

# COVID-19 Checklist: Legal and Business Considerations

As the legal, regulatory, and commercial implications of COVID-19 continue to evolve, our team has created a checklist of the complex considerations that companies should have at top of mind during this difficult time. For additional guidance, please visit our [COVID-19 Legal and Business Toolkit](#) or reach out to us at [COVID19@cov.com](mailto:COVID19@cov.com).

## Crisis Management

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- **Prepare a strategy for crisis management and mitigation.**
  - Develop a crisis management playbook, which should include a communications plan.
  - Consider drafting, vetting, and approving such communications materials as a holding statement, a first response statement, talking points, social media plans, and directions to staff on who is authorized to engage with the press and other stakeholders.
  - Ensure there is a comprehensive and updated contacts list.
  - Develop action plans as part of the playbook that would include legal guidance, process directives, templates for legally required notifications, and logistical considerations.
  - Common issues that lawyers confront in managing crises include document preservation, privilege issues, public disclosure obligations, interactions with insurers and auditors, and a general lack of coordination and direction.

## Employment and Employee Benefits

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- **Assess the ability to continue operations.**
  - Stay informed of new and updated governmental orders and guidance that may impact whether operations may continue and to what extent.
  - Consider methods to facilitate remote working, such as providing employees with new equipment and setting up video conferencing accounts.
- **Implement containment actions to protect employees who are in the workplace.**
  - Review governmental guidelines on relevant health and safety practices, including social distancing and disinfection techniques, and develop a plan for protecting employees in the workplace.
  - Provide workers with appropriate training and, as necessary personal protective equipment, to ensure compliance with safety requirements and practices.
- **Consider applicable laws before requesting employees' medical information.**
  - For example: medical clearances; temperature collection; and requiring disclosure of an illness.

- The collection of employees' health information is highly regulated by laws such as the ADA and GDPR. If an employer is permitted under law to collect personal information, aim to: provide advance notice to employees of any updates to company policy; limit the dissemination of information held about employees with the virus on a strict need-to-know basis; and document processing justification(s) and suitable steps taken to ensure security of information shared.
- **Keep employee relations in mind.**
  - Communicate clear policies with the workforce and earn employee trust.
  - Evaluate health plan coverage for medical expenses necessary to diagnose or treat the coronavirus, including any out-of-pocket costs to employees for these expenses. Consider whether to offer employees access to providers through a telemedicine network.
- **Prepare for disruptions to business and the workforce.**
  - Disruptions to business may mean that employers need to adjust their workforce. This can take many forms, such as: a hiring freeze; a pause in contractor/temporary staffing resources; withdrawing offers of employment to candidates or delaying start dates; reducing agency/temporary work; delaying or freezing salary increases; reducing non-cash benefits; retraining/redeploying staff to unaffected or less affected areas of the business; offering employees sabbaticals; asking employees to take unpaid leave; placing employees on furlough; or layoffs.

## Insurance

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- **Gather and review potentially relevant insurance policies, to include at least:**
  - Property/Business Interruption; Event Cancellation; Pollution Legal Liability; General Liability; Directors and Officers Liability; Employment Practices Liability; and Professional Services.
- **Focus in particular on Property/Business Interruption and any Event Cancellation policies.**
  - Property/Business Interruption policies cover, among other things: 1) the cost to clean up contaminated factories, buildings or other premises, or parts, supplies or other materials and render them safe for use; and 2) lost revenue or lost profits resulting from plant shutdowns, or customer or supply chain disruptions caused by the coronavirus; and
  - Event Cancellation policies cover, among other things: the amount you are out of pocket, including extra costs related to refunds, vendor costs, notification costs, administrative costs, as well as the lost revenues resulting from a cancellation.
- **Look for the following in your policy:**
  - Communicable Disease coverage grants – some policies contain such coverage;
  - Contamination Exclusions – depending upon how they are worded, they may not preclude COVID-19 coverage; in addition, they may not apply to all coverages under the policy, and may not apply if the policy contains a “Communicable Disease” coverage grant; and

- Various Conditions/Requirements – when notice is required; level of claim proof required and timing; loss mitigation requirements; some policies (and some court rulings) require notice to be given very soon after a claim arises (sometimes within weeks).
- **Consider the applicable law:**
  - Most policies do not have choice of law provisions; but
  - The coverage provided and various conditions can be greatly affected by the law of the applicable jurisdiction.
- **Document your claim, including:**
  - The presence of coronavirus or COVID-19 at the relevant location(s) (ideally documented by an expert/vendor); and
  - The time frames for shutdowns, supply disputations, etc.; and
  - All lost income and costs.

## Policy

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- **Prepare for the possibility of mandatory quarantine, isolation, testing, or reporting orders affecting employees or facilities.**
  - These can come from the CDC or from state/local health authorities, but state/local authorities have broader power.
  - State/local authorities have responsibility for managing public health crises within their own borders. Orders of quarantine, isolation, testing, etc. can be directed at exposed individuals, or facilities, not just those that have been infected.
  - Federal authorities are more limited and are tied to the authority to regulate activity at the national borders and interstate commerce. These authorities can be directed to individuals who are infected and at the communicable state of infection, or to “carriers” such as ships, airplanes, etc.
  - Criminal penalties typically can be imposed for violating such orders.
- **Public health agencies have broad information-gathering authorities, but they do not overcome specific privacy statutes or restrictions.**
  - Consider the sensitivity level of the data and any specific restrictions to which you may be subject.
  - You can mitigate risk by requiring an order or other documentation of the public health agency’s information-gathering authority.
- **Review and undertake any needed cybersecurity preparations for increased remote access to company networks or data.**
  - Ensure that systems are updated and fully patched, and that multi-factor authentication is in place.
  - Test your remote access capabilities and incident response plans.

- **Remind your workforce about the dangers of phishing.**
  - Cybercriminals are opportunistic, and we have seen instances of the coronavirus being used to perpetrate phishing schemes.
  - Remind your workforce about these dangers and the need to verify the source of a communication before clicking on links or attachments.
- **The U.S. federal policy response is quickly evolving.**
  - Many of the federal policies being considered could significantly impact corporate operations. Congress is currently considering policies that include paid sick leave, enhanced unemployment insurance, protections for health care workers, free coronavirus testing, and affordable treatment. The Trump Administration is currently considering policies that include tax relief measures for certain industries, loans for small businesses, and a payroll tax cut. The status of these policy proposals remains very fluid.
- **U.S. state and local authorities will exercise significant powers.**
  - States have broad authorities, as has already been demonstrated by many governors declaring states of emergency, and with restrictions being placed by state and local authorities on school openings and mass gatherings. It is still too early to determine—and it will be based on many variables—how these evolving powers may impact commercial operations.
  - Clients should consider developing state/local advocacy strategies, including monitoring local developments in jurisdictions that impact their operations and determining the most effective means of communicating views on potential policies to policymakers.
- **Global policy issues will also remain important.**
  - There are a range of emerging global policy issues related to coronavirus that are also likely to impact multinational corporations, particularly with regard to supply chain disruption, but also involving employment, trade, export control, and other issues.
  - In addition to the policy decisions of sovereign nations, there will be a continued and significant policy role played by multilateral agencies and the international financial institutions (e.g., World Bank, WHO, IMF).

## Corporate: M&A and Corporate Governance

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- **Implications for existing acquisition agreements.**
  - **Post-Signing, Pre-Closing**
    - *Termination:* Consider whether any rights to terminate may have been triggered or any closing conditions may not be satisfied, including because a Material Adverse Effect may have occurred (e.g., as a result of supply chain failures) or because of delays in obtaining approvals from competition authorities. Consider duties to mitigate or cure breaches prior to termination.
    - *Covenant Compliance:* Consider whether the target company is in compliance with all “conduct of business” covenants in light of current events, or whether accommodations by the acquirer need to be sought under such provisions.

- *Financing*: Consider whether representations and warranties regarding the availability of funds for the transaction remain accurate, and whether the parties will be able to ensure compliance with financing covenants.
- **Post-Closing**
  - *Earn-outs*: If there is contingent deal consideration based on performance of the business, consider whether either party will seek to modify the terms thereof based on force majeure, impossibility or other types of claims (see “Contractual and Commercial-Dispute Considerations” below).
- **Implications for new acquisition agreements.**
  - *Deal Certainty*: Consider whether representations and warranties (including Material Adverse Effect definitions), pre-closing covenants, closing conditions, financing contingencies, termination provisions (including outside dates and structuring of termination fees), and the right to specific performance should be adjusted to account for current events.
  - *Purchase Price Adjustments*: Consider the impact on working capital targets and other purchase price adjustments, and whether the transaction agreement should provide built-in flexibility or formulas for setting such targets at closing. Parties contemplating a locked-box mechanism should also consider whether such a structure is practical or desirable given current uncertainties.
  - *Diligence*: The termination and force majeure provisions in the target’s commercial contracts will require heightened scrutiny in light of current events. As a result of COVID-19, there will also be an even greater focus on cybersecurity issues, including because employers may be more vulnerable to cybersecurity attacks than they were in the past as a result of new or expanded remote work programs, the scope of target’s insurance policies for losses attributable to COVID-19 and actions being taken to preserve target’s rights under those policies, supply chain disruptions arising from mandated quarantines and facility closures, and steps being taken by the target to ensure business continuity in the face of potential disruptions. To the extent required, consider also what challenges could arise from conducting diligence wholly remotely.
  - *Disclosure*: Target companies should plan to provide disclosure regarding COVID-19’s impact on their business in their disclosure schedules.
  - *Representation and Warranty Insurance*: Potential acquirers should carefully examine policy exclusions to ensure they are comfortable with the level of risk they might be required to bear in connection with COVID-19-related losses.
- **Corporate Governance**
  - Consider how to advise the Board on mitigating COVID-19 risk and implications for strategic transactions. The Board should consider all aspects of COVID-19’s impact on the target or acquirer’s business, as well as deal structuring, deal certainty, and post-closing obligations. [\(Read Full Article Here\)](#)

## Corporate: Securities and Capital Markets

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- **Conditional reporting relief for public companies and other filers. ([Read Full Article Here](#))**
  - The SEC has issued exemptive orders providing conditional reporting relief for reports under the Securities Exchange Act of 1934 that are due on or before July 1, 2020 other than filings (including amendments) on Schedule 13D.
  - Companies and others relying on the relief must file reports within 45 days of their due date.
    - Companies relying on the exemptive order will maintain eligibility to use Forms S-3 and S-8 if they file required reports within the 45-day period.
    - Companies that are unable to file annual or quarterly reports within 45 days may rely on Rule 12b-25.
  - Public companies relying on the relief must file a Form 8-K (Form 6-K for foreign private issuers) disclosing their reliance on the exemptive order and certain additional disclosures. A separate Form 8-K (or Form 6-K) is required for each filing that is delayed in reliance on the SEC's orders.
- **Disclosure guidance for companies affected by COVID-19. ([Read Full Article Here](#))**
  - Companies and other related persons should consider their activities, including risks and effects presented by COVID-19, in light of their disclosure obligations under the U.S. federal securities laws.
  - Evaluate the impact of COVID-19 and current disclosures prior to engaging in securities transactions (e.g., offerings, buybacks, ordinary market transactions).
  - Evaluate whether COVID-19 or action in response to COVID-19 provides a risk to the company's business that would be material to investors.
    - If the risk is currently affecting the company in a material way, that impact should be described to contextualize the risk.
    - Material risks and impacts may be specific to the operations of a company or industry and broader, such as a decline in economic conditions or increased market volatility.
  - Evaluate existing disclosures frequently to determine whether they should be updated.
  - Review and, if necessary, update the disclaimer used to help ensure the availability of the safe harbor for forward-looking statements, as the company considers disclosing information regarding material developments related to COVID-19.
  - Evaluate disclosure controls and procedures to ensure material information regarding the impact of COVID-19 is being provided to senior management in a manner that allows them to make timely and accurate disclosure determinations.
  - In cases where a non-GAAP financial measure or performance metric is presented to adjust for or explain the impact of COVID-19, highlight why management finds the measure or metric useful and how it helps investors

assess COVID-19's impact on the company's financial position and results of operations.

- Evaluate proposed COVID-19 disclosures in light of securities litigation risk. At least two securities class actions have already been filed based on allegations of false and misleading statements or omissions concerning the virus and related matters.
- Consider risks associated with the health and continued service of key insiders and potential obligations if an executive officer or director becomes ill or incapacitated. [\(Read Full Article Here\)](#)
- **Compliance considerations. [\(Read Full Article Here\)](#)**
  - Take steps to avoid selective disclosure of material information; disseminate material information broadly through established channels.
  - Emphasize the importance of disclosure and social media policies to reduce the possibility of unauthorized disclosures and the potential for rumors and further trading volatility.
  - Emphasize the importance of insider trading policy to avoid inadvertent violations.
- **Annual meeting considerations. [\(Read Full Article Here\)](#)**
  - Contingency planning for annual meeting. If planning is ongoing when proxy statement is filed, consider disclosure regarding potential alternatives and describe how changes will be communicated.
    - Subsequent changes should be announced through a press release that is also filed with the SEC as additional soliciting material on EDGAR.
    - Companies making changes should also take 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.
  - Potential consideration of virtual annual meeting alternatives, either in substitution or in addition to traditional in-person annual meeting.
    - Companies considering a virtual annual meeting should evaluate state law requirements relating to annual meetings.
    - Companies considering a virtual annual meeting should seek to provide a way for participants to meaningfully participate in the meeting.

## **Contractual and Commercial-Dispute Considerations**

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- **For contracts currently being negotiated, consider updating your approach to drafting force majeure provisions.**
- **In assessing existing contracts, consider the terms of any force majeure or impossibility clauses, as well as whether the circumstances of the agreement lend themselves to a frustration-of-purpose argument.**



- **Pay attention to notice provisions in the force majeure clause.**
  - Prompt written notice may be a requirement.
- **Examine whether triggering the force majeure clause may have unwanted side effects.**
  - For example, a right for the other party to terminate.
- **Consider other relevant commercial provisions—such as termination for convenience, change of law, Material Adverse Change, representations and warranties, and covenants—as well as any duty to mitigate damages.**
- **If the contract is with a government body, consider whether any changes by the government body to the scope and requirements entitle your organization to compensation.**
- **Take account of the fact that formal resolution of any disputes will be slow, as many courts and ADR organizations have suspended non-essential services.**
- **Consider establishing a central contact point within your organization to :**
  - review the relevant agreements;
  - manage these contract interpretation questions; and
  - coordinate communications with counterparties.
  - *Please note that these are fact and jurisdiction-specific questions, and a coordinated approach within your organization is advisable.*

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