



Considerations for Emerging Companies in the COVID-19 Era

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The global health crisis, business downturn and uncertainty around the outbreak of COVID-19 are providing businesses large and small with unprecedented business, financial and legal challenges. Welcome to the world of crisis management. Below is an overview of matters companies should consider when responding to the constantly evolving COVID-19 landscape:

- *Develop a core crisis decision-making team.* Appoint a nimble team of individuals who possess the background and training to assess the available information and act deliberately and swiftly with authority and independence. The team also should include members who have a network of resources to call on to get expert advice and assistance to get things done.
- *Use current information.* Update information daily and make sure all decisions are based on current information.
- *Recognize the challenges of crisis decision-making.* Effective decision-making in a crisis requires that you make an objective, realistic assessment of your options and then focus on the most essential company priorities such as public safety and employee safety.
- *Consider retaining a communications consultant or other subject matter expert.* Working with a communications consultant or a subject matter expert may be helpful to mitigate the risk of reputational harm when making certain crisis decisions. In a rapidly evolving situation, it is important to leverage expert advice.
- *Strive to make decisions that are uniformly protective and void of bias.* A well-intentioned company but poorly guided policy that focuses on people from a certain geographic region, or a policy that favors salaried workers over lower level hourly workers, may be both ineffective and controversial.

See further discussion of crisis response considerations [here](#).

Employer Considerations

From an employer's perspective, a crisis such as the COVID-19 pandemic raises many issues and highlights the importance of nurturing every company's most valuable asset: its people. As COVID-19 is shifting work patterns and forcing companies to implement work from home policies for an uncertain time period, there are a variety of key points to take into consideration.

Communications with Employees

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Businesses need to keep employees informed about COVID-19 and their response. By having up to date information on your employees' contact details, you can implement an effective communication system for urgent updates. Therefore, it is important for each company to remain abreast of government updates, guidance on any developments and mandates either via an internal team or third party such as a law firm or risk management business.

Health and Safety

The Occupational Safety and Health Act of 1970 (“OSHA”) requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. Although no new legal regulations or standards have been mandated, OSHA has provided [guidance](#) on how to prepare the workplace, which includes steps to take to prevent risk of exposure, planning guidance based on infection prevention and industrial hygiene practices, and a discussion of engineering, administrative, and work practice controls and personal protective equipment (“PPE”).

Employers should *not* rely on general guidelines. Instead, they should assess the work site(s), workforce, and risk factors. Employers with different workforce needs will likely implement different protocols and procedures. If possible, employers should consider issuing their own guidance regarding infection prevention, how to handle illness or symptoms, and any requirements the employer wants to implement with respect to travel.

Reviewing and Updating Policies and Agreements

Employers should review their policies to determine whether changes are required or recommended in the current environment. An employer should anticipate the possibility of receiving an increased number of questions relating to its plans and policies and coverage relating to COVID-19 and ensure that they adequately protect their employees. Plans and policies to review include sick leave or PTO policies, short-term disability policies, unpaid leave or other personal leave policies, remote work, telecommuting, and alternative work schedule policies, healthcare plans, 401(k) plans, and staffing agency or contractor agreements.

Understanding Implications of Layoffs and the WARN Act

- The Worker Adjustment Retraining Notification (WARN) Act requires employers who are planning a mass layoff to give affected employees at least 60 days' notice of such an employment action. Further, a number of states (including California, Illinois, New Jersey and New York) have mini-WARN Acts with lower thresholds that trigger notice requirements.
- The regulations allow for reduced notice to employees where the mass layoff is caused by business circumstances that were “not reasonably foreseeable as of the time that notice would have been required.” However, employers must give as much notice as practicable and must state why the notice period was reduced.
- The unforeseen business circumstances exception requires fact-specific analysis, and there are not clear guidelines as to when it applies. This provision could apply to the COVID-19 outbreak, depending on the effect it has on an employer.
- California suspended enforcement of the state’s WARN Act in connection with mass layoffs or shutdowns caused by COVID-19, and which would otherwise trigger the WARN Act’s 60-day paid notice requirement, until the end of the COVID-19 emergency. Other applicable states may follow.

Tailoring a Remote Work or Telecommuting Policy to an Employer's Needs

Allowing employees to work remotely can be a lifesaver in a situation where an entire office must close due to an outbreak since it can be crucial to staying operative throughout closures. Implement a tailored work from home policy for COVID-19. Set specific expectations for your employees, provide advice on travel, include an overtime policy (if applicable), clarify instructions for protecting proprietary company information and guidance for reporting any illness.

Employers that normally do not permit remote work or have not historically had remote work policies should consider whether such policy to be limited to specific emergency situations and acknowledge specifically that not all of the employees' essential job functions can be performed remotely.

- Items that may be included in a remote work policy:
 - Technology requirements, e.g., internet
 - Security requirements
 - Equipment provided by employer
 - Hours of work
 - Expectation that employee will take PTO appropriately
 - Safety requirements (workplace injury notification requirements)
 - Availability for calls, online meetings
 - Job expectations
 - Temporary nature of this crisis situation and expected return to office work
 - At-will nature of employment is unchanged
 - Expenses reimbursed – pay attention to state requirements here
 - Acknowledge in emergency that there will be some juggling of work and personal responsibilities
 - Non-exempt employees – recording all hours worked accurately
 - Tax consequences are employee's responsibility
 - Acknowledgment that arrangement is temporary and on an emergency basis
 - Extension of Bring Your Own Device policy, if applicable

Considering Impact of Pandemic on Executive Compensation Arrangements. Employers that are currently implementing performance-based plans or considering new executive arrangements should consider the long-term impact of those decisions.

- *Incentive Plans.* Companies should look to creating incentive plans and establishing performance goals that will create meaningful and appropriate incentives in a volatile market.
- *Contractual Obligations.* A company should be aware of any contractual obligations (such as under employment agreements or severance policies) before making changes to salaries, bonus opportunities or benefit offerings to ensure the company does not inadvertently breach a contractual obligation or trigger an employee's right to resign and receive severance. When entering into new employment agreements, a company should consider including as an exception to clauses that provide good reason protection in the case of salary or bonus opportunity reductions, reductions that are made in connection with management-wide or company-wide reductions.

Technology

If your business already has an option for flexible working, then you have an option during the pandemic. If not, then now is the time to ensure that all your employees have the requisite technology to perform their job

from home. Given that it is not clear when employees are expected to be back in the office, consider urgently sourcing technology for not only your key team members but all employees.

See further discussion regarding employer considerations in managing COVID-19 [here](#). Baker Botts' [employment](#) counsel can assist with employment needs of companies as they navigate COVID-19.

Cybersecurity/Data Privacy during COVID-19

COVID-19, and related response efforts, raises a host of potential cybersecurity and data privacy concerns, including:

- Potential increased cybersecurity risk as a result of more employees working remotely
- Increased social engineering attacks, such as COVID-19 based “phishing” scams in which malicious actors send emails or other electronic messages purporting to be government, health care, or charitable organizations
- Potential privacy compliance concerns related to the collection and processing of health and/or travel information of employees, contractors, consumers, or guests

Companies should provide all employees with clear guidance on proper remote-working expectations or an online training session on cybersecurity risks when working remotely, and ensure that all risk areas are covered with a step-by-step guide on how such risks could be alleviated. For example, employers should reinforce remote work policies, including the use of virtual private networks and the use of company-issued devices.

Click [here](#) for more insight on COVID-19 specific cybersecurity and data privacy concerns.

Further, to the extent companies collect personal health information (“PHI”) of employees, we provide general guidance on PHI collection [here](#).

Supply Chain

Traditionally, businesses would be able to claim damages for breach of contract when contractual obligations are not met, or loss is suffered because suppliers cannot fulfill their duties. The fallout from the COVID-19 pandemic, including supply-chain disruptions, event cancellations, and social distancing, has led to questions about when a party may be excused from its obligations under a contract. If COVID-19 is the reason for contractual failure, businesses otherwise in breach may possibly be excused if there is a force-majeure clause in the relevant contract or if doctrines of “impossibility,” “commercial impracticability” or “frustration of purpose” apply to the contract.

A “force-majeure clause” excuses non-performance due to circumstances such as traditional “acts of God” (e.g. hurricanes, fires) or human events beyond their control (e.g. riots, wars) that prevent someone from fulfilling a contract. Not all businesses in breach can be protected as it is highly fact specific and dependent on the language of the parties’ contract and the nature of the event that is purported to have caused non-performance. Businesses will need legal analysis of the relevant contract provisions, governing law, relevant case law and the events that prohibited the person from being able to perform to determine the rights of each party. See further discussion regarding force majeure and related doctrines [here](#).

Key contracts should be reviewed by all parties involved with an assessment of what pre-emptive measures could be taken to avoid a contractual breach. Parties to a contract could take this as an opportunity to collaborate and consider re-negotiating or delaying obligations.

Millions of people dealing with shelter-in-place, social distancing and similar restrictions in the U.S. and around the world have been turning to digital means to help them carry on with both their personal and work commitments. In this time where physical in-person interaction is not possible, digital technology businesses have opportunities to provide value to people and businesses in their response to COVID-19 and to sustain and grow their businesses. In order to meet such demands smoothly and showcase excellent customer service, businesses should consider whether the customer support team is prepared to be on standby to assist with any complications, such as the increase in bugs and crashes. Consider preparing underutilized employees from less busy teams to step in and assist with customer service. If purchasing more server space would decrease complications, it is worth prioritizing that as your business is in competition with other digital technology companies that are equally trying to stand out in this critical-to-survival phase.

Insurance

Review your insurance policies and check with your insurance provider to confirm whether you are covered for COVID-19. Insurers will require companies to mitigate losses and give notice of losses on a timely basis, and companies will want to take steps to preserve insurance coverage, including working with your brokers regarding coverage and your contractual partners regarding indemnification obligations.

Emergency Succession Plan

For the survival and growth of your business, it is vital to put together a succession plan in the event members of the management team are infected with COVID-19. In a short amount of time, you must create a development plan for likely successors and seek necessary approvals of the succession plan. Companies need to keep in mind steps to prepare for major changes in leadership:

- Plan ahead for emergency situations
- Build sustainable leadership
- Understand and adopt critical elements of a succession plan

See further discussion regarding succession planning [here](#).

IP Considerations during COVID-19

For companies with patent and trademark applications on file, the USPTO has notified applicants that it will be waiving all fees for petitions to revive patent and trademark applications where abandonment occurred due to circumstances associated with COVID-19. However, all statutory deadlines remain in place. See further discussion regarding intellectual property responses to COVID-19 [here](#).

Tax Response to COVID-19

Employer Tax Credits for Wages Paid under Sick Leave and Family Leave Provisions. Effective April 2, 2020, the Families First Coronavirus Response Act (the “FFCRA”) includes provisions generally requiring employers with fewer than 500 employees to provide short-term paid sick leave and longer-term paid family leave to employees while away from work due to COVID-19-related events. A detailed discussion of these provisions can be found [here](#). In order to provide financial assistance to employers, the FFCRA provides a refundable tax credit for qualified wages paid by employers with fewer than 500 employees. The tax credit is allowed against the employer’s portion of Social Security tax (up to a specified cap). If the credit exceeds the employer’s total Social Security tax liability for all employees for any calendar quarter, the excess credit is refundable to the employer.

In cases where the employer maintains a qualified group health plan, an additional credit is available for the portion of the employer's qualified health plan expenses as are properly allocable to sick leave paid under the Emergency Paid Sick Leave Act.

See further discussion of tax in the COVID-19 era [here](#).

Fundraising in the COVID-19 Era

Given the restrictions on the movement of millions of people and business offices closing around the U.S. and the world, business slowdown, stock market crash and continued uncertainty in the market, startups can expect a slowdown in fundraising. Companies should plan to manage operations and cash, leverage existing facilities and/or tap existing investors for support to extend their runway for a longer period than previously planned until the fundraising climate improves. If you have readily available funding, take more than you need – look to obtain 18 months of runway and a plan for extending it to 24 months if necessary. While COVID-19 is presenting huge challenges to all businesses, there are opportunities for many startups, to improve peoples' lives and help other businesses respond to COVID-19, in areas such as mobile transactions and payments, telecom and video communications, collaboration tools and services, remote events/conferencing, edtech, digital health and telemedicine, mobile testing and therapeutics, automation, robotics, artificial intelligence/machine learning, drones, autonomous mobility, medical devices, life sciences, cybersecurity, remote sensing and IoT, logistics, smart cities, fintech, and insurance. These are areas that may see fundraising activity stabilize over the next few quarters. We have seen many successful companies that were started and developed during market downturns, and this may be another time of great opportunity. Prior to seeking additional financing, companies should review the terms of any existing facility agreements, financing agreements and other arrangements to ensure that they request investor or lender consent to take on the additional financing.

Exits During COVID-19

COVID-19 has slowed negotiations in acquisitions as limitations on travel, mobility and in-person interactions continue to broaden and become more restrictive. The terms of acquisition agreements will change in response to greater uncertainty, volatility and risk in the COVID-19 era. Buyers may increase their scope of diligence review around COVID-19's impact, they may pay greater attention on material adverse change clauses, they may add additional conditions to closing, they may focus more on representations and warranties impacted by COVID-19 and add more restrictions on the operations of the company between signing and closing. Regulatory reviews are expected to take longer. The severe stock market crash caused by COVID-19 has effectively closed the IPO market.

Sustaining Operations and Finding Opportunities During and After COVID-19

Companies need to be adaptable to change to survive. It is going to be a difficult time to find financing. Startups will need to find ways to survive the market downturn for the next few quarters by reducing expenses, planning and controlling cash burn, extending the cash runway, buttressing existing customer relationships and finding new opportunities to provide value and develop new business in the market, all while responding to COVID-19 for their own operations and changing the way they run their business.

Startups should review their cash runway and determine how they can sustain the business over several next quarters during the business downturn. Companies should plan for a reasonable cash burn for your stage and type of business and control your cash burn to enable you to get to the next round (and profitability depending on your stage). Startups will also need to scrutinize where they spend their money and review whether

they can reduce expenses without cutting into the core of the business and finding way to do more with less resources, including headcount. Companies will need to be creative with employee compensation. Startups should be careful around hiring and headcount and make decisions as early as possible during the crisis. Companies should also re-set marketing plans and review contracts for potential renegotiation. Startups should review any capital spending plans as cash and liquidity is critical in this environment. Companies should expect their revenues will decline as many businesses are closed and there are significant disruptions with supply chains and employee productivity. Customers are cutting spending and deals are less likely to close quickly and likely will extend for months if they happen at all. Companies should be looking for where they can meet gaps between supply and demand in their market. Companies will need to focus on their current and target customers and stay close to them - what do customers need now and what will they need after this and how can our offering meet that need, how are customers changing how they spend now and going forward - making sure what they offer to those customers fits their evolving needs. Companies will also need to focus on its people – empathizing with employees, supporting them and encouraging bonding, and fostering a culture of adaptability and performance. While COVID-19 is presenting huge challenges to all businesses, there are opportunities for many startups, to improve peoples’ lives and help businesses respond to COVID-19, and build and accelerate beyond this crisis.

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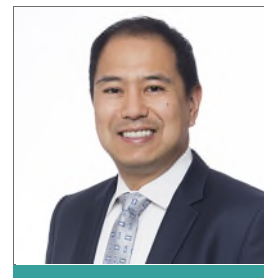


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