

Coronavirus: UPDATED Legal and Practical Tips for Business



**N.H. Association of
Chamber of Commerce Executives**

Connecting Chambers of Commerce across New Hampshire

**BERN
STEIN
SHUR**



Roy W. Tilsley, Jr.
Shareholder, Bernstein Shur
Moderator



**N.H. Association of
Chamber of Commerce Executives**
Connecting Chambers of Commerce across New Hampshire

Bernstein Shur's Coronavirus Legal Response Team



Jim Merrill
Managing Shareholder,
Bernstein Shur New Hampshire
(Crisis Communications)



Talesha L. Saint-Marc
Shareholder, Bernstein Shur
(Employment)



Kristin A. Mendoza
Shareholder, Bernstein Shur
(Business)



Brett Allard
Attorney, Bernstein Shur
(Real Estate / Finance)



Lindsay Zahradka Milne
Shareholder, Bernstein Shur
(Business Restructuring and
Insolvency)



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



**N.H. Association of
Chamber of Commerce Executives**
Connecting Chambers of Commerce across New Hampshire

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. Studies show employees trust their employers more than anyone else to keep them reliably informed.
- 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
 - Technology updates to accommodate new remote work reality
 - Workflow monitoring and client engagement
 - COVID-19 infection in the workplace – handling it properly



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. It is difficult to over-communicate right now.
- 4) Everyone is under a lot of stress: 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 tell their story too.
- 7) Plan for the future. It's easy to get caught up in the day-to-day challenges of communicating and effectively serving your clients while working remotely.



Families First Coronavirus Response Act: Emergency Paid Sick Leave Act (Effective April 1, 2020)

- **Eligible Employers** – Employers with less than 500 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.*”
- **Eligible Employees** – Any employee
- **Leave Provided** – Employers 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:
 - 1) The employee is subject to a **federal, state, or local isolation or quarantine order** related to COVID-19 (**capped at \$511/day or \$5110 in the aggregate**);
 - 2) A **healthcare provider** instructs the employee to self-quarantine (**capped at \$511/day or \$5110 in the aggregate**);
 - 3) Employee has **symptoms** consistent with COVID-19 and is **seeking a medical diagnosis** (**capped at \$511/day or \$5110 in the aggregate**);
 - 4) 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**);
 - 5) 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
 - 6) 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.
- **Tax Credit:** Costs for Emergency PSL is recouped in full by **tax credits** against employer’s portion of social security taxes and/or refunds.



Families First Coronavirus Response Act:

Emergency Family & Medical Leave Expansion Act (Effective April 1, 2020)

- **Eligible Employers** – Employers with less than 500 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.*”
- **Eligible Employees** – Any employee employed for at least 30 calendar days
- **Leave Provided** - Employers 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*)
- Healthcare provider and emergency responder employers may elect not to provide this leave
- **Tax Credit:** Costs for Emergency Expanded FMLA is recouped in full by **tax credits** against employer’s portion of social security taxes and/or refunds.



Families First Coronavirus Response Act:

FFCRA Tax Credit FAQs

- Eligible Employers will claim the credits on their federal employment tax returns
- If Employers need money ASAP, they can reduce their federal employment tax deposits (or request an advance payment of the credits)
- Information from Employees to substantiate leave:
 - The employee's name;
 - The date or dates for which leave is requested;
 - A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason;
 - Quarantine order/self-quarantine – include the government entity ordering quarantine or the name of the health care professional advising self-quarantine
 - Leave for school closings - include the name and age of the child (or children), the name of the closed school, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave
 - A statement that the employee is unable to work, including by means of telework, for such reason.



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
 - Under traditional rules, benefits charged to employer; unsure if this has changed
- “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

- **NH Business Finance Authority – Capital Access Program and Temporary Loan Program**

- **Economic Injury Disaster Loans (EIDL)**

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

- Direct loans from SBA up to \$2,000,000
- 3.75% interest rate (for profit businesses); 2.75% interest rate (non-profits)
- Terms of up to 30 years with deferral of repayment commencement up to 12 months
- EIDL may be approved on the basis of the applicant's credit score alone
- Requirement of being in business for 1 year has been waived
- Personal guarantee requirement of loans under \$200,000 has been waived
- \$10,000 advance can be requested while application is pending to be used for payroll and other permitted purposes; SBA must fund advance within 3 days of application. Advance is not subject to repayment even if application is denied.



Federal and New Hampshire Stimulus Response

• CARES Act Paycheck Protection Program

Loan to grant program serviced through existing SBA lenders

- For small businesses as defined by 7(a) loan guidelines or as otherwise set forth in the CARES Act
- Loan amount can be up to 2.5 times the borrower's average monthly payroll costs over the past 12 months, up to a maximum of \$10,000,000
 - Modified calculation if including seasonal workers
 - Modified calculation for salaries in excess of \$100,000
- Proceeds from loan can be used for payroll, continuation of employment benefits, salaries, commissions, rent, utilities and interest on mortgage & debt obligations
- No loan original fee, no personal guaranty, no collateral
- Loan forgiveness of principal if funds used for permitted purposes within 8 weeks after loan origination (no more than 25% to be used for non-payroll expenses)
- Repayment deferment for 6 months; 2 year repayment term at 1.0% fixed interest
- Loan processing begins for small businesses on April 3rd; for sole proprietors and independent contractors, loan processing begins on April 10th
- Program expires on June 30, 2020 (or earlier if funds run out)

The CARES Act also provides for 2020 recovery rebates for individuals, an employee retention tax credit, deferment of employer payroll tax payments and several other tax modifications



**N.H. Association of
Chamber of Commerce Executives**
Connecting Chambers of Commerce across New Hampshire

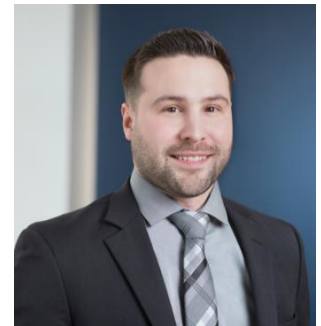


BERNSTEIN SHUR

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

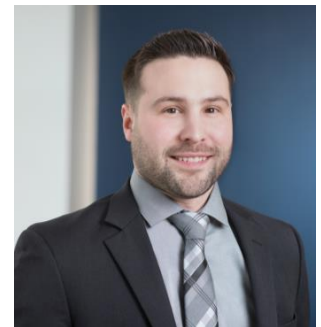
Strategies for Commercial Tenants

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 suppliers and discuss trade term modifications if necessary

4. Communicate with your customers

- 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 (if applicable).
- 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?



Managing Relationships with Suppliers

Suppliers are demanding tighter trade terms and aren't engaging in constructive discussion about how you can both stay financially healthy.

- If you don't have a written agreement prescribing trade terms with your essential suppliers, consider putting your existing practice in writing.
- If a contract exists, review for whether 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 suppliers for critical goods in case your regular source cannot perform or fails.



Managing Relationships with Customers

Customers aren't complying with trade terms and aren't communicating with you about it.

- Monitor A/R aging for compliance with trade terms; follow up and communicate.
- Consider A/R insurance for your bigger accounts.
- If you sell goods (as opposed to services), consider taking legal steps to "perfect" what the law deems to be your security interest in the goods you sell for the time between delivery and payment; this protects your right to "reclaim" goods for nonpayment.
 - Make sure your invoices/contracts provide that you retain title to the goods until payment.
 - File a financing statement with the secretary of state where your customer is located describing the goods in detail, but broadly enough to capture goods you may deliver in the next 5 years.
 - Search for any other secured parties that have also filed financing statements against your customer and send them notice of your filing.
 - Notify your customer in advance, as your filing may impact their borrowing capacity.



What Relief Can Bankruptcy Provide?

1. Ways to handle financial distress

- Operational streamlining
- Downsizing/re-tooling
- Winding down operations without bankruptcy
- Filing a petition for bankruptcy and reorganizing or liquidating

2. Why choose bankruptcy?

- Automatic stay
 - Debt collection
 - Litigation
 - Contract termination
- "Rejection" of burdensome contracts
- Restructuring of debt obligations



Bernstein Shur's Coronavirus Legal Response Team



Jim Merrill
Managing Shareholder,
Bernstein Shur New Hampshire
(Crisis Communications)



Talesha L. Saint-Marc
Shareholder, Bernstein Shur
(Employment)



Kristin A. Mendoza
Shareholder, Bernstein Shur
(Business)



Brett Allard
Attorney, Bernstein Shur
(Real Estate / Finance)



Lindsay Zahradka Milne
Shareholder, Bernstein Shur
(Business Restructuring and
Insolvency)



Resources

- 1) www.bernsteinshur.com
 - E-mail: info@bernsteinshur.com
- 2) <https://www.nheconomy.com/covid19>
- 3) <https://home.treasury.gov/policy-issues/top-priorities/cares-act/assistance-for-small-businesses>
- 4) <https://disasterloan.sba.gov/ela/Information/Index>
- 5) <https://www.nhsbdc.org/covid-19-assistance>
- 6) <https://www.cweonline.org/Entrepreneurs/Resources-Available-to-Small-Business-During-COVID-19-Crisis>

