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# Legal Issues to Consider during Covid-19 Pandemic.

**Ability to Hold a Virtual Meeting.** Meetings by means of remote communication are expressly allowed under the corporate law of many states, including Delaware. Companies wishing to make such a change will need to consider the requirements of the jurisdiction of their incorporation and their organizational documents (certificate of incorporation, bylaws or equivalent) to ensure that they do not prohibit, limit or condition shareholder meetings by remote communication.

**Optics of a Virtual-Only Meeting.** There has traditionally been investor resistance to virtual-only meetings. This resistance is rooted in concerns regarding the inability of shareholders to participate meaningfully in virtual-only meetings. For example, while ISS does not have a formal policy on virtual shareholder meetings, Glass Lewis will generally recommend against governance committee members if the company does not provide detailed disclosure to confirm that shareholders will be afforded the same rights and opportunities to participate as at an in-person meeting. In addition, while both Nasdaq and the NYSE require that listed issuers hold annual shareholder meetings, the NYSE does not impose specific conditions and Nasdaq permits virtual meetings while noting the importance of shareholders having the opportunity to ask questions of management.

A company that elects to hold a virtual-only meeting should coordinate with its platform provider to assess capabilities for live participation (including the ability to ask questions) and finalize appropriate logistics. Furthermore, the company should clearly disclose its rationale for holding a virtual-only meeting along with a description of the manner in which shareholders can participate. In any event, proper communication with your shareholders and specific disclosure regarding the rationale for holding a virtual-only meeting this year may avert criticisms that we have seen in the past.

# Insurance

Companies should consider whether insurance may cover losses sustained from COVID-19-related disruptions. This coverage may apply to commercial properties that sustain disruptions to their operations, trade disruption for losses related to quarantines or other travel restrictions and closures, or general liability insurance. Businesses should not only assess the insurance policies that may apply, but consider providing notice under such policies at this time.

## Contracts

While fact-specific to any particular contract, the outbreak of COVID-19 is likely to have a profound impact on commercial agreements. Companies or their counterparties may find they are unable to perform under an existing commercial agreement.

Parties to existing contracts that are or may be disrupted by the outbreak should promptly assess their legal rights and obligations, including: (i) assessing contractual provisions that have been or may be affected, (ii) identifying and abiding by any relevant notice requirements; (iii) analyzing the risks and consequences of a default or breach under the agreement, and (iv) determining or negotiating alternative means of performance under the contract, where possible.

# Remote Working

Since employees may be required to work remotely to comply with new policies aimed at OSHA compliance, employers should take steps to prepare for employees to work from home where possible (for example, ensuring IT systems support remote working and that internal policies are in place regarding remote working). New policies may be required for in-person meetings versus telephonic meetings (for example policies limiting the number of people gathered together), and continued attendance at industry conferences (as noted below, injury during workrelated travel may impact workers' compensation claims).

The U.S. Department of Labor has confirmed in recent (March 9) guidance (which can be found here) that employers may either encourage or require employees to telework as an infection-control or prevention strategy. This includes imposing such arrangements based on current information from the CDC, state or local public health authorities.

Where working from home is not possible, and employees are absent due to sickness, quarantine, or childcare needs, employers will need to determine whether and for how long absent individuals will continue to be paid.

- **Considerations with respect to Employees who are Exempt under the US Fair Labor Standards Act (the "FLSA"):** The FLSA requires that employers pay at least minimum wage for up to 40 hours in a workweek and overtime pay for any additional time, unless the employee is exempt. Exempt employees are not entitled to overtime pay under the FLSA, however, they generally have to be paid their full salary for any work week in which they perform any work. Employers may require exempt employees to use vacation or paid time off in the case of a workplace closure due to COVID-19, so long as the exempt employee receives his or her full guaranteed weekly salary. If an exempt employee does not have sufficient vacation time or paid time off available, the employee generally must still receive their salary for any week in which he or she performs any work. Exempt employees do not have to be paid for any week in which no work is performed. Employers should also take care to track the type of work performed by exempt employees to ensure that the nature of the tasks being performed remotely are largely exempt-qualifying. While a change in status from exempt to non-exempt should not be an issue for a short-term remote working situation, if remote working is implemented for exempt employees for a longer period of time, the question of exempt status may need to be considered based on the nature of the remote working role under the FLSA and applicable local laws.

- **Considerations with respect to Employees who are Non-Exempt Under the FLSA:** Under the FLSA, nonexempt employees are only required to be compensated for hours worked. An employer is not required to pay hourly employees for time spent in quarantine; however, if work is undertaken while in self-quarantine then employees will need to be compensated for that work and hours worked may be difficult to track as described below. In certain states, payment for time spent in self-quarantine may be required where the employer has required that employees self-quarantine and not perform work. Difficulties in monitoring hours worked for non-exempt employees who are working from home can increase the risk of off-the-clock and overtime claims.

# Employees who become Sick or who have Sick Family Members

In light of OSHA and guidance from the CDC, employers should require employees with symptoms of a contagious disease to stay at home and should not require a health care provider's note to validate their illness or return to work.

- **Unpaid Leave Requirements:** For employees that are off work and who are not being paid, employers should consider the impact of the Family and Medical Leave Act, as well as applicable state and local laws which may permit periods of paid or unpaid time-off to care for sick family members. Currently, there is no requirement under federal law that an employer provide employees leave to care for children who have been dismissed from school. However, in their recent (March 9) guidance, the DOL encourages employers to review leave policies to provide such flexibility.

- **Workers Compensation Insurance:** Employees who contract the virus as a result of business travel may be entitled to benefits under workers' compensation insurance (employees generally would not be entitled to claim under workers' compensation policies as a result of contracting an infectious disease from a colleague in the office).

- **Communication and Confidentiality:** Employers should determine how best to communicate the message that an employee has tested positive for COVID-19. Employers do have a general duty to inform the workforce if an employee tests positive or is a probable COVID-19 case. However, the confidentiality and privacy requirements of the Americans with Disabilities Act, and the Health Insurance Portability and Accountability Act, and other applicable local laws, mean that steps should be taken to preserve the privacy of the impacted employee and not share their identity with the workforce.

### Employment

The U.S. Occupational Safety and Health Administration ("OSHA") requires employers to maintain a safe workplace, which would include taking steps to reduce the risks associated with the COVID-19 outbreak. The steps that an employer should take will vary depending on the type of business; however, recent guidelines provided by the CDC (which can be found here) should be followed by all employers and include the following elements.

# Restrictions on Travel

It is permissible (and recommended in light of OSHA requirements) for employers to implement policies that restrict business travel to high risk destinations and require employees returning from such destinations to self-quarantine for the maximum period it takes for symptoms to appear (currently known to be 14 days). While employers cannot generally restrict personal travel, it is permissible to implement a policy requiring that an employee provide advance notice of any personal travel (in particular to high risk destinations) and requiring that employees self-quarantine upon their return from destinations where there are known cases of COVID-19. Employers should take care to apply the policy impartially and consistently to help avoid claims of discrimination based on the protected class of impacted employees. Proper documentation of decisions made and consistent application will be key to protecting against such claims.

# Force Majeure

Companies may be considering whether the COVID-19 outbreak constitutes a force majeure event such that a party is excused from its contractual obligations. Contract parties may consider issuing force majeure notices or may receive such notices to objectively impossible.

The doctrine of frustration may excuse the performance of a contract in situations where the performance of a contract is possible, but no longer provides a party with the benefits that induced them to make the bargain because of intervening unforeseeable events.

A court's decision regarding whether to excuse a party's non-performance based on the doctrine of frustration will turn on the foreseeability of the event in question and the purpose of the agreement.[4] Generally, invoking the common law doctrine of frustration of purpose is limited to instances where the event is wholly unforeseeable and renders the contract valueless to a party. Frustration of purpose will not apply when a contract simply becomes less profitable, or even when performance causes one party to sustain a loss.[5]

The doctrine of impossibility excuses a party's nonperformance when performance becomes objectively impossible because of the destruction of the subject matter of the contract or the means of performance. It is important to note that the test for impossibility is a strict one and courts have only applied this defense in extreme circumstances, where the events in question were truly unforeseeable.

In addition to the common law defenses discussed above, parties can look to relevant statutory law to evaluate whether nonperformance would be excused. For example, under the UCC, a seller may be excused from timely delivery or non-delivery of goods due to (i) unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting; or (ii) compliance in good faith with an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.[6]

Parties should also consider the consequences flowing from declaring force majeure, including:

- Whether the parties' agreement includes notice obligations before declaring force majeure;
- Whether the force majeure event actually made the party's performance impossible, or just more burdensome
- Whether the impacted party is required to mitigate by using diligent efforts to end the failure or delay and ensure the effects of the force majeure event are minimized;
- Whether immediate relief is available for the impacted party;
- Whether force majeure-related disputes must be arbitrated; and
- Whether force majeure events are covered by the parties' insurance policies (including general liability, business interruption, contingent business interruption, or other insurance policies), and if so, what conditions must the party meet for its claim to be satisfied.

## Frustration or Impossibility

If a contract is silent on force majeure, it may still be possible to argue that the COVID-19 outbreak has frustrated the contract or that performance of the contract becomes objectively impossible.

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## Material Adverse Change or Material Adverse Effect

Some commercial agreements contemplate and allocate risk among the parties in the event of a material adverse change ("MAC") or material adverse effect ("MAE") to the business. If triggered, a MAC or MAE may allow a party to terminate the agreement or otherwise avoid performance. Companies should consider and abide by any notice requirements associated with a MAC and MAE.

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