

COVID-19 ALERT

A MESSAGE FROM THE COLE SCHOTZ INTERDISCIPLINARY TASK FORCE



As the Cole Schotz family and the rest of the world navigate the challenges of the COVID-19 pandemic, our central focus is the health and well-being of our employees, our clients and our communities at large. During these challenging times, our intention is to maintain a high degree of connectedness with our clients and to continue delivering uninterrupted service to the companies and individuals who depend on us. The Cole Schotz team is here for you. Working together, we will meet the challenges posed by these events.

As part of our commitment to guide our valued clients through the multi-faceted issues raised by COVID-19, we have established an interdisciplinary Cole Schotz

task force. Our intention is to regularly post relevant content as a resource to clients seeking information and advice on COVID-19 related legal issues. Our initial installment, along with links to other relevant Cole Schotz materials, is below.

Proposed Federal Legislative Relief

- The U.S. House of Representatives passed an emergency relief package on Saturday, March 14, 2020 to address the broad-ranging effects of the COVID-19 pandemic on the American economy.
- For businesses with fewer than 500 employees, the proposed legislation provides two weeks of paid sick leave and up to three months of paid family and medical leave, equal to no less than two-thirds of the employee's pay.
- The benefits apply to employees who are infected by the virus, quarantined, have a sick family member or are affected by school closings.
- Large employers are excluded, and the Labor Department will have the option of exempting workers at any company with fewer than 50 employees if it determines that providing paid leave "would jeopardize the viability of the business as a going concern."
- The U.S. Senate is expected to consider the bill this week.

Force Majeure Provisions and the COVID-19 Pandemic

- A *force majeure* clause is a contractual provision that allows one or more parties to a contract temporary or permanent relief of its obligations in the event of certain circumstances that would render performance inadvisable or impractical.

- Parties should carefully review how the term force majeure is defined in the agreement at issue. Certain *force majeure* provisions are broadly written while others are narrow and/or apply to specific instances or occurrences.
- For example, the COVID-19 pandemic may constitute a *force majeure* event if the agreement contains language such as “epidemic”, “pandemic” or “illness or disease”. It may also constitute a *force majeure* event if the definition includes words such as “quarantine” or “acts of government”.
- Even if the agreement does not have a definition that is specifically on point, a general provision that refers simply to circumstances “outside of the parties control” arguably may apply to the COVID-19 pandemic. The agreement’s choice-of-law provision is important on that issue, as different states have interpreted force majeure provisions differently.
- Confirm that any required notices are timely sent. Many agreements provide that the party seeking to invoke the *force majeure* clause has to do so within a certain period of time following the event, otherwise the ability to do so is waived.
- Consider whether there are any alternative actions that can be taken to reduce the effect of the *force majeure* event. A party may be required to demonstrate that it took steps to mitigate its damages before seeking to invoke the *force majeure* provision.

Employment Issues Triggered by COVID-19

- As mentioned above, H.R. 6201 provides for extended employee sick leave benefits, expanded family and medical leave act protections, paid family leave, tax credits and unemployment compensation resources and benefits. Employers should note that this has not yet been passed by the Senate and therefore is subject to amendment.
- Employers should develop and communicate any business travel restrictions and remote work from home policies, and implement a communicable illness policy.
- Employers should seek advice on how to address the workplace, notice and quarantine issues when an employee, an employee’s family member, a client or a vendor tests positive for COVID-19. In that regard, it is critical that employers understand how to ensure consistency in applying workplace policies adopted to address the pandemic to mitigate the potential for discrimination and violation of privacy claims.
- When developing protocols, employers should review and consider state and federal sick leave and paid family leave laws and policies including the federal Family and Medical Leave Act and related state laws.
- Employers should work with their advisors to develop strategies for dealing with the negative economic conditions caused by the COVID-19 pandemic. The considerations should include employment implicated by downsizing workforce through furloughs, prospective reduction in pay, cutting back on scheduling and outright layoffs and terminations. Before implementing any cost cutting measures, employers must consider state and federal WARN act and wage issues.

Issues Affecting Commercial Leases and Purchase and Sale Agreements

- Based on the terms of your lease or contract and the economic and operational issues you face, you should consult with counsel on the availability of remedies pursuant to the terms of your lease or contract, such as pursuant to a force majeure clause (as discussed above). In retail leases, it is not uncommon to have rights (such as to terminate the lease or pay a reduced rent) if sales fall below certain stipulated level (a so-called “sales kick-out”) or if minimum occupancy levels of other stores within a shopping center are not satisfied (often referred to as a “co-tenancy” clause).
- You should also consider the possible availability of common law principles and defenses to relieve contractual obligations, such as:
- *Impossibility of Performance*. Relief from performance of contractual obligations may be granted by reliance on the defense of impossibility of performance. If the means of performance is destroyed so as to make performance objectively impossible, then relief from performance of the obligation may

be available. If it can be proven that the economic consequences arising from the COVID-19 outbreak is unanticipated and extreme, then the adverse market conditions, financial and otherwise, may render performance objectively impossible. Absent a pre-litigation settlement, this relief needs to be granted by a court.

- *Impracticability of Performance.* Absent circumstances making performance impossible, the doctrine of impracticability may be available. This is defined as “Performance [that] may be impracticable because of extreme and unreasonable difficulty [or] expense...[or a] severe shortage of raw material or of supplies due to...unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether.” Restatement § 261 cmt. D.
- Similarly, absent a pre-litigation settlement, this relief needs to be granted by a court.

Issues Affecting Landlord/Tenant Relationships

- Tenants who are suffering financially should investigate relief measures which have been instituted by executive orders, legislations and trade groups, such as:
- *Suspension of eviction proceedings.* For example, State of New York officials have suspended eviction proceedings indefinitely. Effective as of 5 p.m. on March 16, 2020, eviction proceedings and pending eviction orders will be suspended statewide until further notice, and this includes commercial evictions. This followed a pledge on March 13, 2020, by a large real estate industry trade group, the Real Estate Board of New York (REBNY) and 29 building owners and managers to stay evictions for the next 90 days with an exception for “criminal or negligent behavior that jeopardizes the life, health or safety of other residents.”
- Similarly, tenants who are having trouble paying utility charges should research relief which may have been granted by governmental officials or the utility companies. For example, the States of New York and New Jersey announced that the states’ utility companies will keep the power, heat and water on for all customers in response to the COVID-19 pandemic. The shut-off moratoriums range between 30 days and through the end of April.

Issues Affecting Lender/Borrower Relationships

- Loan documents and other key financial arrangements should be reviewed for covenant breaches, material adverse change provisions and any other defaults that may be triggered as a result of the COVID 19 pandemic.
- *Financial Covenants.* Companies should assess whether the COVID-19 pandemic will impact their ability to comply with the applicable financial covenants, not only during the upcoming fiscal quarter, but also during future reporting periods as most credit facilities measure the financial covenants over several quarters. Companies may want to have pre-emptive conversations with their lenders to address possible waivers or amendments to covenants that are at risk of being tripped. Owners may also want to consider equity contributions to ensure covenant compliance.
- *Representations and Warranties.* Companies should carefully review ongoing representations that are given to the lender, especially with respect to revolving credit facilities that require that the company certify that the representations and warranties are accurate each time an advance is requested. This is particularly important for businesses that may become subject to litigation as a result of the failure to perform due to the COVID-19 pandemic.
- *Material Adverse Change.* A “material adverse change” provision in a credit facility generally refers to whether there has been a material change in one or more aspects of a company’s business, operations, property, condition (financial or otherwise), prospects or its ability to perform its obligations under the loan documents. The material change typically has to be long lasting and not temporary. Determining whether a “material adverse change” has occurred is fact sensitive. Since the language is usually highly negotiated, the definition set forth in the credit facility should be reviewed and scrutinized in connection with the COVID-19 pandemic.

Business Interruption Insurance Issues

- Business interruption insurance is intended to cover actual loss of business income sustained during a suspension of business operations during the period of “restoration”.
- Coverage can provide for fixed costs and wages during the period of restoration, as well as business losses until regular income is restored.
- The suspension must be caused by direct physical loss, damage or destruction to insured property and be caused by a covered loss.
- Business interruption caused by virus and disease is ordinarily excluded from coverage. In rare cases, however, losses relating to virus and disease can be part of a policy endorsement for an additional premium. Accordingly, it is imperative that insureds review their policy carefully to determine if a covered loss has occurred.
- Certain state legislatures have explored potential law changes to expand the scope of business interruption coverage for small businesses. Whether those measures will pass, and whether they will stand up to constitutional challenge if they do, remains to be seen.

Small Business Relief Options

- On March 12, 2020, the U.S. Small Business Administration (SBA) announced that it would work with state governors, including New Jersey’s and New York’s governors, to provide targeted, low-interest disaster recovery loans to small businesses that have been severely impacted by the COVID-19 pandemic. The SBA’s Economic Injury Disaster Loans offer up to \$2 million in assistance for a small business.
- Please reference these included links for more information:

[SBA to Provide Disaster Assistance Loans for Small Businesses Impacted by Coronavirus \(COVID-19\)](#)

[SBA to Provide COVID-19 Relief to Affected Businesses Via Loans \(NJ Business Magazine - March 12, 2020\)](#)

The Cole Schotz COVID-19 task force and our firm’s leadership team will be closely monitoring the latest developments as we all navigate through this difficult period. We will provide updates as the legal and business issues evolve. As always, we encourage you to reach out to our department chairs with any questions.

ADDITIONAL COVID-19 RESOURCES

Key Considerations for Businesses	Employer Checklist During Coronavirus Pandemic	Doing Business in the Midst of the Coronavirus Outbreak: What Employers Need to Know
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