

We Will Get By, We Will Survive: Critical Issues for Businesses During the COVID-19 Crisis

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While we are certainly in unprecedented times relative to the COVID-19 virus, we nonetheless need to continue to operate our businesses as best as we can. Our employees, vendors, clients/customers and shareholders rely on us. Now is the time for us to demonstrate our understanding of the needs of all our stakeholders and our commitment to them. This article offers some suggestions about how we can make our companies as healthy as possible during this period.

Employees

The Occupational Safety & Health Act (OSHA) requires employers to provide working conditions that do not pose a risk of serious harm and to provide employees with information and training about workplace hazards. Employees must also be permitted to exercise their rights without fear of retaliation. Employers may refer to OSHA's resources for more information.

To help prevent the transmission of the virus, employers should follow the steps recommended by the Centers for Disease Control & Prevention and federal, state and local authorities. Read the [CDC guidance for employers and businesses here](#) and the [State of California Labor & Workforce Development Agency guidance here](#).

Our Employment Department put out a client alert that will be helpful to you in understanding your obligations to your employees. Read the full alert here: [Confronting COVID-19 in the Workplace](#).

Early Saturday morning, March 14, 2020, the House passed HR 6201, entitled "Families First Coronavirus Response Act," then late on Monday, March 16, the House passed a second Bill revising it. It is too early to tell if the Senate will push this forward and, if so, what changes may be made. In the meantime, though, our employment department just put out a client alert based on the status of the House bill as of approximately 9:00 a.m. PST, Tuesday, March 17, 2020. Read the full alert here: [Status and Summary of the Federal Government's Pending Families First Coronavirus Response Act](#).

From a practical standpoint, if your business is to remain open and operational you will need at least some of your employees to continue to work. Consider which job functions can most easily be done remotely. Good examples include customer service which often is done via phone, chat or video. Some companies are able to do procurement effectively from afar as a result of having current data on inventory levels. For those positions that are not as easily done remotely (e.g. receiving or shipping), consult with your employment counsel on how best to structure the workday or workweek to accomplish your needs. Regardless, you may be surprised by how many meetings can be done via phone or video conference.

Regular communication is critical. Aside from emails, a regularly scheduled conference call can be helpful to team cohesiveness and morale, sharing of information and adjusting to the ever-changing situation in which we find ourselves. If your health insurance plan offers phone or other conferences with therapists, you may want to

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remind your employees of this opportunity for them to address some of the emotions that arise in times like these.

Vendors

Your vendors are experiencing immense challenges too. There is a natural tendency to become insular during these periods. However, what is needed is the opposite; the more interaction you have, the better able you are to work together.

Consider all elements of your supply chain. Each step will be challenged to obtain materials, staff up to work with them and the ability to ship them to you (at all or timely). Consider now whether you want to stock up on items. There is certainly an expense of carrying additional inventory. However, there is also a benefit of knowing you have sufficient product to meet customer demand during and after this crisis. The more revenue you can generate during this period, the more able you will be to navigate it. The more revenue you can generate after COVID starts to wane, the more able you will be to finish the year with your actual financial results being closer to your budget. Similarly, those that rely on you for product will be wrestling with the same issues.

Many contracts have what is called a “force majeure” clause that excuses performance due to circumstances beyond your control. That means that delays and/or failure to deliver may not be an event of default (at least for some period of time). Common examples of “force majeure” events are acts of war and natural disasters. It is likely during this period that some of your vendors will reference such a provision or you will want to do so.

We urge you to review your material contracts for such a provision. This will help you better anticipate if/when someone raises the issue. Corporate counsel can help with this kind of a review. If there is no “force majeure” clause, you will want to think carefully about the legal and public relations implications of declaring a breach of contract or one of your vendors asserting that you have defaulted.

Irrespective of what the contract provides, your ability to get the items you need will be largely dependent upon the quality of the relationship and interaction you have with your vendors. Talk to them about what they are currently facing and anticipating. Share your needs. Try to work together to better schedule timing and amount of shipments to give both of you the ability to perform. Consider whether the financial aspects of your relationship need to be adjusted to provide enough resources to keep both of your businesses running.

Another defense to performance is the “frustration of purpose” doctrine. It can apply where (i) performance remains possible, (ii) the fundamental reason for both parties to enter into the contract has been frustrated by unanticipated and severe circumstances, and (iii) it destroys the value of performance of the contract.

For a deeper dive into “force majeure” and the frustration of purpose doctrines in the entertainment context, here is an article written by one of my partners: [Responding to COVID-19: How to Limit Damages After a Breached Contract](#).

Your landlord is often a critical vendor. Understanding their perspective and obligations in a time like this can be extremely valuable. The following is a link to a client alert on that topic from my real estate department: [Curbing COVID-19 - Considerations for Property Owners, Landlords and Tenants](#).

While unpleasant to think about, not all of your vendors will survive if this crisis continues for an extended period. This may inform some of your decision-making relative to inventory as well as whether to seek alternate sources of supply.

Additionally, some of your vendors will file bankruptcy. You will want to plan ahead to protect yourself from such an event. For instance, you will want to try to reduce the amount you are owed by a party because it is likely that your claim against their bankruptcy estate would have a low priority and be paid only a few cents on the dollar. At the same time, you want to prevent having to give back the money you received in the period prior to the bankruptcy filing. A bankruptcy trustee or debtor in possession can seek to recover payments that were preferential (e.g. were more beneficial to a given creditor than to other creditors or in excess of what such creditor would have received had they been paid through a bankruptcy case). Receipt of payments outside of customary terms can be problematic. Giving new value (i.e. new goods or services) in exchange for payments can be helpful. Our insolvency counsel is available to explore these issues with you and help structure best financial arrangements with third parties.

Clients / Customers

Your clients and customers will continue to want your products and services. The amount may be reduced for some period. However, that does not mean that demand is zero or that the reduced demand will continue indefinitely. Thus, you need to find ways to safely take care of their needs.

With a service business, you will be able to do much of your work remotely. You have an even greater ability to distinguish yourself through enhanced responsiveness, high quality work product and demonstrating your deep understanding of the industry and your client. Networking with your clients and referral sources can be done via phone or video conference. It is also an opportune time to focus on prospects and filling your pipeline for whenever this crisis subsides.

For a business that supplies goods, it can be much more challenging to meet your client's needs. Now is the time to get creative relative to your operations:

- Consider whether you can follow the restaurant model of offering "to go" service to your customers. Customers may be more comfortable shopping with you if they can get your product without leaving their car. This can even be enhanced if a product can be effectively packaged in a highly sanitary manner.
- A reduced SKU count can also be helpful to directing your customer's selections to products that you have more of, generate higher margins or which more easily lend themselves to the "to go" model.
- If you do not currently have a direct-to-consumer sales model it may be an opportunity to explore creating one.
- You can also encourage online purchasing by offering reduced shipping and handling charges or in-store pickup/returns. A benefit of online commerce is the elimination of needing to physically run a credit card through a machine or touch cash. You may want to go cashless for in-person purchases for similar reasons.
- Many businesses are also sharing with their customers the lengths to which they are going to ensure that the employees that serve them remain healthy. This may include reduced hours of operation to facilitate deep cleaning.

Shareholders

Owners of companies still need to focus on their own personal, financial situations as well. They are only able to support others to the extent of their own cash flow requirements and liquidity needs. Preparing and regularly updating a multi-week cash flow projection will be extremely helpful to guiding operations, identifying trends and managing working capital.

Now may be the time to make a claim on your business interruption insurance policy. While not a certainty, this may be an avenue to obtaining necessary funds to weather this storm. You will also want to closely monitor government aid packages as well as small business or emergency loan opportunities. Read Greenberg Glusker's client alert on this topic: [Business Interruption Coverage for COVID-19 Losses](#).

You should consider being proactive in talking to your lender. Your financial results during this period are likely to be impacted. Your audit may be delayed. Both of these situations could "trip" covenants in your loan documents. If your borrowing base is determined in part by accounts receivable, it is likely that many of them will be paid late (which could have the impact of making them ineligible for purposes of the borrowing base). Explaining why these are temporary or "one time" occurrences may reduce the chances that your lender declares a default or reduces borrowing capacity. Either such occurrence could have a significant impact on your company's operations and financial results. Oftentimes your lender is more likely to work with you if you have come forward with identification of the issue, a reasonable analysis of the real-life impacts and concrete steps to address it.

If you are considering taking on an investment or selling your company down the road, there are many things you should do during this period to assist with that process:

- Keep good records of how your vendors performed and what you did to diversify your supply chain.
- Track the changes in your inventory levels from what you carried historically (e.g., a trailing twelve month average for the period prior to the COVID outbreak).
- Monitor your accounts receivable and document the changes you made in credit terms and/or the decision of whether to do business with a given party.
- Work with your accountant to identify all "one time," extraordinary or non-recurring expenses you incur as these all may be "add backs" to your earnings for purposes of determining valuation. Do the same with respect to delays or reductions in revenue that are related to this crisis.
- Keep current your list of material contracts with "force majeure" clauses and be thoughtful about whether or not to include them in your future contracts.
- Identify any regulatory changes that could impact your business.
- If you do not currently have a crisis management or disaster plan, it is time to develop one. If you do have one, you should update it so that you are better prepared if something like this happens in the future.
- Identify changes to your insurance policies such as increased premiums as a result of improved coverage (e.g., obtaining a business interruption policy).
- Document any changes to your employment practices as a result of this experience.

Taking the steps referenced above will greatly assist you and your advisors to craft accurate representations and warranties, appropriate disclosures, provide relevant due diligence and justify higher valuation and more

favorable deal terms. You can also use periods when you are less busy to do the “catch-up / clean-up” you have been putting off or to digitize your records to facilitate responding to information requests.

Conclusion

It is difficult to know how long this crisis will continue. What we do know is that we still have businesses to run and, potentially, raise money for or sell at some point. Now is the time to be proactive relative to all aspects of your business. It is important to consider the needs and perspectives of all your stakeholders. More communication is better than less. Lean on your formal and informal advisors to help make better decisions. Know that this situation will end. We will all be different as a result of it. Do what you can to make your business stronger to better get through this time and to be able to take advantage of the recovery process that will come afterwards.

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