Global Guide to Legal Issues arising out of COVID-19

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The profound impact of the measures being taken to contain the spread of the novel coronavirus ("**COVID-19**") is creating a multitude of issues for businesses and their employees. Legal concerns related to corporate governance, disclosure, contracts, financing, strategic transactions, employment, and others are summarized below.

Here are some key legal issues surrounding COVID-19:

1. Employment

Organizations are required to maintain a safe workplace, which would include taking steps to reduce the risks associated with the COVID-19 outbreak. The steps that an employer should take will vary depending on the type of business but include the following elements:

- Restrictions on Travel

It is generally permissible for organizations to implement policies that restrict business travel to high-risk destinations and require employees returning from such destinations to self-quarantine for the maximum period. While employers cannot generally restrict personal travel, it is generally permissible to implement a policy requiring that an employee provide advance notice of any personal travel (in particular to high-risk destinations) and requiring that employees self-quarantine upon their return from destinations where there are known cases of COVID-19. Organizations should take care to apply the policy impartially and consistently to help avoid claims of discrimination based on the protected class of impacted employees. Proper documentation of decisions

made and consistent application will be key to protecting against such claims.

- Remote Working

Most organizations have commenced remote working of their staff. Where working from home is not possible, and employees are absent due to sickness, quarantine, or childcare needs, employers will need to determine whether and for how long absent individuals will continue to be paid and create flexibility in leave policies.

- Communication and Confidentiality

Organizations should determine how best to communicate the message that an employee has tested positive for COVID-19. Employers do have a general duty to inform the workforce if an employee tests positive or is a probable COVID-19 case. However, the confidentiality and privacy requirements of applicable laws, mean that steps should be taken to preserve the privacy of the impacted employee and not share their identity with the workforce. Organizations have a duty to protect employees from discriminatory or retaliatory behavior by other employees if they are suspected to have COVID-19 or have self-reported.

2. Supply Chain

As the global economic impact is expanding, organizations are facing increasing disruptions to supply chains as a result of a drop in consumer demand and workforce impacts. Businesses which are affected are seeking to understand their rights and obligations, and any relief which may be available to them.

Such assessments include supply chain exposure and prioritizing critical suppliers (tier 1) that are impacted and implementing a strategy to identify and negotiate any current and future (post-COVID-19) potential benefits that may be obtained. Contracts could be addressed in the following way:

(i) negotiation to optimize onward supply, and mitigate supply chain impact; (ii) assessment of contractual options available: suspension, termination or force majeure declaration, frustration, etc (iii) claims which may be brought on a case-by-case basis.

3. Contracts

While each contract will have to be examined on its own, the outbreak of COVID-19 is likely to have a profound impact on commercial contracts. Organizations or their suppliers may find they are unable to perform under an existing commercial contract. Parties to existing contracts that are or may be disrupted by the outbreak of COVID-19 should promptly assess their legal rights and obligations, including:

1. assessing contractual provisions that have been or may be affected;
2. identifying and abiding by any relevant notice requirements;
3. analyzing the risks and consequences of a default or breach under the contract; and
4. determining or negotiating alternative means of performance under the contract, where possible.

Where organizations are currently negotiating contractual contracts, it should proactively consider the impact of COVID-19 and appropriately allocate potential risk in the contract.

- Force Majeure

Contract parties may consider issuing force majeure notices or may receive such notices to excuse a party’s non-performance. Any declaration of force majeure must be evaluated under the terms of the agreement and analyzed under the law governing the terms of the contract. Parties should not cease their performance on the basis of a force majeure event without consulting counsel because a mistaken assertion of force

majeure or frustration could have serious consequences. Specifically, an incorrect assertion of force majeure or frustration may amount to a breach (or anticipatory breach) of the contract. A declaration of force majeure will generally not avoid payments under a contract.

The consequences flowing from a declaration of force majeure should be considered carefully and may include:

1. Whether the parties' agreement includes notice obligations before declaring force majeure;
2. Whether the force majeure event actually made the party's performance impossible, or just more burdensome (commercially unreasonable, etc);
3. Whether the affected party is required to mitigate by using diligent efforts to end the failure or delay and ensure the effects of the force majeure event are minimized or mitigated;
4. Whether immediate relief is available for the affected party;
5. Whether force majeure-related disputes must be arbitrated or the potential costs of litigation and/or dispute resolution; and
6. Whether force majeure events are covered by the parties' insurance policies (including general liability, business interruption, contingent business interruption, or other insurance policies), and if so, what conditions must that party meet for its claim to be satisfied.

The declaration of force majeure should also take into account the impact on other agreements and obligations between the same parties or business activity.

- Material Adverse Change

Some agreements contemplate and allocate risk among the parties in the event of a material adverse change/effect to the business. If triggered, it may allow a party to terminate

the agreement or otherwise avoid performance. Organizations may consider and evaluate any contractual notice requirements in this regard.

- Frustration or Impossibility

If a contract does not contain a force majeure clause, it may still be possible for a party to argue that the COVID-19 outbreak has frustrated the contract or that the performance of the contract becomes objectively impossible. The concept of "frustration" may excuse the performance of a contract in situations where the performance of a contract is possible, but no longer provides a party with the benefits that induced them to make the bargain because of intervening unforeseeable events. It will not apply when a contract simply becomes less profitable, or even when performance causes one party to sustain a loss.

The concept of "impossibility" excuses a party's non-performance when performance becomes objectively impossible because of the destruction of the subject matter of the contract or the means of performance.

There may be other defenses that may exist at law, for example, unfair contract terms and which should be considered.

4. Data Protection

Some data protection authorities have started to provide guidance, but there are divergent views on how employers should comply with data protection requirements, depending on the jurisdiction. There may be restrictions on organizations' ability to collect information about the body temperature of their employees or visitors to the premises or information about health and possible COVID-19 symptoms from them. If an organization is alerted to a case of COVID-19 amongst its employees, organizations may record the date and identity of the person suspected of having been exposed to the virus and the organizational measures taken (isolation, remote working,

contact with the company doctor, etc) and report to the relevant health authorities.

Looking Forward

The above are some legal issues that must be considered alongside a business continuity and resilience plan to ensure that organizations are able to meet the ongoing challenges created by COVID-19. Many governments have launched measures for supporting companies at this time.

The extent of measures taken by the authorities in response to the current Covid 19 threat and the way they are applied vary considerably from one state to another at different points of time. This is partly caused by the fact that states have different constitutions and some states are subject to conventions. While some restrictive measures adopted by certain states may be justified on the ground of constitutional or conventional clauses relating to the protection of health measures of exceptional nature may come into conflict with other rights en freedoms. For instance, the European Court of human rights has granted states in the European Union a large margin of appreciation in this field. Recently, the Dutch government implemented the NOW-arrangement (Noodfonds Overbrugging Werkgelegenheid), providing financial help for employers to pay their employees' wages in the COVID-19 crisis.

Now is the time to implement strategies for business stability and prioritize the safety and well-being of your employees as well as those around you. How you do this will vary between businesses and may require tailoring. If you would like assistance, we can advise you on planning your next steps.

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