



## COVID-19 BUSINESS & COMMUNITY GUIDANCE



COVID-19 is impacting almost all aspects of business and our community. The drastic changes are happening daily, in real time. Our Community Support & Business Response Legal Team is analyzing COVID-19 and its effect on Arizona's businesses. We're building on our 40+ years in Arizona to offer thoughtful guidance on how businesses can navigate this complex and fast-changing situation. We're here to help. If the information below does not answer your pressing questions, please feel free to contact our team of professionals.

Gallagher & Kennedy's Business Continuity Response to COVID-19, 3/18/2020

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### Considerations for Board and Shareholder Meetings



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In-person meetings of shareholders, directors, partners, or other owners or managers may prove difficult to convene in light of governmental restrictions on the occurrence, size, time, or place of gatherings.

- Under applicable law and governing documents, it may be feasible to implement an alternative such as telephonic or web-based communications or conferences. For example, for business corporations, Arizona Revised Statutes (A.R.S.) § 10-708 permits participation in shareholders' meetings by remote communication under certain conditions.
- Statutes and/or governing documents may provide alternative means of meeting in the case of "emergencies." For example, under A.R.S. § 10-3303 facilitates the ability of the board of directors of a nonprofit corporation to take action during emergencies.
- Written consents or other means can be used to take action in some instances. For example, in the case of limited liability companies, A.R.S. § 29-3407(D) permits an action requiring the approval of members or managers to be taken without a meeting if the action is approved by the minimum number of members or managers required to approve the action.

Obtaining signatures on legal documents may present logistical problems when people are away from business offices or in places where electronic communication is not available or reliable.

- A government agency, contract party, or other person may be willing to accept instruments or methods that might facilitate the signing of documents. For example, the Arizona Corporation Commission allows persons to complete most business filings online and to fax or mail filings.
- Traditional documents such as powers of attorney or proxies might help in consummating a transaction. For example, A.R.S. § 29-3407(D) permits a member of a limited liability company to appoint a proxy or other agent to vote, consent, or otherwise act for the member by signing an appointing record, personally or by the member's agent.
- Electronic means of obtaining or affixing signatures can be lawful and acceptable in a particular situation. For example, the Arizona Electronic Transactions Act (A.R.S. §§ 44-7001 et seq.) authorizes the use of electronic records and electronic signatures relating to a transaction.

If and to the extent that certain governmental offices and private businesses might be closed from time to time, the obtaining of official certifications or other third-party confirmations might not be practical.

- To the extent the certification is expected by another party to the transaction, it is possible that the law allows the requirement to be ignored, or the other party might be willing to waive the requirement or to accept delivery of the certificate after the fact. For example, a party might be willing to waive a requirement that a landlord certify that the tenant is not in default under a lease.
- Often there is an alternative and lawful means of evidencing the matter in issue. For example, instead of having a copy of a

limited liability company's articles of organization certified by the Arizona Corporation Commission, a party might be willing to accept a certificate signed by one of the company's officers attesting to the organizational documents.

- A party might be able and willing to accept a previous certification in lieu of a recent certification. For example, a certificate of good standing of a limited liability company from the Arizona Corporation Commission pursuant to A.R.S. § 29-3211 might have been obtained last year in connection with a previous transaction, and a party might be willing to accept that as good evidence of the company's existence, even though a more recent certificate would be preferable.

**Terry Thompson is available to answer questions about Considerations for Board and Shareholder Meetings.**

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## CONTRACTS



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### Force Majeure Clauses

Due to the Coronavirus (COVID-19) pandemic, many businesses are confronting unique and unforeseen circumstances that could either excuse or delay the obligation to perform under existing contracts as a result of the occurrence of a force majeure event. Force majeure is a contractual defense generally allowing a party to postpone, defer, or discontinue performance of its contractual obligations in certain specified circumstances. What constitutes a force majeure event is determined on a case-by-case basis and depends upon the terms of the relevant contract, applicable law, and the relevant facts and circumstances. Concerned business should be analyzing the following:

- Reviewing and determining whether a contract includes a force majeure provision, including: (i) the specific events and circumstances that qualify for force majeure treatment; and (ii) other relevant terms and conditions in the contract (including governing law, events of default, dispute resolution, etc.).
- Analyzing whether the performance of any of the parties to the contract will be impracticable or impossible because of COVID-19, as opposed to for a different reason.
- Ensuring timely compliance with any notice requirements, including the production of documentary support and the specific method of notice.
- Maintaining communication with the other party regarding on-going inability or ability to perform contractual obligations.
- Documenting steps taken to mitigate or avoid the impact of COVID-19 on the ability to perform under the contract, as well as all other relevant facts and circumstances.
- Considering if/when the impact of COVID-19 is no longer an unforeseeable event; did that happen when the World Health Organization declared COVID-19 a pandemic on March 11, 2020?

For businesses that have received a force majeure notice, they should be:

- Reviewing the notice to determine whether it falls within the scope of the contract's force majeure provision or applicable law and whether the form and timing of the notice was proper.
- Determining when and how to respond, including whether to terminate the contract in response to the notice.
- Considering whether the notice has an impact on any other contracts and whether a copy of the notice should be provided to other parties.
- Evaluating whether the party claiming force majeure has fulfilled its other obligations under the contract.

**Matt Engle is available to answer questions about Contracts and the possibilities of force majeure claims.**

## UPDATES TO CONTRACTS

**International Chamber of Commerce Comments on Force Majeure Clauses**  
(5/1/2020)

## ADDITIONAL RESOURCES

- ICC Force Majeure Hardship Clauses
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## EMPLOYMENT & LABOR



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### **What are our basic legal obligations with regard to the prevention of infection in the workplace?**

Employers do not have a legal duty to “guarantee” that no one in the workplace will ever be infected with COVID-19. But employers nevertheless should take reasonable steps to reduce the risk of infection, as recommended by the CDC, OSHA, and the Arizona Department of Health Services: encouraging employees to follow common-sense hygiene practices. And employers should follow the CDC guidelines when employees show symptoms of or test positive for COVID-19 (see below).

### **Must we require the use of masks in the workplace? May we require the use of masks?**

According to CDC data, Maricopa County presently is at a “Medium” level of community transmission. Under those circumstances, employers in Maricopa County are not required to mandate the use of masks in the workplace. Employers who wish to be more cautious generally may require the use of masks on their premises if they wish.

### **What is the status of legal regulations mandating COVID-19 vaccines?**

Most of the federal vaccine mandates that were issued in 2021 have been withdrawn or suspended. (Some healthcare providers remain subject to vaccine mandates issued by the Centers for Medicare & Medicaid Services.) Under those circumstances, most employers in Maricopa County are not under any legal obligation to mandate vaccines.

### **May we impose our own requirement that employees be vaccinated for COVID-19?**

Employers in Arizona who wish to be more cautious nevertheless generally may require vaccines as a condition of continued employment if they choose to do so.

Such employers must properly assess any objections from employees who claim that sincerely-held religious beliefs, practices, or observances prevent them from receiving a COVID-19 vaccine. Such employers also must consider objections from any employee with a legal “disability” whose condition prevents him or her from receiving a vaccine.

### **What should we do when an employee has symptoms or actually tests positive for COVID-19?**

The employer must direct the particular employee to stay home and not return to work until he or she meets the CDC's criteria to discontinue home isolation ("Quarantine and Isolation").

Remember that "staying home" does not necessarily mean that one is unable to work. If the employee's job is suitable for remote work, and the employee is medically able, then remote work is a viable option. If remote work is not feasible, the employee may be entitled to use any paid time off that he or she has accumulated (see below).

Then the employer should do some basic "contact tracing" to determine whether any other employees may be required to quarantine. According to guidelines issued by the Maricopa County Department of Public Health, persons who had "close contact" with the positive individual (contact within six feet for a total of 15 minutes or more in any given 24-hour period) should stay home for five days after their most recent exposure to the positive individual. (As above, consider whether remote work may be a viable option. If remote work is not feasible, the employee may be entitled to use any paid time off that he or she has accumulated (see below).

Employers in Arizona are not under a formal legal obligation to notify customers, contractors, suppliers, or other third parties that an employee has tested positive.

### **If an employee has to be absent because of COVID-19, is that paid time off?**

Absences that are due to the employee's own illness, the need to care for a family member who is ill, or the need to stay home with a child whose school has been ordered closed qualify for Paid Sick Time under Arizona's Proposition 206. Employees who have PST available, therefore, must be permitted to use it to cover an absence caused by COVID-19.

An employee who does not have any Paid Sick Time available under Proposition 206 still might have other paid time off available under some other employer policy or procedure (such as vacation, personal leave, and the like). Employers should at least consider permitting such employees to use such paid time off for a COVID-19 absence.

Keep in mind that an employee who needs to be at home for one reason or another might still be able to work remotely. If remote work is feasible and can be productive in any given case, the employee would not be "absent," and therefore would not need or qualify for any of these types of paid time off.

**Don Johnsen is available to answer questions about Employment & Labor issues.**

## **UPDATES TO EMPLOYMENT & LABOR**

Supreme Court Halts OSHA COVID-19 Vaccination Mandate  
(1/13/2022)

Court of Appeals Reinstates OSHA COVID-19 Vaccination/Testing Mandate For Businesses With 100+ Employees  
(12/20/2021)

OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard: Mandatory Vaccine Policy For Businesses With 100+ Employees  
(11/5/2021)

How Does the Most Recent Coronavirus Relief Bill (December 2020) Affect Our Obligations when an Employee Must Miss Work Because of COVID-19?  
(12/28/2020)

Can We Mandate That Employees Get the COVID Vaccine?  
(12/23/2020)

Should Businesses Require People to Sign Waivers to Come Onto Premises?  
(11/17/2020)

Preparing to Re-Open the Workplace; Critical Issues for Arizona Employers  
(5/1/2020)

## G&K EMPLOYMENT LAW ALERTS

- The CARES Act for Employers; Possible Means of Business Survival, 3/30/2020
- Families First Coronavirus Response Act, 3/19/2020
- Coronavirus and Arizona Employers: Keep Calm, and Sanitize On, 3/11/2020

## ADDITIONAL RESOURCES

- Supreme Court of the United States Opinion, 1/13/2022
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## FINANCIAL DISTRESS, BANKRUPTCY & CREDITORS' RIGHTS



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COVID-19 has affected both prosperous and previously distressed businesses. Bankruptcy, moratoriums, government aid, and other tools implemented to ameliorate the disruption initially applied to companies seeking relief, but many of those tools have since phased out or gone away. Understanding the modifications of creditor rights is necessary as companies see if they can successfully operate in a post-COVID-19 economy.

Individuals and companies have experienced indirect consequences as their employees, customers, borrowers, and others have struggled to meet their commitments and endure during the pandemic. Understanding how defaults or delays in performance are best addressed, and, which transactions are no longer possible or prudent, is an important analysis to undertake. Exiting the pandemic will have its own set of delays and complications.

Below are some initial, practical steps businesses can take in evaluating their current situation to determine how to proceed in the future, especially as we transition to a post-COVID world:

- Realistically assess your entire situation.
- Review your outstanding commitments and those owed to you
- Communicate with those you have relationships with, whether contractual or professional.
- Understand that this is an evolving situation and that everyone is figuring this out together at the same time.
- In light of the current uncertainty, it is unrealistic to expect hard commitments. Communicate and agree to set a time to talk.
- Do not look for a band-aid or stop-gap solution until you understand what happens next.
- Beware of extraordinary solutions or transactions. Consider those carefully with your advisors.
- Expect additional delays in performance and remedies and address them accordingly.
- Seek advice from your advisors, and if possible, attempt to work cooperatively with the parties involved in your situation to get through these current circumstances.
- After assessing your situation, commitments, labor and employment issues, and supply chain obstacles (or other struggles), create an action plan to effectively address those challenges.

**Dale Schian is available to answer questions about Financial Distress, Bankruptcy & Creditors' Rights.**

## UPDATES TO FINANCIAL DISTRESS, BANKRUPTCY & CREDITORS RIGHTS

**Expedited Bankruptcy Relief Extended for Small Businesses**  
(5/13/2021)

**Small Business Bankruptcy Relief**  
(2/26/2021)

**PPP Loan Eligibility for Bankruptcy Debtors**  
(2/15/2021)

**Arizona Bankruptcy Court Rulings Facilitate PPP Loans for Business in Chapter 11**  
(6/26/2020)

**CARES Act Expands Bankruptcy Relief for Small Businesses**  
(4/6/2020)

## ADDITIONAL RESOURCES

- *Andes Industries, Inc.* Judgment, 6/12/2020
  - *Blue Ice Investments, LLC* Order, 5/26/2020
  - The Rising COVID-19 Bankruptcy Risks, *Law360*, 3/19/2020
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## FRANCHISING ISSUES



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### COVID-19 Impact on Franchise Disclosure Documents

The North American Securities Administrators Association (“NASAA”), the national association of state franchise regulators, issued new guidance on Item 19 financial performance representations that several states are implementing immediately. The newly published guidelines (See Additional Resources) require certain franchisors who include historical financial results in an Item 19 financial performance representation to amend already filed Franchise Disclosure Documents that should consist of up-to-date 2020 results. These guidelines will ensure that prospective franchise buyers are aware of the impact that COVID-19 has had on those businesses and reasonably reflect current economic conditions.

In determining whether a franchisor is obligated to file an amended FDD, the franchisor should consider the following factors:

- Whether the COVID-19 pandemic has significantly impacted the franchise business;
- The type of data the franchisor includes in the FPR;
- The reasonable inferences a prospective franchisee can draw from the FPR;
- When the franchisor estimates a prospective franchisee can expect to open for business after entering into a franchise agreement;

- Whether and how the franchisor adapts the franchise business to account for current market conditions resulting from the COVID-19 pandemic; and
- Whether and how the franchisor adapts the franchise business to account for future market conditions resulting from the COVID-19 pandemic.

A franchisor that included actual historical sales and profits data in their 2020 FDD and whose business has been impacted by the pandemic should update their FDD to include disclosures concerning that impact. NASAA did not provide specific guidelines on the required amendments. Still, the State of Washington, which has implemented similar requirements already is requiring franchisors to acknowledge that the virus has negatively impacted their business and to include sales results for the first part of 2020 in their financial performance representation. We suspect that other states will accept similar disclosures. The sale of franchises without these disclosures might increase risk because franchisees may later claim that they would not have purchased a franchise if they knew about the impact that COVID-19 had on the franchised business.

**Josh Becker is available to answer any questions about Franchising issues.**

## **ADDITIONAL RESOURCES**

- [North American Securities Administrators Association Guidelines, 6/17/2020](#)
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## **GOVERNMENT AGENCIES' INSPECTIONS, COMPLIANCE DETERMINATIONS, AND REGULATORY REFORM IN RESPONSE TO COVID-19 CONDITIONS**



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**Stan Curry is available to answer questions regarding Arizona state and county inspections, permitting, and compliance enforcement issues for businesses.**

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## **IMPACT ON LITIGATION**



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COVID-19 continues to create significant uncertainty for companies and individuals with respect to business and contractual relationships. The impact of the pandemic on current and future litigation is dynamic, changing on a daily basis, but some of the key issues businesses are facing include:

- What, if any, legal duties are on “hold” during the pandemic?
- Can my business still demand that other people or companies honor contracts?
- If not in the courtroom, are there practical, efficient ways for parties to resolve disputes?
- If we have no choice but to file a lawsuit, or if we are sued, are the courts still open and available?
- Are there quick, available forums for real legal emergencies?

The Federal and State courts throughout Arizona continue to balance the ongoing health risks with the necessity to remain operational. Courts have adjusted aspects of the process to minimize any potential delay while still ensuring litigants are not prejudiced in the enforcement and protection of their legal rights. Most elements of the civil litigation process are moving forward, albeit with greater reliance on virtual or telephonic proceedings and appropriate social distancing measures for in-person proceedings.

Here are some key ways in which COVID-19 has impacted Federal and Arizona State Court litigation and some of the ways in which these Courts are responding:

- New filings are permitted and cases are continuing to move forward in both federal and state court.
- Individual judges have wide latitude to determine how cases should proceed or whether individual circumstances merit postponements or extensions, or if court proceedings should be held remotely.
- Many judges are scheduling and conducting appearances by video and telephone.
- Parties to ongoing litigation are increasingly utilizing electronic means to conduct discovery. For example, depositions are increasingly being conducted via videoconferencing on platforms such as Zoom.
- Courts have adopted procedures to handle requests for emergency relief, like temporary restraining orders or other injunctions. To the extent litigants need emergency relief, the forums are available.
- Parties and counsel continue to use alternative dispute resolution (“ADR”) methods including private arbitration and mediation to resolve their disputes outside of the courtroom. As with the Courts, arbitrators and mediators are increasingly willing to use video conferences in lieu of in-person appearances.
- Civil jury trials have resumed.

**Mike Ross and Hannah Porter are available to answer questions about the Impact on Litigation for businesses in litigation or contemplating litigation.**

## **UPDATES TO IMPACT ON LITIGATION**

**Maricopa County Superior Court Establishes Late Case Fair Limits Proceeding**  
(7/15/2020)

**Maricopa County Superior Court Guidelines to Reopen**  
(5/28/2020)

**Arizona Supreme Court Authorizes Limited Court Operations**  
(5/21/2020)

## ADDITIONAL RESOURCES

- Administrative Order 2020-072
  - Arizona State Courts COVID-19 information
  - Federal Courts COVID-19 information
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## INSURANCE RECOVERY AND PROTECTION FOR BUSINESSES



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### Business Losses

Many businesses have been and will continue to be financially impacted by COVID-19. A number of these businesses have already been denied insurance reimbursement for their businesses losses, forcing them to pursue litigation against their insurance companies. To date, most of these cases have not favored the insureds.

However, each claim is fact-specific and should be evaluated based on the circumstances and terms of the policy. Below are steps businesses can take to evaluate their potential insurance coverage.

- Gather all policies.
  - If you don't have complete or current copies, contact your agent/broker or the insurance companies directly.
  - Don't be discouraged by warnings from your agent/broker or carrier indicating that coverage is not available; it's important to check for yourself.
- Review all policies carefully.
  - Be sure to review all portions of the policies, especially endorsements which can reduce or expand the scope of your coverage.
  - Note any provisions that appear to apply to your situation as well as provisions that confuse or surprise you.
  - For many businesses, the most likely candidates for coverage of business losses are (1) business owner policies and (2) property damage policies with business interruption clauses. Key provisions to review in these policies include:
    - Language requiring "direct" or "actual" loss or damage to property: Such requirements are found in standard form policies and have been deemed by most courts to preclude coverage for COVID-related losses. However, not all policies use the standard forms and, for those that do, a few courts have agreed with the theory that exposure of property to the virus can meet the actual physical damage requirement.
    - Exclusions for viruses, contagions, or pandemics: Some standard form policies contain these kinds of exclusions. If clearly worded and easily identifiable, these exclusions are typically enforceable to preclude coverage, which is another reason why reading policies in their entirety is so critical. Also, the absence of such exclusions in an otherwise standardized policy may support a claim for coverage.
    - Provisions or endorsements that add additional coverage for "extra expense" or "civil authority": These provisions may be broad enough to provide relief if your business is forced to shut down due to the virus. They may include prerequisites (such as a requirement that the suspension be caused by property damage or is necessary to provide civil authorities with access) as well as sub-limits to your coverage (limiting the recovery available to a specific dollar amount or cap on the number of days/weeks of suspension).
    - Disease endorsements: Some policies add coverage for losses arising from contagious, infectious, or

communicable diseases. Businesses with these endorsements have a strong argument in favor of coverage and have been the most successful in lawsuits filed since the onset of the pandemic.

- Businesses in specialized industries may have additional policies (such as environmental contamination policies) or endorsements addressing unique businesses losses and needs during emergency and crisis situations, which is why we recommend gathering and reviewing all policies.
- Contact your agent/broker or carrier:
  - Once you've reviewed your policies, contact your agent/broker or the carrier about the specific provisions you believe provide coverage.
  - Be prepared to provide specific examples of your loss (including lost income and additional expenses incurred or expected to be incurred).
  - Make sure you provide notice of your claim using the procedures outlined in the policy or policies (typically found in a portion of the policy describing "conditions" or duties/obligations in the event of a loss).

### **Liability Defense Coverage**

In addition to incurring their own pandemic-related losses, many businesses face the possibility of third-party claims alleging personal injury due to exposure to the virus. While most businesses will have strong arguments for why they should not be held liable, defending exposure claims can be costly, such that businesses may want to tender these kinds of claims to their insurance companies.

Claims alleging exposure liability are typically covered by commercial general liability policies, given that most exposure lawsuits allege "bodily injury" caused by an "occurrence" or "accident." However, if the plaintiff did not actually contract the virus and limits his or her alleged harm to emotional distress, the insurance company may contest the availability of coverage (even coverage for defense costs) depending on the policy's definition of "bodily injury." Also, some liability insurers have added endorsements to their policies excluding or limiting coverage for injuries arising out of communicable diseases or transmissible pathogens.

Like all other policies, commercial general liability policies should be carefully reviewed, in their entirety to determine available coverages in the face of liability claims. Should your business receive a claim or lawsuit alleging exposure liability, tendering the claim to your carrier – in accordance with any timing or other procedural requirements identified in the policy – can be key to obtaining coverage for the attorneys' fees and costs associated with defending such claims.

**Jennifer Cranston is available to answer questions about coverage and communicating with carriers regarding your business insurance policies.**

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### **PAYCHECK PROTECTION PROGRAM (THE "PPP")**



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**Matt Engle is available to answer questions about the Paycheck Protection Program.**

### **ADDITIONAL RESOURCES**

- Paycheck Protection Program Application
- Paycheck Protection Program Frequently Asked Questions, 4/14/2020

- Paycheck Protection Program Frequently Asked Questions 4/24/2020
  - Paycheck Protection Program Frequently Asked Questions 5/13/2020
  - Paycheck Protection Program Loans and Changes of Ownership 10/2/2020
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## Real Estate



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For many aspects of a real estate transaction, a pandemic, a public emergency, and perhaps (if applicable) a “stay in shelter” order, may rise to the level of “*force majeure*” or act of God, which in turn allows for the excuse, delay, extension or waiver of performance. Where the performance by a party to a contract is rendered impossible, or materially and adversely affected, by unforeseeable factors, then under the principles of *force majeure* that party may be excused.

In assessing whether an event or condition would qualify for such treatment under the concept of *force majeure*, often the “foreseeability” of the event is a significant factor. At its essence, a *force majeure* clause is an attempt to recognize that some risks are not reasonably foreseeable, and therefore, no single party should suffer the resulting consequences and losses.

COVID-19 has created significant uncertainty in the real estate industry, and we are currently sorting through numerous issues including the following:

- How might a pandemic, or a resulting governmental mandate, impact a party to a real estate transaction?
- Would tenants or borrowers be excused from prompt satisfaction of payment obligations? Or of non-payment obligations?
- If a purchaser is required to fund an acquisition, and is informed that due to the turmoil in the credit markets the lender cannot perform when required, what is the status of the transaction and what might be the remedies?
- How are contract provisions interpreted, or in absence of an express contract provision, how is a pandemic to be addressed?
- Would the economic loss be subject to insurance coverage, including under business interruption insurance?
- How would a pandemic alter the standard of care, for businesses conducting a retail business?
- Is there a reasonable, mutually acceptable solution to the situation, where all parties can absorb some of the impact?
- Is there a requirement – whether express or implied – of prompt notification to the other party in the event of a materially adverse condition?

**Jim Connor is available to answer questions about the impact of the current business climate on commercial and residential Real Estate.**

## UPDATES TO REAL ESTATE

### City of Phoenix Extends Several Permit Deadlines Due to COVID-19

(6/1/2020)

### Issues When Considering Lease Modifications in a COVID-19 Business Environment

(4/23/2020)

## ADDITIONAL RESOURCES

- State of Arizona Executive Order 2020-21
  - List of Permit Extensions Due to COVID-19
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## SECURITIES



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### **Raising Capital with COVID?19 As a Disclosure Requirement**

Securities laws require disclosures of material factors that may impact among other things business operations and financial results. Disclosures are both of existing conditions and prospective impact of macroeconomic events or so called acts of God. Clients raising capital will need to consider how COVID?19 could impact sales, result in layoffs, create supply issues if components need to be shipped and related logistics of reduced transport options with flight curtailments, consider whether key employees are not able to work due to illness from COVID?19, and many other factors specific to their business.

For example, a medical facility meant to be a surgical center may need disclosure as it may be repurposed for COVID?19 patients.

Disclosures need to be in private offering documents and public securities reports both in the form of risk factors and the narrative on the business itself. They may even be in the management discussion impacting liquidity particularly if the client has a blown covenant with a lender. There is no "one size fits all" and working with the management team and auditor will help securities counsel determine the needed disclosures.

**Steve Boatwright is available to answer questions about Securities Law, Raising Capital, and Disclosure Requirements.**

## HELPFUL ARTICLES

- Global IPO Slowdown Could Last Until Third Quarter of 2020, *Law360*, 3/25/2020
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## TAX-FEDERAL DEVELOPMENTS



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**Tim Brown is available to answer questions about the challenges in Tax Developments for businesses.**

### **ADDITIONAL RESOURCES**

- IRS Notice 2020-32 Guidance Regarding the Deductibility for Federal Income Tax
  - IRS Temporary Procedures to Fax Certain Forms 1139 and 1045 due to COVID-19
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### **TAX-STATE AND LOCAL DEVELOPMENTS**



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**Tim Brown is available to answers questions about State and Local Tax Developments for businesses.**

### **ADDITIONAL RESOURCES**

- New Mexico Taxation and Revenue Department Bulletin 100.35
  - New Mexico Taxation and Revenue District Offices
  - Arizona Department of Revenue “AZDOR”
  - State of Arizona Department of Revenue “AZTaxes”
  - Arizona General Tax Notice AZDOR GTN 20-1
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### **TORT LIABILITY FOR BUSINESSES**



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### **Potential Liability for Exposure to COVID-19**

As we approach the third year of the coronavirus pandemic—with new variants continuing to require businesses to adjust to ever-evolving conditions—many employers and businesses have remain concerned about civil liability arising from exposure to COVID-19. Companies are wondering about their potential liability to persons who claim they were exposed to COVID-19 while on their property and became ill following that exposure. Such allegations will require a careful analysis of the facts and circumstances relating to the particular claim.

Indeed, in December 2020, one company and its owners were sued for wrongful death with allegations that the company failed to take reasonable COVID-19 mitigation precautions and failed to maintain a safe workplace. Claims for sickness and injury to an employee may be subject to worker's compensation laws, such that an employee's exclusive remedy, with limited exceptions, would be through the worker's compensation system (assuming the employer had worker's compensation insurance). During that process, the employee would need to establish that the injury resulted from exposure in the workplace while performing a function in the course and scope of the employee's work duties.

For non-employees, a company may face claims from a social guest or business invitee if the business knew or had reason to know of a dangerous condition that caused the guest or invitee harm. The elements of such a claim would include establishing (1) the existence of a legal duty owed by the company to the claimant, (2) the company's fault, (3) injury sustained by the claimant, and (4) a causal connection between the company's conduct and the claimant's injury. Of these elements, fault and causation will likely be the key focus of most disputes. Specifically, claimants will bear the burden of proving that the business failed to act as a reasonably careful person would act under the circumstances, including following any industry-specific standards, and that the business's conduct helped produce the injury and that the injury would not have happened without the business's conduct.

In Arizona, facilities like Skilled Nursing Homes or others with captive residents must be particularly careful caring for vulnerable residents. There has been an increase in lawsuits and claims against healthcare facilities for failing to protect patients and residents from getting (and in many cases dying from) COVID-19. Nationwide, a number of "take-home" COVID-19 lawsuits have been filed. A "take-home" case seeks damages from a business based on allegations of violating safety protocols and setting off a chain of infections emanating from the company's business location. Such lawsuits have been filed against a number of companies, including airlines, cruise lines, restaurant chains and retailers such as Amazon.com and Walmart.

The best way to protect a business from liability remains following all requirements established by federal, state, and local authorities in connection with re-opening. In addition, businesses should research any guidelines or recommendations applicable to their industry and develop reasonable policies and practices based thereon. Likewise, businesses should carefully document all efforts to implement their adopted standards, as that documentation be used as evidence in defending future exposure claims.

### **Liability Waivers**

Many businesses routinely require customers, guests, or other persons coming onto the premises to sign "waivers of liability" or other "assumption of risk" documents.

Businesses and property owners should be extremely wary about relying on such waivers to avoid potential liability for exposure to COVID-19. As one might expect, judges tend to scrutinize prospective waivers very carefully, and in any given case, can be tempted to search for some way to void the waiver (and permit the injured person to proceed with his or her suit).

Under those circumstances, businesses and property owners who are considering using such waivers should not use any “pre-COVID-19” forms but should consult with legal counsel to develop documents tailored to the particular nuances and risks of the COVID-19 pandemic.

### **Arizona Legislation**

In 2021, Arizona’s legislature passed SB 1377 and Governor Doug Ducey signed it into law on April 5, 2021. The law provides liability protection for a person or entity acting in good faith to protect members of the public from injury from a public health pandemic unless it is shown by clear and convincing evidence (a higher burden of proof than the “preponderance of the evidence” standard required in most civil lawsuits) that the person, business, school or healthcare company acted willfully or was grossly negligent. This legislation is consistent with legislation in other states that provides additional COVID-19 liability protection to schools, business and healthcare organizations. This legislation applies to all causes of action that are based upon an act or omission that occurred after March 11, 2020, and applies retroactively to matters from March 10, 2020, forward. It is anticipated that numerous court cases will challenge this legislation under various theories, including as violative of the Arizona Constitution.

**Shannon Clark is available to answer questions about the interaction between tort liability and workers’ compensation laws and risk management best practices.**