

**Corporate and Business Alert
March 2020**

Corporate and Business Effects of the COVID-19 Pandemic

*For a discussion of these and other legal issues, please visit our website at www.mhtl.com
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The coronavirus disease 2019 (COVID-19) is increasing concern about possible widespread business interruptions and the need to adapt to the changing behaviors of the consumer made necessary by the virus's spread.

As you are aware, the World Health Organization (WHO) determined COVID-19 to be a global pandemic on March 11, 2020, the President has declared a national emergency as of March 13, 2020, and many states have declared emergencies as well; Governor Charlie Baker declared a state of emergency on March 15, 2020 and enforced sweeping measures which will affect many businesses and their operations, such as strict limitations on gatherings of twenty-five (25) or more people, the immediate cessation of on-premises restaurant and bar services through at least April 6, 2020, and the closing of all public and private schools through at least April 6.

Myriad employment issues, especially those related to the health and safety of your employees, require immediate attention, but those are beyond the scope of this alert. Please consult our website for some of the recent installments of our Coronavirus Working Group analyses on employment topics, including the top FAQs our labor and employment attorneys are fielding as well as the OSHA and CDC guidance on keeping employees safe.

This client alert is focused on two business issues. First, start to look at your company's contracts and anticipate disputes, supplier delays, and your company's potential losses/liability should you fail to be able to deliver as anticipated. As you review your contracts, you will want to pay particular attention to whether there is a material adverse change or *force majeure* clause. If so, it may provide you or those with whom you contract partial or complete exemptions from performance.

You will also want to review your insurance policies and determine the coverage and notice provisions. You should think about the documentation you will need to keep if you anticipate being able to file a claim under a business interruption policy. Although there are many other issues, these two business issues are important to start thinking about and working with your lawyer as soon as possible.

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Force Majeure Provisions in Contracts

Many *force majeure* provisions in contracts specifically include a pandemic as a triggering event. Based on WHO's recent declaration, a contract which contains a *force majeure* provision excusing a party's performance due to an epidemic or pandemic will likely relieve that party of some or all its performance obligations under the contract. Take care to review specific provisions for any additional requirements – such as the length of time that a pandemic may last, or when the declaration of a pandemic becomes official in relation to your contract's performance.

However, not every contract's *force majeure* provision specifically includes pandemics. Contracts may have provisions covering "Act of God" or "government action." Courts have provided little guidance as to which events under "Acts of God" or "government action" may excuse performance under a contract. An "Act of God" clause excusing performance because of the COVID-19 pandemic will largely depend on the jurisdiction. If a *force majeure* clause includes specific disasters such as a flood or tornado, but is silent as to pandemics or epidemics, a court may be less likely to conclude that the pandemic is covered by that *force majeure* clause. Parties may also argue that delays or suspension resulting in nonperformance may be excused due to "government action," which is important in light of the states of emergency and pandemic declaration by WHO discussed above. Nonperformance under a contract may result because of the recent actions taken by local, state, and federal governments. Specific application to a contract will need to be analyzed on a case-by-case basis.

Some *force majeure* clauses are more general in nature and may not list any specific examples of excusable events, but may state that a party will be excused for nonperformance due to unforeseeable events beyond that party's control. Remember, any party attempting to enforce such a clause will necessarily need to convince a court that it attempted to carry out its performance under the contract, but was unable to do so because of the COVID-19 pandemic.

Insurance Coverage for COVID-19 Losses

As many businesses work to mitigate the accelerating COVID-19 crisis, there is growing concern that the pandemic may cause increasingly adverse financial impact to businesses both large and small. One recommendation to potentially mitigate losses is to carefully review existing insurance programs and coverage to determine whether infectious disease-related losses are covered. The scope of coverage will depend upon specific terms of each policy. Business Interruption Insurance may help businesses stem the tide of COVID-19 related losses.

Typically, a company or business' Business Interruption Insurance is purchased as part of a commercial property insurance policy. In many commercial property insurance policies, business interruption insurance coverage is triggered when the holder sustains physical loss or damage to insured

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property. Such coverage may be disputed by many carriers if a pandemic-related claim is placed. Courts across the country, however, have not created a bright line test for so-called “physical loss.” Consequently, contamination and other incidents that leave property unfit for use may meet the definition of a “physical loss.”

Some policies may include coverage for losses caused by “communicable or infectious diseases” without requiring “physical damage” to the insured property. This is a consideration for any business concerned with potential losses from communicable or infectious diseases, such as COVID-19.

Additionally, some policies provide coverage for business interruption losses sustained when a “civil authority” prohibits or impairs access to a policyholder’s premises. Such coverage may not require that any restriction result in “physical loss,” which is particularly important if any of the aforementioned actions taken by the state or federal government have restricted access to areas where active transmission of an infectious disease has been identified.

Starting to review these two issues now with legal counsel is important. After review of your business and insurance contracts, you and your attorney will want to build a team to include your insurance broker and accountant to assist you in developing appropriate strategies for your business.

This Client Alert was prepared by Peter T. McNulty and reviewed by Arthur Murphy, and Katherine Hesse. If you have any questions about this issue, please contact Peter McNulty or the attorney responsible for your account, or call (617) 479-5000.

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