

FOCUS

President's Message

Bruce Martino



Dear Northeast Ohio Chapter Members:

I hope that everyone has had a wonderful summer, despite the continued impact the coronavirus has had on our personal and professional lives.

Usually our programming calendar during the last few months of the year is filled with CLEs, networking, social and pro bono

events. It is also the season for ACC's Annual Meeting, which as was announced earlier this summer, is now being held as a virtual-only event. However, we still have several upcoming events that you will not want to miss.

On October 1st, I handed over the reins to the incoming President, Ray Stefanski, Corporate Counsel, MetLife Legal Plans. Ray moved to Cleveland a couple years ago from the Cincinnati area, where he was actively involved with the ACC chapter there. He has brought great insight and value to our Board and our Chapter, and I look forward to seeing what he achieves as our Chapter President.

I want to give a special thank you to our current Executive Committee and Board for their profound efforts these past few months. They have been dedicated to bringing you a valuable member experience during the pandemic that would not have been otherwise possible without their support.

Regards,
Bruce

Recognitions

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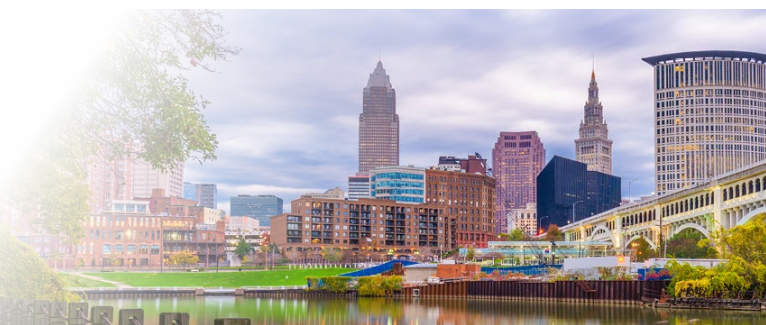
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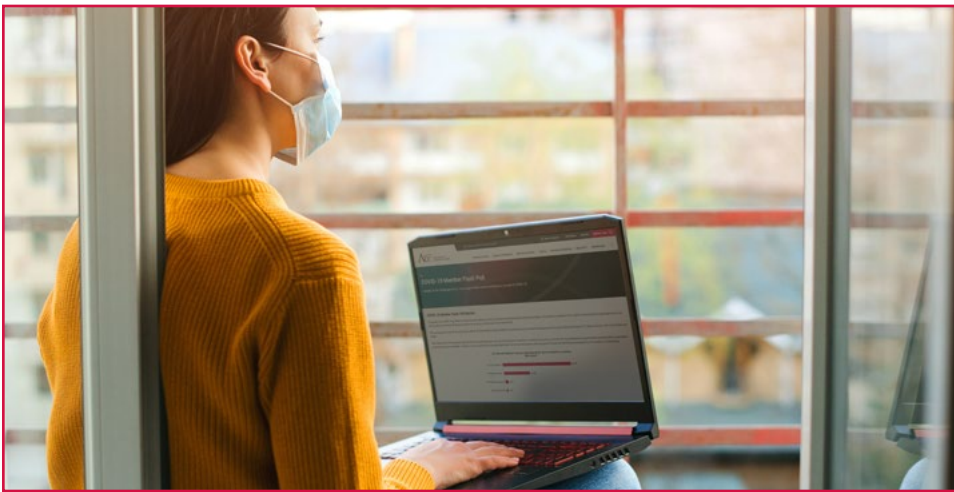
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How In-house Leaders Can Use Technology to Better Prepare for the Next Crisis

By Olga V. Mack



Members of my team recently asked me a question that many in-house lawyers have likely been hearing in one form or another: “The [COVID-19 crisis](#) is hurting the small business community. What are we, as a company, going to do about it?”

During a crisis, corporate counsel deal with many unknowns that make answering a question like this a tricky business. We often need to make decisions long before all the facts are revealed. There are no rulebooks; no straight lines that lead to all the right answers.

We can, however, take advantage of technology to ensure we are better informed during a crisis and better able to assist employees and clients. The use of technology tools can help you take decisive action now while also building continuity and stability into your business systems. This way, you are prepared to deftly manage any future crisis too.

Use technology to provide the stability employees crave

Saying the coronavirus pandemic accelerated remote work arrangements is an understatement. Rather, it forced the change like a mother bird pushing a baby out of the nest. During the pandemic, many employees feel overwhelmed,

distracted, and unable to focus even if the switch to remote work is not new.

[Related: [In-house at Home: Finding Normalcy in Uncertain Times](#)]

At a time when employees crave order and consistency, technology provides dependable direction. Project management tools support remote coordination of tasks and responsibilities. Remote workers stay more engaged with a system that tracks and records milestone events. Automatic notifications inspire fast action and move projects along reliably. Everyone stays in the loop through informative dashboards.

In many ways, the push to rely more on technology now is helping teams build trust in digital frameworks that provide a strong sense of structure, inclusion, and consistency — the very bedrock of the longed-for stability employees need in the virtual workplace.

Spread your influence with automation

In-house leaders can use technology platforms as a vehicle to spread their influence throughout an organization. Through enterprise-wide automation, you dictate which actions are the inevitable result of a confluence of factors.

For example, [Contract Management Software \(CMS\)](#) automates the creation of contracts based on the information it receives from requesters. But you create the language options the software pulls from during automation. You develop the decision-trees the software uses to suggest alternative language. The result is the uniform inclusion of pre-approved language and clauses in contracts.

[Related: [5 Surprising Ways CMS Can Advance Your Legal Career](#)]

In-house leaders also expand their influence by developing training programs and instruction manuals that help others apply technology in dealing with everyday business problems. These efforts help ensure seamless and long-lasting consistency — especially during the flux of a crisis.

Eliminate chaos with a uniform source of truth

Recently, GCs have needed to collaborate with outside counsel and internal executives to handle employment issues and determine what new legislation, such as the US Coronavirus Aid, Relief, and Economic Security (CARES) Act, means for their business systems.

It is much easier to assess the effects of recent events and legislation when documents are centralized and searchable within a single cloud-based platform. Everyone accesses the same information, which is stored in one location within tools such as client, employee, or contract management platforms. Data is more readily accessible, accurate, and up-to-date than that obtained from manually maintained spreadsheets and long and twisted email chains.

[Related: [Remote Collaboration: 3 Ways GCs Can Improve Their Communication Skills](#)]

The resulting uniformity reduces chaos in a crisis. Technology platforms offer

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a single source of truth that helps companies clarify priorities in navigating the ever-changing business and legal landscapes.

Understand business relationships

If you want to craft offers of assistance that are truly useful and meaningful to your business, you must understand the full nature of your contracts. Contract analytics help legal leaders navigate business relationships while centralizing the data and details lawyers need to empower business leaders to help themselves.

[Related: [How Technology Shrinks Our Fictional Divide and Fosters Positive Change](#)]

Your team can quickly answer questions like, “Can we create an offer that aids clients whose contracts renew in the next 30-90 days?” Or “Are there enough renewals to make it a worthwhile effort?” In other words, you can empower your team to have a much more functional and transparent relationship with contracts.

CMS and document management platforms also improve how you interact

and work directly with others online. Simultaneously collaborating on the same document and communicating in real-time enhances mutual understanding and promotes the free flow of information and ideas.

Technology as a guiding tool

Technology’s usefulness has never been more apparent. The COVID-19 pandemic pushed companies to rely on technology as a source of stability in the virtual workplace. Lawyers are finding they can trust automation to facilitate predictability, ensure reliability, and enforce uniformity in decision-making.

Ultimately, using technology now results in faster, easier access to more data-driven insights later, which helps us deal with uncertainty and chaos during a crisis and guides us in making decisions that are beneficial for our companies, our employees, and our clients for years to come.

For more advice and resources on coping during the pandemic, go to the [ACC Coronavirus Resource](#) page.

Author:

Olga V. Mack is the CEO and general counsel of [Parley Pro](#), a next-generation contract management company that has pioneered online negotiation technology. Mack shares her views in her columns on



ACC Docket, *Newsweek*, *VentureBeat*, *Above the Law*, *Bloomberg Law*, and *High Performance Counsel*. Mack is also an award-winning (such as the prestigious ACC 2018 [Top 10 30-Somethings](#)) general counsel, operations professional, startup advisor, public speaker, adjunct professor, and entrepreneur. She co-founded SunLaw, an organization dedicated to preparing women in-house attorneys to become general counsels and legal leaders, and WISE to help female law firm partners become rainmakers. Mack authored numerous books, including [Get on Board: Earning Your Ticket to a Corporate Board Seat](#) and [Fundamentals of Smart Contract Security](#).

ACC News

2020 ACC Annual Meeting: Now Low Rate for the New Dynamic Experience

ACC will host the 2020 Annual Meeting entirely virtually and we want to see you there. You won’t want to miss this year’s program — including live interactive workshops, networking without limits, daily marquee speakers, access to the entire meeting’s substantive content, and more! Reserve your spot today at [acc.com/annualmeeting](#).

In-house Counsel Certified (ICC) Designation

The [ACC In-house Counsel Certification Program](#), helps in-house counsel become proficient in the essential skills

identified as critical to an in-house legal career. The program includes live instruction, hands-on experience, and a final assessment. Those who successfully complete the program will earn the elite ICC credential. Your law department and your employer will benefit from having a lawyer that returns with global best practices in providing effective and efficient legal counsel. Attend one of these upcoming programs:

- Alexandria, VA, November 16-19

Drive Success with Business Education for In-house Counsel

To become a trusted advisor for business executives, it’s imperative for in-house counsel to understand the business

operations of your company. Attend business education courses offered by ACC and the Boston University Questrom School of Business to learn critical business disciplines and earn valuable CLE credits:

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Are you prepared to comply with new state privacy laws?

Rapidly growing data privacy regulations from California to New York make you accountable for all third-party service providers that access, process, or store your company’s personal data. Visit [www.acc.com/VRS](#) for more information.

Was Mrs. Palsgraf Wearing a Mask?

By Pat Haggerty and Patrick Walsh

As of mid-July 2020, approximately 3,600 COVID-19 related lawsuits have been filed across the country. Very few address the recent controversies concerning wearing masks. This will surely change. The combination of new mask requirements and rising COVID-19 complaints will undoubtedly lead to an increase in cases concerning a store owner's liability in connection with mask use, particularly between store owners and their customers, and customers who refuse to wear masks. These twenty-first century disputes will be argued using tort law concepts of duty, foreseeability, and standard of care developed in the early twentieth century.

Palsgraf v. Long Island R. Co., 162 N.E. 99, 99-100 (1928) is the classic example of duty and foreseeability, and their interwoven nature in negligence. For those who do not remember the facts of the case: a man carrying package, who is late to his train, jumps onto the train, aided by railroad employees who help him onto the train car. *Id.* But because of the employees' help, the package in the man's arms becomes dislodged, falls to the ground, and explodes. *Id.* The explosion, caused by fireworks within the package, causes a scale at the opposite end of the platform to fall onto Mrs. Palsgraf, injuring her. *Id.* Justice Cardozo held that the railroad employee actions did not create a foreseeable risk of harm to Mrs. Palsgraf. *Id.* Therefore, Mrs. Palsgraf's injuries were not caused by a breach of a duty owed to her by the railroad. *Id.* at 342-344.

The *Palsgraf* case highlights the intertwined elements of negligence, where the duty and standard of care a person is owed is limited by foreseeability. Traditionally, duty is the legal requirement for an individual to act in a cer-



Image courtesy of Thomas B. on Pixabay.com

tain manner and breaching one's duty subjects that individual to liability. RESTATEMENT 2d. (Torts) § 4. An individual's duty is defined by the standard of care they are required to give; generally, the standard is the reasonable person under the circumstances. *Id.* at § 283. Foreseeability limits an individual's duty by defining that a reasonable person only has a duty to protect others from reasonable risks that are likely to cause injury, not unreasonable ones. *Palsgraf*, 162 N.E. at 99-100.

In applying this traditional analysis to the mask controversy, the question becomes whether failing to wear a mask, or not requiring store patrons to do so, creates a foreseeable risk to others. The answer is a bit complicated. From late February, when COVID-19 first came to the US, until early April, the CDC did not recommend the general public use face coverings.¹ However, The CDC has changed its position, now touting the potential efficacy of face covering to prevent the spread of COVID-19, calling face coverings "one of the most powerful weapons we have to slow and stop the virus. . . ."²

This information conflicts with other health organizations that do not recommend general mask use. For example, while both the WHO and the European Centre for Disease Prevention and Control recommend face covering for at-risk individuals, they do not recommend general use by the public because "[t]here is no evidence that non-medical face masks or other face coverings are an effective means" to protect the wearer.³ Courts, when interpreting the foreseeability of contracting COVID-19 while wearing a mask, will have to look to the science of communicable spread and the best evidence of preventing that spread.

Likewise, Courts will need to look to evidence of customs and practice. Activities that are common and conform to a usual pattern are probative to the required standard of care and deviations from the standard which result in an injury are likely foreseeable. 57A Am Jur. 2d Negligence §§ 164, 172. While there is conflicting information regarding how wide-spread mask use should be, numerous government localities and

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¹Colin Dwyer & Allison Aubrey, CDC Now Recommends Americans Consider Wearing Cloth Face Coverings in Public, NPR (April 3, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public>

²Press Release, CDC, CDC Calls on Americans to Wear Masks to Prevent COVID-19 Spread (July 14, 2020), <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html>

³World Health Organization Q&A: Masks and COVID-19, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-on-covid-19-and-masks> (last visited July 21, 2020); ECDC, USING FACE MASKS IN THE COMMUNITY (2020).

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retail chains are requiring masks, possibly creating a standard of care. Twenty-eight states currently require individuals to wear masks in public.⁴

In addition, numerous retailers including Walmart, Target, CVS, and Walgreens require a mask to enter their stores.⁵ Whether this mass adoption of masks creates a community standard will be determined by courts looking to what a reasonable person would do.

Finally, in response to stores requiring their patrons to wear masks, some become angry, even violent, possibly exposing storeowners to liability from third-party individuals who are injured by these outbursts. There are ample examples of store patrons having

outbursts from requests to wear a mask, including a security guard being killed, a man brandishing a gun, store managers being attacked, explicate language and gestures, and a customer wiping his nose on a store employee.⁶

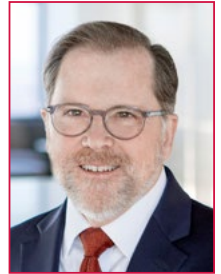
Generally, storeowners do not have a duty to protect others from violent actions of a third-party because these actions are not foreseeable, but if the violence was foreseeable, the storeowner could be liable. *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141 (1982). With violent outbursts over masks on the rise, courts will need to determine whether the commonality of this behavior makes it foreseeable.

Ultimately, no matter how courts decide on these issues, Mrs. Palsgraf, and the

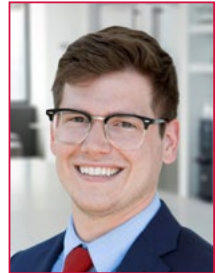
precedent she helped established in 1928, will be the basis of the analysis.

Authors:

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⁴Allen Kim, et al, *These Are the States Requiring People to Wear Masks When Out in Public*, CNN (July 17, 2020), <https://www.cnn.com/2020/06/19/us/states-face-mask-coronavirus-trnd/index.html>

⁵Kelly, Tyko, Walmart, Lowe's Aldi, Target Among Retailers Adding Face Masks Requirements Due to COVID-19, USA TODAY (Jul7 20,2020), <https://www.usatoday.com/story/money/2020/07/16/masks-required-shopping-these-stores-walmart-target-costco-coronavirus/5446365002/>.

⁶Bill Hutchinson, 'Incomprehensible': Confrontations Over Masks Erupt Amid COVID-19 Crisis, ABC NEWS (May 7, 2020), <https://abcnews.go.com/US/incomprehensible-confrontations-masks-erupt-amid-covid-19-crisis/story?id=70494577>

Continuity Planning in the COVID-19 Era

By Anthony J. O'Malley and J. Bret Treier

The COVID-19 pandemic has presented myriad practical and legal challenges to businesses and the directors who oversee them.

As soon as companies had to adjust to the realities of working from home and remotely connecting with their employees, customers, and management, the once-theoretical consideration of business continuity planning became a reality that required immediate attention.

Failure to adequately manage and sufficiently monitor their company's business continuity plan can subject directors to potential liability for breaching their fiduciary duties. Below we discuss how businesses can mitigate these risks in the COVID-19 era.

Legal obligations for continuity planning

It is axiomatic that directors discharging their fiduciary duties of care and loyalty must act in good faith to ensure they

are informed about the business and its operations. Absent these efforts, directors cannot successfully discharge their duty of oversight, as established by Caremark and its progeny (see previous client alert, [here](#)).

A business disruption—like the COVID-19 pandemic and its fallout—does not relieve directors of compliance with their duties. Rather, it heightens the need for them to stay informed so that they can act in the best interests of the corporation because the requirement of continuity planning is not limited to fiduciary obligations.

For example, the Securities & Exchange Commission (SEC) has proposed rules (the Rule) for registered investment advisers (RIAs) that require the implementation of written continuity plans. As the SEC noted, its staff had “observed advisers with less robust planning, causing them to experience interruptions in their key business operations and inconsistently maintain communications with

clients and employees during periods of stress.” (p. 8-9.) Though not yet adopted, the Rule proceeded from the view that, to effectively mitigate such risks, entities must adopt “plans that are reasonably designed to address operational and other risks related to a significant disruption in the investment adviser's operations.”

Once those plans are implemented, particularly during exigent times such as the beginning of the COVID-19 pandemic, directors should routinely revisit and monitor the adequacy of the plans in continued fulfillment of their oversight duties under Caremark.

Practical steps for business continuity planning and monitoring

There is no one-size-fits-all approach to business continuity planning, but key considerations that should be addressed in a business continuity plan include:

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Image courtesy of Manfred Antranias Zimmer on Pixabay.com

- Putting steps in place to ensure the maintenance of key data and systems to allow for the continued operation of the business in the event of a large-scale interruption, such as a pandemic or natural disaster.
 - Companies face greater risk to data and systems continuity when employees access company networks remotely, including risks of cyber threats. The board should consult with IT professionals to implement, monitor, and update plans to address vulnerabilities caused by employees' improperly secured home networks and routers; a system for successfully distributing patches and software updates to users; protecting against phishing schemes (including phone calls from bad actors pretending to be company IT professionals), which often become more prevalent during times of crisis; and the increased likelihood that shared computers may be used to access sensitive information, among other threats.
- Ensuring a robust backup and restoration capability for those systems, including alternative locations allowing for the operation of key systems and data during a business interruption, and a plan for remotely continuing operations for extended periods of time.
- Developing a program for testing and verifying the efficacy of the planned systems.
- Transition planning that allows for the assumption of key duties by other members of the company's staff, and which

provides for the necessary communication between employees, management, and key third parties.

When companies create and implement business continuity plans, boards should actively ensure that the planning meets the needs and addresses the risks of the business in fulfillment of their fiduciary duties of care, loyalty, and oversight. As such, boards should consider the following steps at a minimum:

- Review and evaluate any existing business continuity plans and their effectiveness in the COVID-19 pandemic and, if such plans are not in place, the formation of a subcommittee (or use of an existing board committee) to spearhead the establishment and monitoring of such a plan;
- Consult with executive management and outside advisors (including technical and legal) to evaluate the effects of the COVID-19 pandemic on the business's operations and resilience, and potential changes reflecting that evaluation; and
- Establish a secure repository of key documents and reporting data accessible to board members during a business interruption, along with a secure means of communication among board members, to provide the necessary information and access to fulfill their oversight responsibilities.

Once implemented, boards should regularly monitor the performance and continued appropriateness of the plans during the period of crisis. As the end of

most public companies' financial quarters is approaching, now is the time for boards and committees to seek updates from management and outside advisors on the success of their companies' plans and address any issues that have occurred or changes that have been identified after implementation.

Finally, any continuity plan must account for the well-being of the company's employees. Helping to protect their health during a business interruption (such as the COVID-19 pandemic) is critical to the ongoing effective operations of any business. Planning around this aspect should include:

- Ensuring proper health resources, both mental and physical, are in place and made available to employees.
- Maintaining compliance with applicable federal and state guidelines to protect the health of returning employees, including those promulgated by OSHA, the CDC, and state boards of health.

Taking these steps will help mitigate risks during times of crisis, including during the COVID-19 era.

Vorys has established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in a myriad niche disciplines impacted by the pandemic. See Vorys' coronavirus-related alerts and webinar invitations [here](#).

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When Work From Home Becomes the Norm, BYOD Takes On New Complexity and Risk

By Deana Uhl and Vanesa Hercules

An estimated [58 percent](#) or more of American knowledge workers are now working remotely. This number is up by more than 30 percent from pre COVID-19 averages, and dwarfs previous figures that [reported](#) roughly seven percent of the U.S.'s 140 million civilian employees worked from home. To many, this mass exodus from the conventional workplace has been a welcome shift in employer expectations and telework policies. For organizations that don't typically allow remote work, however, enabling it at a moment's notice has raised serious logistical, compliance and security challenges.

Many companies in technology, insurance, professional services and certain other industries already have a large portion of employees who work from home at least some of the time. These were relatively well prepared for the current circumstances. Others have been caught completely off guard, unprepared and without the proper equipment for tens, hundreds or thousands of employees, or infrastructure to enable them to access company systems securely from dispersed locations.

From a governance standpoint, policies that dictate the rules for working from home—including how employees interact with company data, what devices and applications are approved and what additional safety measures they need to take—are also lacking. The result is a significantly increased number in employees using personal devices for work, and the rise of new and unexpected areas of legal, security, compliance and privacy risk.

Shortfalls in strong policy and information governance isn't exactly a new issue. But the current situation has exacerbated corporate risk exposure significantly. For teams in reactive mode, working to put out fires and close the gaps in company exposure, we've compiled a list of key areas to consider that may help focus efforts. These include:

- **VPN use:** An April [CNET article](#) reported, "demand for VPNs increased

by 44 percent over the second half of March and remains 22 percent higher than pre-pandemic levels." VPNs help employees securely access systems, but they also come with inherent challenges. For one, employees may not know how to use a VPN, or understand the proper procedures for connecting to it from their personal devices. Increased usage is also straining company VPNs and internet service providers, making it difficult or impossible in some cases for the entire remote workforce to access the network. This may force employees to use their home wi-fi or unsecured hot spots, which can lead to exposure. More, VPNs have a history of being exploited by malicious actors, and some providers have been flagged for weak security. It's critical for organizations to properly vet their VPN providers and get a handle on the scope of issues surrounding VPN use to ensure the most secure connection possible for remote employees.

- **Information security awareness:** Even employees who have been adequately trained on information security best practices may not think of security in the context of working in their homes. More than ever before, sensitive information and communications are dispersed across personal devices and residences. Employees will be taking phone calls and printing confidential documents at home; and saving privileged and private information to their personal computers and mobile devices. Awareness campaigns and best practice refreshers can go a long way in preventing private documents from being disposed of improperly or left out for others to see.
- **Personal networks and accounts:** The merging of work and home environments will inevitably lead to more blending of company information in personal email and messaging accounts, and across smaller, less secure telecom networks. When employees use personal accounts to

view and share company documents containing personally identifiable information and IP, tracking and managing that data can become very messy.

Organizations subject to data privacy laws like GDPR and the California Consumer Privacy Act may run into issues with data subject access requests and other privacy compliance matters if sensitive data resides in unknown devices and accounts. When business as usual resumes, legal, compliance and IT teams will need to remediate employee devices, to ensure private information does not remain in unauthorized or unknown locations.

- **Policy updates:** Going forward, organizations need to revisit the BYOD policies they were developing five years ago. It's likely that we'll see a second wave of coronavirus related shutdowns later this year, and organizations need to be better prepared in round two. Ironing out what rights the company has to personal devices used for work, and processes for recalling data stored on those devices will be critical in reducing risk for future privacy, regulatory and e-discovery matters.
- **Process improvements:** In the aftermath of this crisis, organizations can seize an opportunity to examine their weaknesses and bolster processes around them. This may include creating a centralized location to store documents, file sharing systems and policies, tracking mechanisms to monitor where data is being shared or downloaded, usage parameters for collaboration and chat applications and procedures for remediating sensitive data from remote devices.
- **Educate and train:** The best way to ensure private and sensitive information doesn't perpetuate on personal devices is to give employees clear guidance on what they need to do when they return to the workplace.

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Teach employees how to find and delete sensitive information from their devices, or how to transfer it back to the company. Make sure they are equipped with the knowledge and techniques they need to help reduce risk and work from home in a secure and compliant manner.

Ultimately, companies need to be more proactive about the future of work. We're likely to see a significant increase in the number of people who continue working remotely even after the pandemic is over. Organizations need to be thinking about this shift and begin taking steps to adapt to it. Collaboration across stakeholders in legal, compliance, IT and security will be essential to meet new challenges

in remote work situations, and balance employee efficiency with strong data protection.

This article also appeared in *Legaltech News*, an ALM Publication, on May 20, 2020.

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Deana Uhl is a Managing Director at FTI Consulting, advising corporate clients, with a focus on designing, implementing and enabling change management for information governance, data privacy, data security and e-discovery programs.



Vanessa Hercules is a Senior Director at FTI Consulting where she helps clients operationalize information governance initiatives, streamline litigation hold and eDiscovery processes, remediate legacy data, manage global data privacy risk, and develop cross-functional workflows with sustainable business processes.



For additional information on FTI Consulting, please visit www.ftitechnology.com. If you have questions on this topic or would like to arrange a call with Deana or Vanessa, please contact John Winkler at FTI Consulting. He can be reached at 216-543-9087 or John.Winkler@fticonsulting.com.

COVID-19 and Executive Risk: How Can D&O Coverage Help in this Pandemic?

By John M. Orr and Rob Yellen

Organizations around the world have been dealing with a myriad of COVID-19-related issues and resulting financial and operational hardships. Risks associated with directors and officers (D&O) liability are among the many risks that are top of mind. In the context of this pandemic, the risks may include:

- The adequacy and accuracy of disclosures in a financial/business environment with so much in flux, including many businesses trying to cope with shutdowns and other unprecedented pressures.
- Fiduciary and other duties owed. Changes are occurring quickly and there is no real precedent for many of today's tough decisions.
- Complications and challenges in balancing the needs and priorities of today's diverse and complex interests among key stakeholders.
- Regulatory and compliance uncertainty in facing unparalleled events and responses by authorities.
- Workforce and operational adjustments bring new, potentially unanticipated risks.

- Legal, financial and other external advisors may be overtaxed or unavailable as many others are wrestling with COVID-19 related issues.
- Reputation risk arising from perceptions, well-founded or not, of how management has responded to the pandemic.

Below we address D&O insurance coverage issues and questions, including how we would anticipate a foreseeable D&O claim to be addressed, coverage and policy language considerations, and emerging changes in D&O underwriting behavior.

Do COVID-19 D&O claims fall within policy insuring agreements?

Insuring clauses in both public company and private company D&O policies typically have broad triggers. The coverages are segregated into three distinct insuring grants: coverage for non-indemnified D&O loss (Side A), indemnified D&O loss (Side B), and organizational loss, or "entity coverage" (Side C).

All three grants customarily cover "loss" resulting from "claims" against an "insured" "for a wrongful act." Applying

the traditional definitions of these terms, the foreseeable COVID-19 D&O claim would fall within the insuring agreements, thus being potentially covered and subject to the policy's remaining terms and limitations. Importantly, entity coverage would not be available to a public company for negligence-based claims that are unrelated to the purchase or sale of company securities, as public company entity coverage is almost always exclusive to "securities claims."

As an example, a COVID-19-related securities claim may involve a shareholder class action alleging violations of securities laws relating to the adequacy of COVID-19 risk disclosures.

As of this writing, two such actions have been filed. The policy may also extend to cover costs associated with certain government investigations and inquiries. Wording varies from company to company and product to product. To be clear, D&O wording is not likely to speak to specific risks associated with COVID-19. Nevertheless, most policies will respond well to traditional D&O perils, even those triggered by COVID-19 events. This "silent

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COVID-19” coverage is “silent” because it does not expressly address pandemic perils, but it may nevertheless respond to them.

Beware of coverage limitations potentially being applied in unexpected ways

- **Bodily injury exclusion:** Generally, there are two types of bodily injury exclusions. The first excludes losses “for” bodily injury, sickness, disease, etc. – i.e., direct losses, such as medical expenses. To the extent a COVID-19 claim seeks damages for indirect financial losses, we do not anticipate the exclusion to be a coverage impediment. A second, broader variation of the exclusion, often found in the policies of healthcare and life sciences companies, and companies engaged in more hazardous operations, precludes coverage for claims “based upon, arising out of” a bodily injury. Exceptions to the exclusion for Side A losses and securities claims may be available.
- **Pollution exclusion:** Pollution exclusions preclude coverage for claims “for” or, alternatively, “based upon, arising out of,” the release or dispersal of pollutants, including specified contaminants, some of which may have a bearing on COVID-19 claims. Examples may include “germs,” “viruses,” and “biological irritants.” Exceptions to the exclusion may be available for Side A losses and securities claims.
- **Conduct exclusion:** The exclusion for intentional/deliberate acts may trigger upon a final, non-appealable adjudication of such conduct. In light of the high hurdles of intentionality and adjudication, we would not envision the exclusion to apply in most COVID-19 cases.
- **Professional services (E&O) exclusion:** Similar to a bodily injury exclusion, should an E&O exclusion appear in a policy, it is likely to exclude loss “for” or “based upon, arising out of” acts or omissions in the rendering or failure to render professional services. The “based upon” wording may have more impact in COVID-19 cases for companies in affected industries, such as healthcare and life sciences. Exceptions for Side A losses and securities claims may be available.

- **Other insurance:** Should claims trigger coverage under the D&O policy, they may also implicate additional coverage lines, such as general liability or environmental. How each policy responds, whether as primary, excess, or via a shared arrangement, will depend on the specifics of the claim and the additional policies’ respective other insurance wordings.

Coverage considerations for private companies

Although public and private companies’ policies have similar structures and share common terms, there are differences that may be material in a COVID-19 claim. For example, private company policies afford broader entity coverage. Thus, negligence-based claims against a private company relating to COVID-19 risk mitigation, preparedness, response measures, among others, may be covered. In contrast, the public company’s entity coverage is implicated only in securities claims.

Private company policies may also provide insureds with more options in how claims are defended. Where public company policies almost always afford the insured with coverage for indemnification of approved costs incurred through counsel selected and managed by the insureds, private company policies may impose upon the insurer a duty to defend claims or, in other cases, may give the insured the option of defending itself or transferring that obligation to the insurer. Policies with an optional duty to defend feature generally provide a limited period in which insureds may tender that defense to the insurer before the option is lost. Choosing whether to keep control of the defense of a claim or to tender it to an insurer can involve a complex balance of advantages and disadvantages. Your broker and legal advisor should be consulted as early as possible to help with that assessment.

In addition, with broader entity protection, private company policies will customarily have more exclusions unique to the company’s Side C coverage. Examples include: contractual liability exclusions, which in the context of COVID-19, may be relevant to alleged failures to fulfill contractual obligations due to disruptions

in travel, product or services sourcing, and logistics; and employment practices exclusions, which may apply to claims relating to layoffs or other corporate actions impacting employees.

Bankruptcy considerations and D&O coverage

With a potential global recession on the horizon, cascading bankruptcies could well disrupt whole industries or economies. Previously well-performing businesses may find themselves confronted with mandated closures, seemingly insurmountable workforce challenges, and cash management concerns. Meanwhile, the advancement and indemnification protections executives typically rely on to protect themselves may not be available when they need them most. D&O coverage may be the only protection they can count on. As expense pressures grow, D&O coverage is not a place to look to cut costs. It has never been more important.

With this in mind, companies should turn their attention to policy provisions that have the potential to come into play in these situations.

- **Side A:** Coverage for non-indemnifiable D&O losses could be impacted to the extent bankruptcy law restrictions may curtail the company’s ability to advance or indemnify losses. Side A is a critical, last-line-of-defense coverage that should be a part of every enterprise’s D&O risk management plan. It should be considered a D&O coverage tool that can yield dramatically different results depending on strategic choices relative to breadth and levels of coverage, form choices, coverage enhancements, and program structure.
- **Bankruptcy waiver:** A bankruptcy clause may comfort directors and officers by specifying that (1) a bankruptcy filing will not relieve the insurer of its coverage obligations, (2) the policy is intended to benefit individual insureds as a matter of priority, and (3) the parties will not to oppose or object to efforts by the insurer or insureds to obtain relief from the automatic stay to pay claims.

- **Order of payments:** An order of payments provision provides that the insurer will prioritize claim payments under Side A before paying losses under Side B or C. In some cases, the clause may authorize the organization to advise the insurer to delay payments under Sides B and C in favor of future Side A payments.
- **Entity v. Insured/Insured vs. Insured exclusion:** In the context of bankruptcy, claims may be asserted against directors and officers by trustees, receivers, and other bankruptcy constituencies. To mitigate against application of the exclusion, companies should seek to exempt such claims from the exclusion.

Potential opportunities from often overlooked first-party coverages

- **Crisis management:** First party coverage may be available in some instances for crisis management expenses to the extent a company has experienced a “crisis” due to COVID-19 factors. Events that may trigger coverage include negative earnings announcements, key executive resignations, employee layoffs, product recalls, elimination or suspension of dividends, among others. The coverage is customarily subject to a sublimit of liability.
- **Reputational risk:** Similar to crisis management coverage, some policies may include first party coverage for a director’s or officer’s “reputation crisis.” Also traditionally sublimited, the coverage may be applicable to individuals to the extent their reputations are adversely impacted by certain developments arising from a COVID-19 crisis. The trig-

gers may be narrow and could require the act of an enforcement authority.

- **Business interruption:** D&O policies do not cover first party business interruption exposures. Should a company experience losses due to a permanent or temporary shutdown of operations, neither public nor private company D&O policies would afford coverage; however, third party liability claims, such as lawsuits arising out of a business shutdown or other interruption, may be covered.

Get ready early for a challenging renewal

As of this writing, we are beginning to experience changes in the underwriting of D&O risks. These changes are happening on the heels of an already firming, and in some segments, hard market. Adding to the mix of firming conditions, COVID-19 is likely to present new dimensions to renewal challenges.

For starters, in advance of renewal, especially those in the nearer term, insureds should expect heightened underwriter focus on COVID-19 impact, plans and disclosures. So far, top D&O underwriting areas of focus are liquidity and industry. Inquiries may be tailored to company-specific concerns or they be limited to a consistent COVID-19 questionnaire that asks the same questions of all insureds. Inquiries may also drill down on COVID-19-related risk disclosures, the impact on financial results, operations, product/services shortages, industrywide concerns, liquidity/solvency, and cyber security. For some companies, insurers may attempt to modify terms

that were, several weeks back, formally or informally quoted or conveyed.

Conclusion

We are in fluid and changing times. Companies should engage their brokers on COVID-19 D&O risk more deeply and scrutinize coverage terms going forward. We encourage companies to begin renewal protocols early, and to advise their brokers of anticipated changes in exposures, such as M&A transactions and bankruptcy filings. Previously challenging market conditions are likely to become more challenging very quickly. Although coverage may also be more expensive, with the heightened risk this environment presents, it may be far more valuable today than it ever was.

Contact the Authors:

Willis Towers Watson (NASDAQ:WLTW) is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson



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NEO CHAPTER NEWS

We ♥ WEBINARS!

L+E Updates related to COVID-19

On March 31, attorneys from Fisher Phillips presented a webinar, *L+E Updates related to COVID-19*. The topics discussed included coronavirus' impact on employers, including Ohio's Stay in Place order; employment benefits, sick leave + FMLA; and Workers Compensation. Afterwards, the panelists answered audience-generated questions.

Labor Relations Impact of COVID-19: Issues for Union and Non-Union Employers

In June, the Littler team presented a 1.0 CLE webinar, *Labor Relations Impact of COVID-19: Issues for Union and Non-Union Employers (Protected Concerted Activity, Union Organizing & Bargaining Demands)*. The program focused on what both union and nonunion employers could do to address and manage the issues that arose from the pandemic, such as threatened walkouts, sick-outs, strike threats and other disruptions.

Cannabis Conundrums: Can Employers "Just Say No"? What if They Don't?

Over three days in mid-July, Vorys, Sater, Seymour and Pease presented a webinar series, *Cannabis Conundrums: Can Employers "Just Say No"? What if They Don't?* In addition to covering the history of medical and recreational cannabis use and legalization, the Ohio Medical Marijuana Control Program, and the use of medical marijuana under Ohio law, each session focused on 2-3 conundrums that employers face when cannabis comes to the workplace.

"Happier Hour"

To help our members adjust to the challenges of working during Ohio's Stay at Home Order, ACC NEO created a discussion-focused webinar called "Happier Hour." So far, we've hosted two of these informal, late afternoon programs:

- The first one was held in late April, *Pants, not pajamas: Making WFH work for you*. During the hour-long webinar, members who have been working from home for years offered tips and suggestions to the WFH newbies in the Zoom meeting.
- The second one, COVID-19-proofing your career, was hosted in early June and featured Julie Lady as the facilitator. Julie is an attorney who now works in compliance for a major Cleveland-headquartered bank and is seeking accreditation as a career coach.



ACC NEO, Jackson Lewis team up for another successful volunteer project

On Thursday, August 6, ACC NEO members and Jackson Lewis attorneys volunteered in the repack area of the Greater Cleveland Food Bank. The nine participants followed all safety rules as directed by the Food Bank: the participants wore masks, disposable gloves and practiced safe social distancing the entire time they were there.

It was important for both ACC NEO and Jackson Lewis to do this project, as there has been an increased need for donations and volunteers throughout the coronavirus pandemic. According to the Food Bank, one in six Northeast Ohio residents already struggled to put food on the table and many experienced additional hardships because of COVID-19.



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