

GUIDANCE FOR COVID-19

MARCH 20, 2020



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INTRODUCTION

The coronavirus pandemic is a business disruption unprecedented in our time. From its beginning in central China to its growing spread in the United States and Europe, COVID-19 has already left a mark on the world. The ultimate footprint of the outbreak is unclear, but, with careful thought, businesses can take concrete steps today to minimize losses and build resilience.

To help you navigate this disruption, we at Messerli Kramer prepared the following overview of the top business and legal issues you are likely to face. This carefully vetted guidance – combined with our individualized, localized support – will enable your organization to withstand this time of uncertainty.

With our passionate team and remote capabilities, we are dedicated and equipped to continue supporting you at the highest level of service.



EMPLOYMENT & HUMAN IMPACT

Your business depends on a strong, confident workforce. We recommend the following steps to support your staff while preventing and containing community spread:

- > **Designate a company representative** to monitor COVID-19 health and policy updates and lead your organization's response to the changing landscape. Engage in regular meetings with leadership to determine changes to your policies/procedures as needed.
- > **Ensure compliance with proper cleaning and personal hygiene protocols**, with particular attention to the guidelines published by the [Center for Disease and Control](#) and the [Occupational Safety and Health Administration](#), and make sure you have sufficient supplies, if applicable, for your workplace.
- > **Limit non-essential travel**, especially to affected regions.
- > **Build a system for employee reporting**, with particular attention to employees' privacy rights and an action plan for notifying other employees in the event a co-worker is confirmed to have COVID-19.
- > **Define standards for when employees are required to stay home or return to the office**, being sure to account for both direct (symptomatic and/or diagnosed COVID-19) and ancillary (personal vulnerability, childcare for school closures, and/or caring for sick family members) absences. Consult counsel regarding medical inquiries and/or employee testing to ensure that you are in compliance with all applicable laws and regulations.
- > **Review and adjust leave and pay policies**, with particular attention to written employment agreements, leave policies, collective bargaining agreements, exempt versus non-exempt status, FMLA rules, disability policies, local rules, and other factors. As federal and/or state legislation changes, modification or amendment to leave policies and practices is essential.
- > **Review your work-from-home policies and infrastructure**, ensuring that you are prepared to stay productive, that personal and business-issued devices are used appropriately, and that sensitive information accessed off-site is protected and/or disposed of properly.
- > **Avoid discrimination and ensure compliance** with state and federal laws, including the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the ADA, and state and local sick leave laws.
- > **Take similar measures to protect third parties** like customers and vendors, who might have claims against your business if you unnecessarily expose them to risks that result in their illness or loss.

The following is a summary of the federal legislation recently enacted to address employee leaves in response to COVID-19, including the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, both effective April 2, 2020.

Emergency Family and Medical Leave Expansion Act.

- > Applies to employers with less than 500 employees.
 - > Excludes healthcare providers and emergency responders.
 - > Employers with less than 50 employees may request an exemption if the leave would jeopardize the viability of their business.
- > Employees are eligible if they have worked for the company for 30 days or more before the first day of leave.
- > Applies if an employee is unable to work or telework to care for a child (less than 18 years old) if school or care provider is closed or unavailable due to a public emergency declared by a federal, state or local authority.



EMPLOYMENT & HUMAN IMPACT *cont.*

> **Benefits**

- > 12 weeks job protected leave
 - > First 10 days may be unpaid (employees can opt to use PTO/vacation/sick leave during this 10 day period, including Emergency Paid Sick Leave as provided below).
 - > After 10 days, employees are paid at 2/3 their regular rate of pay subject to the following caps (\$200/day or \$10k aggregate per employee).

- > **Job Restoration.** Employers with 25 or more employees will have the same obligation as traditional FMLA to restore an employee to the same or equivalent position following leave. Employers with less than 25 employees are excluded from this provision if the position is no longer available due to economic downturn or other circumstances caused by a public health emergency; however, they must make reasonable attempts to return the employee to an equivalent position and such effort must continue for up to a year following the leave.

Emergency Paid Sick Leave Act (*Effective April 2, 2020*)

- > Applies to employers with less than 500 employees. (exceptions for healthcare providers and emergency responders)
 - > Employers with less than 50 employees may be eligible for an exemption from paying sick leave to an employee who is caring for a child whose school or place of care has closed or whose childcare provider is unavailable because of COVID-19 if the leave would jeopardize the viability of their business.
- > Employees are eligible no matter how long they have worked for the company.
- > Eligible based on the following factors:
 1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
 2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
 3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
 4. Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
 5. Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
 6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

> **Benefits**

- > 80 hours of paid sick leave
- > For items 1, 2, and 3 above, paid at their regular rate of pay subject to cap of \$511/day or \$5,110 aggregate per employee
- > For items 4, 5, and 6 above, paid at 2/3 of employee's regular rate subject to cap of \$200/day or \$2,000 aggregate per employee
- > Paid leave will not carry over to the following year and can be in addition to other leaves provided by the employer.
- > Sick leave ends the work shift immediately following the termination of the need for paid sick time.
- > Employers cannot require employees to use other forms of paid leave before using paid sick leave under this new law.
- > Employers are required to post a notice of this benefit as soon as it is developed by the Secretary of Labor.
- > Prohibits retaliation against any employee who takes leave.



FINANCE

Your business needs to meet its existing obligations and capital needs in order to remain stable and grow through this season of volatility. Follow this road map to ensure your organization's financial health.

Model the most likely finance and operations scenarios. [Experts anticipate](#) that the market will likely follow one of three trajectories:

- > Quick recovery by Q2 2020;
- > Global slowdown with a rebound in Q3 2020; or
- > Recession lasting through Q4 2020.

As you model your organization's finances through these scenarios, consider, too, potential government restrictions on operations, ranging from individual to local and national quarantines. Use these frameworks to forecast your ability to meet existing financial obligations, project your operating budget, and evaluate capital expenditures.

Resolve potential trouble areas. Use your modeling to pinpoint vulnerabilities. Monitor liquidity and adjust borrowing and spending as appropriate. Proactively discuss and negotiate any problematic terms in your existing financial relationships.

Determine the extent of your insurance coverage. In particular, review your business interruption policy's language concerning public health crises, communicable diseases, and civil authority actions. Typically, these policies require physical property damage before intangible losses can be paid out. The insurance industry also tightened its coverage of losses caused by viral diseases since the SARS outbreak of the early 2000s. However, even if your policy does not currently cover COVID-19-related losses, [government authorities soon may force insurers to cover these losses](#).

Explore government relief. World governments are mobilizing business support, including tax relief and discounted lending programs. For example, the U.S. Small Business Administration is coordinating with state Governors to provide working capital loans of up to \$2 million to the most-affected small businesses and non-profits through its [Economic Injury Disaster Loan Program](#). As of the date of this publication, the program covers certain counties in the following states: California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York, Oregon, Rhode Island, and Washington. Your state and local governments may offer similar relief. Early guidance from the SBA suggest that it will offer terms of a one year deferral on payments and thereafter a 3.75% interest rate and 30 year amortization. Consider taking advantage of these options before looking to more costly private sector tools.

Evaluate borrowing and refinancing opportunities. The Federal Reserve steeply cut the federal funds rate and has implemented other measures to stabilize the banking industry. Though not guaranteed, this may be a unique opportunity to borrow and refinance debt at lower rates. Consult your accounting, legal, and banking partners to evaluate your liabilities and borrowing needs.

Consult counsel if your business experiences significant losses. Certain sectors, including the oil and service industries, may experience heavy losses as a result of decreased demand, supply chain disruption, and/or abnormal market behavior. Businesses who have exhausted the options outlined above may need to consider restructuring or entering bankruptcy in order to salvage resources.



LEGAL

Force Majeure. As operations are interrupted by COVID-19, you may find yourself or your business partners struggling to meet contractual obligations. The legal principle of *force majeure* (“superior force”) is often written into contracts to account for such unexpected and uncontrollable business disruptions. But invoking *force majeure* requires careful consideration of the actual agreements and business interests involved. Consider the following:

- > **Scope.** Does the contract’s *force majeure* provision cover disease outbreaks? Does the provision indicate that its list of triggering events is exhaustive, or may additional triggering events be considered?
- > **Obligation to mitigate.** Regardless of whether COVID-19 or related events trigger the agreement’s *force majeure* provision, the parties may have an obligation to limit losses and perform their contractual duties to the best of their ability.
- > **Risk of repudiation.** If one party attempts to avoid a contractual duty by invoking *force majeure*, the other party may have grounds to repudiate the whole agreement. Carefully evaluate your contract and the business interests involved before abandoning any responsibilities.
- > **Troubled Vendor Program alternatives.** Consider negotiating with business partners if you or they are struggling to make good on commitments. Parties can negotiate the exchange of equipment, intellectual property, collateral, advances, priorities in security interests, and more to maintain working relationships.

The initial burden of proof is on the party looking to enforce the provision and enforcement of a Force Majeure provision depends primarily on the drafting of the provision and is an affirmative defense which means that the defendant has the burden of proving that this provision exempts performance. The court will look at a contractual provision to determine whether the language properly applies in the situation at hand.

Commercial Impracticability. The term Force Majeure relates only to contractual provision. In the absence of such a provision, the doctrine of Commercial Impracticability under the UCC may exempt performance of a contract. In a case where no Force Majeure clause is present, the party looking for relief from performance of its obligations under a contract can attempt to show that the circumstances fall under the Minn. Stat. § 336.2-615. If they can prove that the situation fits in the framework of the statute, both parties are excused from their responsibilities under the contract.

Public company disclosures. If your business is publicly traded, you may need to update your risk disclosures and other, public filings in light of new or enhanced business challenges arising from COVID-19.



CONCLUSION

COVID-19 has significantly disrupted business around the world. However, with the right information and sound advice, your organization can minimize losses, build resilience, and successfully navigate this difficult season.

Official policies are changing rapidly, so be sure to stay current with the following authorities:

- > [World Health Organization](#)
- > [U.S. Department of Health & Human Services - Centers for Disease Control and Prevention](#)
- > [U.S. Department of Labor – Occupational Safety and Health Administration](#)
- > State & local authorities

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