

Coronavirus: Legal and Practical Tips for Business





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Agenda

- 1) Welcome and Overview
- 2) Crisis Management and Communications
- 3) Employment and Workplace Issues
- 4) General Business and Corporate Considerations
- 5) Real Estate and Financing
- 6) Restructuring and Insolvency
- 7) Question and Answer

Crisis Management and Communications

Why Do Your Communications and Response Matter?

The way you communicate reflects your values, while helping ensure your message is heard and understood. Your success at communications ultimately helps to promote the goods or services you provide and can define your standing as a business and community leader.

With COVID-19 we are dealing with a worldwide event, unprecedented in modern times. But the general outline of a communications response is similar to any crisis:

- 1) Verify and assess the issue at hand
- 2) Develop an action plan that (a) clearly defines staff roles; (b) develops key messages and talking points; and (c) outlines defined benchmarks for both internal and external communications
- 3) Constantly monitor and regularly evaluate your efforts, and be nimble enough to course correct if necessary



Crisis Management and Communications

Who are you speaking to? Audiences include:

- 1) Employees
- 2) Partner organizations
- 3) Customers or clients
- 4) Vendors
- 5) Regulators and legislators
- 6) General Public

How are you speaking? Channels of communications include:

- 1) Direct communication
- 2) Email
- 3) Social media
- 4) Website
- 5) Intranet



Crisis Management and Communications

Employee Communication – Preserving Your Most Valuable Resource:

- 1) Employees want to hear from the boss – have him or her run point.
- 2) Rely on experts. Try to avoid gossip or rumor.
- 3) Always be transparent and honest. It's OK to not to have all the answers.
- 4) Be empathetic. Be relatable. Be confident.
- 5) Communicate regularly. People want to understand what's happening, how it will impact them and what you're doing:
 - Increased cleaning
 - Asking people to voluntarily self-quarantine
 - Updates from CDC or NH DHHS, new guidance, other health experts
 - Changes in work: Remote work options, changes in personnel/travel polices
 - Changes in hours of operation/visitors to the workplace/employment levels
 - Technology updates to accommodate new work reality
 - Workflow monitoring and client engagement



Crisis Management and Communications

External Communication – We're All In This Together:

No segment of the economy globally or our community locally is being left untouched by COVID-19. Much the same as your internal communications, your external outreach should be honest, empathetic and show leadership:

- 1) Use your various mediums – website, email, social media – to let your customers and the general public know of the steps you're taking to deal with the pandemic.
- 2) Keep everyone updated of changes, but don't always feel like a blast email is the best approach. Be creative.
- 3) Pick up the phone, I: Call through to some of your key customers, clients and vendors. Show interest in them, share information, then do it again.
- 4) Pick up the phone, II: Let elected officials know what and how you're doing. They are hearing concerns from their constituents daily – help them get the word out.



Crisis Management and Communications

The Bottom Line:

- 1) Things are changing quickly. You won't have the answer to every question.
- 2) You aren't expected to be a pandemic expert or to see the future.
- 3) When things change, let people know. You CANNOT over-communicate right now.
- 4) Everyone is under a lot of stress: Be informed. Be kind. Be patient.
- 5) Make it personal. We're all in this together. Reach out and talk to people who matter to you, your business and your employees.
- 6) Fight for your clients and customers. Use your communication strategy to not only tell your story but tell that of your clients and customers.
- 7) Continue to live your personal and workplace values - let them guide your communications, internal and external.



Employment: Top Five Things To Consider

- 1) Cancel all nonessential business-related travel; carefully consider whether “essential” business travel is truly essential
- 2) Impose a mandatory a 14-day quarantine for employees returning from travel to Warning Level 3 countries, known hotspots within the United States and cruises
- 3) Encourage remote work for those employees who can do so (and don't forget about cyber security)
- 4) If a temporary business shutdown occurs, employees may qualify for unemployment pursuant to **Emergency Order #5**, which extends unemployment to employees impacted by COVID-19
- 5) Allow employees to take accrued PTO, sick or vacation while out on COVID-19 related absences and don't forget about the **Families First Coronavirus Response Act**, which becomes effective April 2



Families First Coronavirus Response Act:

Emergency Paid Sick Leave Act

- Leave is paid out now by employer, recouped in full by tax credits against employer's portion of social security taxes and/or refunds.
- Employers with less than 500 employees must provide **two weeks** of paid sick leave to all employees.
- Full-time employees = 80 hours; Part-time employees = the average number of hours for 2 weeks.
- Employees may take Paid Sick Leave if:
 - The employee is subject to a federal, state, or local isolation or quarantine order related to COVID-19 (i.e., **shelter in place**)
 - A **healthcare provider** instructs the employee to self-quarantine;
 - Employee has **symptoms** consistent with COVID-19 and is seeking a medical diagnosis;
 - The employee is **caring for an individual** who is subject to a federal, state, or local isolation or quarantine order (**2/3 regular rate of pay**);
 - The employee is caring for a child for whom the **school or childcare has been closed** or is unavailable due to COVID-19 precautions (**2/3 regular rate of pay**); or
 - A similar reason to be specified later by the Department of Health and Human Services Secretary (**2/3 regular rate of pay**).
- Exclusion for healthcare provider employers or emergency responders.



Families First Coronavirus Response Act:

Emergency Family & Medical Leave Expansion Act

- Leave is paid out now by employer, recouped in full by tax credits against employer's portion of social security taxes and/or refunds.
- Employers with less than 500 employees must provide up to **12 weeks** of paid leave to employees unable to work (or telework) due to need to care for children under 18 whose school or childcare is closed.
 - First 10 days are unpaid, but the employee can use PTO or may be eligible for Paid Sick Leave
 - Remaining leave is paid at 2/3 the employee's regular rate, up to \$200/day and \$10k/employee (*there's a calculation for part-time employees*)
- Can apply for an exemption with Department of Labor if you have under 50 employees and providing this leave would "*jeopardize the viability of your business as a going concern.*"
- Healthcare provider and emergency responder employers may elect not to provide this leave.



FAQ : Unemployment and Layoffs

Unemployment Insurance Changes (Emergency Order #5)

- One week waiting period eliminated.
- Benefits are charged against the unemployment compensation trust fund and not charged against the employer's experience rating during period of emergency.
- Employees (and self-employed individuals) are eligible if total or partial unemployment is due to:
 - A current diagnosis of COVID-19
 - Quarantined (including self-imposed quarantine), at the instruction of a health care provider, employer, or government official
 - Caring for a family member or dependent who has COVID-19 or is under quarantine related to COVID-19
 - Caring for a family member or dependent who is unable to care for themselves due to the COVID-19 related closing of their school, childcare facility, or other care program
- WorkShare Plans allow employers to submit a plan to reduce the hours of a group of employees by 10% - 50% in lieu of temporary layoffs.
 - Employees can collect wages for hours worked plus UI benefits for reduced hours
 - Plan must be approved; earliest effective date – 21 calendar days from receipt of plan
 - Plan cannot exceed 26 weeks
- “Supplementing” UI benefits with additional payments may jeopardize eligibility.
- Continuing health benefits or paying COBRA premiums likely will not jeopardize eligibility.



Issues Affecting Contracts

- Anticipate the impact of Coronavirus on contract performance – yours and that of the other party
- Contract and legal doctrines that may excuse performance
 - Force majeure contract clauses
 - General or specific
 - Notice obligations
 - Burden of proof
 - Choice of law
 - Doctrine of impossibility
 - Doctrine of impracticability



Business/Contractual: Top Five Things To Consider

- 1) Review all mission critical contracts with counsel now
- 2) Prioritize contracts that have current performance requirements (by you or third party) to determine:
 - Do you have an alternative supplier/vendor?
 - Will you be able to perform your obligation?
 - Will the opposing party be able to/prevented from performing?
- 3) Understand the basis for your (or third-party's) non-performance (does it fit into the applicable force majeure clause?)
- 4) Formulate a plan and talk to the third party as soon as possible
- 5) Consider whether long-term performance agreements can be renegotiated now



Federal and New Hampshire Stimulus Response

- **Federal Tax Return Extension**

Federal tax returns and payments may be filed as late as July 15th without penalties or interest

- **Disaster Loans**

NH's disaster declaration to trigger availability of economic injury disaster loans from the SBA has been processed

- **Unemployment Insurance**

Use of increased availability of UI for COVID-19 reasons will not impact employer rating



Real Estate and Finance Considerations

Issues Affecting Commercial Tenants

1. Many of the same considerations and issues outlined above with respect to contractual and business issues apply in the context of commercial leases.
 - Ability to perform according to the terms of lease
 - Application of force majeure clauses (but usually not with respect to payment obligations!), doctrine of impossibility, etc.
 - The same strategies apply – Review your leases, assess your business's ability to comply with the terms, formulate a plan, communicate with your landlord or the property manager as issues arise or are anticipated.
2. Understand the terms of your lease – Some terms that you thought were "mere boilerplate" are meaningful and have real life impacts.
 - Does the landlord have the right to close the building to deal with a public emergency? Can the landlord limit your access to the building?
 - Does the lease give tenant the right to rent abatement if the building is temporarily closed?
 - Does the decision to implement remote working arrangements trigger a default under the "go dark" provisions of the lease?
 - Are there any special maintenance or repair obligations that may be triggered by the need for additional cleaning obligations resulting from an infected employee or guest?
 - Can the landlord limit the services provided to the tenant during an emergency?
 - Do you have obligations to secure your premises during an emergency?
 - Are there notice and cure rights for certain tenant defaults under the lease?



Real Estate and Finance Considerations

Strategies for Commercial Tenants

1. Communicate with your landlord early and often!
 - A. Have a plan before you talk to the landlord – What are the issues? How do you propose solving the issue?
 - B. We are all in this together: Be cooperative. Just as your business and your employees are suffering, the landlord's business and employees are suffering. Your success is their success.

2. So you can't pay your rent, then what???
 - A. Communicate promptly and clearly with your landlord! See Item 1 above!
 - B. Reasonably anticipate your needs for rental relief. Formulate a reasonable and realistic proposal.
 - C. Even if your landlord is willing to give you some relief, you expect that your landlord will require you to pay your share of operating expenses and real estate taxes if your lease is a triple net lease or a modified gross lease.
 - D. A Tip: Offer to extend the term of your lease for a period equal to the period of rental relief requested. (So, if you ask for 3 months of base rent abatement, offer to extend the term by 3 months.)
 - E. Get it in writing! Any rent relief or relief from another breach resulting from the COVID-19 crisis should be documented in a written amendment to the lease, signed by both parties.

3. Governor's Emergency Order #4 under Executive Order 2020-04

No evictions of commercial or residential tenants may be pursued while the State of Emergency remains in effect. **THIS DOES NOT RELIEVE TENANTS OF THEIR OBLIGATION TO PAY RENT.**



Real Estate and Finance Considerations

Issues Affecting Commercial Borrowers

1. **Déjà vu!** Many of the same considerations and issues outlined above apply to commercial loans.
2. Dust off those loan documents! Your obligations extend beyond just paying principal and interest. Some common loan provisions to consider include:
 - Financial covenants – Know them; anticipate the need for relief from expected covenant violations; request relief from the lender early.
 - Availability of revolving lines of credit – Is there a borrowing base formula that could affect your ability to draw on a revolving line of credit? Restrictions on drawing on line of credit during an ongoing event of default (including financial covenant defaults).
 - What are your obligations to protect the lender's collateral.
 - Are you in compliance with the lender's insurance requirements? (Hopefully the lender required you to carry business interruption insurance or you obtained it even if not required by your lender.)
 - Are there covenants that would affect your business's ability to take on additional debt if your business borrows funds from SBA or under NH's disaster loan programs?
 - Are there covenants that would affect your business's ability to bring in new investors and issue new equity interests to such investors?
 - Pay your taxes - If there are unpaid taxes that create a lien that is superior to the lender's mortgage or other security interests, they will have no choice but to act to protect their collateral position.



Real Estate and Finance Considerations

Strategies for Commercial Borrowers

- 1. Déjà vu all over again!** Many of the same strategies you will use with your vendors, landlords and others apply here.
 - COMMUNICATE!!! - If you don't talk to anybody else, talk to your lender if you are having difficulty. The lender is more likely to work with you to come to forbearance arrangements, waivers of covenant defaults, and extension of additional credit if you communicate with them.
 - Come up with reasonable proposals for any relief you might need from the lender.
 - Protect the collateral. For example, if the loan is secured by real estate and the real estate will be vacant due to a decision to require remote work or a governmental order, make sure the property is secured so that it is not damaged.
 - Get any covenant default waivers and forbearance arrangements in writing, signed by the lender.
- 2. Special considerations** If your business takes advantage of emergency loan programs offered by the SBA, the state or other governmental agencies.
- 3. Coordinate with your primary lender.** At minimum, the primary lender's consent is likely required by your loan documents.
 - Subordination and intercreditor agreements - Your existing lenders and the provider of emergency debt will likely need to document arrangements that address priorities with respect to debt payments and enforcement against collateral.
- 4. Governor's Emergency Order #4 under Executive Order 2020-04**
 - No foreclosure under RSA 479 may be pursued while the State of Emergency remains in effect.
 - Unclear whether or not the order prohibits secured party sales under Uniform Commercial Code, which applies to loans secured by assets other than real estate.
 - **THIS DOES NOT RELIEVE BORROWERS OF THEIR OBLIGATION TO MAKE PAYMENTS OF PRINCIPAL AND INTEREST.**



Maintaining Operations in a Distressed Economy

1. Develop a 30-day budget of essential expenses and identify cash flow issues
 - What expenses can be trimmed?
 - Communications with accounts payable, employees, and business partners can go a long way.
2. Communicate with your lender; savvy banks are likely to work with borrowers to avoid mass distress
 - Forbearance, interest moratoriums, borrowing base flexibility.
 - Covenant easing – leverage ratios, minimum liquidity, line of business.
3. Communicate with your trade suppliers and discuss trade term modifications if necessary
4. Communicate with your customers regarding:
 - Slowing order fulfillment/provision of services.
 - Safety precautions your employees are taking to keep customers safe.
 - Staying current on trade terms in order to ensure your continued provision of goods/services.
5. Communicate with your employees
 - If your operations do not require a full team, consult with your labor counsel about short-term layoffs, giving employees access to unemployment benefits.
 - Stay abreast of legislative relief regarding low- or no-interest loans to make payroll, and ensure you're complying with requirements for loan forgiveness.
 - Maintain morale as best as possible – this will pass, and your labor is likely one of your most valuable assets.
6. Remain nimble.
 - Are there different or other goods or services that you can provide in this new market to fill cash holes?
 - What emergency legislative fixes have emerged?



Warning Signs that Business Partners are in (Unusually High) Distress

The entire global economy is in some level of distress. What are the signs of a business partner's distress, and how could it impact your business?

1. Customers aren't complying with trade terms and aren't communicating with you about it.
 - Outstanding A/R should be monitored.
 - Consider A/R insurance.
 - Consider taking legal steps to "perfect" what the law deems to be your security interest in inventory between delivery and payment; this protects your right to "reclaim" goods for nonpayment.
2. Trade vendors are demanding tighter trade terms and aren't engaging in constructive discussion about how you can work together to both stay financially healthy.
 - If you don't have a written agreement prescribing trade terms with your essential suppliers, consider putting that agreement in writing.
 - For those agreements that exist, review them to see whether your suppliers have unilateral authority to tighten trade terms.
 - Be prepared to engage in constructive discussion about changes to trade terms – keep in mind that inflexibility could put critical suppliers out of business.
 - Consider alternative sources for critical suppliers in case your regular business partner cannot perform or fails.



What Relief can Bankruptcy Provide?

What is the difference between liquidating under state law and "bankruptcy"?

1. What tools does bankruptcy provide?
 - Automatic stay
 - Rejection of contracts
 - Restructuring of debt obligations
2. At what cost?
 - Legal fees
 - Financial disclosure
 - PR fallout



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Resources

- 1) www.bernsteinshur.com
- 2) <https://www.nheconomy.com/covid19>
- 3) <https://disasterloan.sba.gov/ela/Information/Index>
- 4) www.cdc.gov
- 5) www.who.int/health-topics/coronavirus
- 6) <https://coronavirus.jhu.edu/map.html>