



## Q&A from COVID-19 Legal Implications Webinar on 3/13/20

Link to Webinar [here](#). Please note you will be required to register to access.

*Please note that this information is current as of 3/16/20, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by [CDC and local officials].*

For further questions, please reach out to Benesch's COVID-19 Task Force. We amalgamated the questions so they could be useful to as many of our clients as possible. As stated earlier, these answers are subject to change and to the rapidly evolving legal landscape that is now developing.

### Labor & Employment Questions

*Q. How will unemployment be handled for hourly employees? Will they lose eligibility if they receive any pay from their employer?*

A. This is a state-specific issue, and the answer at this moment is now fluid depending on how states choose to address the crisis. Generally, unemployment is only available to an employee to the extent they are unable to receive their normal compensation.

*Q. What is the best practice for handling employee attendance when schools are closed?*

A. At present, there is no federal requirement that leave be provided for child care (that will change for employers with fewer than 500 employees if the Senate passes the Families First Act, which was passed by the House over the weekend). A few states, including California, do have specific provisions providing for limited protected leave. Notwithstanding, employers are generally working to be flexible to the extent possible. Alternative schedules and/or temporary adjustments to leave and attendance policies are common approaches. Remote working schedules are also typical. We recommend being explicit that any such changes are due to current events and subject to change, so as not to create an ongoing expectations.

*Q. In the event we have an employee returning from personal travel to Europe. Should a request be made for them to remain at home for 14 days?*

A. There is no absolute requirement that such a request be made. However, the request can be made, and given present circumstances, would be reasonable to do so if business conditions allow.

*Q. If you send an employee who is exhibiting symptoms at home, do you have to provide paid leave even if they have exhausted their own PTO/leave balances?*

A. At present, there is no federal requirement that paid leave be provided in this circumstance. However, that will change for employers with fewer than 500 employees if the Senate passes the Families First Act, which was passed by the House over the weekend. Additionally, some states and locations have paid sick leave laws, which could apply here.

*Q. If the federal government implements a paid leave, would it be applied retroactively to cover compensation missed, especially for hourly?*

A. The current legislation (which is not yet law) has no retroactive application.

*Q. What about banning travel?*

A. Many employers are starting to limit or ban travel for work. Banning personal travel is a bit more complicated and a review of your employment policies for consideration of quarantine, or implementation of a policy regarding work after travel to those countries designated as Level 3 by the CDC should be considered.

### Healthcare Questions

*Q. We have a large number third party contractors entering our facility daily. Are we permitted to conduct health checks (e.g., checking for fever) for individual contractors upon entry and denying entry to those individuals with a fever?*

A. Fever checks do not always catch all possible carriers of COVID-19 and if you are not a healthcare facility, you may not be prepared to handle the collection of such information. Gathering general information regarding the 4 areas: 1) are you experiencing COVID-19 symptoms of fever, cough, shortness of breath, 2) have you been with anyone with a COVID-19 diagnosis in the past 14 days, 3) have you traveled to a country with a Level of 3 or Level 4 travel advisory, or 4) whether there is community-spread in the place the person has been in the past 2 weeks (county diagnosis of COVID-19)? Your company will have to make decisions about how to handle answers in the affirmative, such as maintaining a separate conference room with teleconference meeting availability, postponing the visit, arranging meetings via the web or simply turning the guest away until a quarantine period has passed. Feel free to follow up with any further questions.

*Q. Are we legally able to ask employees to disclose if someone in their family has contracted it? I was not sure with HIPAA regulations.*

A. This is not directly governed by HIPAA and policy can dictate reporting and staying remote to ensure a safe workplace.

*Q. We are a care center with minimal nursing staff - can we require nurses to assist in a facility close by if the need arises due to nurse illness?*

A. We are seeing such needs be coordinated with local departments of health.

*Q. What is the proper method for health care employees or employees generally to screen personnel?*

A. Gathering general information regarding these 4 areas and sending the employee to occupational health if any of the answers are in the affirmative: 1) are you experiencing COVID-19 symptoms of fever, cough, shortness of breath, 2) have you been with anyone with a COVID-19 diagnosis in the past 14 days, 3) have you traveled to a country with a Level of 3 or Level 4 travel advisory, or 4) whether there is community-spread in the place the person has been in the past 2 weeks (county diagnosis of COVID-19)?

*Q. Can we require associates that call off sick with flu like symptoms to provide a doctor release to return to work? Getting doc appts will be difficult and increases risk of exposure, so this is tricky...*

A. Officials are generally encouraging that this practice be avoided to ensure additional strains are not put on providers at this time.

#### Transportation & Logistics/Supply Chain Questions

*Q. Drivers are being asked to sign waivers at food-grade shipping and receiving facilities stating that they are not sick or have not tested positive for COVID-19. What is the potential liability to the carrier relevant to his/her answers to the questionnaires?*

A. The risk to all parties involved is that there could be a potential for adulteration or a claim of some other harm to those food stuffs. If there ever was indeed a compensable harm, then that food services company could conceivably bear some liability and may seek to recover from its suppliers and service providers. This is a very fact specific question, but in short the requirement to create any form of contemporaneous document may have some practical impact on which party bears liability depending upon the precise circumstances.

*Q. What can drayage service providers do to avoid incurring charges from having to store containers that cannot be returned with third parties?*

A. We are likewise hearing of the extreme surplus in international shipping containers particularly on the West Coast. The backhaul trade from the United States to China has suffered due to the coronavirus impact. This imbalance of supply and demand is exacerbated by terminal closures. Precisely which party suffers the expense of late return charges and similar fees associated with handling the glut of shipping containers is dependent on applicable terms or contract, defense available under applicable law, as well as the strength of relationships and relative bargaining power. Our team is ready to examine the particular facts of these challenges and assess viable strategies for mitigating financial exposure.

## Construction Questions

*Q. Do you think Force Majeure will be withheld as a credible defense in case of contract delay or will courts identify Covid-19 as "predictable" and therefore Force Majeure is not a reasonable defense?*

A. We do not believe that courts will hold that COVID-19 is a "predictable " event especially given its unparalleled broad impact. The key item then becomes what contractual clause exists in the governing contract. If there is a strict force majeure provision, the contractor's recovery may likely be limited to an extension of time without an avenue to recover additional compensation for delay damages. In the absence of the aforementioned clause, a changed conditions claim demanding additional compensation becomes far more tenable.

## Data Security and Privacy Questions

*Q. What issues are arising in the data security and privacy area?*

A. The most recent issues concern criminals who seek to take advantage of the COVID-19 crisis. We have seen examples of phishing scams and other malware attacks arising from this crisis. For example, hackers are creating websites with seemingly important COVID-19 information, or websites at which they are trying to sell products to consumers, which contain malware, viruses and other hacking tools. Employees should be instructed to be increasingly vigilant during this time for communications that could be phishing attacks and to report any suspect emails and other communications to your IT staff immediately. If there is any doubt about the validity of an email or attachment, employees should be instructed NOT to open the email or attachment until it has been scanned and screened appropriately.

*Q. What should we be doing about our data security and privacy compliance efforts under CCPA and other laws, rules and regulations?*

A. These efforts must continue until we receive notice that compliance deadlines have been postponed. Currently, neither federal nor state governments have issued guidance abating or postponing data security and privacy compliance obligations.

*Q. What happens if we suffer a data breach during this time when our staff is working remotely and focused on other important concerns?*

A. Take steps to develop an internal action plan if one has not already been created and implemented. Also, ensure that you have ready access to outside professionals, both technical professionals and legal professionals, whose operations are up and running and stand ready to assist. Make sure that you have implemented effective backups and backup systems so that a potentially crippling attack can be ameliorated and your business can continue to operate in the face of a malware attack; and review your contracts with third party service providers and processors to ensure that they have done the same including reviewing all applicable service level agreements and review all force majeure clauses to ensure that you understand the

impact on your business of a force majeure event affecting your key service providers. Finally, engage a reputable network and endpoint monitoring firm to implement a network and endpoint monitoring program which will provide advance warning of data security and privacy attacks that could impact your organization.