



Keeping Your Business Safe and Nimble in Response to COVID-19

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The COVID-19 coronavirus is poised to continue spreading throughout the United States. Even if your company and employees are not directly affected, the broader consequences of COVID-19 on the economy and the dislocations it is already causing in travel, consumer demand, supply chains and financial markets will likely have a significant impact.

We've put this memorandum together to highlight some of the legal questions our clients are already grappling with in the hope that you find this useful in your own planning. We expect these issues to become even more important if cities and states in the United States impose more stringent restrictions on mass transit and other forms of travel or prohibit everyday public activities. We've also included an overview of operational considerations that our clients have relayed to us in the last few weeks.

We hope that aggressive action by federal, state and local governments as well as our public health officials will quickly contain the coronavirus pandemic and prevent it from turning into a humanitarian crisis or a long-lived economic downturn. That said, hope is no substitute for careful advance planning. We encourage you to create your own coronavirus response plan, if you haven't already done so, and to keep it up to date in light of the spread of COVID-19 and the government responses to the virus. As always, we are here to support you and your business during this time.

Workforce Considerations

Business Travel

As has been widely reported, many companies have banned business travel to varying degrees, with some banning all "non-essential" travel and others banning all international travel. On March 11, the federal government instituted a 30-day ban on travel from Europe to the United States as part of its response to the COVID-19 pandemic. We expect that as COVID-19 spreads in the United States, other countries may begin to ban entry by Americans as well.

If travel is a part of your business, consider whether meetings that would otherwise be held in person and require participants to travel can be held by video conference or by phone. To the extent your employees absolutely need to travel, consider limiting travel to essential meetings only and banning corporate travel to the countries most severely impacted by COVID-19—which currently include China, South Korea, Iran, and Italy, and, to a lesser extent, Japan and Hong Kong—as well as the rest of Europe, given the federal government's travel ban measures. Continue to monitor the [travel advisory guidance published by the Centers for Disease Control and Prevention](#) (CDC) to expand this list as needed.

Under the federal Occupational Safety and Health Act, employers have a [general duty](#) to provide a safe work environment. Employers should therefore consider alternatives for employees needing to travel to high-risk areas. If employees do choose to travel, make sure they are aware of the potential risks, including the possibility of mandatory quarantine upon return to the United States (either by the government or by you, as their employer).

For any employees who are not United States citizens, keep in mind that the federal government has banned travel to the United States by most foreign nationals who have traveled to China or Iran during the 14-day period preceding their entry into the United States.

Quarantine Measures

As recommended by the CDC, employers should actively encourage employees with acute respiratory illness symptoms to stay home. Employers should also ask employees to notify them if they travel to high-risk countries or have close contact with family members, friends or roommates who do so. To comply with federal and state privacy laws, employers should maintain employee responses to questions about their health in a confidential medical file accessible only by those who have a business reason to view this information.

Providing Notice Regarding Sick Employees

Per the CDC's guidance, employers should notify their employees if a member of their workforce is confirmed to have contracted COVID-19. As federal law requires employers to maintain confidentiality under such circumstances, you should make sure not to disclose the names or identities of your sick employees, however.

The Occupational Safety and Health Administration (OSHA) has [deemed the outbreak of COVID-19 a "recordable illness"](#) if a worker is infected on the job, including if infected while traveling for work. Accordingly, under OSHA regulations, covered employers (*i.e.*, those with more than 10 employees) are required to file reports of such cases with OSHA. For more information about OSHA's injury and illness recordkeeping and illness requirements, please visit [this page](#).

Working Remotely

Employers do not have a legal obligation to allow telecommuting and remote work. But in light of the challenges and risks posed by COVID-19, your company may wish to consider whether and how effectively your employees can work from home both in the short-term (*e.g.*, 2 weeks) and the longer-term (*e.g.*, 2 months or more). If working remotely is not a regular practice at your company, consider how you can leverage existing technological, team management, and similar systems such as Slack, Microsoft Teams, Zoom and/or Google Drive to create and sustain a productive, positive and efficient remote work environment for an extended period of time.

If your employees handle personally identifiable data or protected health information, ensure that remote workers access such data through an encrypted method of transmission and

consider enhancing security through the use of multi-factor authentication to grant log-in access. Finally, consider conducting a dry run of your remote work capabilities with your IT provider before you are forced to send employees home.

Also consider *when* it might make sense for your employees to start working remotely, taking into account the following factors in your areas of operations: the number of confirmed cases of COVID-19, the mortality rate and the transmission rate; your employees' commuting radius; the impact of the virus on public transportation; and any government quarantine actions.

As mentioned above, employers have a general duty under federal law to provide a safe and healthy workplace. While OSHA does not have a specific regulation pertaining to COVID-19, it can look to nationally recognized standards and recommendations to determine an employer's obligations, including recommendations from the CDC, the National Institute for Occupational Safety and Health, the World Health Organization or other similar sources. If OSHA determines that employees are reasonably likely to be exposed to COVID-19, it can require an employer to develop and implement protective measures.

Sick Leave Policies

We recommend that you examine your sick leave policies to ensure they are flexible and consistent with [public health guidance](#) and the applicable federal, state, and local requirements. Federal law does not require employers to provide paid sick leave; however, some states, including New York and California, and some cities, including New York City and Los Angeles, mandate that covered employers provide paid sick leave to employees who have worked a certain number of days or hours in a calendar year. For example, under California's Healthy Workplace Healthy Family Act, full-time, part-time and temporary workers who work in California 30 or more days in a calendar year are entitled to at least three days of paid sick leave per year. Under New York City's Paid Sick Leave law, employers with five or more employees must provide at least five days of sick leave per year to full-time, part-time and temporary workers who work more than 80 hours in New York City in a calendar year. To view your city's or state's paid sick leave policies, visit this [online resource maintained by A Better Balance](#).

Federal, state and local laws also impose obligations on employers to provide unpaid leave to sick employees. Under the Family and Medical Leave Act (FMLA), employers with more than 50 employees must provide up to twelve weeks of unpaid leave to a qualified employee who has a "serious health condition." Leave under the FMLA is also permitted for qualified employees who have immediate family members affected by a "serious health condition." While the FMLA does not explicitly apply to COVID-19, depending on the severity of an infected employee's condition and the need to be quarantined, the employee may be eligible for FMLA leave. Additionally, if an employee is able to demonstrate that she is not able to work due to becoming ill from COVID-19, she may qualify for short-term disability benefits.

You may also receive requests from employees to work remotely or take sick leave if their children are impacted by school closures due to COVID-19. Although employers are not required to grant such requests under federal law, certain states and localities have enacted more protective legislation. For example, the New York City Earned Sick Time Act allows qualified employees to use accrued sick leave to care for a child during an unexpected school closure.

Workforce Adjustments

Employers can terminate at-will employees for any reason, including economic necessity brought on by an external market force like COVID-19. If an employer decides to lay off employees, it may have notice obligations under federal and state Worker Adjustment and Retraining Notification (WARN) laws depending on the number of employees at the company and the number of employees whose employment is terminated. The federal WARN Act, for example, requires employers with 100 or more employees to give 60 days' notice for a shutdown or mass layoff affecting 50 or more employees at a single site of employment. There is an exception to the notice requirement in the event of a "natural disaster" or "unforeseeable business circumstances." Whether this exception applies to COVID-19 is not certain but even if it were found to apply, an employer is still required to give as much advance notice as possible.

Note that many states have similar laws that apply to smaller employers or require notice for less significant adjustments to the workforce. For example, the New York WARN act applies to employers with 50 or more employees and requires 90 days' notice of a closing or layoff effecting 25 full-time employees. The notice requirement under the relevant California law, which applies to employers with 75 or more employees, is similar to the federal standard. Remote workers are considered for purposes of determining the number of employees a given employer has.

Communicate Your Plan Internally

As you continue to develop your company's plans for responding to the COVID-19 pandemic, you may want to consider sending a message to your employees to let them know of any actions you've already taken and your plan for developing a response, as well as reminders about appropriate workplace hygiene. A sample letter to this effect can be found [here](#).

Business Operations

Contingency Planning

Whether or not your company and employees are directly affected by COVID-19, the pandemic and resulting economic effects will require reexamination of your strategic plan together with your board of directors and qualified advisors. As new developments arise, we recommend sitting down with your finance team to review the company's operating budget and cash flow expectations for the next twelve to eighteen months and stress testing these projections based on different downside scenarios at varying degrees of severity. At a minimum, we suggest modeling drop-offs in revenue, delays in new product and feature launches, increases in unit costs and reduced availability of third-party financing. It may also be helpful to consider whether social distancing in response to COVID-19—*e.g.*, telecommuting, online teaching, telemedicine and direct-to-consumer prescriptions—will have a long-term effect on demand for your product or service.

We also recommend that you integrate your analysis into a contingency plan for how to face and overcome the specific risks posed to your business by the spread of COVID-19 and share this plan with your board of directors and, if applicable, key investors, sooner than later. A comprehensive contingency plan will typically cover:

- **Cash Runway:** It is critical at this relatively early stage of the pandemic to make a full assessment of your company’s cash runway. Consider the consequences to your business of a potential economic decline over the next six months, including the need to readjust sales forecasts, growth assumptions and earnings assumptions. It may be helpful to identify and factor into your assessment the company’s priority cash flow needs such as payroll and any upcoming debt maturities.
- **Funding:** If your company is currently in a funding cycle, speed of execution and certainty of closing will become paramount. Ideally you should be able to define what are your “must haves” versus “nice to haves” in negotiations with potential funding sources and, working with nimble and knowledgeable legal advisors, quickly drive financing discussions to a binding agreement. It will be important to keep an open mind and have realistic expectations about valuations and the financing terms that may be on offer in a changed climate. Creative strategies that can help bridge valuation gaps—such as milestone investments, earn-out notes and deferral (as opposed to conversion) of convertible or derivative securities in a financing round—will become more attractive.
- **Operating Costs:** Societal shifts in response to COVID-19 may create opportunities to optimize your operations and reduce costs. For example, if most or all employees will work remotely, you may be able to reduce rent and related outlays. It may also be helpful to reexamine your capital spending plans to determine if they still hold up in light of current economic trends; it will be important as part of this process to review the termination provisions of your capital expenditure contracts to ensure that cancellations or reductions in spending will not trigger penalties.
- **M&A Activity:** M&A activity as an alternative to pursuing (or a consequence of a disappointing) investor financing has already become more prevalent since the withdrawal of WeWork’s IPO, and we expect this trend to continue. Well-capitalized companies with profitable unit economics and thoughtful management will be presented with opportunities to make bolt-on acquisitions of promising business lines and acquire talented teams of individuals from companies that have not succeeded in becoming cash-flow positive. Companies that are in the market for financing may find it more attractive than before to sell a larger than usual minority stake or even a majority interest to a strategic partner to reduce the pressure inherent in pursuing multiple rounds of financing at ever-higher valuations. Transactions of this type often generate a lower payback than previous investors may have expected and require experienced counsel with the necessary judgment and skill set to help balance competing groups in the cap table.

Contract Disputes

Another important measure to help prepare for the effects of COVID-19 on your business operations is to review your company’s contracts for “*force majeure*” and other potentially applicable provisions. If you or a contractual counterpart cannot perform under the contract due to the impact of COVID-19—for example, due to quarantine measures—you should understand what the relevant contract says about performance under such circumstances.

To the extent the applicability of *force majeure* provisions to the outbreak of COVID-19 is litigated, the analysis will be highly fact-specific for each contract. First and foremost, courts will look to the plain language of the contract, including if it lists “epidemic” or “pandemic” as an example of a *force majeure* event. If the COVID-19 pandemic does not clearly fall under a listed event in the contract, courts will analyze whether this situation is of a similar nature to the events that are expressly enumerated in the agreement. Even if a court finds that the definition of *force majeure* has been met, it will also consider whether performance of the contract was rendered impossible, as opposed to merely more difficult or more expensive.

Even if a contract does not contain an express *force majeure* provision, a party seeking relief for a contractual breach may rely on certain other legal doctrines, such as impossibility of performance, although you should be aware that courts construe these doctrines very narrowly. Ultimately, determining whether it may be worth invoking a *force majeure* provision will depend on the individual ways in which the pandemic has impacted your company and your ability to perform under the relevant contract. We are experienced in litigating matters involving *force majeure* and can assist you in determining whether you (or your counterpart) has a *bona fide* basis to invoke *force majeure* or other similar legal doctrines.

Crisis Management Team

Performing the contingency planning and risk assessment discussed above should not be a one-and-done exercise—the COVID-19 pandemic is continuing to evolve and so too should your company’s response. To keep a pulse on how this situation develops, consider appointing a crisis management team explicitly tasked with reviewing and synthesizing new information about COVID-19, meeting to discuss developments on a regular basis, and communicating to senior management particularly relevant information that may have a direct impact on your company’s business outlook. A typical crisis management team will include individuals responsible for finance, HR, communications and legal as well as outside counsel and, if appropriate, an outside PR firm. Living in communities where COVID-19 is spreading, we are of course all trying to keep apprised of the latest developments. But having a dedicated team responsible for examining the news with the lens of how it impacts your business will help to ensure your risk assessments, decision-making and contingency planning are informed by the most current and accurate information.

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This overview of the potential impact of COVID-19 on our clients is meant to help you as you continue your planning, but does not take into account all facts and circumstances. If you have any questions about how the issues we’ve brought up apply to your company’s specific facts, we encourage you to contact us. We are here to support you and your company. We look forward to continuing to work together to strengthen your business for enduring success.

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