

COVID-19 Legal Implications for Non-Profits

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Agenda

1. Contracts

- Force Majeure.
- Proper termination.

2. Insurance

- D&O policy concerns, business interruption insurance, event and conference insurance.

3. Corporate Governance issues

- Meetings
- Board/officer elections

4. Recent federal law changes

- PPP and EIDL loan programs, employee retention credit, and employee paid sick and FMLA leave expansions.

5. EEOC concerns re COVID and intersection with ADA

6. Potential liability shield for employers

Contracts: Force Majeure

- Force Majeure in Latin means “superior or irresistible force.”
- Generally excuses a party's non-performance only where performance was impossible because of unforeseen, and typically extreme, events outside the parties' control, such as war, "acts of God," and natural disasters.
- There is no implied right of protection by a force majeure clause; a force majeure event can only potentially excuse performance if the contract actually has a force majeure clause.

Contracts: Force Majeure

- The “test” for force majeure usually requires the satisfaction of three distinct criteria:
 - the event must be beyond the reasonable control of the affected party;
 - the affected party’s ability to perform its obligations under the contract must have been prevented, impeded or hindered by the event; and
 - the affected party must have taken all reasonable steps to seek to avoid or mitigate the event or its consequences.
- Typically, force majeure clauses will be included in hotel, catering, venue, and service contracts.

Contracts: Force Majeure

- Non-profits should:
- Carefully review the definition of force majeure in their contracts to determine whether there is any express event incorporating events such as COVID-19 and, if not, whether the general language is sufficient to include COVID-19 and its consequences.
- Consider those aspects of the relevant contract that you are not able to perform and satisfy yourself that the inability to perform is due to the consequences (direct or indirect) of COVID-19 and not a different reason.
- Consider and review what steps you are taking to avoid or at least reduce the effects of COVID-19 upon your workforce and your ability to continue to perform contract.

Contracts: Proper Termination

- In conjunction with a review of non-profits' force majeure language, you should also review your agreements' termination clauses.
- Generally, an agreement's term can be terminated "without cause" and "for cause."
- Without cause means that a party can terminate an agreement at any time, for any reason, usually by providing notice (or written notice) to the non-terminating party of certain amount of time.
- For cause is for a specific reason outlined in the agreement that may allow a party to terminate immediately for breach.
 - Sometimes, an agreement will specify that the breaching party may "cure" the breach within a certain amount of time.

Insurance: D&O Policy Concerns

- Directors and officers' insurance, known as D&O insurance, generally insulates directors and officers from wrongdoing done in the scope of their duties as part of the non-profit.
- Recently, we have begun to see lawsuits alleging that companies and their directors and officers breached their duties in the context of COVID-19 exposures.
- D&O liability insurance policies have relatively few exclusions. Many of these exclusions go to the knowledge and conduct of the individual insureds themselves, not the perils or risks insured against.
- Although few D&O policies contain exclusions for claims arising out of losses due to epidemics, insurers may now attempt to insert them into D&O policies during the renewal cycle.
- Policyholders should resist any such exclusions or limitations to the extent possible, as they are directly contrary to the purpose of D&O liability insurance.

Insurance: D&O Policy Concerns

- In the COVID-19 context, reductions in value of pension plans or the bankruptcy or insolvency of a company could give rise to related fiduciary liability claims.
- Many management liability policies include both D&O liability and fiduciary liability coverages. Fiduciary liability coverage is designed to protect individuals responsible for creating, implementing, administering, or managing their company's employee benefit plans, including pensions and health plans.
- The claim here against directors and officers and trustees of benefit plans for mismanagement or failures to disclose that lead to an unexpected drop in the company's stock price. Many employee benefit plans include company stock as part of retirement plans and ESOPs, among others. Accordingly, when a company's stock price drops, fiduciaries of those plans can be the target of ERISA and other claims for mismanagement and breach of fiduciary duties with respect to plan beneficiaries.

Insurance: D&O Policy Concerns

- Cyberattacks and electronic fraud are on the rise as hackers try to exploit increased vulnerabilities.
- Directors and officers play an important role in ensuring that their companies' cyber and data-security standards and action plans meet legal requirements and comply with any breach-notification laws.
- Failure to do so could result in actions alleging failure to comply with such standards and state or federal data privacy laws.

Insurance: Business Interruption

- Business interruption insurance is coverage that replaces business income lost in a disaster.
- The event could be, for example, a fire or a natural disaster. Business interruption insurance is not sold as a separate policy but is either added to a property/casualty policy or included in a comprehensive package policy as an add-on or rider.
- Business interruption typically indemnifies for loss of revenue that would have been earned had there been no business interruption and the continuing normal operating expenses incurred during the time it takes to restore the damaged property.

Insurance: Business Interruption

- Standard business interruption policies typically include an endorsement excluding viruses or epidemics;
- However, coverage has begun to evolve. In 2014, in response to the Ebola epidemic, specialty brokers offered a new type of coverage called “Pandemic Disease Business Interruption Insurance” to cover loss of income arising from government mandated closure of healthcare facilities.
- Now is the time for non-profits to review their policies to determine whether their policies may be construed to provide coverage for losses resulting from disease outbreaks, such as COVID-19, and for consequential losses not directly caused to the insured, such as where a supply chain is interrupted and the insured is impacted.

Insurance: Event and Conference

- Event and conference insurance is designed to protect a conference from possible circumstances that might occur during your event that are beyond your control.
- Regarding COVID-19, the question becomes does COVID-19's designation as a "pandemic," or do "state of emergency" declarations in many jurisdictions, affect the scope of our insurance coverage?
- The answers to these questions will all depend on the terms of your policy.

Insurance: Event and Conference

- However, many of these policies exclude coverage for uncommon and catastrophic events. For example, virtually all such policies have coverage exclusions for losses that are caused by acts of war, and some may also exclude terrorist attacks. Some event cancellation policies also exclude coverage for natural disasters and, most pertinent here, communicable diseases.
- Often the key questions for coverage are: Does the communicable disease exclusion apply? If so, did the policy holder pay extra to purchase a coverage "extension" that will cover losses from communicable diseases, even if their base coverage will not?

Insurance: Event and Conference

- In this regard, WHO's "pandemic" designation is particularly important. Many event cancellation policies use WHO's declaration as a trigger for their communicable disease exclusion. Some policies contain language similar to the following:
 - *This insurance does not cover loss arising directly or indirectly as a result of any communicable disease or the threat or fear of communicable disease (whether actual or perceived).*
 - *This exclusion shall not apply unless prior to or simultaneously with the loss arising, the communicable disease is declared an epidemic or pandemic by the World Health Organization (WHO) or by Federal or Local Government Agency. However, any threat or fear of communicable disease, whether actual or perceived, is excluded.*

Governance Issues

- Operational Issues
 - State Corporate Statutes
 - Articles of Incorporation
 - Bylaws
 - Polices

 - Meetings
 - Voting
 - Board/Officer Elections

Recent Federal Law Change: PPP and EIDL

- The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) is a \$2.2 trillion package, contains a mixture of different relief measures for small businesses, including non-profit organizations, state and local governments, and individuals.
- CARES also created the Payment Protection Program and amended the Economic Injury Disaster Loan program, both run through the U.S. Small Business Administration.
- Both programs are aimed at helping small businesses and non-profits get through the COVID-19 crises.

Recent Federal Law Change: PPP and EIDL

| Payment Protection Program | Economic Injury Disaster Loan |
|--|--|
| <ul style="list-style-type: none">• Allows (forgivable) loans up to \$10 million to § 501(c)(3) and § 501(c)(19) non-profits, and for-profit small businesses with fewer than 500 employees if they were in existence on February 15, 2020.• The loan may be used for payroll support, such as employee salaries, paid sick or medical leave, health and other insurance premiums and retirement benefits, severance payments, state and local employment taxes, and mortgage, rent, and utility payments during the 8-week period following loan origination.• The loan amount is tied to payroll costs to determine the size of the loan which is generally 2.5 times the average total monthly payroll costs from the prior year. | <ul style="list-style-type: none">• Allows loans (that are not forgivable) to non-profit organizations, which include entities exempt under Sections 501(c), (d), and (e) of the Internal Revenue Code, and small businesses with fewer than 500 employees.• EIDL loans carry a 2.75% interest rate for non-profit organizations and up to \$2 million can be borrowed.• Section 501(c)(3) and Section 501(c)(19) organizations may apply for both PPP loans and EIDL loans as long as they are not used for the same purpose. |

Recent Federal Law Change: Employee Retention Credit

- The Employee Retention Credit is a fully refundable tax credit for employers equal to 50 percent of qualified wages (including allocable qualified health plan expenses) that Eligible Employers pay their employees.
- This Credit applies to qualified wages paid after March 12, 2020, and before January 1, 2021.
- The maximum credit for an Eligible Employer for qualified wages paid to any employee is \$5,000.

Recent Federal Law Change: Employee Retention Credit

- Eligible Employers for the purposes of the Employee Retention Credit are employers that carry on a trade or business during calendar year 2020, including tax-exempt organizations, that either:
 - Fully or partially suspend operation during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19; or
 - Experience a significant decline in gross receipts during the calendar quarter.

Recent Federal Law Change: Employee Retention Credit

- A significant decline in gross receipts begins with the first calendar quarter in 2020 in which an employer's gross receipts are less than 50 percent of its gross receipts for the same calendar quarter in 2019.
- The operation of a trade or business is partially suspended if an appropriate governmental authority imposes restrictions on the employer's operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 such that the employer can still continue some, but not all of its typical operations.

Recent Federal Law Change: Emergency Paid Sick Leave

- The Families First Coronavirus Response Act requires employers with less than 500 employees to provide employees two weeks of paid sick leave, paid at the employee's regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period), to quarantine or seek a diagnosis or preventive care for COVID-19.
- It also requires payment at two-thirds the employee's regular rate or two-thirds the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period) to care for a family member for those purposes or to care for a child whose school has closed, or childcare provider is unavailable, due to COVID-19.
- Under the Act, "paid sick time" is calculated based on the employee's required compensation and the number of hours the employee would otherwise be scheduled to work.

Recent Federal Law Change: Emergency FMLA

- The Families First Coronavirus Response Act requires employers with less than 500 employees to provide up to 12 weeks of leave under the FMLA.
- Eligible employees are those with a qualifying need related to a public health emergency who have been employed for at least 30 calendar days by the employer with respect to whom leave is requested.
- A “qualifying need related to a public health emergency” is one where the employee is unable to work or telework due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.
- A “public health emergency” means an emergency with respect to COVID-19 declared by a federal, state or local authority.

Recent Federal Law Change: Less than 50 Employees

- The U.S. Department of Labor has said that small businesses with fewer than 50 employees, including religious and non-profit organizations, are exempt from previous two FMLA and sick leave provisions if, due to school closings or childcare unavailability, the leave requirements would jeopardize the viability of the business.
- An "authorized officer" of the business must determine whether it meets this criteria.

COVID-19, EEOC, and the ADA

- The U.S. Equal Employment Opportunity Commission (EEOC) recently put out guidance on how to respond to the pandemic under federal employment nondiscrimination laws such as including Title VII, Age Discrimination in Employment Act, the Americans with Disabilities Act.
- Guidance from the EEOC is constantly evolving as they put out updated documents (<https://www.eeoc.gov/coronavirus>).
- The laws enforced by the EEOC do not hinder employers from following COVID-19 guidance from the CDC or state or local public health authorities.
- An employer is covered by the ADA if it has 15 or more employees.

COVID-19, EEOC, and the ADA

Q: How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

A: During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat.

Q: When may an ADA-covered employer take the body temperature of employees during COVID-19?

A: Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued precautions, employers may measure employees' body temperature.

COVID-19, EEOC, and the ADA

Q: Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?

A: Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace.

Q: When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty?

A: Yes. Such inquiries are permitted under the ADA.

COVID-19, EEOC, and the ADA

Q: May an employer administer a COVID-19 test before permitting employees to enter the workplace?

A: The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.

Q: During the hiring process, may it screen applicants for symptoms of COVID-19?

A: Yes. An employer may 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.

COVID-19, EEOC, and the ADA

Q: May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?

A: Yes, as this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

Q: Is an employer to grant a request to telework from an employee who is 60 or older because the CDC says older people are more likely to experience severe symptoms if they get COVID-19?

A: No. The Age Discrimination and Employment Act does not itself have an accommodation provision like the ADA; however, if an employer is allowing other comparable workers to telework, they should make sure it is not treating older workers differently based upon their age.

Potential Liability Protections for Employers

- Congressional leaders are debating whether – and how much – liability protections to include in the upcoming Phase 4 stimulus bill with Senate Majority Leader Mitch McConnell (R-Ky.) insisting that employers be shielded from liability if their workers contract the coronavirus.
- So far, any legislation would require that employers comply with federal guidelines to receive liability protection from COVID-19 related claims.
- The Senate will debate on the new stimulus in the coming weeks.
- Any federal liability protection framework would likely have to override state law.
- California Governor recently issued an Executive Order that makes COVID-19 related claims a “work related” injury and therefore capable of being paid by workers’ compensation.

Potential Liability Protections for Employers

- At this point, legislative text is unclear, but we would imagine that there will be some level of liability protection for employers in the next COVID-19 response bill.

QUESTIONS?

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