

## COVID-19 Non-Employment Business Action Items: 10 Things You Must Do

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There are many business issues to consider surrounding COVID-19 Coronavirus outside of the general employment issues that arise. We have put together a list of top 10 non-employment related things a business should do.

### **Conserve Cash**

Cash in a business is like blood in a body: it is essential to life. In a time of crisis, a primary focus for a business must be on conserving, preserving, and accessing cash. That is accomplished by reducing expenses, deferring non-essential purchase, and ensuring that critical lenders remain on board.

### **Request Payment Holiday**

As mentioned above, cash is king. Accordingly, if possible, preserving that cash through obtaining a payment holiday in which you are given an excused absence from paying your loan and adding those payments (plus the applicable interest) to the end of the term of the loan could provide you the lifeline you need.

### **Review Contracts for *Force Majeure* Clauses**

The Coronavirus outbreak and related governmental directives could constitute a *force majeure* event under existing contracts and applicable laws, meaning that a party to a contract may seek to have its performance delayed or excused. However, before you cease performance, or if a counterparty seeks to stop its performance based on a *force majeure* event, you need to understand each party's rights and the consequences of doing so, including any unintended consequences that could

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exist (e.g., mitigation of damages, repudiation of contract if wrongly invoked, creation of right in other party to terminate contract or exclusivity, potential for litigation, etc.).

### **Consider Whether Defenses of “Frustration” or “Impossibility” Are Applicable**

Even when a contract is silent on *force majeure* events, a party to a contract may seek to have its performance delayed or excused based on claims that the contract’s purpose has been frustrated or is impossible to perform. While these defenses typically have been narrowly construed and rarely invoked, under the right law and facts, these could be applicable to a claim that you have breached a contract, and you need to be prepared to assert or to defend against such claims.

### **Consider Whether the Coronavirus Outbreak Is a “Material Adverse Change” or “Material Adverse Effect” under Existing Contracts**

While a material adverse change (“MAC”) or material adverse effect (“MAE”) term (together “MACEs”) typically is very difficult to invoke to terminate a transaction, it is possible that the dynamic Coronavirus outbreak could lead to the applicability of such MACEs in a M&A transaction if it has an impact “in a durationally-significant manner” and in a financing transaction, if it has a shorter but still sufficiently significant impact. If you are in the middle of negotiating a contract with such a term, you may consider specifically defining whether a pandemic or epidemic applies and what precisely it is.

### **Provide Advance Notice of Potential Delays**

Most businesses, in today’s “distancing” environment, face the same disruption problems. Consequently, open and honest discussions among businesses that rely upon each other, about expected disruptions (once they are known), is advisable.

### **Review Your Insurance Policies for Coverage**

Certain policies (e.g., business interruption, key man, employee coverage, liability, business income, etc.) may cover damages relating to a pandemic or communicable disease. If necessary, you should provide notice to your insurers.

### **Consider Alternative Suppliers**

If you rely on suppliers, you will want to identify your suppliers and their upstream suppliers and consider alternatives. You also will want to consider your suppliers’ ability to perform, their liability for nonperformance, and their financial situation.

### **Evaluate Deadlines in and Impact on Litigation**

To the extent you are currently involved in litigation, you will want to understand the deadlines that exist over the next six months and be proactive in seeking extensions if necessary. Many courts are moving toward postponing all in-person hearings and trials. However, filing deadlines

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may not be altered given electronic filing capabilities of most courts, so be mindful of time deadlines to file claims, thus avoiding time bar defenses.

### **Consult Professionals with Experience in Handling Financial Problems**

Times of uncertainty and financial crisis require professionals with experience and expertise in helping businesses deal with uncertainty, financial stress, and related issues. Whether you contact an attorney, accountant, or other advisor with experience handling financial stress, the sooner you do so the more options will remain available. There are professionals with experience in helping companies and individuals through these issues who can serve as a resource. Koley Jessen has a dedicated team with years of experience helping clients through financial distress that can serve as a resource should you need one.

### **BONUS: Be Mindful of Employment Issues**

In addition to the above non-employment business action items, employee and personnel issues are sure to arise given the current business closures, restrictions, and work-from-home arrangements that are likely to continue for weeks to come. The Koley Jessen Employment, Labor, and Benefits Department is closely monitoring the impact Coronavirus will have on the workforce, and has published several articles on the topic which can be found in our resource center here.