

COVID-19 Outbreak: Time for a Business Health Checkup

By: Harsh Arora, Partner in Kelley Kronenberg's Fort Lauderdale office. [COVID-19 Outbreak: Time for a Business Health Checkup. Daily Business Review, March 2020](#)

The health of a business correlates with the health of its employees, suppliers, and customers. Given the global economy and China's role as the world's manufacturing superpower, the outbreak of COVID-19, the disease associated with the novel coronavirus, poses a significant threat to businesses. While global efforts are focused on containing the spread of this new virus, businesses must prepare for the continued increasing, and evolving impacts on their operations. With many major financial impacts, both directly and indirectly, a longer-lasting and more intensive outbreak has begun to, and will continue to, present a horde of legal concerns relating to domestic and international businesses. These concerns range from disturbances to the supply chain leading to potential contractual disputes to employment law concerns for commercial operations across all industries.

Businesses should address the following symptoms to mitigate issues relating to COVID-19:

The Rise of Contractual Problems

Basic contract principles provide that businesses are to perform as required under the contract, including meeting deadlines, despite external factors impacting their performance, such as COVID-19, which make it more difficult for parties to perform their obligations. There are very few protections when contractual requirements are not met, limited to a number of circumstances, which include, but are not limited to, impossibility or impracticability of performance that is frustrated by an event that the parties could not have reasonably anticipated.

- **Force Majeure Provisions**

Another protection usually, but not always, provided in commercial contracts is a force majeure provision excusing a party from its performance obligations. A force majeure provision provides relief to a party from performance of the required obligations provided in a contract when circumstances, that are beyond the control of the parties, arise making performance impracticable, impossible, or even potentially illegal. When a contract lacks a force majeure provision, parties to a contract are left looking towards common law contract doctrines for shelter, but usually are left stranded, as those doctrines rarely excuse performance. Whether the force majeure provision will excuse a party from a contractual obligation is very fact specific, and will depend on the specificity of the provisions and the extent that the event at issue prevented performance. Whether a force majeure provision applies in this instance, involving the COVID-19 outbreak, depends on the extent to which the outbreak has made a party's performance impossible, instead of making it more difficult to perform, merely postponing it, or making it costlier. As force majeure provisions are generally narrowly interpreted, only applying to the specific events listed in the contract, businesses should review their contracts to determine if an epidemic or outbreak is a covered event

- **Indemnification Provisions**

Similarly, an indemnification provision is another important contractual protection that should be considered by businesses, which allows a party to shift potential damages, attorneys fees and costs to the other party in the event of a failure to comply with the terms of a contract. These provisions are both generally heavily negotiated and litigated, as they are used in contracts where the risks are associated with a party's nonperformance. If there are no protections available under the contract, then by proactively seeking amendments or written extensions for performance, businesses could avoid a breach.

- **Frustration of Purpose**

In the event a contract does not include a force majeure or indemnification provision, the potential epidemic does not satisfy the threshold of the provision sufficient to trigger the included provision's effects, or a party's contracts cannot be amended to include these protections, the party seeking protection should consider the doctrine of frustration of purpose, although this should be a last ditch attempt at being awarded protection. Contracts are usually construed per their language as courts typically require parties to respect the negotiated terms. Prior to asserting frustration of purpose, businesses must take into account when their contracts were entered into. If a contract was entered after it could be reasonably anticipated that the spread of COVID-19 would become a pandemic, proving frustration of purpose sufficiently in order to obtain protection would be much more difficult.

- **Operation Risks**

Additionally, businesses should have a fully comprehensive business continuity plan (BCP) in place that is ready to be rolled out. [A BCP](#) can identify the potential threats to the business operations from the effects of a pandemic to supply chain disruptions. It also provides a way to mitigate these threats as well as their consequences and entails having a framework in place which allows key functions of the business to continue. As part of such BCP, businesses should review their internal policies and procedures to combat potential issues relating to the COVID-19 outbreak as to their employees, and if no policies or procedures exist, then to create, establish, and implement such policies and procedures. Businesses must also make sure to educate their employees regarding the impacts of COVID-19, provide a sanitary workplace, and implement an organized BCP, in an attempt to limit, and ultimately prevent, exposure.

- **Business Interruption Insurance Issues**

Many businesses are protected by insurance policies which are designed to kick in when disaster strikes, allowing businesses to make up for lost revenue due to such disaster. Additionally, some businesses may possess protection from contingent business interruption insurance,

which is an extension to other insurance that reimburses lost revenue resulting from an interruption of business of either a customer or a supplier. This current epidemic has severed many supply chains and disrupted business activity across the world. But after past viral epidemics, including SARS in 2003, Ebola in 2014 and Zika in 2015, insurance companies have added such epidemics as exclusions to their policies, which now require a direct physical loss or damage. The losses from the COVID-19 outbreak will probably be much larger, but less likely to be insured. Quarantines and travel bans can make it impossible for employees to do their jobs, but do not cause the physical damage to workplaces that is necessary to trigger successful business interruption claims. That means businesses will have to absorb much of the losses themselves, either directly or with money, if there is some set aside in a special self-insurance reserve. The COVID-19 outbreak may lead to extensive litigation regarding policy limits and exclusions. That is why it is prudent to review business interruption policies in order to best map out the potential impacts to counter the commercial threats posed by COVID-19.

- **Evolving Viral Developments**

Due to the fast-evolving effects of COVID-19, businesses should carefully monitor the updates from the United States agencies and organizations, both locally and federally, as well as global health agencies and organizations. As the global situation is constantly updated, businesses should carefully review their potential legal exposure with counsel, and formulate the appropriate measures as proposed above.

As COVID-19-related disputes can be predicted, businesses should mitigate their risks by planning ahead per their BCP and by consulting with their counsel to proactively review the above symptoms to avoid disruption of operations, and to mitigate risks that can result in disputes with employees, suppliers, and customers.