE (CREDIT AGREEMENT)**

RESEARCH PATH: *Finance > The Credit Agreement > Credit Agreement Guide > Forms*

For an overview of practical guidance on COVID-19, see

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

RESEARCH PATH: *Finance > Trends & Insights > Practice Notes*

Perfection and Certifications: Delivery Challenges

As amendments, waivers, credit agreements, and other related loan documents are signed, borrowers and lenders will need to be prepared for logistical difficulties and delays due to closures and disruptions, such as:

- Perfection requirements for collateral (in particular possessory collateral or collateral requirement particular stamps) due to closures and disruptions caused by COVID-19 may need to be extended (including if such perfection is required for eligibility of collateral under ABL facilities or drawdowns). For an example of this, see the FS Energy & Power Fund amendment's[33] handling of collateral pool (specifically a suspension of delivery requirements as a result of the pandemic).
- Certain transactions may need to close without the usual good standing certificates if they are not received on time, with a representation as to good standing and a post-closing obligation for the certificate to be delivered.
- Documents that require original signatures will need to be coordinated well in advance, including putting appropriate authorizations in place if needed.

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RESEARCH PATH: *Finance > Trends & Insights > First Analysis > Practice Notes*

25. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12105901. 26. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12098582. 27. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12104697. 28. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12096942. 29. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12097163. 30. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12096118. 31. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12070379. 32. The credit agreement can be found at https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12115987.

33. https://apps.intelligize.com/AgreementsAndOtherExhibits/View/Exhibits/12103780.



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COVID-19 from a Securities Law Perspective

This article discusses capital markets and securities law in the time of COVID-19, which started in late 2019 and impacted the whole world in a matter of months, and explains how the U.S. Securities and Exchange Commission (SEC) responded to address the effects of the pandemic, particularly on public companies.

THE ARTICLE ALSO HIGHLIGHTS KEY FORM 10-K AND FORM 10-Q matters, including risk factors, management discussion and analysis (MD&A), and financial statement issues, and examines various financing alternatives for companies considering their options to bolster their capital structure.

We are experiencing an unprecedented event, the COVID-19 pandemic, which, in addition to the terrible human toll, has also led to an economic crisis. Companies that are subject to U.S. securities reporting requirements are navigating the challenges posed by the pandemic. Addressing these developments may pose distinct issues for companies, depending on their industry, their regional focus, their supply chains, and their personnel. Nonetheless, all reporting companies must tackle their duties to report on a timely basis about their financial results, their business and operations, and their future prospects. Doing so is especially difficult when there are so many uncertainties.

The SEC and the staff of the SEC have responded to the pandemic by acting promptly and providing reporting companies and other market participants with relief in the form of extensions to certain filing deadlines, alternative approaches to meeting certain paper filing requirements, and guidance regarding the types of qualitative and quantitative disclosures that the SEC and the markets generally require regarding the effects of the pandemic. This article summarizes many of the key actions taken by the SEC to address the effects of the pandemic as well as the guidance provided by the SEC and the SEC staff regarding disclosures and accounting matters. In many respects, the guidance from the SEC serves to remind reporting companies and their advisers of fundamental and longstanding disclosure principles: the need for timely disclosures that provide some transparency in order to promote market integrity; the importance of providing investors with insights through well-crafted trend and forward-looking statements regarding the potential impact of material developments; and the need to avoid potentially misleading non-GAAP and key performance indicators in SEC filings and other investor-focused communications. While the events of the last few months are deeply unsettling, it should be a source of comfort that these underlying principles have served reporting companies well in providing a path forward as they communicate with stakeholders.

SEC Pronouncements

SEC Exemptive Order for Public Companies

On March 25, 2020, the SEC issued a new exemptive order[1] (Public Company Order) under the Securities Exchange Act of 1934, as amended (Exchange Act) to provide relief to public companies and persons required to make filings with respect to public companies. The Public Company Order covers the period from March 1, 2020 to July 1, 2020, and supersedes and extends an exemptive order[2] that the SEC previously issued on March 4, 2020.

Under the Public Company Order, any public company that is unable to timely make a filing due to COVID-19 is given extra time, provided that the company otherwise complies with the order's provisions. Any company relying on the Public Company Order must furnish to the SEC a current report on Form 8-K or, if a foreign private issuer, on Form 6-K, no later than the original filing deadline for each filing that is delayed. This interim disclosure must state that the company is relying on the Public Company Order and briefly describe the reasons why the company could not file the report, schedule, or form due during the relief period (Required Document) on a timely basis. In addition, the interim disclosure must state the estimated date by which the company expects to file the Required Document and include company-specific risk factors explaining the impact, if material, of COVID-19 on the company's business. If the Required Document cannot be timely filed because of the inability of a third person to furnish a necessary opinion, report, or certification, the interim disclosure must attach as an exhibit a statement signed by the third person explaining the reason for the delay. The company relying on the Public Company Order must file the Required Document with the SEC no later than 45 days after its original due date and must disclose in the Required Document that the Public Company Order is being relied on and the reasons why it could not be filed on a timely basis.

Any company complying with the provisions of the Public Company Order will be considered current and timely in its Exchange Act filing requirements for purposes of eligibility to use Form S-3 or Form F-3 (and for purposes of well-known seasoned issuer status), if it was current and timely as of the first day of the relief period and it files the Required Document within 45 days of its original filing deadline. A company relying on the Public Company Order will also 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 within 45 days of its original filing deadline.

It is important to remember that companies taking advantage of the relief provided by the Public Company Order must furnish a separate Form 8-K or 6-K for each Required Document that will not be timely filed. In addition, companies should keep in mind that they can also rely on Rule 12b-25[3] if they are unable to file a Form 10-K or 10-Q, or comparable reports filed by a foreign private issuer, on or before the extended due date.

The Public Company 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, those security holders 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.

SEC Division of Corporation Finance Guidance

Also on March 25, 2019, the SEC's Division of Corporation Finance (Division) issued CF Disclosure Guidance: Topic No. 9[4] (CF#9) to provide guidance on disclosure and other securities law obligations that companies should consider with respect to COVID-19. CF#9 recognizes that it may be difficult for companies to assess or predict with precision the broad effects of COVID-19 and that its actual impact will depend on many factors beyond a company's control and knowledge. At the same time, CF#9 observes that "the effects COVID-19 has had on a company, what management expects its future impact will be, how management is responding to evolving events, and how it is planning for COVID-19-related uncertainties can be material to investment and voting decisions."

CF#9 emphasizes that under the SEC's principles-based disclosure framework, "disclosure requirements can apply to a broad range of evolving business risks even in the absence of a specific line item requirement that names the particular risk presented." As examples, CF#9 notes that COVID-19-related disclosures "may be necessary or appropriate in management's discussion and analysis, the business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and the financial statements."

1. https://www.sec.gov/rules/exorders/2020/34-88465.pdf. 2. https://www.sec.gov/rules/other/2020/34-88318.pdf. 3. 17 C.F.R. § 240.12b-25. 4. https://www.sec.gov/corpfin/coronavirus-covid-19.

Assessing and Disclosing the Evolving Impact of COVID-19

To illustrate the types of impacts COVID-19 may have that could give rise to disclosure obligations, CF#9 includes a non-exhaustive series of questions for companies to consider with respect both to their present and future disclosure obligations, including:

- How has COVID-19 impacted your financial condition and results of operations?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets?
- Do you anticipate any material impairments, increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments?
- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including controls and procedures?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so?
- Do you expect COVID-19 to materially affect the demand for your products or services?
- Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services?
- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

CF#9 encourages disclosure that is tailored to the company's business, providing material information about the impact of COVID-19 through the eyes of management. In addition, CF#9 encourages companies to "proactively revise and update disclosures as facts and circumstances change." CF#9 further reminds companies that they can present forward-looking information in a manner that would be covered by the safe harbors in Section 27A of the Securities Act of 1933, as amended (Securities Act) and Section 21E of the Exchange Act.

Investors and the SEC are likely to review any COVID-19 disclosure carefully. Therefore, public companies should allow plenty of time prior to filing a periodic report for drafting and internal review of any proposed COVID-19 related disclosures.

For example, it would be useful for companies to begin drafting more detailed risk factors, or updating existing risk factors, relating to COVID-19 for inclusion in their next SEC filing for which risk factor disclosure is required. As pointed out in CF#9, such disclosure should be specific and tailored to the specific impacts to the company's operations from the COVID-19 outbreak. Similarly, companies should also be preparing and revising their MD&A COVID-19 related disclosures well in advance of their next SEC filing.

Because of the rapidly changing 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 business units that may not normally be part of their disclosure controls and procedures, to ascertain whether any developments could require disclosure.

Trading Before Dissemination of Material Non-Public Information

CF#9 reminds companies and related persons that they need to consider their federal securities law obligations when issuing or trading in their company's securities. CF#9 emphasizes that when companies, directors, officers, and other corporate insiders are aware of material COVID-19 impacts or risks to their company that have not been publicly disclosed, they "should refrain from trading in the company's securities until such information is disclosed to the public."

In addition, CF#9 warns companies to avoid selective disclosures regarding the impact of COVID-19 by broadly disseminating such material information. Companies should consider, depending on their particular circumstances, whether "they need to revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate." As discussed below, companies also should consider when they have a duty to disclose and ensure that they are not releasing positive news while in possession of negative news, and the need for any disclosure, if made, to be accurate in all material respects and not to contain a material omission.

Reporting Earnings and Financial Results

CF#9 also addresses earnings releases recognizing that the ongoing and evolving COVID-19 situation "may present a number of novel or complex accounting issues, that, depending on the particular facts and circumstances, may take time to resolve." Therefore, CF#9 encourages companies to address financial reporting matters earlier than usual, consulting with experts as needed.

CF#9 also reminds companies of their obligations with respect to non-GAAP financial measures, including the SEC's recent guidance with respect to disclosure of key performance indicators and metrics discussed below.

The SEC has expressed its willingness to discuss on a case-by-case basis issues that may arise in connection with COVID-19, in addition to the ones in the Public Company Order and CF#9 discussed above, for reporting companies. Companies that have particular concerns should reach out to the staff of the Division to discuss how to handle issues that may arise.

Joint Statement

On April 8, 2020, SEC Chair Jay Clayton and Division Director William Hinman issued a joint statement titled The Importance of Disclosure–For Investors, Markets and Our Fight Against COVID-19[5] (the Statement). In the Statement, Chair Clayton and Division Director Hinman noted that "[i]n the coming weeks, our public companies will be issuing earnings releases and conducting analyst and investor calls." They urged "companies to provide as much information as is practicable regarding their current financial and operational status, as well as their future operational and financial planning." Finally, they provided several observations and requests for companies to consider as they prepare their disclosures, focusing primarily on forward-looking statements. These observations and requests build upon previous guidance issued by the Division.

In short, Chair Clayton and Division Director Hinman highlighted several disclosure points, including:

- Company disclosures should reflect the current state of COVID-19 affairs and outlook and, in particular, respond to investor interest in:
  - Where the company stands today, operationally and financially
  - How the company's COVID-19 response, including its efforts to protect the health and well-being of its workforce and customers, is progressing
  - How the company's operations and financial condition may change.
- Historical information may be relatively less significant.
- Providing detailed information regarding future operating conditions and resource needs is challenging, but important.
- High quality disclosure will not only benefit investors and companies, it will promote valuable communication and coordination across the economy.
- Companies that respond to the call for forward-looking disclosure should avail themselves of the forward-looking safe harbors in the U.S. federal securities laws.
- Good faith attempts to provide appropriately framed forward-looking statements would not be second-guessed by the SEC.

5. https://www.sec.gov/news/public-statement/statement-clayton-hinman.

There are four important takeaways for public companies to consider as they plan their upcoming earnings calls and quarterly disclosures.

First, quarterly earnings reports and related investor and analyst calls will not be routine. Historical information may be substantially less relevant as shareholders want to know where companies stand today, and how they have adjusted and expect to adjust in the future as they continue to deal with COVID-19. While recognizing that producing comprehensive financial and operational reports, both historical and forward-looking, may present challenges for public companies, the SEC continues to encourage earnings and related disclosures to be as timely, accurate, and robust as practicable under the circumstances.

Second, Chair Clayton and Division Director Hinman request that companies provide as much information as practicable regarding their current status and plans for addressing the effects of COVID-19, including information regarding their current operating status and their future operating plans under various COVID-19-related mitigation conditions. They note that investors and the markets may be particularly interested in, among other things, detailed discussions of current liquidity positions and expected financing needs, whether the company is receiving or intends to apply for financial assistance under various COVID-19 related federal and state programs, including the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, and how such assistance has had or may have a material effect on the company.

Third, in requesting that companies produce more forward-looking information under the current circumstances, the SEC recognizes the particular challenges companies will face to produce forward-looking information in light of the unknowns that still exist, including the making of a variety of assumptions, some that relate to factors that are beyond their control. Nonetheless, they encourage companies to consider the broad frameworks that have been proposed to have the economy move forward and discuss how following those frameworks may affect their operations if it would be of material interest to investors, while avoiding generic or boilerplate discussions.

Fourth, as is always the case, companies providing forward-looking information are encouraged to avail themselves of the safe harbors for forward-looking statements in the federal securities laws. The SEC recognizes that in many cases actual results may differ substantially from what were reasonable estimates when the forward-looking statements were made.

Although the Statement says that the SEC would not expect to second-guess good faith attempts at providing forward-looking information, the SEC will not be the only interested party reviewing disclosures. Investors, and more particularly the U.S. plaintiffs' bar, will have the benefit of hindsight when deciding how to view the adequacy of disclosure previously made. Since these parties will not be bound by the views of the SEC, it is important to follow the conditions necessary to take advantage of the safe harbor provisions of the U.S. federal securities laws to provide a defense against any future lawsuits in the event actual results differ from the forward-looking information as discussed below.

Other Related SEC Pronouncements

In addition to the Public Company Order, CF#9 and the Statement discussed above, the SEC and its various divisions and offices have issued a significant amount of COVID-19 driven or related guidance and relief in a relatively short period of time, including for public companies in dealing with their disclosure obligations, SEC filings, shareholders, and the markets in general. Some of the other actions relate to the following.

Form 144 Paper Filings

On April 10, 2020, the Division announced[6] that it was providing temporary relief with regard to the requirement to file paper copies of Form 144 during the period from April 10, 2020, through June 30, 2020. Specifically, the staff said that it will not recommend enforcement action to the SEC if Forms 144 are submitted via email in lieu of mailing or delivering the paper form to the SEC if the filer attaches a complete Form 144 as a PDF attachment to an email sent to PaperForms144@SEC.gov.

In addition, if a filer is unable to provide a manual signature on the Form 144 submitted by email, the SEC staff will not recommend enforcement action if the filer provides a typed form of signature in lieu of the manual signature and:

- The signatory retains a manually signed signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic submission and provides such document, as promptly as practicable, upon request by Division or other SEC staff.
- Such document indicates the date and time when the signature was executed.
- The filer or submitter (with the exception of natural persons) establishes and maintains policies and procedures governing this process.

6. https://www.sec.gov/corpfin/announcement/form-144-paper-filings-email-option.

Shareholder Meetings

On April 7, 2020, the Divisions of Corporation Finance and Investment Management announced that they were providing guidance[7] to assist issuers, shareholders, and other market participants affected by COVID-19 with meeting their obligations under the federal proxy rules. The guidance focused on the following matters:

- **Changing the date, time, or location of a shareholder meeting.** In the guidance, the staff took the position that an issuer that has already mailed and filed its definitive proxy materials can notify shareholders of a change in the date, time, or location of its shareholder meeting without mailing additional soliciting materials or amending its proxy materials if it (1) issues a press release announcing such change; (2) files the announcement as definitive additional soliciting material on EDGAR; and (3) takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as any proxy service provider) and other relevant market participants (such as the appropriate national securities exchanges) of such change.
- **Virtual shareholder meetings.** In recognition of the fact that many issuers were contemplating the possibility of conducting a virtual shareholder meeting through the internet or other electronic means in lieu of an in-person meeting, the staff said that it expects the issuer to notify its shareholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and disclose clear directions as to the logistical details of the virtual or hybrid meeting, including how shareholders can remotely access, participate in, and vote at such meeting. Issuers 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 described above for announcing a change in the meeting date, time, or location.
- **Presentation of shareholder proposals.** In light of the possible difficulties for shareholder proponents to attend annual meetings in person to present their proposals, the staff encourages issuers, to the extent feasible under state law, to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season. Furthermore, to the extent a shareholder proponent or representative is not able to attend the annual meeting and present the proposal due to the inability to travel or other hardships related to COVID-19, the staff would consider this to be good cause under Exchange Act Rule 14a-8(h)[8] should issuers assert the absence as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.
- **Delays in printing and mailing of full set of proxy materials.** The staff understands that some issuers in the current COVID-19 environment would like to furnish their proxy materials through the notice-only delivery option permitted by Exchange Act Rule 14a-16[9] (17 CFR 240.14a-16), but have concerns about their ability to comply with certain provisions of the rule. The staff encouraged issuers affected by printing and mailing delays caused by COVID-19 to use all reasonable efforts to comply with the rule without putting the health or safety of anyone involved at risk. In circumstances where delays are unavoidable due to COVID-19 related difficulties, the staff would not object to an issuer using the notice-only delivery option in a manner that, while not meeting all aspects of the notice and timing requirements of Rule 14a-16, will nonetheless provide shareholders with proxy materials sufficiently in advance of the meeting to review these materials and exercise their voting rights under state law in an informed manner and so long as the issuer announces the change in the delivery method by following the steps described above for announcing a change in the meeting date, time, or location.

7. https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns. 8. 17 C.F.R. § 240.14a-8(h). 9. 17 C.F.R. § 240.14a-16.

Notarization and Timing Requirements of Certain Filings

On March 25, 2020, the SEC adopted several temporary final rules.[10] One provides relief from the notarization requirements of Form ID from March 26, 2020, through July 1, 2020, subject to certain conditions, including that the filer indicate that it could not provide the required notarization due to circumstances relating to COVID-19 and that the filer submit a PDF copy of the notarized manually signed document within 90 days of obtaining an EDGAR account. The others extend the filing deadlines for certain reports and forms due between March 26, 2020, and May 31, 2020, that companies must file pursuant to Regulation A and Regulation Crowdfunding, subject to certain conditions, including that the company promptly disclose to its investors reliance on the extension relief, and when a company files the required report or form, it must disclose that it is relying on the temporary final rules and state the reasons why, in good faith, it could not file the report or form on a timely basis.

Authentication Document Retention Requirements

On March 24, 2020, the SEC staff from the Divisions of Corporation Finance, Investment Management, and Trading and Markets announced[11] relief to certain of the manual signature and document retention requirements. Rule 302(b) of Regulation S-T requires that each signatory to documents electronically filed with the SEC "manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing." Such documents must be executed before or at the time the electronic filing is made. Further, electronic filers must retain such documents for a period of five years and furnish copies to the SEC or its staff upon request. Pursuant to this relief, the SEC staff of the three divisions announced that they would not recommend the SEC take enforcement action if:

- A signatory retains a manually signed signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing and provides such document, as promptly as reasonably practicable, to the filer for retention in the ordinary course pursuant to Rule 302(b).
- Such document indicates the date and time when the signature was executed.
- The filer establishes and maintains policies and procedures governing this process.

Related Content

For an examination of the periodic reporting and other disclosure obligations of public companies under the Securities Exchange Act of 1934, see

> PUBLIC COMPANY PERIODIC REPORTING AND DISCLOSURE OBLIGATIONS

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

For further practical guidance on public company reporting, see

> PERIODIC AND CURRENT REPORTING RESOURCE KIT

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

For a summary of recent guidance and accommodations by the Securities and Exchange Commission (SEC) and Nasdaq relating to COVID-19, see

> COVID-19 UPDATE: SEC AND NASDAQ RESPONSE AND UPDATED SEC C&DIS

RESEARCH PATH: *Capital Markets & Corporate Governance > Trends & Insights > First Analysis > Articles*

For a discussion on key recent updates by the SEC regarding the COVID-19 outbreak, see

> SEC'S CONDITIONAL REPORTING RELIEF AND COVID-19 DISCLOSURE GUIDANCE: FIRST ANALYSIS

RESEARCH PATH: *Capital Markets & Corporate Governance > Trends & Insights > First Analysis > Articles*

Finally, as the COVID-19 pandemic continues and governments and companies take additional precautionary measures that may impact businesses, more disclosure-related and filing or compliance issues may arise. Therefore, companies should monitor the SEC for any further developments.

Materiality and Forward-Looking Statements

In light of the guidance from the SEC and SEC staff, companies and their advisers have to review, reconsider, and discuss anew basic concepts, including materiality. Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. In terms of considering COVID-19 related disclosures, the concept of whether a fact is material or not is a mixed question of law and fact. The SEC has consistently noted that the issuer is in the best position to know what is likely to be material to investors. This is no different under these unusual circumstances. However, since materiality is often judged with the benefit of hindsight, and the SEC has often looked to trading volume and price movements as evidence of materiality, it is essential to consider closely whether disclosures relating to COVID-19 would be viewed as impacting the market. As discussed further below, even after the Sarbanes-Oxley Act, the principle survives that material information need not be disclosed currently unless there is a specific event or circumstance that affirmatively triggers a disclosure duty.

As noted above, in connection with CF#9 and the Statement, the SEC and the SEC staff has emphasized the importance of trend disclosures. In crafting its disclosures in MD&A to account for the effects of COVID-19, a reporting company will have to consider the objective of this section in periodic reports, which is intended to provide stockholders with a view through the eyes of company management of the business and financial results. MD&A also must have a forward-looking component. Management must discuss known trends. Disclosures may be required even when the likelihood of occurrence of a known trend or uncertainty is less than certain. In fact, in SEC guidance, the SEC has called for a discussion of material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. Known trends include both matters that would have an impact on future operations and have not had an impact in the past and matters that have had an impact on reported operations and are not expected to have an impact upon future operations.

In considering MD&A trend disclosure, the analysis differs from traditional materiality analysis and sets an arguably lower disclosure threshold: is the known trend, demand, commitment, event, or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required. However, if management cannot make that determination, it must evaluate the consequences of the known trend, demand, commitment, event, or uncertainty on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the company's financial condition or results of operations is not reasonably likely to occur. In light of all the many unknowns related to the effects of COVID-19, government measures to address the pandemic, including economic and public health and safety measures, and the international reactions to the pandemic, the assessment outlined above may be particularly time-consuming.

There are a number of other sections of a periodic report, as well as other statements, such as earnings releases, in which a reporting company will need to consider the appropriateness of the inclusion of forward-looking statements. As noted above, in CF#9 and in the Statement, there is an emphasis placed on transparent disclosures. Transparency, to some extent, requires giving stakeholders a window into a company's expectations regarding its business and prospects. In order to encourage companies to provide additional forward-looking statements, there are safe harbors that may be helpful. The Private Securities Litigation Reform Act of 1995 (PSLRA) includes a safe harbor for forward-looking statements. In the context of a private action brought under the Securities Act or the Exchange Act that is based on an untrue statement of a material fact or an omission of a material fact necessary to make the statement not misleading, an issuer (covered by the PSLRA safe harbor) would not be liable for a forward-looking statement if the statement is identified as a forward-looking statement and is accompanied by meaningful cautionary statements that identify the factors that could cause actual results to differ materially from those in the forward-looking statement, or it is immaterial, or the plaintiff fails to prove that the forward-looking statement if made by a natural person was made with actual knowledge by that person that the statement was false or misleading or if made by a business entity was made by or with the approval of an executive officer and made or approved by such officer with actual knowledge that the statement was false or misleading.

In crafting disclosures, it is important to consider whether a statement constitutes a forward-looking statement. This will

10. https://www.sec.gov/rules/interim/2020/33-10768.pdf. 11. https://www.sec.gov/corpfin/announcement/staff-statement-regarding-rule-302b-regulation-s-t-light-covid-19-concerns.

depend on the context and the facts and circumstances, but would include projections of future performance, plans for future operations, and assumptions regarding the projections and plans. Language that suggests that the statement is forward-looking—like "we expect," "we believe," "we intend," etc.—is helpful in making clear that the outcome that is discussed depends on future events. Often, there will be comments that may be mixed—meaning that part of the comment may speak to actual events, and part of the comment may refer to expectations regarding future occurrences. Drafting forward-looking disclosures relating to the potential COVID-19 effects on a company's business and financial results will require a careful review in this and future quarters.

The forward-looking statement also must be accompanied by meaningful cautionary language. This requires identifying the particular risks associated with the statement. Cautionary language and risks should be tailored to the projections, estimates, and opinions that are expressed, and issuers should take care not to default to generic or boilerplate statements. To the extent that the language warns against something that already has happened, the warning would be inadequate—that may be the case for many companies this quarter. An issuer's disclosure committee or other preparers of periodic reports should consider as well whether there is any actual knowledge that a forward-looking statement is misleading or that the risks described by the issuer in its filings already had manifested.

For this most recently concluded quarter and for upcoming quarters this year, in preparing for earnings announcements and periodic reports, the issuer should consider:

- Updating its forward-looking statements disclosure
- Ensuring that its risk factors are updated
- Not referencing an occurrence in a risk factor as a hypothetical if the event has actually come to pass
- Eliminating boilerplate disclaimers and disclosures regarding trends since these are unlikely to reflect current events
- Reviewing carefully with counsel all forward-looking and trend disclosure in order to vet the cautionary language

Non-GAAP Financial Measures and Key Performance Indicators

Non-GAAP Financial Measures

The SEC provides two sources of guidance relating to non-GAAP financial measures. Item 10(e) of Regulation S-K applies to non-GAAP financial measures in SEC filings. Regulation G applies to all public statements made by SEC reporting companies that contain non-GAAP financial measures, including earnings releases, earnings calls, and investor presentations, as well as SEC filings.

Regulation G permits public companies to disclose material information that includes a non-GAAP financial measure, but only if that measure, whether or not in an SEC filing, is accompanied by a presentation of the most directly comparable GAAP financial measure and a reconciliation of the differences between the non-GAAP financial measure and the comparable GAAP financial measure. For oral public disclosure, like earnings calls, Regulation G permits the company to post the reconciliation simultaneously to its website and announce the location to investors. Rule 100(b) of Regulation G prohibits the use of "a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of that measure, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading."

Item 10(e) of Regulation S-K governs the use of non-GAAP financial measures included in SEC filings. It requires that a non-GAAP financial measure be accompanied by a presentation, of equal or greater prominence, of the most directly comparable GAAP financial measure, with a reconciliation to such measure. The filing must disclose the reasons why management believes that presentation of the non-GAAP financial measure provides useful information to investors. Also, there must be a statement disclosing the additional purposes, if any, for which management uses the non-GAAP financial measure. In addition, Item 10(e) also contains some express prohibitions on the calculation and presentation of non-GAAP financial measures.

The Division staff issued[12] a series of compliance and disclosure interpretations (C&DIs) devoted to non-GAAP financial measures. Among other matters, these C&DIs provide guidance concerning what the Division staff considers to be misleading use of non-GAAP financial measures and what it considers to be unacceptable prominence of a non-GAAP financial measure presentation. These C&DIs also offer guidance in specialized areas.

As noted above, the Division staff issued CF#9 to provide guidance on disclosure and other securities law obligations that companies should consider with respect to the effect of COVID-19. According to CF#9, if a GAAP financial measure is not available at the time of the earnings release because COVID-19-related adjustments require additional information and analysis to complete, "the Division would not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results." The non-GAAP financial measure should not be disclosed more prominently than the most directly comparable GAAP financial measure or range of GAAP measures. However, for SEC filings, such as Form 10-K or Form 10-Q, where GAAP financial statements are required, companies should reconcile to GAAP results and not include provisional amounts or a range of estimated results.

CF#9 specifies that in a circumstance where a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, the company must only include non-GAAP financial measures that it uses to report financial results to its Board of Directors. According to CF#9, companies should use non-GAAP financial measures and performance metrics "for the purpose of sharing with investors how management and the Board are analyzing the current and potential impact of COVID-19 on the company's financial condition and operating results," and not for the purpose of presenting a more favorable view of the company. When reconciling non-GAAP financial measures to provisional amount(s) or an estimated range of GAAP financial measures, companies should explain to the extent practicable why the line item(s) or accounting is not complete and what additional information or analysis may be needed.

As companies prepare to report their earnings, they should take into account the portion of CF#9 relating to non-GAAP financial measures, while also being mindful of the SEC's guidance in recent years regarding the limited and careful approach that companies must take when presenting non-GAAP financial measures.

Key Performance Indicators

On January 30, 2020, the SEC provided guidance[13] (KPI Guidance) regarding the disclosure of key performance indicators (KPIs) and metrics used in the MD&A section of SEC filings. This guidance, which reflects the SEC's interpretation of existing MD&A requirements, became effective on February 25, 2020.

For some time now, SEC representatives have expressed concerns regarding the use of KPIs. These concerns are similar to those raised by the SEC with respect to the use of non-GAAP financial measures. See, for example, remarks[14] by then-Commissioner Kara Stein addressing KPIs. The SEC's Division of Enforcement also has taken action in recent years against companies relating to the use of misleading KPIs. The KPI Guidance describes how Item 303(a) of Regulation S-K and comparable requirements of Forms 20-F and 1-A apply to KPIs and metrics. Item 303(a) not only specifies particular items for disclosure in the MD&A (such as liquidity, capital resources and results of operations), it also requires discussion of "such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations." In addition, Instruction 1 to Item 303(a) requires discussion of "statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition, and results of operations."

Although the KPI Guidance came out before COVID-19 reached pandemic levels in the United States, as principles-based guidance, it is applicable to KPIs used in COVID-19 disclosures. CF#9 expressly reminded companies of their obligations with respect to non-GAAP financial measures, including the SEC's recent guidance with respect to disclosure of KPIs and metrics. For example, if a company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, "it would be appropriate to highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations."

12. https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm. 13. https://www.sec.gov/rules/interp/2020/33-10751.pdf. 14. https://www.sec.gov/news/speech/speech-stein-102318.

The KPI Guidance observes that some companies disclose non-financial and financial metrics when describing the performance or the status of their business. These metrics vary by company and industry, and some metrics include company- or industry-specific matters. These metrics may reflect external or macro-economic matters, or they may be a combination of external or internal information.

The KPI Guidance reminds each company that uses metrics in its MD&A that, under existing requirements, it "need[s] to include such further material information, if any, as may be necessary in order to make the presentation of the metric, in light of the circumstances under which it is presented, not misleading." According to the KPI Guidance, a company must consider whether an existing regulatory disclosure framework—such as GAAP or, for non-GAAP financial measures, Regulation G or Item 10 of Regulation S-K—applies in the context of the metrics it uses and assess what "additional information may be necessary to provide adequate context for an investor to understand the metric presented." The KPI Guidance states that, based on facts and circumstances, the SEC generally expects that a metric be accompanied by the following disclosure:

- A clear definition of the metric and how it is calculated
- A statement indicating the reasons why the metric provides useful information to investors
- A statement indicating how management uses the metric in managing or monitoring the performance of the business

According to the KPI Guidance, a company needs to consider whether there are underlying estimates or assumptions for a metric or its calculation that need to be disclosed in order for the metric not to be materially misleading. If a company changes the calculation method or presentation of a metric from one period to another or otherwise, it should consider disclosing, to the extent material:

- The differences in the way the metric is calculated or presented compared to prior periods
- The reasons for the change
- The effects of the change on the amounts or other information being disclosed or previously reported
- Other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects

Depending on significance, following a change in methodology or presentation, it may be necessary to recast prior metrics to conform to the current presentation and place the current disclosure in the appropriate context.

The KPI Guidance emphasizes the importance of disclosure controls and procedures in the context of key performance indicators and metrics that are derived from the company's own information. If these indicators and metrics are material to either an investment decision or a voting decision, the KPI Guidance states that "the company should consider whether it has effective controls and procedures in place to process information related to the disclosure of such items to ensure consistency as well as accuracy."

The KPI Guidance contains the following non-exclusive list of examples of metrics to which this guidance applies:

- Operating margin
- Same store sales
- Sales per square foot
- Total customers/subscribers
- Average revenue per user
- Daily/monthly active users/usage
- Active customers
- Net customer additions
- Total impressions
- Number of memberships
- Traffic growth
- Comparable customer transactions increase
- Voluntary and/or involuntary employee turnover rate
- Percentage breakdown of workforce (e.g., active workforce covered under collective bargaining agreements)
- Total energy consumed
- Data security measures (e.g., number of data breaches or number of account holders affected by data breaches)

During this period of uncertainty, many companies and their boards of directors may be struggling with competing desires to communicate with their stakeholders and to restrict or control their communications until such time as more complete information is available....

Companies should assess whether they currently use, or plan to use, any key performance indicators or metrics. If the answer is yes, they should consider whether there is additional information that should be disclosed and develop the presentation for that new disclosure.

Because the KPI Guidance is already in effect, companies that will be using KPIs in their upcoming MD&A disclosures should promptly assess whether they need to make any changes to the MD&A to reflect the KPI Guidance. In particular, companies adjusting KPIs to give effect to the COVID-19 pandemic must take the KPI Guidance into account.

A company that discloses performance indicators and metrics in its MD&A section that are derived from the company's own information should review its disclosure controls and procedures to be sure these are effective with respect to the calculation of these indicators and metrics. The review should also include a discussion with the audit committee. The audit committee should understand the performance indicators that are used—what their purpose is, whether they are well-understood and well-defined, what the methodology is for their calculation, and whether there have been any significant changes in the indicators presented by the company or in their calculation methodology. This review and any update of disclosure controls and procedures should be completed before the company files its next annual report on Form 10-K or quarterly report on Form 10-Q.

Often, a company will use KPIs in its investor presentations, including in its earnings releases. The same level of review and care should be undertaken in relation to the preparation of these presentations and the use of performance indicators in these materials.

Earnings Releases and Analyst Calls

During this period of uncertainty, many companies and their boards of directors may be struggling with competing desires to communicate with their stakeholders and to restrict or control their communications until such time as more complete information is available and the company and those speaking on its behalf can do so with greater certainty. It is useful to keep in mind that under the federal securities laws, there is no general obligation for issuers to disclose material information; rather, issuers are required to do so only where the federal securities laws specifically impose such a duty. Of course, there are certain periodic reporting obligations and the occurrence of certain events may trigger the mandatory filing of a Current Report on Form 8-K, but generally speaking, a failure to speak (an omission) is a violation of Rule 10b-5 under the Exchange Act only if there is a duty to speak. As a result, if there is no obligation under the securities laws to make a disclosure by a particular date, an issuer can remain silent. Of course, if an issuer decides to make positive announcements, it must ensure that it also discloses any additional information (which may be negative) that would be necessary in order to make the statement not misleading. During these unusual times, companies also should give thought to their usual pattern of communication. Many companies have set a precedent in terms of when and how and how frequently they communicate with the public. Similarly, companies should consider their disclosures, including the timing and content of these, in light of other events, such as their insider-trading and blackout periods and any potential offerings of securities or other transactions in their securities.

In addition to considering their duties to disclose, companies will always want to be mindful of Regulation FD, which was adopted to address the problem of selective disclosure of material information by companies, in which "a privileged few gain an informational edge—and the ability to use that edge to profit—from their superior access to corporate insiders, rather than from their skill, acumen, or diligence." Regulation FD fundamentally reshaped the ways in which public companies conducted conference calls, group investor meetings, and "one-on-one" meetings with analysts and investors. Even in the case of a pandemic, it is essential to keep core principles of fair disclosure intact.

During these uncertain times, companies may be more likely to be communicating more regularly with their lenders, their suppliers, their vendors, and their bankers and other advisers. Regulation FD only covers disclosures to certain

enumerated persons: securities market professionals such as brokers, dealers, investment advisors, institutional investment managers and sell-side or buy-side analysts, and shareholders who it is reasonably foreseeable would trade on the basis of the information. Regulation FD does not cover disclosures to customers, suppliers, strategic partners, and government regulators in ordinary-course business communications. It also does not cover communications with attorneys, investment bankers, accountants, and others who owe a duty of confidence to the company, including parties that have entered into an express undertaking to maintain confidential nonpublic information shared by the company with them (a temporary insider). That said, a company should be very careful to identify any material nonpublic information that is to be shared with a temporary insider and have formulated a clear view regarding when the company will make such information public or when such information will become stale or outdated as a result of the passage of time or otherwise.

Again, during tumultuous times, representatives of a company may be called upon to respond to questions from stakeholders or to comment in the context of investor presentations or investor updates on the company's financial condition. It is important to keep in mind that whenever a public company, or any person acting on its behalf, discloses material non-public information to certain enumerated persons (as discussed above), then the company must disclose that information, either simultaneously (in the case of intentional disclosures) or promptly (in the case of unintentional disclosures) using a reasonable method of broad public disclosure.

In connection with earnings releases and other investor calls, a reporting company will want to consider Section 10(b) and Rule 10b-5 of the Exchange Act, which prohibit material misstatements or omissions, compliance with Regulation FD, protecting forward-looking statements as discussed above, compliance with the non-GAAP measure rules, and the KPI Guidance. Balancing all of these regulatory considerations, while striking the right balance between providing some insights into the company's results and prospects, is challenging. In the course of reviewing periodic filings, the SEC staff has been increasingly focused on information communicated in earnings releases and earnings calls and the consistency of those messages with the disclosures contained in periodic reports.

In addition, the SEC has paid particular attention to the practice of providing guidance (and subsequent confirmation of guidance) to analysts and others. Companies take on a "high degree of risk under Regulation FD" when engaging in private discussions with analysts seeking guidance or affirmation of prior guidance. Of course, as a result of the pandemic, many companies have chosen to withdraw prior guidance and provide adjusted guidance or not provide any guidance given the many unknowns. Nonetheless, it is useful to remind management teams that no earnings guidance can be shared in discussions with analysts or others without simultaneous public disclosure. The same cautionary notes apply to the affirmation of prior guidance. It is also useful for in-house legal and investor relations teams to remind those speaking on behalf of the company to the market of the company's Regulation FD and other communications policies. There may be pressure on management teams at this time to be more forthcoming or to provide more insights to the investment community regarding their views of the company's future results. Investor calls should be scripted, if possible, and attended by at least two representatives of the company. All communications should be closely tracked to ensure that consistent messages are communicated and to react promptly if an inadvertent disclosure has occurred.

Form 10-K and Form 10-Q Matters

In order to allow time for drafting and internal review of appropriate language, public companies should begin preparing COVID-19 disclosures in advance, given heightened investor and SEC scrutiny. Such disclosure should be specific and must be tailored to the specific impacts to the company's operations from the COVID-19 outbreak.

SEC disclosure requirements are principles-based to a large degree and there are many areas where existing SEC rules, while not expressly mentioning pandemics, could require disclosure. Areas in which COVID-19 may give rise to disclosure or other securities law considerations are elaborated upon below.

Related Content

For additional information on the SEC's response to COVID-19, see

> SEC REPORTING COMPANIES: CONSIDERING THE IMPACT OF THE CORONAVIRUS ON PUBLIC DISCLOSURE AND OTHER OBLIGATIONS: FIRST ANALYSIS

RESEARCH PATH: *Capital Markets & Corporate Governance > Trends & Insights > First Analysis > Articles*

For an analysis of the key ramifications of the COVID-19 outbreak for public companies, see

> COVID-19 RAMIFICATIONS FOR PUBLIC COMPANIES—SEC DISCLOSURES, SEC FILINGS AND SHAREHOLDER MEETING LOGISTICS: FIRST ANALYSIS

RESEARCH PATH: *Capital Markets & Corporate Governance > Trends & Insights > First Analysis > Articles*

For detailed advice on the requirements for and drafting of management's discussion and analysis for annual reports, 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 practical guidance on the coronavirus in a number of practice areas, including capital markets, see

> CORONAVIRUS (COVID-19) RESOURCE KIT

RESEARCH PATH: *Capital Markets & Corporate Governance > Trends & Insights > Practice Notes*

Risk Factors

Item 105 of Regulation S-K requires risk factors to discuss the most significant factors that make an investment in a company speculative or risky, as opposed to presenting risks that could apply generically to any company. As the impact from COVID-19 has intensified, companies may become increasingly aware of additional ways in which the pandemic poses specific risks beyond what they may have previously disclosed. As the situation persists and evolves, it may be necessary to continue to assess COVID-19 risk factor disclosures throughout the year. 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 and then to re-evaluate these throughout the year to determine if they need to be supplemented or re-evaluated. Although there is no requirement to include risk factors in a quarterly filing or on a current report, a company may consider doing so if it believes that it may be likely that it will seek to undertake a securities offering in the near-term and would like to ensure that its filings present an accurate picture of the company.

There are many ways in which COVID-19 may pose risks for a company. Revenues may decline in some lines of business. Some companies may face liquidity challenges and credit may be less expensive and/or more expensive. To the extent that a company maintains an investment portfolio, it may be exposed to greater market volatility. Remote working might give rise to greater cybersecurity concerns. There could be increased litigation risk. Uncertainty with respect to the ultimate scope and duration of the pandemic may itself be a risk. The list of questions for assessing and disclosing the impact of COVID-19 that the Division staff provided in CF#9 is a helpful starting place for such analysis, but companies need to reflect on how the pandemic has impacted their own particular circumstances. It is possible that various segments of a company may be affected in different matters. For example, some segments might be having supply chain or distribution issues as a result of government shutdown orders while others may be more susceptible to a decline in discretionary spending arising from economic turbulence.

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.

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 problems within its supply chain or distribution network, and if so, are such 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? Does the company operate any facilities where there has been a significant outbreak of COVID-19? 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 Issues

Companies should discuss with their accountants whether COVID-19 disclosure is needed as part of their financial statement footnotes, including a subsequent event footnote. Contingency disclosures are another area that should be carefully assessed, particularly from the perspective whether a contingent COVID-related loss is remote, reasonably possible, or probable. Companies will also need to make determinations from an accounting perspective whether COVID-19 has led to any impairment of various types of assets. Among other financial statement concerns to be considered with respect to COVID-19 in extreme cases are going concern issues.

Controls and Procedures

Item 307 of Regulation S-K requires a company to disclose the conclusions of its principal executive officer and principal financial officer regarding the effectiveness of its disclosure controls and procedures as of the end of each quarterly period. Similarly, Item 308(c) of Regulation S-K requires a company to disclose any change in its internal control over financial reporting that occurred during each quarter that has materially affected, or is reasonably likely to materially affect, its internal control over financial reporting.

"Disclosure controls and procedures" is defined in Exchange Act Rule 13a-5 and 15d-15 to mean controls and other procedures of a company that are designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Exchange Act is recorded, processed, summarized, and reported, within the time periods specified in the SEC's rules and forms. "Internal control over financial reporting" is defined in each rule as a process designed by, or under the supervision of, a company's principal executive and principal financial officers and effected by the company's board of directors, management, and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

- Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the company.
- Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors.
- Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the company's assets that could have a material effect on the financial statements.

Because the COVID-19 pandemic is affecting so many aspects of business, and many employees are now working from home rather than at their usual work locations, companies should continually monitor and evaluate their disclosure controls and procedures and internal control over reporting to make sure that they remain effective in the current environment, as well as to consider whether changes need to be made to ensure that they remain effective in gathering and reporting all required information. Companies may also want to consider making the potential impacts of COVID-19 an express part of their applicable controls and procedures in light of the fact that many disclosure decisions for the foreseeable future will be made with regard to COVID-19 and its impacts.

In addition, because of the swiftly moving changes in the COVID-19 situation and its related impacts, 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 controls and procedures processes, to ascertain whether anything is happening that could require disclosure.

Litigation

Item 103 of Regulation S-K requires a company to briefly describe material pending legal proceedings, other than in the ordinary routine litigation incidental to the business, to which the company or its subsidiaries are subject. Companies are beginning to be subject to litigation arising out of the impacts of COVID-19. It does not matter whether the company is a plaintiff or a defendant. For example, some companies are suing their insurers for failure to cover damages under an insurance policy due to a loss of business income. Other companies are being sued by employees who have contracted COVID-19 allegedly in the workplace. Just as COVID-19 has been rapidly expanding, the number of lawsuits filed because of it will likely continue to grow.

Description of Business

Item 101 of Regulation S-K requires a company to provide a narrative description of the business, including the business done and intended to be done by the company. Among the things that should be addressed as part of this disclosure are the principal products produced and services rendered by the company, the sources and availability of raw materials, the dependence on a single customer, the amount of backlog orders, competitive conditions in the business, and the number of employees. Each of these items could be changing as the impacts of COVID-19 evolve.

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, or is expected to materially change, its business. When looking at its disclosure, a company should start by asking a series of questions that will help inform its disclosures. 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 to 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 there any acquisitions or previously disclosed organic growth initiatives put on hold?

Financing Alternatives

Many companies may be considering their financing alternatives at this time in order to bolster their capital, to provide third parties with confidence regarding the company's ability to weather continued volatility, to continue to comply with bank or other contractual covenants, or simply for opportunistic reasons. The financing alternatives may be quite dependent on whether the company is undergoing financial distress or merely wants to strengthen its financial position. For many companies, the best alternative may be a private investment in public equity or PIPE transaction. In a PIPE transaction, a placement agent, acting as the company's financial intermediary, will engage potential institutional investors confidentially and gauge their interest in participating in a financing transaction. The company is not required to disclose the potential financing until definitive securities purchase agreements are entered into with the investors. Some companies may not be able to use their shelf registration statements (to the extent that these are effective) unless or until they update their disclosures for the effects of COVID-19. Others may prefer to share material nonpublic information to investors that have committed to keep such information confidential and negotiate financing terms with investors that have been able to consider this data. A number of companies may need significant capital injections. Venture capital funds, private equity funds, and other financial sponsors may be interested in participating in a financing round and negotiating financial or other ongoing affirmative or negative covenants with the company. In addition, from time to time, these financial sponsors may negotiate for themselves governance rights, such as board seats or observer rights. Given that these transactions led by financial sponsors may involve highly structured securities, and the negotiation of other ongoing rights, a private placement may be the most appropriate financing alternative. The rules of the securities exchanges, which require a shareholder vote in the case of certain private placement transactions completed at a discount, upon the consummation of a transaction that will result in a change of control, or in connection with a transaction that involves related parties, should be considered in connection with a proposed PIPE transaction.

To the extent that a company has an effective shelf registration statement and its disclosures are current, it may consider as an alternative to a PIPE transaction conducting a shelf takedown that may be structured as a registered direct, or agency best efforts, public offering, or as a firm commitment confidentially marketed public offering. A registered direct offering may be a practical alternative, especially for a company that will offer its securities to a small number of institutional investors through a placement agent. In a registered direct offering, investors introduced to the company by the placement agent purchase securities directly from the company. Investors that may not want to hold restricted securities (such as those sold in a PIPE transaction) will prefer a registered direct or confidentially marketed public offering.

In connection with any financing transaction, the company and its advisers will have to consider closely whether all of the company's disclosures, including risk factors, business, and MD&A disclosures, are current. While, during more stable markets, it may be quite common to undertake a financing transaction after the release of quarterly earnings and before the filing of that quarter's Form 10-Q, there may be some reluctance to do so in this environment. A company may want to minimize the gap in time between its earnings announcement and the filing of its Form 10-Q, and placement agents and underwriters may wish to see the quarterly report prior to undertaking an offering. All of the questions raised by the SEC in CF#9 and in the Statement are highlighted in the context of a securities offering.

Market Outlook

As discussed above, these are unusual and uncertain times and reporting companies and their advisers will have to consider the very fundamental principles of securities laws as they consider when and how to make disclosures relating to the effects of COVID-19 on their businesses, results of operations, and future prospects. The relief provided by the SEC has been timely and provides much-needed flexibility for issuers struggling to operate amidst stay-at-home and similar orders. Additional SEC guidance, whether in the form of CF#9 or the Statement, provide useful reminders for interpreting and applying longstanding principles to an unprecedented pandemic. L

Michael L. Hermsen *has an extensive practice at Mayer Brown LLP that focuses on securities matters, including the representation of issuers in securities offerings and liability management transactions; corporate clients in connection with compliance, reporting, and stock exchange matters; and companies, boards of directors, and management on, among other things, corporate governance matters and executive compensation disclosures and reporting. Mike has been included in The Best Lawyers in America in the practice areas of securities/capital markets law and securities regulation for over a decade and Legal 500 recommends Mike in "Capital Markets – Equity Offerings," noting Mike has "unsurpassed knowledge of SEC rules." In addition, Mike is frequently cited in the media regarding new regulatory initiatives.* ***Anna Pinedo*** *is a partner in Mayer Brown's New York office and a member of the Corporate & Securities practice. She concentrates her practice on securities and derivatives. Anna represents issuers, investment banks/ financial intermediaries, and investors in financing transactions, including public offerings and private placements of equity and debt securities, as well as structured notes and other hybrid and structured products. She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including technology, telecommunications, healthcare, financial institutions, REITs and consumer finance. Anna has worked closely with foreign private issuers in their securities offerings in the United States and in the Euro markets. She also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.* ***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. In addition, her practice includes representing clients on transactions such as securities offerings and mergers and acquisitions, as well as providing general securities, corporate, limited liability company, and contract advice.*

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LexisNexis, Australian Commission Create Vietnamese Version of Human Rights Law App

Lawyers and other legal professionals in Vietnam can now easily access international human rights legislation, treaties, and other documents in Vietnamese, thanks to a collaboration between the Australian Human Rights Commission and LexisNexis Australia.

The Commission partnered with LexisNexis and the Ho Chi Minh Academy of Politics in the development of the Vietnamese language version of RightsApp, a mobile app first produced in English in 2017. The app is the first of its kind for mobile devices.

"An important step in the realization of human rights is having the language of international human right instruments available for everyone. This will now be possible through the release of RightsApp Vietnam," said Rosalind Croucher, president of the Australian Human Rights Commission. "The Commission is delighted to partner with LexisNexis and the Ho Chi Minh Academy of Politics in developing the Vietnamese version of RightsApp. Through this innovative app, we are able to put human rights in the hands of many."

Greg Dickason, managing director of LexisNexis Pacific, said, "Advancing the rule of law is one of the our most fundamental core values at LexisNexis. We were extremely honored to have partnered with the commission to develop the RightsApp in 2017 and we are equally honored to support the commission in their work to advance the equal and free access of human rights on a global scale."

RightsApp is available to download for free for both iOS and Android devices.

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- Supporting corporate citizenship initiatives that strengthen civil society and the rule of law across the globe.

Additional information about LexisNexis' activities in support of the rule of law is available at https://www.lexisnexisrolfoundation.org/.