

# Questions Clients Are Asking About COVID-19

## What's Next: Questions for Re-Opening

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## Executive Summary

The COVID-19 pandemic has upended the world, resulting in lockdowns in nearly every country. Ninety-five percent of Americans are currently under some type of shelter-at-home order,<sup>1</sup> businesses have been stopped in their tracks, and more than twenty-two million Americans have filed for unemployment benefits.<sup>2</sup>

When infection rates and hospitalizations decline, the new challenge will be “when” and “how” to “re-open” the country and restart the economy while maintaining the health and safety of our people. The re-opening likely will proceed on a state-by-state (or region-by-region) basis, in which governors, mayors, and public health officials will decide for each of their populations. State governors have already formed pacts to coordinate this process.<sup>3</sup> The federal government recently released guidelines, titled “Opening Up America Again,” which envision opening the economy in three phases, after “gating criteria” are met, including: (1) a downward trajectory of influenza-like illnesses and documented cases over a 14-day period; (2) the ability of hospitals to safely treat non-crisis patients; and (3) a robust testing program for healthcare workers.<sup>4</sup> Various other government agencies have also issued guidelines concerning COVID-19, including the Centers for Disease Control and Prevention (“CDC”) and the Department of Labor’s Occupational Safety and Health Administration (“OSHA”).

We recommend that businesses develop a detailed COVID-19 action plan that cohesively addresses the regulations and guidelines governments and government agencies have recently issued and will continue to issue. We are available to assist with these plans.

In the rush to encourage the economy to re-start, businesses will have to navigate conflicting government guidelines. For instance, it appears likely that re-opening guidelines and standards will differ from state to state and within a given state, and that the federal guidelines may also differ. Thus, if your business operates in more than one state, county, or city, you will need to consider how to comply with potentially conflicting mandates as to how and when to re-open your business, or whether you can do so in one state if you are unable to do so in another.

The purpose of this Alert is to identify some of the issues that businesses will face, so that consideration can begin before governments green-light the re-opening of the economy. It is not intended to answer every question; too many details remain to be worked out and subject to legislation, guidelines, and executive orders. Below we present some of the key issues our clients may encounter:

- ✓ **What Are My Obligations Concerning My Employees' and Customers' Health and Safety?**
- ✓ **Will Re-Opening Affect Contractual Defenses Such As Force Majeure, Impossibility, or Frustration of Purpose?**
- ✓ **Will Re-Opening Affect Insurance Claims For Business Interruption?**
- ✓ **What Can I Do to Avoid Violations of Antitrust Laws?**

We expect to be able to help our clients with the many additional issues that inevitably will arise. Please reach out to us to discuss these issues or any other topics you want to consider in more detail.

## **I. What Are My Obligations Concerning My Employees' and Customers' Health and Safety?**

### **A. How do I provide a safe environment for employees and customers?**

The most important task for businesses is to stay informed of federal, state, and local health and safety guidelines and recommendations.

Official guidelines now dictate enhanced hygiene protocols such as no-contact greetings, cleaning hands at the door, increased use of non-cash payment methods, increased ventilation, regular disinfecting, and the adoption of measures to stagger customer flow.<sup>5</sup>

The federal guidelines state that employers should “develop and implement appropriate policies, in accordance with Federal, State, and local regulations and guidance, and informed by industry best practices, regarding: social distancing and protective equipment, temperature checks, sanitation, use and disinfection of common and high-traffic areas, and business travel.”<sup>6</sup> They also include guidance for specific types of employers (schools, senior living facilities, large venues, healthcare providers, restaurants, gyms, and bars) for each Phase of re-opening.<sup>7</sup>

Businesses should be prepared to post signs, provide hand sanitizer, train employees on recognizing and responding to signs of illness, mandate that employees regularly wash their hands, and re-train employees to avoid close contact with customers.<sup>8</sup> It is also important to follow guidance set out by OSHA, which classifies different workforce settings into “Low,” “Medium” and “High” risk categories for the spread of COVID-19.<sup>9</sup>

Businesses should also pay close attention to the actions of their peers. Major companies have put forth comprehensive plans for how they plan to re-open safely. For example, the owner of a Nebraska outdoor shopping complex with 80 stores and restaurants has proffered a re-opening plan that includes taking customers' temperatures before they can enter stores, strict limits on the number of shoppers allowed to browse the aisles, and hospital-grade disinfection of surfaces.<sup>10</sup> Casino executives have also presented their ideas for how Las Vegas will re-open. This includes facial coverings, limited entrances, and social-distanced seating. They also propose taking guests' temperatures and making testing available to all employees and guests in nearby testing sites.<sup>11</sup> Casino hotels would re-open using only one-third of their rooms.<sup>12</sup> These actions are not unprecedented. Macau, the world's largest gambling market, has already re-opened under similar restrictions.<sup>13</sup> Hollywood executives and producers have envisioned similar restrictions when film and TV production resumes. New protocols may involve waivers to indemnify productions, health questionnaires, temperature checks, hygiene training, diagnostic testing of all people on set, and antibody tests, if available.<sup>14</sup>

Companies with unionized employees should also be aware of requests from unions regarding health and safety. Several unions, including the United Farm Workers of America and Familias Unidas Por La Justicia AFL-CIO, have filed lawsuits asking for tougher rules regarding social distancing, hand-washing stations, sanitation, and sick leave.<sup>15</sup>

## **B. How Do I Ensure My Employees Stay Healthy?**

Companies should follow the latest updates on diagnostic testing, antibody testing, and contact tracing. The CDC has said that widespread testing and aggressive contact tracing will be necessary in re-opening the country.<sup>16</sup> According to federal guidelines, states should be able to "quickly set up safe and efficient screening and testing sites for symptomatic individuals and trace contacts of COVID+ results."<sup>17</sup> Contact tracing efforts may be assisted by applications that will be forthcoming from Apple and Google.<sup>18</sup>

Employers should develop an action plan to handle COVID-19 cases among their workforce to ensure symptomatic employees: (1) report any symptoms, (2) do not come to work, (3) get tested if appropriate, and (4) use contact tracing if available.<sup>19</sup> Depending on your industry, action plans may also involve shutting down floors or sectors for limited periods to test and limit the spread of contagions. It may also be useful to encourage employees to take their temperatures daily.<sup>20</sup> Although this is an imperfect predictor, the CDC recommends taking temperatures twice a day to monitor COVID-19 exposure.<sup>21</sup> Employers should also consider developing a relationship with a commercial test provider to enable employees to obtain periodic and prompt testing.

It will also be necessary to stay well informed, as these guidelines can be expected to change rapidly. For example, the CDC recently released new guidelines which allow critical infrastructure workers to continue working after exposure to COVID-19 as long as they are asymptomatic and follow specified safety precautions.<sup>22</sup>

Officials and scientists have also suggested that antibody testing could be an important part of maintaining health and safety. Dr. Anthony Fauci has even suggested that the United States could issue "immunity cards," a tool the government of Chile is currently implementing.<sup>23</sup> Some governors have asked the President to invoke the Defense Production Act to produce these tests.<sup>24</sup> At this time, however, the test is still in early phases and the reliability of certain versions is under review.<sup>25</sup> Further, antibody tests may not be the most useful tool in an employer's toolkit, given that a relatively low percentage of the population is estimated to have actually been infected with COVID-19.<sup>26</sup>

### **C. What Are My Reporting and Privacy Obligations?**

Unfortunately, businesses will also need to balance the obligation to protect the health and safety of their employees against their privacy rights. Thus, although it is important to ask employees about their health to satisfy a potential duty to warn of any COVID-19 infections, businesses should be careful about demanding excessive personal information from their workers, as that could violate employment and data-protection laws.

To mitigate risks, businesses should comply with requirements and guidelines promulgated by the Equal Employment Opportunity Commission (“EEOC”) concerning COVID-19. The EEOC confirmed that during the COVID-19 pandemic, employers are able to, without violating the Americans with Disabilities Act (ADA) or the Rehabilitation Act: (1) ask employees if they are experiencing symptoms of COVID-19, provided that the information is maintained as a confidential medical record; (2) measure employees’ body temperature; (3) tell employees who become ill with symptoms of COVID-19 to stay home (or leave work); (4) require employees returning to work to provide a doctor’s note stating they are fit for duty; (5) screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job; and (6) withdraw a job offer when it needs the applicant to start immediately but the individual tests positive for COVID-19 or has symptoms of it.<sup>27</sup>

Further, businesses should be aware of their reporting obligations regarding worksite hospitalizations or fatalities. OSHA has released updated guidance regarding reporting requirements specifically for COVID-19.<sup>28</sup>

### **D. What Duties Do I Have as to Common Law Tort Liability?**

**Tort Liability:** As the country re-opens, businesses have more information about COVID-19 than they did several months ago. This may translate to a heightened duty to warn about dangerous conditions and to take other reasonable measures to protect employees and customers (although this week the Trump administration said it would support limitations on such liability).<sup>29</sup> “Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.”<sup>30</sup> Several COVID-19-related lawsuits have already been filed against companies for failing to protect employees and customers:

- In Illinois, surviving relatives of a Walmart worker who died on March 25, 2020, after several employees had exhibited symptoms of COVID-19, sued Walmart and the owner of the shopping center for wrongful death, alleging that they had a “duty to exercise reasonable care in keeping the store in a safe and healthy environment and, in particular, to protect employees, customers and other individuals within the store from contracting COVID-19 when it knew or should have known that individuals in the store were at a very high risk of infection and exposure due to the high volume of individuals present at and circulating throughout the store on a daily basis.”<sup>31</sup> The complaint alleges the store owners failed to exercise the duty of care by: (1) failing to clean and sterilize the store; (2) failing to implement, promote or enforce social distancing in the store; (3) failing to provide PPE like gloves or masks to employees; failing to warn employees that other employees were exhibiting symptoms of COVID-19 in the store; (4) failing to follow the safety recommendations of the US DOL and OSHA; (5) failing to follow the safety guidelines and recommendations of the CDC; and (6) failing to prohibit employees exhibiting signs of COVID-19 from entering the premises and coming to work.
- Cruise lines are also facing claims for their conduct during the pandemic. For example, employees of Celebrity Cruises have brought a proposed class action for the cruise line’s alleged “careless and

continuous failure to protect its crewmembers assigned to work aboard the vessels from COVID-19” despite it having “prior notice pertaining to the dangerous conditions and/or explosive contagiousness associated with COVID-19 aboard its vessels.”<sup>32</sup> Australian police have launched a criminal probe into whether Carnival Cruise’s subsidiary Princess Cruises misled authorities about an outbreak aboard a ship docked in Sydney, and its Costa Cruises subsidiary is facing multiple passenger lawsuits regarding its Covid-19 response, alleging the company neglected to inform passengers about potential coronavirus exposure and failed to take necessary precautions to protect those aboard.<sup>33</sup>

- In Austria, authorities in Tyrol are facing investigations and a potential class-action lawsuit involving as many as 2,500 tourists over their handling of a coronavirus outbreak in the Austrian winter sports resort of Ischgl. The Austrian Consumer Protection Association alleges that after reported cases of coronavirus, authorities kept ski resorts open, even though they knew or should have known of a threat of mass infection, and are liable for damages.<sup>34</sup>

## II. Will Re-Opening Affect Contractual Defenses Such As Force Majeure, Impossibility, or Frustration of Purpose?

Businesses should consider what impact, if any, re-opening will have on any contractual defenses that they may have asserted or planned to assert, such as force majeure, impossibility, or frustration of purpose.

**Force Majeure:** The COVID-19 epidemic has shone a spotlight on force majeure clauses in commercial contracts, leading many businesses to rely on these clauses to excuse performance or terminate the contracts. In short, “[t]he purpose of a force majeure clause is to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties.”<sup>35</sup> Force majeure clauses often contain an enumerated list of force majeure events such as “acts of God,” “government regulation,” or “disaster” in addition to catch-all clauses such as “any other emergency beyond the parties’ control making it inadvisable, illegal, or impossible to perform their obligations under this Agreement.”<sup>36</sup> Some clauses even include “epidemics” in the list of covered events.<sup>37</sup>

A key issue that often arises (in New York, for instance) is whether performance was rendered impossible by the force majeure event.<sup>38</sup> The Second Circuit has found that a government order prohibiting performance can render contractual performance excused under a force majeure clause.<sup>39</sup> But courts also have found that if a party is able to fulfill its duties under the contract despite the governmental action, the party’s performance would not be excused under the force majeure clause.<sup>40</sup> In other states, such as California, courts may not require strict impossibility, but only that performance became “impossible or unreasonably expensive.”<sup>41</sup>

Accordingly, this raises questions as to how courts may address a party’s actions in the context of re-opening their business. Re-opening may undermine a party’s claim that past performance was not possible. Even assuming a force majeure defense is supported, it could be limited to the time period preceding re-opening the business, thus reducing any reliance on the defense going forward. Each case will present its own facts.

**Impossibility:** Similarly, re-opening could affect a party’s assertion of an impossibility defense, at least once the business re-opens. Even in the absence of a specific force majeure clause in a commercial contract, a party can try to excuse non-performance under the common law doctrine of impossibility if it can show that: (1) performance of the contract was rendered impossible, and (2) the event causing impossibility was unforeseeable.<sup>42</sup> Courts could limit the defense, such as to only the time preceding re-opening.

**Frustration of Purpose:** A party may also attempt to rely on the common law defense of frustration of purpose to avoid its contractual obligations due to COVID-19. Frustration of purpose occurs “when a change in circumstances makes one party’s performance virtually worthless, frustrating his purpose in making the contract.”<sup>43</sup> One court has stated: “Frustration of purpose excuses performance when a virtually cataclysmic, *wholly unforeseeable event* renders the contract valueless to one party.”<sup>44</sup> Notably, under this doctrine, performance under the contract does not need to have been rendered impossible.<sup>45</sup> However, the basis of the contract does need to be fully and completely frustrated rendering it valueless or worthless to one party. Thus, if a business re-opens, that could undermine its ability to argue that the contract is valueless or worthless.

### III. Will Re-Opening Affect Insurance Claims For Business Interruption?

Another issue to consider is what impact, if any, re-opening your business may have on insurance claims. Businesses may have coverage under a number of policies that may be applicable to COVID-19, including business interruption insurance, event cancellation insurance, general liability policies, directors’ and officers’ policies, and workers’ compensation. Obviously, it is critical to review each policy because each policy will contain its own scope of coverage and may contain specific exclusions relevant to COVID-19.

For instance, many business owners will make claims under business interruption policies, which may compensate a business for its lost revenue and profits when operations are affected by damage to property that impairs or prevents normal operations. Even assuming a business’s interruption policy covers losses associated with COVID-19 such as government-enforced quarantines or travel restrictions, re-opening the business may affect potential claims that arose during the shutdown. A court could interpret the fact of reopening as an admission that the business has no longer been “interrupted.” Moreover, if a business decides not to immediately re-open in a state or locality that has lifted its restrictions, that business may no longer be able to claim that it has suffered harm under the policy, at least after the locality’s re-opening.

### IV. What Can I Do To Avoid Violations of Antitrust Laws?

Businesses should also be attuned to potential antitrust risks if they choose to collaborate with competitors, including sharing data or technical information, as they coordinate their reaction to the COVID-19 pandemic. Antitrust enforcement agencies like the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) have stated a permissive approach to competitor collaborations that, for example, seek to increase the production or distribution of critical medical supplies and personal protective equipment.<sup>46</sup> For example, in response to a request from five medical distributors regarding collaboration to increase output of medical supplies, the DOJ issued a business review letter confirming that procompetitive collaboration is lawful under the antitrust laws.<sup>47</sup>

At the same time, however, they have warned companies that antitrust laws will be enforced against collaborations that may exploit workers or inflate prices.<sup>48</sup> In particular, the agencies stated that they are on alert for “employers, staffing companies (including medical travel and locum agencies), and recruiters, among others, who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked,” including “unlawful wage-fixing and no-poach agreements, anticompetitive non-compete agreements, and the unlawful exchange of competitively sensitive employee information, including salary, wages, benefits, and compensation data.”<sup>49</sup> Thus, companies should make sure

they are aware of the most updated guidance if they are engaging in collaborative behavior within their industry and steer clear of actions that would suppress competition.

## V. Conclusion

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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- <sup>5</sup> CDC, *Keeping the Workplace Safe* (March 10, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/stay-safe.html>.
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<sup>28</sup> *See id.*

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<sup>31</sup> *See* Complaint, *Toney Evans v. Walmart, Inc. et al.*, No. 2020L003938 (Cook County Cir. Ct. April 6, 2020).

<sup>32</sup> *See* Complaint, *Nedelcheva, et al. v. Celebrity Cruises, Inc., et al.*, No. 1:20-cv-21569 (S.D. Fla. April 14, 2020); *see also* Complaint, *Weissberger v. Princess Cruise Lines*, No. 20-cv-2267, Dkt. 1 (C.D. Cal. March 9, 2020) (couple sued cruise lines for emotional distress suffered after allegedly negligent screening procedures led to a COVID-19 outbreak onboard).

<sup>33</sup> David Oliver, *Costa Cruise passengers file class-action lawsuit alleging mishandling of coronavirus crisis*, USA Today (April 8, 2020), available at <https://www.usatoday.com/story/travel/cruises/2020/04/08/coronavirus-costa-cruise-passengers-file-lawsuit-over-virus-spread/5119527002/>.

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<sup>35</sup> *United Equities Co. v. First Nat. City Bank*, 52 A.D.2d 154, 157 (1st Dep't 1976), *aff'd*, 41 N.Y.2d 1032 (N.Y. 1977).

<sup>36</sup> Richard A. Lord, 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2019).

<sup>37</sup> *See, e.g., Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588, 613 (3d Cir. 1977).

<sup>38</sup> *See, e.g., Phibro Energy, Inc. v. Empresa de Polimeros de Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) ("Mere impracticality or unanticipated difficulty is not enough to excuse performance.") (citation omitted).

<sup>39</sup> *See, e.g., Harriscom Svenska, AB v. Harris Corp.*, 3 F. 3d 576, 580 (2d Cir. 1993) (holding force majeure clause that contained the term "governmental interference" excused performance when the government prohibited sales to Iran).

<sup>40</sup> *See, e.g., Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).

<sup>41</sup> *See, e.g., Jin Rui Grp., Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 F. App'x 511 (9th Cir. 2015) ("California law requires a promisor invoking a force majeure clause to show 'that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive.'" (quoting *Oosten v. Hay Haulers Dairy Emp. & Helpers Union*, 45 Cal. 2d 784, 291 P.2d 17 (1955))).

<sup>42</sup> *See, e.g., Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902 (N.Y. 1987) ("Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."); *see also* UCC § 2-615 (2002).

<sup>43</sup> *PPF Safeguard v. BCR Safeguard Holding*, 924 N.Y.S.2d 391, 394 (1st Dep't 2011) (citing Restatement (Second) of Contracts § 265, Comment a).

<sup>44</sup> *Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 221 (N.D.N.Y. 2012), *aff'd*, 798 F.3d 90 (2d Cir. 2015) (internal quotation and citation omitted) (emphasis in original).

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<sup>45</sup> See, e.g., Richard A. Lord, 30 WILLISTON ON CONTRACTS § 77:95 (4th ed. 2019) (“The doctrine of commercial frustration in the law of contracts is similar to the doctrine of impossibility of performance in that it requires extreme hardship to excuse the promisor; however, commercial frustration assumes the possibility of literal performance but excuses performance because supervening events essentially have destroyed the purpose for which the contract was made.”); *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974) (“[I]mpossibility may be equated with an inability to perform as promised due to intervening events, such as an act of state or destruction of the subject matter of the contract. ... Frustration of purpose, on the other hand, focuses on events which materially affect the consideration received by one party for his performance. Both parties can perform but, as a result of the unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place. Thus frustrated, Y may rescind the contract.”).

<sup>46</sup> DOJ, *Joint Antitrust Statement Regarding Covid-19* (March 24, 2020), available at <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

<sup>47</sup> DOJ, *Department of Justice Issues Business Review Letter to Medical Supplies Distributors Supporting Project Airbridge Under Expedited Procedure for COVID-19 Pandemic Response* (April 4, 2020), available at <https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting>.

<sup>48</sup> FTC, *Joint Antitrust Statement Regarding Covid-19 and Competition In Labor Market* (April 13, 2020), available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement\\_on\\_coronavirus\\_and\\_labor\\_competition\\_04132020\\_final.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf).

<sup>49</sup> See *id.*