Tackling Legal and Business Challenges Caused by the COVID-19 Pandemic

Article By

Erik K. Swanholt
John J. Atallah

Foley & Lardner LLP
Coronavirus Resource Center

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Virtually every consumer-facing business has been impacted by shelter-in-place orders, supply chain issues, or new uses for products in a socially distanced society. Many are making headway in adapting to the “new normal” as lockdowns are lifted, employees return to work, and facilities are gradually reopened to the public.

In the face of these challenging circumstances, it is important that companies take an analytical step-by-step approach, and exercise diligence in following those steps even as the cries for a speedy resolution get louder. A prepared business can respond quickly without putting itself at undue risk.
Here, we provide guiding principles for managing potential exposure to liability in these uncertain times, and examine a handful of industry-specific considerations.

**General Principles**

1. **Document the Company’s State of Mind**

   It is important that your business continually document its efforts to respond to issues created by the COVID-19 pandemic so that the company’s real-time state of mind can provide support for why certain decisions were made. Various immunity statutes like the Public Readiness and Emergency Preparedness (PREP) Act employ a “reasonable belief of compliance” standard that may be proven by contemporaneous records of the company’s thinking at the time of its actions. Although it may be difficult to imagine now, people, including judges, regulators and jurors, will forget how desperate these times were. It would therefore be imprudent to rely on people’s memories of the exigency of these circumstances in the calm days that come long after the crisis has abated. Keep appropriate real-time records to remind key personnel of the reasoning behind important decisions, and to substantiate your decision-making in this challenging context.

2. **Be Aware of Upcoming Changes to Stay-At-Home Orders**

   Many states and localities are evaluating phased approaches for reopening businesses that were previously ordered closed. Keep up to date on new developments that will impact whether (and by what means) you, your suppliers, retailers, and/or competitors can return to business. Staying ahead of these developments by working with knowledgeable counsel can give you a significant competitive advantage and prevent a lawsuit. Visit our [50 State Emergency Order Tracker](#) for additional information.

3. **Tread Carefully When Changing Consumer-Facing Policies**

   Before making changes to consumer-facing policies and/or procedures (e.g., refunds and exchanges of goods, event postponements, service modifications, etc.), consult with attorneys in order to minimize the risk of unnecessary exposure. Event planners, ticket sellers, professional sports teams, and others have been targeted in class action lawsuits relating to cancelled events. Plaintiffs’ lawyers are on the lookout for more targets. For additional information, see our [recent article](#) on class action lawsuits resulting from the COVID-19 pandemic.

4. **Be Proactive About Document Retention**

   If and when your company is impacted by a lawsuit, it is important that you have protocols in place to ensure that all potentially relevant documents and electronic files are preserved. Implementing a thorough and effective document retention program (and if necessary, a defensible litigation hold protocol) can be challenging, particularly where personnel are working from home, sometimes using their own computers, smart phones, and other devices. Likewise, particular document retention policies (i.e., archival or deletion of emails after a period of months) that
are largely implemented on an automatic basis may need to be adjusted to account for the remote use of personal devices.

**Specific Issues to Consider**

While every business has been and will continue to be impacted by this pandemic, the nature of the impact varies from industry to industry and from business to business. The sections below provide further guidance on particular issues faced by companies in manufacturing and consumer finance, as well as in the broader context of labor and employment.

**Manufacturing**

**Continue to Evaluate Key Commercial Contracts**—The pandemic has caused significant supply chain disruptions for a wide variety of businesses. Manufacturers in particular should review key contracts to understand their contractual obligations and rights in these circumstances. Focus on important terms, including but not limited to: (1) force majeure clauses that might excuse your company (or your company’s suppliers or customers) from performing obligations under the contract; (2) minimum purchase or sale requirements, sole source or other exclusivity obligations, and other terms that may present a heightened risk of breach; and (3) provisions that might be used to pass increased labor, raw material, shipping, or storage costs to counterparties. Choice-of-law provisions may implicate the new laws of a state that has enacted emergency legislation or is operating under an executive order that impacts contract performance or liability for breach.

**Develop and Implement Protocols for Vetting New Suppliers, Customers, and Products**—Significant decreases in consumer spending, along with rampant workforce disruption, among several other factors, have caused many businesses to scale down or cease operations. These businesses may be your suppliers or your most direct route to the consumer. Before entering into new agreements, thoroughly vet the counterparties; at a time like this, it is key to know who you are working with before any deals are closed. Consider establishing procedures for identifying and managing risks with respect to financially distressed suppliers and/or customers. Alternative supply chains should be vetted carefully before bringing newly sourced products into the picture, as these changes can impact manufacturing operations and the quality of the end product. Ensure new suppliers certify compliance with all applicable federal, state, and local regulations and standards (i.e., ASTM, ANSI, EPA, TSCA, CPSC, FDA, etc.), and that they are able to comply with strict import regulations enforced by the still-active U.S. Customs and Border Patrol. The Consumer Product Safety Commission, the regulator of consumer product safety, is also active through the pandemic with an eye towards counterfeit products, toys, and other products that do not meet safety standards. For example, it has posted dozens of recalls on its Twitter account so far this year.

**Identify Potential Consumer Class Action Issues**—The pandemic has given rise to a substantial number of putative class action lawsuits alleging price gouging, improper product labeling, failure to warn, breach of data security, health care, and other claims. One recent report suggests more than 1,000 COVID-19-related lawsuits have been filed across the country to date, and many of these are putative class
actions. A key here is balancing transparency for consumers and contracting partners while your business maintains its high pre-crisis standards for quality and abides by the representations it makes about the efficacy of its consumer products.

**Consumer Finance**

**Ensure the Privacy of Data Accessed Off-Site**—Consumer data is subject to strict protections under federal and state laws and regulations, including the Gramm-Leach-Bliley Act (GLBA), the Fair Credit Reporting Act (FCRA), and the FTC’s Privacy of Consumer Financial Information Rule. Financial institutions, consumer reporting agencies, and other entities operating in the consumer finance space should take extra precautions to ensure the privacy of consumer data accessed off-site by employees. While many businesses have protocols in place for remote access on a short-term basis, extended work from home and related social distancing measures mean that officers and employees of these institutions will need stable, longer-term solutions. Strike a balance between facilitating responsible access to sensitive data (and thereby continuing to serve clients at a high level) while complying with all applicable laws and regulations.

**Expect a Swell in Consumer Disputes**—The broad financial impact of the pandemic will cause many individuals and businesses to miss mortgage, rent, utility, credit card, and auto loan payments. The reporting of derogatory information on these tradelines, which must follow strict statutory requirements, will likely cause a swell in consumer disputes. Take a proactive approach in hiring and training employees to handle consumer disputes and reinvestigations, monitor debt and payment relief efforts by federal, state and local governments, and work diligently to comply with rigid statutory deadlines.

**Labor and Employment**

**Check Your Jurisdiction**—Labor and employment laws vary significantly from state to state, and the assessment and application of these laws will differ based on particular conditions in each jurisdiction, including those relating to reductions in workforce or compensation. If yours is a nationwide, or multistate business operation, understanding these variations can be the difference between smooth sailing and a class action lawsuit.

**Make a Detailed Plan for Reopening Facilities**—Advance planning is critical as you reopen facilities. This should include specific plans for the procurement of personal protective equipment and training on its use and social distancing practices. See our Labor & Employment group’s recent article entitled *Best Practices When Implementing a Program for Taking Employee Temperatures During the COVID-19 Pandemic* for additional information.

**Include Protocols for Impacted Employees**—There are rules and guidelines in place to address issues relating to an employee who claims to have, or does display, COVID-19 symptoms. The same is true of employees needing to care for impacted family members under the Family and Medical Leave Act (FMLA) and parallel state laws. Consider tailored training on these issues for HR and facility management personnel.
Develop an Understanding of PPP Loans and How to Use Them—The Paycheck Protection Program (PPP) administered by the U.S. Small Business Administration can be a tremendous asset to businesses endeavoring to keep their workforce employed during the COVID-19 crisis. However, the process of applying for and using PPP loans can be complicated, particularly given recent news that PPP loan applications will be audited to ensure they are going only to businesses where such funding is necessary to support ongoing operations. Companies must act urgently, but appropriately, to obtain funding and comply with the law. Accordingly, working with experienced legal counsel is a must.

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