



Commercial and Corporate Considerations

As we see the increasing number of employees being asked or required to work from home and the cancellation of numerous events, we have been working with our clients to address how they manage the myriad of legal issues presented by these circumstances. Beyond just advising our clients to read their contracts, we are specifically advising them with respect to these topics:

- *Force majeure clauses:* Those clauses with the funny name have taken on new significance. These provisions may provide relief when the failure to perform arises due to circumstances beyond your (or the other party's) control. When reading these clauses, pay particular attention to any pre-conditions for invoking these clauses (e.g., does a state of emergency need to be declared) and to any technical requirements (e.g., is notice to the other party required; when are you required to recommence performance).
- *Material Adverse Effect/Material Adverse Change clauses:* These provisions are common in merger and acquisition agreements, but may also appear in other agreements. Whether there has been a MAE or MAC will depend on the specific definition of the term used in the agreement and any specific exceptions thereto (e.g., have general economic conditions, events affecting national securities markets generally, or force majeure events been carved out).
- *Insurance requirements:* Does the agreement require you, or the other party, to have insurance in place that may cover a disruption in performance? If so, what are the terms of the policies and who is an insured thereunder?
- *Disaster recovery requirements:* Does the agreement require the parties to have disaster recovery plans in place? You should review your own disaster recovery plan (if you haven't done so already) and consider requesting a copy of the other party's plan, if you do not have a copy. Implement those policies to the extent applicable to the circumstances.
- *Non-contractual requirements:* In addition to the terms of your agreements, there may be non-contractual requirements that impact how you adjust your operations for current events. Those non-contractual requirements may include:
 - *Regulatory requirements:* Regulatory requirements may impact your ability to adjust how you conduct your business. For example, if you are in a regulated industry, are your employees permitted to perform certain regulated activities from a location other than your primary place of business? If so, are there specific requirements that must be in place to permit remote operations (e.g., security requirements)?
 - *Board and shareholder meetings:* If you are considering remote meetings, you should determine any requirements of applicable law or your company's governance

documents that may affect how such meetings are conducted. Note that not all state laws are the same, e.g. while some states require only that remote participants be able to hear or read the proceedings, others require more broadly that participants be able to communicate. You will likely also need to have a mechanism for confirming that those participating and/or voting are directors or shareholders entitled to participate and/or vote. It is important to note that many state statutes provide that the failure to hold an annual shareholders' meeting will not invalidate corporate actions, which may mitigate the risks associated with the failure to hold an annual meeting.

- *Disclosures to Shareholders:* Public companies, in particular, need to evaluate whether disclosures to shareholders are needed with respect to current events. Companies should consider whether a current disclosure is needed, or whether later disclosures will be sufficient. The nature of those disclosures (e.g., risk factors, etc.) will also need to be evaluated carefully.

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