Proskauer

Coronavirus: Details Matter

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As the Coronavirus (COVID-19) continues to disrupt markets and industries globally, businesses face significant internal and external challenges with how to identify and plan for issues caused by the outbreak. In response, Proskauer has formed a cross-disciplinary, cross-jurisdictional team focused on supporting and addressing the concerns of our clients. Each issue requires a detailed understanding of the operational and legal implications affecting customers, suppliers, employers and investors, and our team is ready to help clients navigate problems and implement an effective response.

We have developed a non-exhaustive checklist of practical steps, business assessments and resources that any business owner should be considering to manage ongoing operations. We are continuing to monitor the developments and will provide updates as necessary. Our Coronavirus Disruption Checklist is intended to help identify some of the challenges your business may face. Once a potential problem is identified, careful consideration must be taken to analyze each issue thoroughly.

Coronavirus Disruption Checklist

These are initial considerations and not intended to reflect the entirety of challenges and questions you may have. Like most other situations, once an issue is identified, details matter, and understanding them in context is paramount.

Contracts:

- Identify key provisions of existing material contracts that affect your business, your customers and your suppliers obligations:
  - *Force majeure*
  - Review potential adjustments to contractual threshold amounts
  - Consider the possibility of travel restrictions and court closures in drafting – specifically allowing for teleconferences and videos for arbitrations and the like
  - Material adverse change/event

    - Representations/warranties
    - Covenants
    - Termination rights
    - Effect on compliance with/ability to meet conditions
    - Events of default and remedies
    - Timing for delivery/supply and grace periods
    - Price adjustments
    - Effect on thresholds/milestones
    - Notices to financing sources and other parties
    - Timing and procedures for notification for the above
- Consider changes that should be implemented in contracts being drafted (*e.g.*, not only does Coronavirus need to be considered but also future outbreaks of infectious diseases)
- Consider additional due diligence (financials, contingency plans, insurance requirements, dependency on specific suppliers/customers/geographies)
- To the extent any budgets have been or are required to be provided or received, consider if and how to revise or adjust them to account for potential business disruption
- Identify your options should a supplier not be able to deliver or a distribution channel is shut down

Insurance Policies:

- Review **all** insurance policies to assess potential coverage for resulting losses to property or profits and potential claims by third-parties. Examples of coverage most likely to be applicable include:
    - Business interruption (BI) – covers loss of income due to interruption of business; although policies typically require physical loss to property, an infestation/contamination rendering premises uninhabitable may trigger coverage
    - Supply chain (Contingent BI) – loss resulting from disruption of customers/suppliers/utilities/attraction properties; in addition to the physical damage issue, policies should be reviewed carefully for any bacterial/virus exclusions

    - Civil authority – covers loss resulting from prevention (or restriction) of ingress/egress to policyholder's premises by government authority; could apply to quarantines affecting customers or employees or travel bans by government entities; may or may not require physical damage trigger
    - First Party property damage – may apply to damage to or loss of use of real or personal property as a result of viral contamination, if not otherwise excluded, or inability to sell product "damaged" by virus
    - Liability policies (CGL, D&O and E&O) – cover various types of claims against the company and/or its directors and officers; depending on the nature of the company's business, it may be prone to liability claims that arise from the response to the virus
    - Event Cancellation; Travel or Trip Cancellation; covers losses from having to cancel events or travel; policies must be carefully reviewed for trigger and for infectious disease and other exclusions
    - Specialized Policies or Coverage Extensions – communicable or infectious disease coverage, brand protection, adverse media, or reputation coverage in place for some businesses
- For all types of coverages it is critical to review the timing deadlines and provisions for notice and other procedures to ensure that potential coverage is not compromised by a failure to follow required procedures.

Financial Reporting and Disclosures:

- The outbreak has occurred while many companies have been releasing earnings and finalizing their annual reports. The SEC and PCAOB issued a joint statement regarding, among other things, the effects of Coronavirus on financial reporting.
    - The joint statement emphasized that, while the effects of Coronavirus on a particular company may be difficult to assess or predict, information regarding the company's plan and response to the outbreak could be material to an investment decision and may need to be disclosed. Companies were urged to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements.
    - To the extent companies are filing annual or quarterly reports, companies should evaluate the current and potential effect of the outbreak on their business operations and work with internal and external counsel to consider appropriate updates to risk factors, MD&A and subsequent event disclosure.

    - In addition, companies and, if applicable, their investment advisers should review their and their vendors' business continuity and disaster recovery plans, which would include pandemic procedures and plans.

- The SEC also has publicly stated it is monitoring, and, to the extent appropriate, will provide guidance and other assistance regarding, disclosures related to the current and potential effects of Coronavirus.
    - Companies that are, or plan to be, active in the capital markets will need to continue to review the situation and their disclosures in the context of their capital raising activities. It will be especially important for companies to work closely with their underwriters and deal teams to plan ahead for any potential offerings, understand when the window for transactions might be available, and be prepared with contingency financing plans to the extent the market for deals is unavailable.

Communicating with Investors:

- As companies engage with their investors, both at investor presentations and conferences, and in their one-on-one conversations, they should be prepared to address the effect the Coronavirus outbreak has had and might have on their business. Given the dynamic nature of the situation, companies should continue to evaluate whether public disclosures remain sufficient to address these concerns and, to the extent additional disclosure is required, we would remind companies to consider and comply with their obligation to make that disclosure.

Accessing Trading Windows:

- To the extent a company has a trading window open, companies will need to continually evaluate whether it is necessary to close their trading windows as the situation progresses and the potential that material non-public information about the effect of the Coronavirus outbreak on the company and its business becomes available to management.

Finance Documents - Breach and/or Default:

- Identify the potential consequences of a breach and/or default.
- Borrowers must actively evaluate the impact any such breach or default may have on liquidity and affirmatively undertake contingency planning initiatives to extend runway and minimize disruption.
- Similarly, lenders must conduct an ongoing review of their portfolio to identify which credits may suffer value degradation or covenant breaches and/or defaults

and be prepared to manage those relationships. The volatility in trading prices also may create an opportunity for buyers to acquire securities at an attractive discount.

Regulatory Issues:

- Monitor applicable federal, state and local public health department guidelines and regulatory requirements, as well as advisories from governments and regulators.

It is also important to remember that companies with multiple office locations should seek to create a consistent position/message (at least in the same jurisdiction) to avoid being perceived by counterparties as taking contradictory positions or actions.

Fraud:

- Global crises, such as Coronavirus, invariably spawn a host of business ventures aimed at addressing various newly-created needs.
- As a result of Coronavirus, there predictably will be many actual and/or suspected instances of fraudulent conduct associated with outbreak-related initiatives.
- Before deciding to participate – whether as a principal, investor or customer – in any business venture associated with Coronavirus, great care should be taken to ascertain not only the venture's legitimacy but also the absence of any arguable misrepresentation.

Workplace Considerations

Policies:

- Review your workplace policies to consider what measures may be necessary to protect employees from the current outbreak:
    - Travel policies – consider alternatives to work-related travel to affected areas, and consult with counsel regarding other potential measures to implement around business and personal travel
    - Review/prepare policies for operations for multiple scenarios and locations
    - Business continuity plans – review policies to prepare for closures in offices and facilities; confirm remote access to systems and consider stress testing
    - Identify critical functions that cannot be performed remotely and devise solutions to perform those functions

Communication with Employees:

- Avoid alarmist or speculative language, and stick to providing factual information based on official guidance.

CDC Recommendations:

- Review recommendations to determine best course of action to address the possibility of an outbreak that may impact the workplace:
  - Evacuation plans
  - Employee and government communication in the event of possible exposure
  - Providing protective equipment if warranted and consistent with OSHA guidance

These, and other issues for employers to consider as Coronavirus' impact on the workplace continues to develop, are discussed in greater detail in our blog post, *Coronavirus and the Workplace: What Employers Need To Know*.

The situation is dynamic and continues to change constantly so we will continue to update and add more information.

Related Professionals

- **Evandro C. Gigante**
  Partner
- **Jeffrey A. Horwitz**
  Partner
- **Vincent Indelicato**
  Partner
- **Mary B. Kuusisto**
  Partner
- **Jordan B. Leader**
  Senior Counsel
- **Bradley I. Ruskin**
  Partner
- **Yuval Tal**
  Partner