



A Robinson+Cole Legal Update

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Planning for Business Delays and Disruptions Due to Coronavirus (COVID-19)

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In the last several days, the United States has seen its first cases of, and indeed deaths from, the novel coronavirus, or COVID-19. As of this writing, states with people under investigation for the virus, and those with confirmed cases of the virus, include California, Washington, Oregon, New York, Florida, Arizona, Nebraska, Texas, Wisconsin, New Hampshire, Massachusetts and Rhode Island. Experts predict rising numbers of coronavirus infections here in the U.S.

However, even before the actual reports of patients in the U.S., companies were already facing significant commercial effects from the virus. Because our companies, markets and economies operate across borders around the world, including in countries experiencing virus outbreaks, we are seeing supply chain, travel and business disruptions for reasons including factory staffing shortages due to employee illness, travel restrictions, and other disruptions and cancellations. As warnings and guidance from our government about preventive measures for our personal health are issued, you can also check your client, customer and vendor agreements and business terms to see what provisions exist to protect you in the current developing situation, both here in the U.S. and in other countries in which you operate or rely on for products, raw materials and sales. This article highlights some things to consider or look for in preparing for the current situation.

WHAT IS CORONAVIRUS (COVID-19)?

As has been widely reported, the outbreak of respiratory illness caused by a novel (new) coronavirus (most recently re-named COVID-19) first started in Wuhan, China. The World Health Organization (WHO) was first notified of coronavirus in December 2019. Since then, WHO has declared COVID-19 a “public health emergency of international concern,” or (PHEIC). A PHEIC is described by WHO as a situation that is “serious, unusual or unexpected; carries implications for public health beyond the affected State’s national border; and may require immediate international action.” While PHEIC is very serious, the virus has not yet met WHO’s criteria of a pandemic, which is considered an uncontained global spread of the virus with large-scale severe disease or death. All reports indicate a sustained period of disruption from the virus can be expected, although the disruption may be limited to particular countries or regions.

WHAT CAN COMPANIES DO TO PREPARE?

Beyond reviewing business continuity plans, remote work plans, and understanding how your current insurance coverage may respond to business interruptions and losses resulting from the virus, the issues below are some of the key measures you might consider taking to minimize the potential effects of the coronavirus on your business.

Generally consider the coronavirus’ impact on your business’s day-to-day operation and ability to perform your contractual obligations to third parties.

Before digging into a review of your business contracts, take the time to more generally consider your business and your relationships with suppliers, vendors and customers, and consider the situations that pose the greatest potential for harm in the event of an unplanned interruption or delay. Communicate with certain key third parties to understand their current situation and concerns, in order to minimize any surprises to you or them, and reduce your risk.

Look at the terms of your purchase orders and contracts, particularly the “force majeure” clauses.

Force majeure provisions in contracts excuse a party from performing its obligations under the contract if the party’s failure to perform or delay in performing is due to certain articulated reasons. There are standard events that appear in most force majeure clauses. A standard force majeure provision will usually excuse a failure of performance that is caused by or arises from an act of God, acts of war, acts of certain third parties such as suppliers and carriers, shortages of raw materials and supplies, riots and civil disturbances. Other force majeure events specific to the type of contract and the type of services may be negotiated by the parties.

However, when the actual event preventing contract performance is a disease or a quarantine, consider whether these events are specifically stated in the force majeure provision. You may have to look to other articulated reasons, such as the imposition of a government restriction, ban or order or a transportation shortage. For example, in China, to slow the spread of the virus, the government has locked down cities, which means workers can’t report to factories or ports. These labor shortages can result in product shortages as well as a decrease in the number of cargo ships to the U.S. Force majeure provisions focused on government action or labor shortages may excuse performance, even if the virus event itself does not.

If you anticipate a problem arising with a vendor or customer, pre-litigation review of contracts can be helpful to avoid any such potential litigation. If you seek to enforce a contract and expect a vendor or customer to rely on a force majeure defense, an early review of that clause and the other provisions in the contract before the full-blown dispute occurs can help determine if the other party’s conduct is likely to be excused in court, in which case early communication with the other side may be helpful to make alternate arrangements acceptable to both parties. And, if you document your needs and expectations in advance, any failure by the other side to adequately respond to reasonable proposals or requests for assurances or alternate performance may be helpful in any future litigation. Similarly, if you expect a coronavirus issue to impact your ability to perform, waiting to be sued and then relying on the force majeure defense may not be the best route to follow. Informing the other party in advance of the specifics of the coronavirus’s impact on performance, or the potential for such an issue, may allow for a business resolution instead of litigation, or at least strengthen your claim in any subsequent litigation that you were proactive and reasonable in identifying the problem in advance to the other party and that your inability to perform based on force majeure issues should be enforced by the court.

Look for alternate suppliers.

If you have the ability to source materials from multiple sources, you may want to consider issuing purchase orders to the alternative supplier(s) in areas not affected by the virus outbreak. If you are currently committed to an exclusive supplier, consider whether your supplier would agree to permit alternative sourcing for a certain defined period to minimize supply chain disruption. If your current exclusive supplier has a good faith obligation to mitigate the effects of a force majeure event, it may be very agreeable to a temporary waiver of any obligations to source exclusively from it.

Limit non-essential travel to affected areas, and use non-international hubs for domestic U.S. travel.

Many companies, including Amazon, are limiting employee travel, both internationally and domestically. Many airlines and hotels are offering waivers to change or cancel flights and reservations without a fee. The latest U.S. State Department travel warnings are listed at [here](#). If you must travel, check your travel insurance or credit card travel coverage. Coronavirus-related losses are not likely covered by any travel policy purchased now, but coverage may exist under policies purchased prior to January 22, when WHO declared a PHEIC.

Address coronavirus in contracts currently being negotiated.

If you are currently negotiating an agreement with a supplier, vendor or customer, certainly consider including in the force majeure clause language that would excuse a party from performing because of coronavirus and infectious disease or epidemic-related issues more generally.

Monitor government action.

Coronavirus guidance and developments are evolving rapidly. It is important for one or more people within your business to closely monitor regulatory actions in the jurisdictions where you and your suppliers and customers do business to determine whether your company may be required to take measures (shutdown, suspend shipments, travel ban, etc.) that could affect your contractual obligations.

Draft letter(s) to communicate or invoke force majeure.

You may be required under your contract to promptly notify a third party in the event of an actual or threatened force majeure event, as well as to use good faith efforts to mitigate that event. If you believe that one or more of your contractual obligations will be adversely impacted by coronavirus, work with your legal counsel now to draft the letters to those third parties, so you can ensure your letter provides all of the detail required by the contract and that you are ready to send it, if and when the moment arrives.

FOR MORE INFORMATION

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