

Coronavirus: Legal and Practical Tips for Businesses and Employers





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Agenda

- 1) Overview
- 2) Crisis Management and Communications
- 3) Human Resources/Employment/Legislative
- 4) Business/SBA/Contracts
- 5) Insurance/Risk Management
- 6) Question and Answer



Overview

- 1) Events continue to unfold rapidly – we all are trying to keep up
- 2) After our Webinar on Monday, it was clear many people wanted more information – Today's presentation will review and update the topics we covered in the previous Webinar
- 3) 90 minutes – an overview of each topic followed by Q&A; I will moderate
- 4) Your phones are muted, so please use the Q&A function to submit your questions – we will do our best to get to as many as possible
- 5) In addition to this information, please talk to your counsel



Crisis Management and Communications

Responding to a crisis

Most often, when we think about a crisis, we are thinking about a localized event. It impacts one business, one location, one community or one country.

This situation is different. It's worldwide and unprecedented in modern times. But the general outline of a response is similar to any crisis:

- 1) Verify and assess the issue
- 2) Notify pertinent staff and remind them of role in crisis
- 3) Assess the crisis level and develop action plan
- 4) Implement the plan, develop messages and manage communications
- 5) Monitor, evaluate and course correct if necessary



Crisis Management and Communications

Identifying your audiences:

- 1) **Employees**
- 2) Partner organizations
- 3) Customers/clients
- 4) Vendors
- 5) General Public

Identifying your channels of communications:

- 1) Direct communication/in-person/telephone
- 2) Email
- 3) Social media
- 4) Website
- 5) Intranet



Crisis Management and Communications

Employee communication:

- 1) Put company leadership front and center. Employees want to hear from the boss.
- 2) Rely on experts: Direct people to the US CDC and the Maine CDC for guidance.
- 3) Be transparent and honest. It's OK to not to have all the answers.
- 4) You cannot over communicate. People want to understand what's happening and how it will impact them, including at work.
- 5) After you've developed your action plan and when you have new information, share it with employees. For example, they want to know what you're doing and what they can do:
 - a. Increased cleaning
 - b. Asking people to voluntarily self-quarantine
 - c. Updates from US/Maine CDC, new guidance, other health experts
 - d. Changes in work: Remote work options, changes in personnel/travel polices
 - e. Changes in hours of operation/visitors to the workplace/employment levels



Crisis Management and Communications

What employees want to know:

Global Strategy Group, a national polling company, conducted research on workers opinions around COVID-19/Coronavirus. Here's what they found:

- 1) Employees want to know how you plan to respond
- 2) They want to be informed and prepared (as much as possible)
 - a. 68% said it was most important for business to inform workers of what's happening
 - b. 63% prioritized preparing employees for what's happening
 - c. Only 32% prioritized being reassured

GSG also identified specific information that employees want to know.

- 1) 75% want to know how you plan to respond if someone tests positive for COVID-19
- 2) 74% want to know if someone has the illness
- 3) 73% want to know what steps they should take if they believe they've been in contact with someone who has the coronavirus
- 4) 72% want specific guidance on when they shouldn't come to work if they're sick and think they might have coronavirus.



Crisis Management and Communications

General rules for communicating during this crisis:

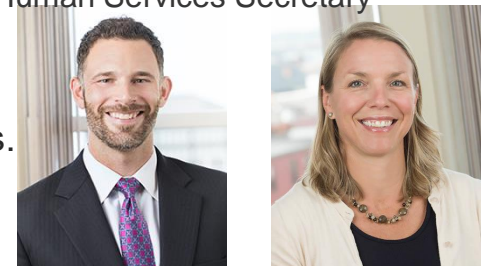
- 1) Things are changing quickly. You won't have the answer to every question.
- 2) You aren't expected to be an expert on pandemics or to see the future.
- 3) When things change, let people know.
- 4) You **CANNOT** over-communicate right now.
- 5) Everyone is under a lot of stress: Be informed. Be kind. Be patient.



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, for part-time, 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 paid leave to employees caring for children under 18 whose school or childcare is closed.
 - Full time employees 80 hours, for part-time, the average number of hours for 2 weeks.
- 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

- One week waiting period eliminated.
- Benefits sought are not charged against the employer's experience rating during period of emergency.
- Defined COVID-19-related reasons:
 - He or she is under a temporary medical quarantine or isolation restriction to ensure that the individual has not been affected by COVID-19 and is expected to return to work; or
 - He or she is temporarily laid off due to a partial or full closure of the individual's place of employment as a result of the state of emergency and is expected to return to work once the emergency closure is lifted.
 - He or she is on a temporary leave of absence continues to remain able and available to work for and maintains contact with the relevant employer due to:
 - medical quarantine or isolation restriction,
 - a demonstrated risk of exposure or infection, or
 - a need to care for a dependent family member as a result of COVID-19
- Workshare program allows employers to apply on behalf of their company or a unit of the company, but has restrictive rules on the amount of reduction in hours and has separate application process.
- COVID-19 related closures or reductions may not be so predictable.
- "Supplementing" benefits with additional payments may jeopardize employees' 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
 - Doctrine of impossibility
 - Doctrine of impracticability



General, Non-Specific Force Majeure Clause

FORCE MAJEURE

If the Contract becomes illegal or impossible to perform by either party due to acts of God, war, terrorist act, disaster, strikes, civil disorder, or other comparable unforeseeable emergency, this Contract may be terminated for any one or more of such reasons by written notice from one party to the other.



Specific, Detailed Force Majeure Clause

18. Force Majeure

18.1 Definition of Force Majeure

18.1.1 For purposes of the Contract, “**Force Majeure**” means any event or circumstance which wholly or partly prevents or delays the performance of any material obligation arising under the Contract, but only if and to the extent: (i) such event is not within the reasonable control, directly or indirectly, of the affected Party; (ii) the affected Party has taken all reasonable precautions and measures in order to prevent or avoid such event or mitigate the effect of such event on its ability to perform its obligations under the Contract, and which by the exercise of due diligence the affected Party could not reasonably have been expected to avoid and which by the exercise of due diligence it has been unable to overcome; and (iii) such event is not the direct or indirect result of the negligence or the failure of, or caused by, the affected Party.

18.1.2 Events that, subject to the foregoing, could qualify as Force Majeure events include unusual flooding, lightning, landslide, earthquake, fire, drought, explosion, epidemic, quarantine, storm, hurricane, tornado, other natural disaster or unusual or extreme adverse weather-related events, all state or nationwide strikes, unforeseen site conditions, acts (or failure to act) of Governmental Authorities, war (declared or undeclared), riot or similar civil disturbance, acts of the public enemy (including acts of terrorism), sabotage, blockade, insurrection, revolution, expropriation or confiscation, unavailability of fuel, power or raw materials if the cause thereof otherwise would qualify as an event of Force Majeure, and restraint by a court order or other Governmental Authority, provided that all events asserted as Force Majeure meet the requirements set forth in the Clause 18.1.1 and do not fall within any exclusion set forth in the Clause 18.1A.



Maine UCC § 2-615

11 M.R.S.A. § 2-615

§ 2-615. Excuse by failure of presupposed conditions

Currentness

Except so far as a seller may have assumed a greater obligation and subject to section 2-614 on substituted performance

(1) Delay in delivery or nondelivery in whole or in part by a seller who complies with subsections (2) and (3) is not a breach of his duty under a contract for sale, if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(2) Where the causes mentioned in subsection (1) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(3) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under subsection (2), of the estimated quota thus made available for the buyer.

Credits

1963, c. 362, § 1, eff. Dec. 31, 1964.



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 as a result of government mandate, CDC guideline, epidemic in general or personal choice?
- 3) Understand the basis for your (or third-party's) non-performance (does it fit into the applicable force majeure clause?) See above.
- 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 Maine State Loan Assistance (1 of 3)

- **SBA Disaster Loans –**

- Maine was first state to obtain necessary disaster certification of all counties
- New Hampshire – all ten counties approved disaster certification
- Up to 30 year term, 3.75% rate with no repayment for 4 months
- Small businesses (functionally most businesses in Maine) Please review the loan application at disasterloan.sba.gov for more details on the loan process, but you will need to provide, at a minimum:

- Completed SBA loan application (SBA Form 5).
- Tax Information Authorization (IRS Form 4506T) for the applicant, principals and affiliates.
- Complete copies of the three most recent Federal Income Tax Returns. If you do not have your 2019 Tax return complete, please returns for 2016 - 2018.
- Schedule of Liabilities (SBA Form 2202).
- Personal Financial Statement (SBA Form 413).
- Financial statements for business.



Federal and State Loan Assistance (2 of 3)

Consumer and Sole Proprietor Loan Guaranty Program

- Enabled by omnibus bill passed by Maine legislature Tuesday night and administered by and applied for through local banks and guaranteed by FAME Maine.
- Conference call with FAME and Maine banks and credit unions with DECD to discuss this program today at 2:30



Federal and State Loan Assistance (3 of 3)

What about Businesses Larger than SBA Qualification Caps?

- House Bill passed March 19 allocates funds to individual states from the federal government, which the States can use to reimburse State-created programs targeted at relief/loans for larger businesses
- Stay tuned for Maine or NH programs targeting this market
 - FAME Maine
 - DECD



Risk Management: Top Two Things To Consider

- 1) Take reasonable precautions to protect customers, visitors and employees.
- 2) Insurance: Act as a prudent uninsured to mitigate losses and ensure maximum insurance coverage for damages.



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Resources

- 1) www.bernsteinshur.com
- 2) www.portlandregion.com
- 3) www.cdc.gov
- 4) www.maine.gov/dhhs/mecdc
- 5) www.who.int/health-topics/coronavirus
- 6) <https://coronavirus.jhu.edu/map.html>



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