

WTA II

COVID-19 RESPONSES IN THE WASHINGTON, D.C. AREA AND INITIAL SUGGESTIONS FOR THE REGION'S BUSINESSES

On January 30, 2020, the World Health Organization declared the severe acute respiratory syndrome coronavirus 2 (“SARS-CoV-2”) outbreak a “public health emergency of international concern,” and, on March 11, 2020, characterized the outbreak as a “pandemic.” Both the disease that SARS-CoV-2 causes—“coronavirus disease” or “COVID-19”—and measures intended to combat its spread have hampered businesses’ operations and will continue to do so.

The COVID-19 pandemic has caused public officials to take various actions to attempt to slow the spread of the disease. Businesses must stay abreast of the ever-shifting responses by multiple levels of government that may affect their operations and obligations.

Businesses are also facing commercial and economic challenges as COVID-19 and efforts to reduce SARS-CoV-2 exposures disrupt operations and supply chains. Businesses that may be unable to meet their obligations should review key provisions in their agreements and insurance policies to identify potential opportunities to reduce the economic damage they will suffer.

Though circumstances change rapidly, for now, the following high-level summary describes federal and state responses in the greater Washington, D.C. area. The summary also includes observations about potential commercial measures businesses might explore in response to economic disruptions.

GOVERNMENT RESPONSES

Federal Response to the Pandemic

On March 13, 2020, following the WHO’s pandemic announcement, President Trump issued an executive order declaring a national emergency concerning the COVID-19 outbreak.¹ The response continues to evolve, but as of the time of this writing, in response to the pandemic, the federal government, among other actions, has restricted international travel and issued guidance to healthcare providers and individuals, including exhortations to avoid large gatherings and unnecessary in-person interactions for the next several weeks.² More generally, policymakers and medical professionals have suggested “social distancing” (and, in some cases, even more stringent restriction of interactions) is

¹ See <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

² A summary of the Centers for Disease Control and Prevention (“CDC”) is available here: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>. The recommended crowd size limits have changed several times. Most recently, on March 15, 2020, the CDC suggested people should not gather in groups of more than 50 for eight weeks. Then on March 16, 2020, President Trump issued guidelines that suggested avoiding gatherings of more than 10 people. https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

necessary to prevent a potentially catastrophic collapse of the healthcare system. Federal agencies have made guidance available that may be of interest to businesses, including Occupational Safety and Health Act “Guidance on Preparing Workplaces for COVID-19.”³

In response to the strains that COVID-19 and recommended responsive measures have placed on employers and employees, on March 18, 2020, Congress passed the Families First Coronavirus Response Act (H.R. 6201) (“FFCRA”), which President Trump signed the same day.⁴ Key features of the FFCRA that will be of interest to businesses include: (1) extending and expanding Family Medical Leave Act (“FMLA”) coverage to address certain absences relating to the current pandemic and requiring paid FMLA leave benefits in some cases; (2) establishing a new paid sick leave entitlement for similar absences;⁵ and (3) providing certain tax credits to help employers shoulder some of the costs of these benefits. The leave provisions generally apply to employers with fewer than 500 employees; but subsequent regulatory exemptions from some of the paid leave requirements might be available to certain businesses with fewer than 50 employees if providing the otherwise mandated benefits “would jeopardize the viability of the business as a going concern.” The legislation includes certain payment limits and caps. The law does not appear on its face to preclude state and local authorities from requiring employers to provide more generous benefits. The provisions relating to leave take effect no later than April 2, 2020, and will apply until December 31, 2020.⁶

District of Columbia Response to the Pandemic

On March 11, 2020, D.C. Mayor Muriel Bowser declared a public emergency and a public health emergency.⁷ The order establishing a public emergency prohibits persons from charging more than the “normal average retail price” for products or services sold.⁸ Violations of the “overcharging” code carry a fine of \$1,000 and other civil penalties, including revocation of D.C. licenses, permits, and other administrative certificates.⁹

On March 16, 2020, to further encourage “social distancing,” Mayor Bowser issued another order restricting “mass gatherings,” which the order defines as gatherings that bring together or likely bring together 50 or more persons at the same time in a single confined or enclosed space.¹⁰ The term “mass

³ <https://www.osha.gov/Publications/OSHA3990.pdf>.

⁴ See <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201eh.pdf>.

⁵ Generally, covered absences include those (1) resulting from governmental quarantine orders or quarantine recommendations by healthcare providers, (2) necessitated by an employee’s COVID-19 symptoms and efforts to obtain diagnoses, and (3) resulting from a need to care for quarantined individuals or children.

⁶ The new law also provides other benefits related to COVID-19 testing, unemployment insurance, and nutrition programs.

⁷ See

https://mayor.dc.gov/sites/default/files/dc/sites/mayormb/release_content/attachments/MO.DeclarationofPublicEmergency03.11.20.pdf and

https://dchealth.dc.gov/sites/default/files/dc/sites/doh/page_content/attachments/2020-035-District-Government-Preparation-for-the-Coronavirus-COVID-19.pdf.

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https://mayor.dc.gov/sites/default/files/dc/sites/mayormb/release_content/attachments/MO.DeclarationofPublicEmergency03.11.20.pdf (citing D.C. Code § 28-4102).

⁹ See D.C. Code § 28-4103.

¹⁰ See <https://mayor.dc.gov/sites/default/files/dc/sites/mayormb/publication/attachments/MO-Prohibition-on-Mass-Gatherings-During-Public-Health-Emergency.pdf>.

gathering” includes outdoor events in an area enclosed by a fence or other physical barrier if 50 or more people in that space are within arm’s length of one another. Moreover, a “mass gathering” includes a gathering of 10 or more people by an organization that primarily serves or targets individuals who are 60 years old or older, have serious medical conditions, or are immunocompromised. Further, the order directs restaurants and taverns to suspend table seating and limit service to “delivery and grab-and-go operations only.” Finally, the order requires “nightclubs, multi-purpose facilities, health clubs, health spas, massage establishments, and theaters” to suspend operations. Each violation of the order is punishable by a fine up to \$1,000 and administrative penalties up to revocation of a D.C. license.¹¹

Maryland Response to the Pandemic

Maryland’s Governor, Larry Hogan, has issued a number of executive orders in response to the COVID-19 pandemic. On March 5, 2020, after confirming three infections in Maryland, Governor Hogan issued a proclamation declaring a state of emergency and a catastrophic health emergency.

Following that declaration, in light of necessary “social distancing” and other ramifications of the pandemic, Governor Hogan issued several executive orders under Maryland’s Public Safety Article, including orders: (1) mandating telework for certain state employees and instituting travel restrictions required by moving the State to “Elevated Level II – Flexible Operations”¹² (March 12, 2020); (2) extending the deadline for obtaining certain licenses, permits, registrations, and other governmental authorizations, which would have expired during the state of emergency, to 30 days after the state of emergency is rescinded¹³ (March 12, 2020); (3) activating the Maryland National Guard¹⁴ (March 12, 2020); (3) closing casinos (March 15, 2020); and (4) prohibiting “[s]ocial, community, spiritual, religious, recreational, leisure, and sporting gatherings and events . . . of more than 50 people,” which explicitly applies to restaurants, bars, and similar establishments; fitness centers; theaters; and government buildings and facilities¹⁵ (March 16, 2020).

Also on March 16, 2020, Governor Hogan issued an omnibus healthcare order (“Omnibus Order”) establishing additional health facilities (including previously decommissioned hospitals), controlling assets received from the Strategic National Stockpile, establishing license reciprocity for practitioners who hold valid out-of-state healthcare licenses, allowing healthcare practitioners with inactive licenses to practice at Maryland healthcare facilities, activating the Maryland Responds Medical Reserve Corps, limiting the performance of elective medical procedures, and closing all adult daycare centers.¹⁶ The Omnibus Order established criminal penalties for willful violations (e.g., punishable by up to one year of imprisonment and a fine up to \$5,000).

Along with the Omnibus Order, on March 16, 2020, Governor Hogan issued an executive order temporarily (1) prohibiting utility companies (i.e., electric, gas, sewage disposal, telegraph, telephone, water, cable, internet service provider, or any combination of these) from terminating service and collecting late fees and (2) prohibiting evictions of persons suffering “a substantial loss of income

¹¹ See D.C. Code §§ 7-2307.

¹² See <https://governor.maryland.gov/wp-content/uploads/2020/03/Elevated-Level-II.pdf> and <https://dbm.maryland.gov/employees/Pages/COVID19.aspx>.

¹³ See <https://governor.maryland.gov/wp-content/uploads/2020/03/Licenses-Permits-Registration.pdf>.

¹⁴ <https://governor.maryland.gov/wp-content/uploads/2020/03/National-Guard.pdf>.

¹⁵ <https://governor.maryland.gov/wp-content/uploads/2020/03/Executive-Order-Amending-Large-Gatherings.pdf>.

¹⁶ See <https://governor.maryland.gov/wp-content/uploads/2020/03/Executive-Order-Health-Care-Matters.pdf>.

resulting from COVID-19 or the related proclamation of a state emergency . . . due to job loss, reduction in compensated hours of work, closure of place employment, or the need to miss work to care for a home-bound school-age child.”¹⁷

Maryland’s Department of Commerce has compiled materials to assist business owners with understanding and responding to these obligations.¹⁸

Virginia Response to the Pandemic

Virginia’s Governor, Ralph Northam, issued an executive order declaring a state of emergency on March 12, 2020. The order banned state employee travel outside of the Commonwealth. The order also authorized executive branch agencies, with the concurrence of cabinet secretaries, “to waive any state requirement or regulation, and enter into contracts without regard to normal procedures or formalities, and without regard to application or permit fees or royalties.”¹⁹ Additionally, the order effected a disaster declaration, which makes selling, leasing, or licensing (or offering to sell, lease, or license) “any necessary goods and services at an unconscionable price” unlawful.²⁰ Violators may be required to pay civil penalties of up to \$2,500 per violation, investigation costs and expenses of up to \$1,000 per violation, and reasonable attorneys’ fees.²¹

On March 17, 2020, Governor Northam issued an executive directive to the Commissioner of the Department of Motor Vehicles closing the department’s Customer Service Centers and other locations. The directive also extended the validity of licenses and certain other credentials that expire on or before May 15, 2020, for 60 days and loosened certain driver training restrictions.

The Commonwealth has also undertaken additional measures, including activating the National Guard, canceling state conferences and large events for at least 30 days, urging localities to limit large public events, closing schools, and encouraging private businesses to explore telework and paid time off options.

Other state and local agencies have also suspended or restricted operations, and the Commonwealth has compiled information and materials about dealing with COVID-19’s impacts.²²

POTENTIAL COMMERCIAL MEASURES

COVID-19 and efforts to stem infections may impair businesses’ abilities to fulfill obligations required under various agreements. The failure to perform obligations could potentially expose parties to liability for breaching these agreements; but contracts often include clauses that address parties’ obligations when unexpected and uncontrollable events occur. Additionally, insurance or indemnification agreements might also provide avenues for relief.

¹⁷ See <https://governor.maryland.gov/wp-content/uploads/2020/03/Executive-Order-Prohibit-Termination-of-Residential.pdf>.

¹⁸ See <https://businessexpress.maryland.gov/coronavirus>.

¹⁹ [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf).

²⁰ Virginia Post-Disaster Anti-Price Gouging Act, codified in Va. Code §§ 59.1-525 *et seq.*

²¹ Va. Code § 59.1-206.

²² <https://www.virginia.gov/coronavirus-updates/>.

Accordingly, businesses and their counsel should consider the following:

1. **Review Force Majeure and Material Adverse Change Clauses.** The current pandemic may be covered by a “force majeure” or similar provision in a relevant agreement. Force majeure clauses typically provide that a party’s obligation to performance is suspended where the party is unable to perform due to “acts of God, and the public enemy, the elements, fire, accidents, breakdowns, strikes, differences with workmen, and any other industrial, civil or public disturbance, or any act or omission beyond the control of the party having the difficulty, and any restrictions or restraints imposed by laws, orders, rules, regulations or acts of any government or governmental body or authority, civil or military” or some variation.²³ The interpretations of such clauses might vary depending on which jurisdiction’s law applies and the subject matter of the agreement.²⁴ Force majeure clauses are not catch-all provisions, and courts typically construe them narrowly to address only the types of disasters or events that the agreements’ terms indicate the parties envisioned.²⁵ Courts are unlikely to interpret force majeure clauses “to buffer a party against the normal risks of a contract.”²⁶ Further, courts generally will not imply a force majeure clause where the parties did not expressly agree to such a provision, though courts may imply an excuse for impracticability in contracts for goods governed by the Uniform Commercial Code (“UCC”).²⁷

Certain business transactions (typically the purchase or sale of a company or all of its assets and related financing transactions) might also be subject to “material adverse change” (“MAC”) or “material adverse event” clauses that allow parties to back out of a pending deal before final closing in the event of some material economic change or disaster. These clauses are usually the subjects of significant negotiations, so their terms vary. Further, as with force majeure clauses, courts may take a restrictive view when interpreting the applicability of a MAC clause, including analysis of whether the purported adverse change is part of a general economic decline and whether the effects of the change or event are likely to last for a substantial time.²⁸

²³ *Langham-Hill Petroleum, Inc. v. S. Fuels Co.*, 813 F.2d 1327, 1329 n.1 (4th Cir. 1987).

²⁴ In addition to these particular provisions, parties must, of course, also review the other terms of their agreements, including choice of law clauses. Courts typically enforce the parties’ expressed intent regarding the law that applies to a claim arising from a breach of contract. The law that governs interpretation and/or performance of the parties’ agreement could materially affect the outcome of a contract claim. Before taking any action, parties should be aware of provisions that identify the controlling law. Absent an express provision, courts determine which jurisdiction’s law will apply under common law principles.

²⁵ *Carrollton Bank v. Fujitsu Transaction Sols., Inc.*, 56 F. App’x 603, 606–7 (4th Cir. 2003) (applying New York law and explaining that events contemplated by a force majeure clause “are confined to things of the same kind or nature as the particular matters mentioned”) (internal quotation marks and citation omitted).

²⁶ *Langham-Hill Petroleum, Inc.*, 813 F.2d at 1330 (quoting *N. Indiana Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986)).

²⁷ *Compare Bayou Place v. Aleppo’s Grill*, No. 18-CV-2855, 2020 U.S. Dist. LEXIS 43960, at *21–22 (D. Md. Mar. 13, 2020) (applying Texas law and refusing to apply a “force majeure” affirmative defense in breach of contract case even where a hurricane had been deemed an “act of God” by Texas courts) *with* UCC 2-615 (excusing delay or non-delivery in whole or part where a seller’s performance has been made impracticable by “the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic government regulation or order,” and the seller provides the buyer “seasonable” notice).

²⁸ *See, e.g., Akorn, Inc. v. Fresenius Kabi AG*, 2018 Del. Ch. LEXIS 325, at *126 (Oct. 1, 2018) (enforcing a MAC clause for the first time in the history of the Delaware Chancery Court based on a finding that “financial

Courts' treatments of these types of clauses vary by jurisdiction, and outcomes turn on the specific facts underlying claims and defenses. Parties that are unable to perform contractual obligations or complete a transaction due to the current pandemic and related fallout should review their agreements and the applicable case law to determine whether and how such clauses might affect their duties.

2. Review Insurance Coverage and Applicable Indemnification Provisions. Parties that are unable to perform their obligations or that are otherwise affected by the present pandemic may find some relief from insurance coverage or potential indemnifiers. Some policies may contain business interruption or property impairment provisions, which, depending on the policy's language, may cover instances where a business cannot operate due to unforeseen challenge like those presented by the current pandemic. Often, however, the policy terms may require the insured to demonstrate that business operations were impaired by physical loss or damage to the insured's property in order to make a claim. The same is true for contingent business interruption coverage, which might be triggered when the insured's supplier cannot fulfill its obligation to provide goods or services to the insured. Parties should also assess whether—independent of their own insurance coverage—their losses might be indemnified by a business partner or third party.

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performance has declined materially since the signing of the Merger Agreement and that the underlying causes of the decline were durationally significant”); *see also Frontier Oil Corp. v. Holly Corp.*, 2005 Del. Ch. LEXIS 57, at *143 (Apr. 29, 2005) (construing a clause narrowly to conclude it did not apply).