

# Current business trends to keep an eye on in the age of COVID-19

## Margo's Master Plan

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As the distribution of COVID-19 vaccines accelerates around the country, there is reason for optimism in 2021. As more of the population receives these vaccines, a life that resembles what we know as “normal” will return, albeit at a slower pace.

Still, business leaders must stay ready for anything in the coming months. There will be a profound impact on many businesses with employees working virtually, employees easing back into workspaces, along with the continuing spread of COVID-19 and its changing variants. Critical questions relating to data privacy, employment policies, and governance issues must be addressed, even as the pandemic continues to upend many of the trends that we expected to see play out a year ago.

In the area of data privacy, we have already seen a handful of states and the Supreme Court take significant steps to restrict and clarify the use of personal data. For instance, last month Virginia passed the comprehensive Virginia Consumer Data Protection Act into law. Florida, New York and Washington state legislatures are similarly pushing for expanded or new data protection laws.

There are also a number of proposed federal law changes to watch for in 2021. The Safe DATA Act (also known as the Data Accountability and Transparency Act of 2020) attempts to circumvent the “consent” system by putting limits on the collection, use and sharing of American consumers’ personal data. Additionally, there are proposed changes on the table for the Health Insurance Portability and Accountability Act that call for changes to additional access, care coordination use, and interoperability.

In contrast to this push for transparency and consumer rights, the Telephone Consumer Protection Act’s scope was narrowed by the Supreme Court just last week in a business-friendly ruling. Meanwhile, in Illinois, Biometric Information Privacy Act class-action lawsuits were on the rise; however, that trend may end if lawmakers succeed in their push to repeal BIPA’s teeth, another business-friendly move. For now, companies that use biometric data such as fingerprints and facial recognition must ensure that consent and other requirements are met if doing business in or have employees in Illinois.

And, as always, ransomware and other security threats to data security will continue to be top-of-mind in 2021. Health care entities and social media around the country will continue to be targeted and exploited. Likewise, financial organizations should also prepare for more attacks on the high-value data they hold.

eventually, vaccination in the workplace.

As the year moves along and the vaccine rollout continues, the legal questions around vaccinations might get even more complex. For example, employers will have to navigate issues relating to the Americans with Disabilities Act and health information privacy rules. Guidance from the Equal Employment Opportunity Commission makes clear that the vaccine is not a medical exam; however, asking employees to divulge any medical conditions relating to the vaccine does implicate the ADA and could possibly run afoul of the Genetic Information Nondiscrimination Act. If a company does intend to implement a policy of vaccinations for employees, it is highly recommended that the company employ a third-party to ask the prescreening questions and administer the vaccines. Additionally, a company that mandates vaccines should be ready to engage in the interactive process with employees who refuse the vaccine based on disabilities or sincerely held religious beliefs.

Businesses should also be aware of some developing trends in securities and corporate governance matters. The Securities and Exchange Commission proved in 2020 that COVID-19 does not earn companies a free pass from securities actions. Despite the pandemic, the SEC remained very active last year on the enforcement front, with 715 enforcement actions in 2020. It also collected a record \$4.68 billion in disgorgement and penalties, and a record \$175 million was awarded to whistleblowers.

Further, the SEC announced in December 2020 a COVID-19-related enforcement action against a public company that alleged misleading disclosures about the financial impact of the pandemic on the company's operations and financial condition — the first instance of allegations focused on the disclosure of COVID-19's financial impact. Shareholders also brought actions in 2020, alleging companies either concealed COVID-19 risks altogether or provided insufficient information in their disclosures. So, when preparing disclosures in 2021, public companies should continue to keep in mind the guidance that was given at the outset of the pandemic, such as reviewing and updating risk factors and providing fulsome disclosure around the impact of COVID-19 on financial conditions and results, while also incorporating the impact of COVID-19 on executive compensation.

Finally, environmental, social, and governance, or ESG, matters continue to be a hot topic for both public and private companies in 2020 and into 2021. Societal forces and systematic concerns ranging from climate change to racial discrimination and inequity, to the health crisis, to the attack on the U.S. Capitol on Jan. 6 have kept ESG matters top of mind for institutional investors and the broader public. BlackRock's letter to CEOs in 2021 continued to underscore that ESG risks constitute investment risks and boards of directors and company management should continue to assess and oversee the risk that ESG issues may present to their businesses.

As we all came to understand so deeply last year, massive change can be fast and unexpected. Fortunately, last year also showed us that companies are capable of meeting the challenge of that change and quickly developing best practices for managing legal risks and minimizing legal conflicts.

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