

COVID-19: Important Legal Issues For U.S. Businesses To Consider

March 20, 2020

1. Assess Employment Risks.

Companies are experiencing, or will soon experience increased absences as a result of the global Coronavirus (COVID-19) public health emergency. Further, due to shelter in place, CDC guidelines, or other best practices, companies will need to adopt or revisit their telework policies.

The Families First Coronavirus Act (FFCA), which was signed into law on March 18, 2020, has major implications for employers with **under 500** employees. Broadly, the FFCA creates a new qualifying reason for leave under the Family and Medical Leave Act for those who cannot work due to childcare needs and creates a completely new mandate that employers provide a minimum amount of emergency paid sick leave. More information on the impact of the FFCA can be found [here](#).

Telework policies and practices need to be carefully crafted, implemented, and monitored, and should address or consider the following:

- Security Requirements.
 - Assess your ability to manage and implement consistent security standards across multiple remote users.
 - Confirm any customer or third party contractual requirements re remote access or remote access by non-U.S. residents.
 - Technology and Network Capabilities. The simultaneous use of internet, VPN may overwhelm your existing IT

Authors

Daniel B. Hassett

Partner

202.719.3309

dhassett@wiley.law

Jessica N. Rosenthal

Partner

202.719.7478

jrosenthal@wiley.law

Rebecca L. Saitta

Of Counsel

202.719.7075

rsaitta@wiley.law

Practice Areas

Corporate

systems. Performance of IT systems will need to be monitored at least daily, including any data breach events.

- E-signature. Review capabilities for remote signature/notarizing documents.

Finally, layoffs or furloughs may trigger a number of laws, including the Worker Adjustment and Retraining Notification (WARN) Act and should be planned carefully with experienced employment counsel.

2. Supply Chain (Downstream – Your suppliers)

- Communicate, communicate, communicate w/ suppliers and customers.
- Perform contract rights assessment – Review and summarize for future use your contractual rights under material supply contracts, including the following provisions:
 - Default and termination for convenience rights;
 - Requirements, volume or exclusivity commitments;
 - Indemnity and limitation of liability provisions;
 - Audit rights;
 - Insurance coverage for supplier breach;
 - Force Majeure; and
 - Update contractually required notice/contact and registered agent info as needed.
- Increase monitoring of vendors and customers
- Explore alternative sourcing for supply chain
 - Request adequate assurances under UCC 2-609
 - Trigger audit or final statement requirements
 - Review anticipatory breach rights

3. Bankruptcy/insolvency.

Unfortunately, it is anticipated that COVID 19 will result in an uptick in business bankruptcy filings. Companies may be impacted by bankruptcy filings by their customers or suppliers.

Mitigating the affect of the inevitable bankruptcy filings may be segregated into two categories: (i) strategic pre-bankruptcy risk mitigation, and (ii) post-bankruptcy claims.

- Pre-Bankruptcy risk mitigation
 - See Section 2 above
 - Assess your exposure.
 - Be diligent in collecting invoices as they come due and according to invoice terms.

- Consider available security interests, if appropriate.
- More information discussing our recommended practices for managing distressed supplier and customers can be found [here](#).
- Post-Bankruptcy Claims
 - Pay attention to notices and deadlines.
 - The Bankruptcy Code has fixed deadlines for filing claims.
 - Different deadlines may apply to different types of claims.
 - Once you are aware of or are notified of a bankruptcy filing, there should be a centralized resource to timely file and monitor claims.
 - The bankruptcy filing can also impact the treatment of outstanding contracts with the company seeking bankruptcy protection.
 - To the extent that you are a supplier, consider requesting that the debtor seek approval for your company to be designated a critical vendor.
 - Be aware of restrictions imposed by the Bankruptcy Code's automatic stay.

4. Loan Documents and Other Material Agreements

Social distancing and interruptions of our routines are likely to have an adverse impact on companies' P&L's and balance sheets.

Action items as to loan agreements:

- Undertake a close review of your company's loan documents sooner rather than later to assess where potential defaults may lie:
 - Upcoming financial covenants – monthly and quarterly tests in April under many loan agreements.
 - Other operating covenants – with reduced operations, are you headed toward a potential breach of other operating covenants in your loan documents, including a covenant to operate in the ordinary course of business?
- Once you have a sense of the scope of potential defaults, early communication with lenders is the best course of action to request waivers of defaults – the goal is to head off a situation where a lender can enforce its rights to accelerate the loan, charge interest at the default rate or exercise other available remedies. Open the dialogue early with your lender to try to get on the same page before any potential enforcement action or default notice arrives in your inbox.

Action items as to other material agreements:

- Review all material agreements to which your company is party, including material leases and agreements with material suppliers, vendors, and customers – need to assess potential defaults toward which your company may be headed and understand any cure periods that may be afforded in the

event you are in default, as well as any termination rights the counterparty may have.

- Analyze which of your material customers may be in default and whether you want to send default notice and exercise rights and remedies.

5. M&A Transactions

It would not be surprising under the current circumstances for buyers and sellers to rethink any transactions that are in the process of being negotiated or have been signed and are not yet closed. Bear in mind that the profile of the target company or its assets may change as weeks progress, whether for the better or the worse.

As is often the case in transactions, much is a matter of assessing the risk your company is willing to take and the leverage each party in the transaction has.

For a deal with a current binding purchase agreement, we recommend a close review and assessment of the purchase agreement, and each party's available termination rights, covenants obligations, and remedies.

- Assess price/valuation in light of current market conditions
 - Does the price or valuation of the deal still make sense?
 - Do you want to discuss a reduced purchase price more appropriate to current circumstances or seek an exit of the deal entirely?
- Review material adverse change (MAC) provision in the contract (if there is one)
 - Invoking a MAC clause is difficult in any circumstance and will require a close review of the purchase agreement, the circumstances and the impact of COVID-19 on the target company or assets.
 - Does the agreement include exceptions to the MAC clause – for example, is there an exception for changes in general economic conditions (whether global, national or local) that do not disproportionately affect the company or assets being acquired?
 - Any deposit the buyer made under the agreement may be caught up in a dispute as to whether or not a MAC occurred under the contract.
- Can the seller satisfy their bringdown?
 - If the time comes when all conditions to closing in a purchase agreement are satisfied and a seller would be required to close except that it cannot certify that its representations and warranties in the purchase agreement are true and correct or that its covenants in the purchase agreement have been satisfied, then the buyer most likely would not be required to close.
 - Sellers should quickly assess whether they will be able to make their bringdown at closing, or if it makes sense to approach the buyer to negotiate amendments to the seller's representations and warranties and interim covenants in the purchase agreement.

- If the seller cannot cure, the buyer may be able to terminate and receive its deposit back.

If you have any questions concerning the above or if you would like us to review loan documents and other material agreements to understand and assess your risks and help devise the best strategy for your company, please reach out to Daniel B. Hassett at 202.719.3309 or dhassett@wiley.law.

Visit our COVID-19 Resource Center