

COVID-19 Checkups:

Managing Your Business Through the Pandemic

Businesses are adopting new Workplace Policies to keep their company's afloat, meet deadlines and keep their staffs safe and productive. Without careful planning, COVID-19's disruptions to supply chains and impacts on Employees, Customers and Vendors can decimate your Company's value and even viability. Transbay Law Group helps Businesses of all sizes to respond to the COVID crisis, navigate uncharted waters, maintain operations and stand ready to capture new opportunities in the months ahead. Contact Stuart Hays, Managing Partner; stuart@transbaylaw.com; (650) 520-9771.

As fiduciaries, Managers and Boards are required to keep themselves informed about their Company's risks, operations and compliance with Workplace rules and the law. Companies that operate without detailed Workplace Policies and COVID strategies risk legal action from a broad range of parties. What are your obligations for keeping stakeholders safe, systems secure, facilities clean and the enterprise operational. How does COVID-19 impact HR matters, facilities management, leasing matters, corporate communications and regulatory compliance?

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Employee Safety, Workplace Rules and Compensation

- Can Businesses require Employees to disclose their health, symptoms, exposure of family members?
- Do Businesses have to comply with HIPAA privacy laws?
- Can Businesses take employees' temperatures or collect other health-related data?
- Are there restrictions on any data collection involving COVID-19 risks? What are the risks?
- Are privacy or security risk assessments required or advisable?
- What are the confidentiality or privacy rules for naming impacted employees?
- What are the proper COVID-19 security measures to ensure information is secure?
- How do Layoffs, Leaves, Terminations and Furloughs Impact Employee Benefit Plans and Insurance?
- Can Businesses continue Employees benefit coverage if Terminated, does COBRA apply?
- Does Health Insurance cover COVID-19 testing or treatment?
- Does COVID-19 infection qualify as a disability? What if employees are unable, or prohibited from working due to COVID-19?
- Can Employees take hardship distributions from their 401(k) plans? Can employees contribute sick days or vacation time to other employees?
- Can employees be subject to mandatory quarantine imposed by governmental authorities (and, if so, by whom)?
- What information should be reported to the various state and federal authorities?

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Contractual Breach/Supply Chain Considerations

- How do Businesses Address Supply Chain Disruptions and Threats of Litigation?
- Does COVID-19 trigger force majeure clauses and excuse non-performance? For how long? What about "Time is of the Essence" clauses?"
- Who is Responsible if Suppliers cannot Supply do to the COVID-19 outbreak?
- What is the most efficient way to resolve disputes?
- Can Collaborate with Competitors during the Crisis?
- Should you Try to Allocate Among Customers?
- Can Market-Clearing Practices be Considered, "Gouging?"

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Corporate and Transactional Considerations

- How can Board Members and Senior Management perform and discharge their fiduciary duties to shareholders and others? To whom do they owe a fiduciary duty? What duties are owed in light of COVID-19?
- Is COVID-19's impact "Material" for purposes of SEC disclosures statements? How does it impact the Company's business including financial condition, supply chain, liquidity, results of operations.
- How does a Company prepare a plans for Succession, Emergencies, Continuity, Loss of Key Employee. Are Crises Management Plans Required? Prudent?
- What are your Company's Quarantine and Cash-Flow risks? Do Government Action/Inaction Mitigate them?
- Are Hostile Takeovers a Risk?
- Should Business add COVID-10 Risk Factors to Offering Memoranda? And SEC Filings?
- Are COVID-19 impacts covered by Insurance?

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Mergers & Acquisitions

- Do Force Majeure or other Savings Clauses Excuse Non-Performance of Contract Obligations?
- Should Due-Diligence Checklists address COVID-19 issues?
- Can M&A Agreements include Detailed COVID-19 representations and warranties?
- Should "Material Adverse Conditions" and "Closing Conditions" clauses be revised to address COVID-19 conditions?
- Can Purchase Agreements be Revised to add Price Adjusters and/or Ratchets based on changing COVID-related conditions? Could such Clauses be added After Closing?
- How can a Seller address Buyer concerns about Purchasing during the COVID situation?
- What Privacy Issues are Magnified as Employees Work-From-Home?

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Healthcare Providers

- Should/Must healthcare providers notify health authorities about patients or employees known or suspected of COVID-19 infection?
- Should/Must healthcare providers disclose that they have treated COVID-19 patients?
- Does a state of emergency allow healthcare providers disclose/discuss patients with COVID-19?
- Should healthcare providers ration masks, swap tests, antibody tests? ICU access?
- Can Providers refuse Treating COVID-19 Patients or Suspected Patients?
- Are COVID-19 Screenings and/or Treatments Reimbursable? Are the Medically Necessary?
- Do Healthcare Providers assume Risks when Quarantining Patients or Employees?
- Are Healthcare Providers obligated to document and report COVID Positive/Negative Diagnoses, Test Results and/or Temperatures?
- How can Hospitals and Providers mitigate their Risks of Class Action Lawsuits?

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Real Estate

- Does the COVID-19 epidemic impact "Time is of the Essence" clauses in Real Estate Purchase and Sale Agreements?
- Are "Material Adverse Effect" clauses triggered by the COVID-19 crises? Could they Excuse Financial or Acquisition Non-Performance?
- How Can Financing Agreements be Revised/Amended to address the COVID-19 situation?
- Is Force Majeure a defense to Non-performance?
- Do Work-From-Home (WFH) policies add privacy and/or regulatory compliance issues?

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COVID Checkups for the Workplace

Protecting Your Business's Employees, Relationships, Operations and Value.

During the unprecedented outbreak, all California Businesses should evaluate their readiness for the novel coronavirus (COVID-19). Transbay Law Group, PC's COVID-Business Checkup helps your Company adapt to rapidly changing Laws, comply with evolving Workplace Rules, follow Medical Privacy Regulations and preserve relationships with customers and suppliers. We can also help you evaluate your Business Interruption coverage, availability of relief for Non-Performance of Contractual Duties--and Strike a Balance between Employee Safety and Preservation of the Company's Viability and Value. Contact Stuart Hays, Managing Partner at stuart@transbaylaw.com, 650-520-9771.

Work-From-Home, Sick Leave and Telecommuting Policies.

Now is the time to review and revise Workplace Policies to comply with new/evolving Center for Disease Control and Prevention (CDC) guidelines and State, Federal and Local Laws. A New Set of Workplace Policies should be distributed to employees right away. The New Policies should address Stay-At-Home Policy for Employees exhibiting Flu-Like Symptoms, use of Paid-Time-Off, accrual of Paid-Sick Leave (minimum of 1 hour for every 30 hours worked), and flexible Telecommuting/Work From Home alternatives when appropriate and Social Distancing at all times. Transbay Law Group is ready to help Companies promote and implement Work-From-Home (WFH) arrangements and comply with Wage and Hour Laws and Employment Benefit Rules.

WFH arrangements should include guidelines to motivate productivity and legal compliance including:

- Minimize Distractions.
- Dedicate Ergonomic Workplace.
- Adopt Saas Platforms to integrate/manage workflow, e-mail, IM and video conferencing
- Regular Communications
- Monitor Wage and Hour Law Compliance Including Time, Meal and Rest Reporting.

Medical Privacy Compliance

Though employers may wish to check-in on the wellbeing of their employees, they must be careful to respect their medical privacy, which may include compliance with the Americans with Disabilities Act (ADA), California Constitution, HIPAA, and/or relevant state and local laws. These laws restrict employers from inquiring about their employees' medical history, specific medical conditions, and sharing an individual's confidential medical information. The EEOC provides guidelines for Employers for an Influenza Pandemic. The Guidelines include:

- Send employees home with "Flu-like symptoms" (ie fever or chills AND a cough or sore throat)
- Ask employees about Flu-like symptoms, or if Returning from Travel through CDC identified "At-Risk Area"
- Treat all medical information confidential, separate from personnel files
- Comply with EEO, CDC, and HIPAA guidelines for Employee Medical Information
- Limit inquiries to the extent practical and keep medical information confidential.
- If Employee Tests Positive for COVID-19, should notify CDC and other employees.

Avoid Discriminatory Application of Policies

Recirculate updated Workplace Policies that includes reminders of the Company's stand against harassment and discriminatory policies. Document, investigate and address discrimination or harassment complaints. Document all inquiries (and responses) made to employees regarding Symptoms or Travel to At-Risk Areas. Consistently apply any policies Company-wide. In Operational Shut-Down becomes necessary, make sure to Compensate Exempt and Non-Exempt Employees Correctly. For Exempt Employees, continue compensation unless their work stops for an entire workweek. For Non-Exempt Employees, hourly workers are paid for time worked only, at least a one-half day. Transbay Law Group is prepared to develop a comprehensive Workplace Policy to Protect you, your Business and its Employees during the crises. Please contact Stuart Hays, Managing Partner at 650-520-9771; stuart@transbaylaw.com.

COVID-19's Expansive Definition of "Essential Business"

California's "Stay-At-Home" order broadens Bay Area counties' "Shelter-In-Place" orders essentially orders businesses except "Essential Businesses" to cease operations and send employees home. There are additional exceptions for "Minimum Basic Operations." All California business owners need to understand how the orders apply so they can make critical decisions regarding their companies, employees and their futures. Contact Stuart Hays, Managing Partner, stuart@transbaylaw.com, 650-520-9771.

Essential Businesses are defined as Grocery Stores, Certified Farmers' Markets, Farm and Produce Stands, Supermarkets, Food banks, Convenience stores, and other establishments engaged in the retail sale of canned food, dry goods, fresh fruits and vegetables, pet supply, fresh meats, fish, and poultry, and any other household consumer products . . . This includes stores that sell groceries and also sell other nongrocery products. More broadly, Essential Businesses are those involved in:

- Food cultivation, including farming, livestock, and fishing
- Businesses that supply other essential businesses with the support or supplies necessary to operate, and
- Businesses that ship or deliver groceries, food, goods or services directly to residences

Bullet Point No. 2 could be the Exception that Swallows the Rule. Please contact Transbay Law Group, PC to see if your business could qualify. Remember, "Shelter-In-Place" orders permit "Minimum Basic Operations" regardless of whether your business is defined as an "Essential Businesses".

"Minimum Basic Operations" include "the minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or for related functions." It is important to recognize that all activities conducted while the "Shelter-In-Place" orders are in effect, whether such activities fall under the definition of "Essential Businesses" or "Minimum Basic Operations," must follow all CDC social distancing, hand washing and other requirements.

If you decide to continue business operations as an "Essential Business" or for purposes of maintaining "Minimum Basic Operations", document the bases for your conclusions and keep safety of employees in the forefront of considerations.

Contact Transbay Law Group, PC

As companies track the disruptive impacts of COVID-19, policies should be scrutinized by professional coverage counsel. Please contact Stuart Hays, Managing Partner, Transbay Law Group, PC at 650-520-9771 or stuart@transbaylaw.com.

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Business Interruption Coverage for COVID-19

COVID-19 is severely disrupting the US Economy. Drastic Measures include County-wide Shelter-in-Place and Statewide Shut Down Orders may help enforce CDC's social distancing guidelines. The Goal is to combat the pandemic, mitigate the rate of infections and strains on our healthcare system. The Organization for Economic Cooperation and Development estimates that if the coronavirus continues to spread more widely, it could cut global growth in 2020 by half and substantial losses and business failures to follow.

Business Interruption

To start, Company's should have coverage-counsel review their Business Interruption Coverage in their commercial property insurance policies. These Commercial Property generally include "civil authority" coverage which provides a benefit in the event that the Company experiences losses caused by State, Federal or Local government actions. Property owners can cover certain losses of income resulting from government restrictions to access to a covered "location." Examples of covered locations could include commercial office buildings, hotels, restaurants, shopping centers, laboratories, and manufacturing/assembly facilities.

"Civil authority" coverage may require that the government action result from "direct physical damage." Such damage may include a location contaminated with COVID-19 that is unfit for its intended use. Its also possible that such contamination may occur within a radius of the covered Property. Its also possible that the policy may cover business interruption even without government action. The outcome of coverage will depend on the language of your property policy and the specifics of the disruption to your business.

Business Interruption/Supply Chain Impacts

COVID-19 may also disrupt your Company's supply chain. Most products are at least partially comprised of foreign manufactured components or elements. Commercial property policies often contain "supply chain" or "contingent business interruption" coverage. These coverages may provide property owners with a benefit in the event that there is a physical loss or damage to supply chains. These suppliers could be manufacturers, distributors, or customers that may be impacted as a result of government action that bars access or impairs operations of, those upstream or downstream suppliers, service providers, and customers.

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COVID-19 and Construction Contracts

How do labor and material supply chain disruptions resulting from the COVID-19 epidemic impact construction contracts? The answer depends on the language the contract, before damages can be found and a judgment rendered, all agreements obligate the parties to mitigate their damages, some allow for more time, others require substitutions.

The first step in the analysis is to review all the relevant documents. This includes the construction contract but also construction loan agreements, guaranties, use permits and building permits which may have expiration dates and milestone obligations. In addition to the owner/contractor agreement, there are often subcontracts and purchase orders. If there are shortages of labor, materials or equipment, all parties should maintain detailed records that identify the source of such shortages, their impacts on construction progress and attempts to mitigate damages.

Builders risk insurance policies generally cover direct physical losses. Coverage is often expanded to cover business loss and even increased construction costs, but not damages stemming from epidemics and most include hard expiration dates. As a result, it is often owners, rather than contractors, bear the risk of increased costs, shortages and force majeure events, including pandemics.

For example, the American Institute of Architect's Form AIA A201-2017 General Conditions establishes that if the Contractor is delayed due to delay in deliveries or other causes beyond the Contractor's control, or by other causes, and the Architect determines justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine. Some contracts require contractors to continue performing pending resolution of a claim. Others are silent, others still allow contractors to suspend work pending resolution. Labor and material shortages may appear to be beyond a contractor's control, but even if subcontractors claim force majeure, owners can argue that a subcontractor's inability to perform is not beyond the contractor's control because the contractor must be able to demonstrate attempts to obtain substitute subcontractors. The Design-Build Institute's includes pandemics as Force Majeure Events that give the contractor additional time to perform. AIA A201-2017 sets forth that contractors have the burden of asserting claims for time extensions. Notice of a claim must be given within 21 days after the "occurrence of the event" and must be accompanied by an estimate of cost and of probable effect of delay on progress of the work.

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