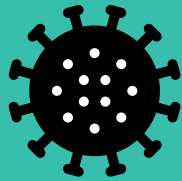


SPECIAL REPORT

Staying Compliant and Minimizing Impact Amid Coronavirus Concerns



Bloomberg Law



Introduction

From quarantine and sick leave issues to its effects on M&A, the coronavirus is significantly impacting global businesses. As a result, companies are increasingly turning to their legal counsel for guidance. Experts say it's time to review contracts, employment agreements, and handbooks, and be aware of cybersecurity issues to avoid potential liabilities and negative exposure for your business.

On its new [In Focus: Coronavirus](#) page, Bloomberg Law® has all the news and resources on issues that are top of mind for legal practitioners, including labor and employment, SEC disclosures, pending litigation, and more.

Read on for the latest updates, sample forms, and policies you need to keep your company compliant.



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INSIGHT: Plan, Don't Panic—10 Things Employers Should Do to Deal With Coronavirus

March 10, 2020

Read it on [Bloomberg Law](#).

The new coronavirus is daily front-page news, and many workplaces offer ideal conditions for transmission. Foley & Lardner attorneys give 10 tips for employers on navigating the maze of employee health, safety, privacy, equal employment, and business need operational and legal challenges.

The flu-like respiratory illness Covid-19, known as coronavirus, is daily front-page news as the number of cases in the U.S. continues to rise.

We still have much to learn, but **it is believed** to spread through respiratory droplets between people in close proximity (six feet or less), and through touching infected surfaces and then touching one's own mouth, nose, or eyes. In other words, many workplaces offer ideal conditions for transmission.

What Are Employers' Legal Obligations to Deal With Covid-19?

Under the [Occupational Safety and Health Act](#) and similar state laws, employers have a duty to provide a safe, healthy work environment and an obligation not to put employees in situations likely to cause serious physical harm or death. At the same time, implementing broad-based bans or making business decisions unsupported by statistical realities could expose employers to claims of disability and national origin discrimination, among others.

Further, employees' time off work may implicate obligations relating to paid sick leave. And if an employee contracts Covid-19 in the course of their employment, workers' compensation comes into play.

Navigating this maze of employee health, safety, privacy, equal employment, and business need presents an operational and legal challenge for employers. Addressing Covid-19 is complex, and this article cannot cover all of the considerations

However, at a minimum, here are 10 things every employer should be doing (or not doing) to address the Covid-19 outbreak.

10 Things Employers Should Do (or Not Do) About Covid-19

1. Ban business travel to high-risk places.

The CDC has advised against all non-essential travel to China, Iran, South Korea, and Italy. Designate a management official to check the CDC website daily to see the [latest tracking](#) of the virus' spread.

This person should be involved in ban decisions. If an employee expresses fear of any business travel, have a rational discussion and review the statistics. Even if the fears are irrational, consider the negative impact on employee morale by forcing someone to travel during the outbreak.

2. Take precautions with employees returning from Covid-19 “hotspots.”

If an employee has traveled to such an area, consider making the employee stay home for the 14-day incubation period upon return. Make an individualized determination of whether the employee should work remotely or not, depending on responsibilities and business need.

3. Require sick employees to stay home, and determine how to compensate them.

As detailed above, you have an obligation to keep employees safe. Whether you should pay sick or quarantined employees (who are not working remotely) depends on their exempt or non-exempt status; previous use of sick leave; union contracts; and your policies and benefit plans.

You can bend the “normal” rules to show concern about employee health. For example, forcing employees to stay home for two weeks without pay or to use precious PTO could incentivize hiding symptoms or travel, which defeats the goal of preventing spread in the workplace.

4. Do not treat some employees differently.

For example, do not limit your requests for employees to stay home or self-quarantine to older or pregnant employees, or to employees of specific races or national origin. Develop an approach that treats all employees even-handedly and stick to it.

5. Do not require employees to undergo medical testing.

As of now, test kits for the virus are somewhat limited and can only be performed by a qualified healthcare provider. The CDC is instructing healthcare providers to be selective in how testing is administered.

Screening all employees’ temperatures as they enter the workplace is likely to create more panic than benefit, and is not normally warranted. Such screening may violate the [Americans with Disabilities Act \(ADA\)](#), as does requiring employees undergo a medical test to confirm a Covid-19 diagnosis.

6. Communicate expectations to employees.

Right now, you should be communicating with your employees to (a) emphasize the need to stay home when sick, (b) remind them of respiratory etiquette and hand hygiene, and (c) advise them to monitor their health and those with whom they live.

7. But do not ask, “Do you have coronavirus?”

Such an inquiry could run afoul of the ADA. (Although it is not clear Covid-19 qualifies as a “disability,” employers generally need to know whether employees are fit to work and what limitations, if any, they have—not a specific diagnosis.) Generally, you can ask, “do you have any of the specific symptoms ([listed on the CDC website](#))”?

8. Do not disclose an employee’s health condition (generally).

Such notification may violate diagnosed employees’ right of privacy. However, if you learn that an employee has been diagnosed with Covid-19, and you have not been contacted by local health authorities, contact the health agency to seek guidance on employee communication or other steps the agency wants you to take.

9. Develop a communication plan in the case of an outbreak or pandemic.

Ensure you have a way to reach all employees if they lose access to work email, regardless of where they are located. Management should also prepare for the plethora of questions employees will likely have; designate a point-person or official team to ensure consistent messaging.

10. Start business contingency planning now.

Your workplace might not have any employees with a confirmed case of Covid-19, so now is the time to prepare. You should develop contingency plans tailored to your industry, the size of your business, and how you will operate if absenteeism rates go up or if you have to mandate closures.

Relevant factors include how many of your employees have remote working devices, whether you can cross-train employees, whether you have alternative suppliers, and whether you want to prioritize certain customers or functions.

The Covid-19 outbreak implicates a range of employment laws, including the ADA, GINA, OSHA, Title VII, and ERISA. To deal with individualized legal issues, you should consult your attorney.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners

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NEWS: Employee Remote Work Amid Coronavirus Risks Security Flaws

March 5, 2020

Read it on [Bloomberg Law](#).

Daniel R. Stoller, senior legal editor, Bloomberg Law
Sara Merken, reporter, Bloomberg Law

- **U.S. regulators unlikely to give a free pass in light of Covid-19**
- **Companies must act to ensure remote systems are secure**

Company employees that work from home during the novel coronavirus outbreak must meet data-security requirements or risk regulators' scrutiny.

The employees may use tools that lack firewalls or tap into public Wi-Fi, creating data-security vulnerabilities, privacy attorneys and security executives said. Many small- and medium-sized companies aren't prepared for the risk, they said.

The businesses should use coming weeks to harden systems for remote work before the spread of Covid-19, the illness linked to the current outbreak, worsens, said Kirk Nahra, co-chair of Wilmer Hale's cybersecurity and privacy practice. "This event, unusual as it is, actually is an example of why people should be thinking about it in advance in a crisis," he said.

Alphabet Inc.'s Google, Facebook Inc., and Twitter Inc. are among the companies that are already letting some employees work remotely as the coronavirus, which has already hit more than 93,000 people globally, spreads in the U.S. Amazon.com Inc. today recommended that employees work from home through the end of March.

Other employers are testing whether systems can handle their entire employee base working remotely in case they later need to send workers home. "The companies that will be most at risk are the ones who are not prepared to have a remote workforce," said Nicholas Merker, a partner at Ice Miller LLP who counsels companies on privacy and data security.

Businesses, though, may draw the ire of regulators if they don't adopt reasonable security standards for remote employees or train them to safeguard customer data. Government agencies won't give "a complete free pass" to companies that don't uphold data security standards, said Nahra, part of Wilmer Hale's Covid-19 coronavirus task force.

Real Threats

More employees working remotely increase the risk they'll transfer data to personal devices for ease of use or connect devices insecurely, said Kimberly Kiefer Peretti, co-leader of Alston & Bird's cybersecurity preparedness and response team.

"There is an increased chance for devices containing sensitive information to be lost or stolen," Peretti said.

Employees working remotely must keep up their guard against phishing attacks, Thomas Etheridge, vice president of services at the cybersecurity company CrowdStrike, said. One e-crime actor called MUMMY SPIDER has been using coronavirus as a spam email theme to get recipients to download Emotet malware samples, he said.

Employees shouldn't "click on links or download items sent as attachment if they aren't sure of the source," Etheridge said.

Companies can limit risks by having workers use two-factor authentication processes and Virtual Private Networks, which can provide the same level of security as corporate systems, said Mark Barrenechea, CEO at OpenText, a data management company in Canada.

They also can use the outbreak as an opportunity to prepare data security and business continuity plans for future pandemics, catastrophes, and natural disasters, said Greg Touhill, who was U.S. chief information security officer in the Obama administration and is now president of AppGate, a cybersecurity company.

Remote work requires advance coordination of a company's technology, security, human resources, and business operations to ensure a successful program, said Gerald Beuchelt, chief information security officer at LogMeIn, a Boston-based provider of remote connectivity services.

"Relying on security training and awareness programs to drive 'cyber smart' behavior, not only at work but also at home," will help keep organizations secure, Beuchelt said.

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PRACTICAL GUIDANCE: Checklist - Developing Business Continuity Planning Policies (Annotated)

Editor's Note: *Weather-related emergencies, bomb threats, fire, acts of terrorism, disease outbreaks, and other disaster and emergency situations present numerous policy and procedural issues for employers. Organizations of all kinds must consider how to respond to disasters that can happen without warning, threatening the lives of employees who are forced to evacuate the workplace at a moment's notice—and possibly damaging or destroying critical infrastructure needed for business operations. Employers can adopt disaster and business continuity plans to manage these situations, help protect the lives of employees and visitors, and reduce the time and cost of returning to normal business operations.*

Adapted from Bloomberg Industry Group's HR Policy Handbook, Business Continuity Planning.
Find it on [Bloomberg Law](#).

Policy Pointers

Items employers should consider in developing business continuity planning policies include:

Declaring an emergency.

Comment: Evacuation procedures should identify who or what authority has the power to issue an evacuation order and under what circumstances. Because a wide variety of emergencies—both man-made and natural—might require a workplace evacuation, employees need to respond differently to different types of threats. For example, employers might want to have employees assemble in one main area inside the workplace if threatened by a tornado or a chemical spill nearby but evacuate to an outside location during a fire. Employers' plan must identify when and how employees should respond to various types of situations.

Warning systems.

Comment: Employers should establish a system for emergency warnings. This system should have a distinct, recognizable signal that is audible or within view by everyone in the facility; be capable of warning persons with disabilities (for example, a flashing strobe light can be used as a warning for people with hearing impairments); have an auxiliary power supply; and be tested regularly.

Evacuation procedures.

Comment: Many employers designate specific employees as evacuation coordinators to help move employees and visitors to safe areas during emergencies. The appropriate number of coordinators should be available at all times during work hours. They can be responsible for checking offices, bathrooms, and other spaces before exiting an area and ensuring that fire doors are closed when exiting. All designated employees should be trained on using alternative routes if primary evacuation routes become blocked. These employees also should be aware of employees with special needs who might require extra assistance during an evacuation, how to use the buddy system, and any hazardous areas to avoid during an evacuation.

Disaster management team.

Comment: Assembling a disaster management team is key to successful continuity planning, and senior management should select team members who are qualified to address business needs for the accounting, human resources, information technology, public relations, and legal functions.

Electronic systems/data.

Comment: The plan needs to address the amount of time it takes to restore data and telecommunication systems before the business experiences serious setbacks and how much employers are willing to pay to implement a data and telecommunications backup plan. Many organizations store more than just data in their off-site backup systems; they also safeguard copies of mission-critical software, such as operating systems and applications, so they can reinstall their entire system on other computers if needed.

Staff records.

Comment: To quickly and accurately account for employees after an evacuation, employers should maintain a complete list of current staff, including their home addresses, email addresses, telephone numbers, and emergency contacts; designate assembly areas where employees should gather after evacuating; and take a head count after the evacuation, identify the names and last known locations of anyone who isn't accounted for, and pass that information to the official in charge. Employers also should establish a method of accounting for nonemployees, such as customers, suppliers, and other visitors, and set procedures for assisting them during an evacuation.

Employees who shut down critical operations before evacuating.

Comment: Certain equipment and processes must be shut down in stages or over time, which might not be possible or practical in emergency situations. Employers should review their operations and determine whether total and immediate evacuation is possible for various types of emergencies. If any employees are designated to stay behind, employers' plan needs to detail the procedures they are to follow.

Communication procedures.

Comment: Failure to communicate effectively during an emergency is itself a disaster. Employers need sound communication procedures to report emergencies, warn employees and visitors of danger, keep family members and off-duty employees aware of what is happening at the workplace, and stay in touch with customers and suppliers.

Shared worksites.

Comment: If employers share a worksite with another employer, they should coordinate their evacuation procedures. Employers also should have further evacuation procedures in the event that an incident expands, such as sending employees home or providing transportation to an off-site location.

Business continuity.

Comment: The business continuity plan should cover employers' response to dealing with human losses, excessive absenteeism due to infectious illnesses, communication breakdowns, and the loss of data and facilities. The goal of a business continuity plan is to preserve and protect the essential elements of a business and maintain an acceptable level of operations during the crisis and recovery period. The plan also needs to address what happens if business facilities are partly or completely destroyed and how to deal with the loss of senior management or other employees (for example, critical employees and their backups need to be identified).

Outside constituencies.

Comment: The plan should identify constituencies in and outside of the company that will need information following a crisis, including employees, their families, government agencies, customers, and stockholders, and take into consideration the needs of employees affected by a disaster. These needs can range from providing counseling to help employees and their families cope with a crisis to arranging financial, housing, transportation, and other kinds of assistance.

Federal and state requirements.

Comment: Under the federal Occupational Safety and Health Act provisions and state safety and health laws, certain employers must follow industry-specific procedures in emergencies to ensure employees' safety and health.

ANALYSIS: Coronavirus Shuts Down Contracts, Too

February 25, 2020

Read it on [Bloomberg Law](#).

Denis Demblowski, Legal Analyst, Bloomberg Law

Diane Holt, Legal Analyst, Bloomberg Law

At what point does the coronavirus health crisis get you out of a contract? Short answer: when the epidemic interrupts delivery of services or products. Ripple effects from the [widespread illnesses](#) may also interfere with legal obligations. A [market](#) or [supply chain](#) may fail as a result of a series of disruptions, or a government may impose quarantines or impose public health regulations or other rules that make it impossible for parties to follow through with their commercial obligations.

Force Majeure ('Superior Force') Clauses

Disease and quarantine may not be listed specifically as force majeure events in many contracts. But commentators generally agree that the combination of the coronavirus epidemic, the China government's virtual lockdown of the Hubei province, and its restrictions on movement of people and goods within, into, or from the country qualifies as a force majeure event under conventional characterizations of the term. In fact, the China Council for the Promotion of International Trade stated at the end of January that it would [issue force majeure certificates](#) to local companies affected by the outbreak to support a claim for force majeure relief in any dispute with a foreign or domestic counterparty.

Not everyone shares that point of view. During the first week of February, oil and gas companies [Total S.A.](#) and [Royal Dutch Shell Plc](#) [rejected force majeure notices](#) from a buyer of liquefied natural gas in China that cited the outbreak of the virus, transportation interruptions, and government restrictions as cause for lowered demand and inability to perform. Given the unprecedented nature of the coronavirus outbreak and its impacts, parties in similar circumstances may be reluctant to risk litigating the issue, particularly in a Chinese forum.

Should the virus continue to spread outside China, or if the [World Health Organization](#) declares the coronavirus a global pandemic, there will be little doubt that this health calamity will also be regarded as excusable force majeure due to the havoc it has wreaked on the commercial world.

Recent Examples of Force Majeure

Parties have invoked force majeure clauses in other types of unexpected situations in recent years: [damage to the Keystone pipeline](#) because of a leak; [closure of the Brazilian Brucutu mine by Vale SA](#) because of a dam burst that killed up to 300 people; fuel contracts held by state-owned Petroleos Mexicanos (Pemex) that [could not meet new standards](#) for ultra-low sulfur diesel; [a strike in the Escondida Peruvian copper mine](#) owned by BHP Billiton Ltd.; not to mention the [Fukushima meltdown](#), which—even years later—impacted Tokyo Electric Power Co. electricity deliveries in Japan.

Boilerplate: Take a Second Look

Most commercial contracts, particularly those of an international scope, contain a [force majeure](#) clause. The clause addresses events that excuse or delay a party's contractual performance when resulting from circumstances outside the party's reasonable control. Parties may invoke

this excuse to avoid contractual liability, either in advance of a likely breach, or as a defense to a charge of breach of contract.

Practitioners who might be tempted to skim the so called “boilerplate” or miscellaneous section of a commercial contract may now want to parse more carefully the words of their agreements’ force majeure clauses. Is there an argument that the performance of clients or counterparties may be excused, delayed or suspended due to the current situation?

There is no universally accepted definition of what constitutes a force majeure. However, typical force majeure events listed in a commercial contract include natural disasters (fire, storms, floods), governmental or societal actions (war, invasion, civil unrest, labor strikes), infrastructure failures (transportation, energy), acts of God, and other events beyond the control of the affected party.

A party invoking the protections of a force majeure clause is usually required to give prompt **notice** to its counterparty detailing the nature of the event and the anticipated extent and duration of the event’s effects on the party’s performance. The affected party must diligently work to remove the cause or remedy the impact of the event. A force majeure event of permanent or long-term duration will typically lead to a termination of the parties’ arrangement.

Conventional wisdom suggests that contract parties keep lines of communication open and attempt to reach a negotiated accommodation regarding the effects of the virus outbreak on their commercial arrangement.

We can expect that international supply chain participants and their legal counsel will quickly work to bring additional commercial and legal clarity for similar situations that may arise in the future. The disruption in global markets occasioned by the coronavirus epidemic will likely result in force majeure, frustration, impossibility, or similar clauses being rewritten or amended to specifically include widespread infectious diseases, epidemics, and government lockdowns each as a qualifying force majeure event in international commercial agreements.

PRACTICAL GUIDANCE: Sample Notice - Notification of a Force Majeure Event (Annotated)

Editor's Note: *In many commercial agreements, the parties stipulate that certain events beyond a party's reasonable control that prevent or delay the party's performance ("Force Majeure") will constitute an excuse for that party. Typical Force Majeure events include natural causes (fire, storms, floods), governmental or societal actions (war, invasion, civil unrest, labor strikes), infrastructure failures (transportation, energy), etc. Force Majeure clauses usually exclude overall economic conditions such as stock market or interest rate fluctuations that may affect businesses or the economy generally. The party affected by Force Majeure is usually obligated to provide prompt written notice to the counterparty of the occurrence of the Force Majeure event (in reasonable detail) and the expected duration of the event's effect on the party. Some agreements may provide that a disruption in a party's performance due to Force Majeure extending beyond a stated period is cause for termination of the agreement.*

A form of Force Majeure notice follows. Find it on [Bloomberg Law](#).

FORM OF FORCE MAJEURE NOTICE

To: Counterparty

Address

Re: Supply Agreement dated [DATE]

Ladies and Gentlemen:

We are writing to confirm the message conveyed in a [Telephone Call or E-Mail] on [DATE] to your [NAME OR TITLE].

Comment: Frequently, the affected party will alert counterparties of a force majeure event in an immediate broadcast telephone or email message followed by a more complete written confirmation. Depending on the nature of the event and the party affected, counterparties may first learn of the occurrence in a news report. In any event, it is in the affected party's interest to inform counterparties quickly to put them on notice that a force majeure is being declared.

On [DATE] our manufacturing facility in [LOCATION] was severely damaged by [Hurricane, Storm, Electrical Fire, or Other Specific Cause Listed or Described as a Force Majeure Event in the Parties' Commercial Agreement], resulting in a [Complete; Partial] shutdown of the facility. All shipments of goods and materials to or from the facility are curtailed pending further investigation and damage assessment.

In accordance with section xx of the above referenced agreement, we are hereby declaring the occurrence of an event of force majeure, which excuses our performance while the effects of this event are continuing.

Comment: The party affected by force majeure will want to review carefully the force majeure clause of the commercial agreement and mirror the wording of the clause as closely as possible in its declaration to the counterparty, both as to the specific event constituting the force majeure and its consequent effect on the party's performance. During the period of the force

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majeure, non-affected parties may seek to cover their purchase or sale requirements from alternate sources.

At this time, we anticipate that the facility will be closed for at least [DURATION]. We will provide updates regarding this situation [At Regular Intervals], [Including by Press Release or Public Statement].

Comment: During the course of a force majeure event, the contracting parties are likely to engage in a number of formal and informal communications regarding the damage caused by the event and status of the affected party's recovery.

Please direct any questions about this matter to [NAME].

Sincerely,

PARTY



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