

# Driving Toward the New Normal: The Road to Recovery

## WEBINAR

12:30 pm Thursday April 30, 2020

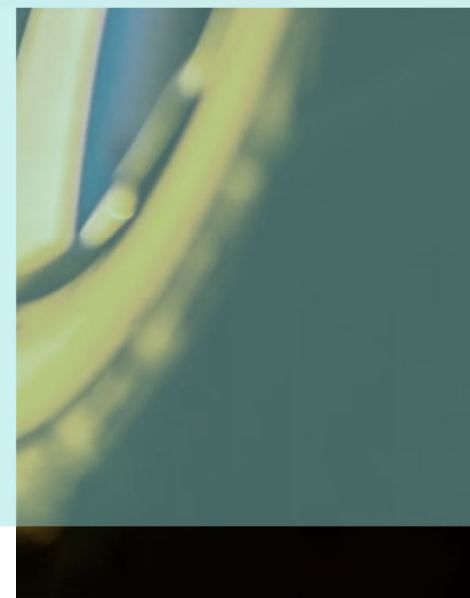
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# Today's Speakers



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# Agenda



Introductions.

A GC's perspective.

Board counseling and communications.

Public company reporting.

Key contractual issues.

Landlord-tenant considerations.

Navigating stay-at-home orders.

Transitioning back to the workplace.

Discussion and Q&A.



# A GC's Perspective

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# Effective Board Oversight

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Mid 90s caselaw; recently revisited following Blue Bell Ice Cream and Clovis Oncology.

Two pronged test:

- Has the Board implemented a reporting system / information controls?
- If yes, has the Board consciously failed to monitor or oversee the company's operations, disabling them from being informed of risks or problems.

Understand “mission critical” and focus on identifying and attending to “Red Flags.”

Contractual relief may be express or negotiated.



# Addressing Pandemic Specific Risks

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Keep the Board abreast of all developments.

Document the process to update directors regarding management's response to the pandemic and the impact on the company's business.

Continue to evaluate the timing of meetings and the flow of information as the situation unfolds.



# Board Focus on “People”

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## Phases of the crisis ...

- Phase 1: safety for all
- Phase 2: employee well-being / operations
- Phase 3: return to work is around the corner

Return to work questions.

Consideration of executive pay issues.

Focus on how to “right size” G&A over the long term.



# Public Company Reporting

Exchange Act reports and other public disclosures should take into consideration recent SEC and staff guidance.

- CF Disclosure Topic #9: Coronavirus (COVID-19) provides a list of topics that companies should consider when assessing COVID-19's impact and related disclosure obligations:

Financial condition and results of operations	Impact of travel restrictions or border closures on operations
Capital and financial resources, including liquidity position <sup>(1)</sup> and outlook	Challenges in implementing business continuity plans
Assets on the balance sheet and ability to timely account for those assets	Impact on demand for products or services
Material impairments, increases in allowances for credit losses, restructuring charges, other expenses or changes in accounting judgments	Impact on supply chain and distribution
Ability to maintain internal control over financial reporting	Impact on human capital resources and productivity





# Public Company Reporting: After Q1

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No affirmative duty to “update” under federal securities laws, but ...

Need for increased vigilance to prevent insider trading and selective disclosure.

Following quarterly earnings conference calls and periodic report filings, continue to reassess prior disclosures in light of evolving situations.

- Track risks that are no longer hypothetical or have evolved over time
- Track changes in management’s expectations

Continue to assess approach to guidance.

Focus on liquidity (and covenant compliance.)

Work closely with auditors and financial reporting staff to vet accounting judgments and estimates.

# Pandemic as a Force Majeure Event

- Can contractual parties invoke force majeure to excuse non-performance?
  - Dependent on facts and circumstances. Elements:
    - Outside reasonable control; not reasonably foreseeable; effects could not be avoided; event materially affects ability to perform; party took reasonable steps to avoid or mitigate, and to provide notice.
  - Dependent on contractual definition of force majeure.
    - Specificity requirement; *Ejusdaem Generis* canon of interpretation; “Act of God” problem
  - Legal or physical *impossibility* (not just extreme difficulty) is generally required.
  - Enforcement of force majeure differs from jurisdiction to jurisdiction. FM applicability may differ at different points along the supply chain.
- Even if a force majeure event has occurred, liability may still exist.



# Most-Favored Customer Provisions

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- Does the contract contain a “most favored customer” provision that provides preferential (or at least equal) treatment for your client?
  - Many MFC clauses are drafted narrowly
  - Most focus on best pricing
  - Look for best performance provisions;
  - Careful of outs for force majeure and commercial impracticability (e.g. UCC Sec. 2-615)
- Does the contract include provisions that help enforcement?
  - Audit Rights
  - Transparency (e.g. “cost plus” pricing)
  - Confidentiality



# Impact of Pandemic on M&A Transactions

In M&A deals, certain common terms may have increased prominence, and new terms and processes may be adopted.

- Working Capital. Net Working Capital formulas may require adjustment due to the inapplicability of pre-pandemic measurement periods. Parties may increase working capital requirements.
- Purchase Price Adjustments. Consider applying floors or collars to purchase price to reduce unintended volatility in purchase price consideration, especially where consideration is in the form of stock. Consider earnout formulas and their hurdles and milestones; consider constraints on operation of business post-acquisition
- Material adverse effect. Consider exclusion (or inclusion) of COVID-19-related effects; or more general carveout for disease outbreaks, pandemics, international calamities or public health events. Consider disproportionality, geographic issues.
- Representations and warranties. Some may have been rendered untrue, inaccurate or incomplete. E.g., financial health; viability of customer relationships; supply chains or projects; employment matters; physical and information security; data privacy.
- Indemnities and limitations. Consider adding specific indemnities relating to pandemic effects, e.g. workforce accommodation costs, supply chain disruptions or contract terminations. Consider carveouts for buyer's knowledge of effects.
- Due diligence. Due diligence timelines will be longer due to remote working; may take longer to understand effects of the pandemic on target's business. Due diligence requests should include new questions on pandemic effects.

# Landlord-Tenant: Rent Relief Framework



Some jurisdictions, including D.C. locally, have enacted emergency protections, but they protect against enforcement of default remedies and do not compel relief.

- D.C. has enacted commercial protections, but Maryland and Virginia have not.
- Code of D.C. §16-1501 extends length of time for eviction indefinitely.

Contractual relief may be express or negotiated.

- Lease provisions are independent covenants.
- Force majeure provisions not the solution tenants have hoped for.
- 5<sup>th</sup> Amendment takings argument is novel, but relatively untested.
- Quiet enjoyment also not effective grounds for obtaining relief.



# Landlord-Tenant: Rent Relief Options

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The more effective negotiations are based on understanding landlord requirements.

- Rental stream covers debt, funds capital improvements and provides return on investment.
- If rental stream decreases, borrowers (landlords) may find themselves in default of some of the covenants in their loan agreement
- Some lenders are providing relief by, among other things, not enforcing the covenants.

There are a large number of options for getting relief.

- Abatements, deferrals, use of security deposit, bartering.

Additional landlord requirements.

- Financials, additional security deposit, letters of credit, guaranties.



# Navigating “Stay at Home” Orders

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Some states have executive orders mandating business closures.

- D.C. – Mayor’s Order 2020-054.
- Virginia – Governor’s Executive Order No. 55.
- Maryland – Order of the Governor No. 20-03-30-01.

Federal government guidance is more than guidance, but less than an order.

- Cybersecurity and Infrastructure Security Agency (CISA).
- Essential critical infrastructure workforce advisory list of functions critical to public health and safety, and economic and national security (Version 3.0 – April 17, 2020).
- Presidential Policy Directive 21.

# Navigating “Stay at Home” Orders (cont’d)



There are a good number of best practices that apply regardless the sector.

- Develop work operating protocols.
- Complete legal analysis to determine whether business operations are deemed “essential” or “critical,” and document the underlying basis.
- Consider sending a letter to the state authority to confirm analysis.
- Inform suppliers of intent to continue operating.
- Work with human resources to develop defensible determinations as to who is required to return to work.





# Transitioning Back to the Workplace

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As the stay-at-home orders are lifted, employers have to decide who returns and when.

- Federal “opening Up America Again” guidelines.
- CDC and OSHA also have guidelines.

What workplace controls and social distancing requirements need to be in place.

- Modifying work patterns.
- Addressing use of common areas and collaborative spaces.



Use Hand Sanitizer  
Before and After Touching  
Keypads and Door Knobs

**HIGH-TOUCH AREA**

We appreciate your commitment  
to reducing the spread of  
COVID-19 in our community.









# Returning to the Workplace: Health / Safety

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OSHA and CDC have issued guidelines on infectious disease preparedness and response plans and teams.

Among the health and safety considerations are the following:

- Can employees be required to wear personal protective equipment? Yes
- Who is responsible for providing PPE? Employers
- Can vaccinations be required? No

# Returning to the Workplace: Protecting the Workplace



Among the many legal questions on how to protect the workplace are:

- Should the employer require a doctor's note or serology test? Yes
- May employers question employees regarding whether they have COVID-19 or its symptoms? Yes
- Can or should employers measure employees' body temperatures before they enter the workplace? Yes
- Should employers ask employees to disclose whether they have a medical condition that would make them especially vulnerable to COVID-19 complications?  
No



# The Road Ahead

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## Discussion and Q&A

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<http://hub.kslaw.com/return-to-work>



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Coronavirus Business Recovery – Return to Work Hub

A graphic for 'Data, Privacy and Security' featuring a shield icon with a padlock, set against a background of colorful digital data points and lines.

**Data, Privacy  
and Security**

A graphic for 'Employment' showing a close-up of a fountain pen writing on a document.

**Employment**

A graphic for 'EU and UK' featuring a globe with a network of lines connecting various points, set against a warm, glowing background.

**EU and UK**

A graphic for 'Executive Compensation and Employee Benefits' showing a financial candlestick chart with multiple lines, set against a warm, glowing background.

**Executive Compensation  
and Employee Benefits**

# Thank You



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