

RESOURCES

COVID-19 Business Continuity Planning

Businesses of all sizes are being impacted by the coronavirus and more are feeling the impact every day as the ripple effects move throughout the global economy. Businesses need to evaluate their particular situation and create a continuity plan to continue operating in these rapidly changing times. Below is an outline of key areas to focus on and address to ensure your business can successfully ride out the storm.

Access to Capital: This is a critical area for many businesses to ensure employees are paid, payroll taxes are paid, bills are paid, and manufacturing and supply chain operations continue.

The government run Small Business Association (“SBA”) Loan program is actively working to provide additional capital to small businesses in need. As part of the Coronavirus Preparedness and Response Supplemental Appropriations Act (HR 6074), that passed into law on March 6, 2020, the coronavirus pandemic was deemed a “disaster” under the SBA’s Disaster Loan Program. Currently, qualifying small businesses in all 50 states are eligible to apply for these low-interest rate federal disaster loans. The loans are designed to assist small businesses suffering from “substantial economic injury” and may be used to pay existing fixed debt, payroll, accounts payable, and other bills that cannot be paid due to the ongoing crisis.

Loans can range in size up to \$2,000,000 with current interest rates at 3.75% (for small businesses) and 2.75% (for private nonprofits). Loan terms can be up to 30 years depending on the underlying circumstances. Additionally, the CARES Act that is currently moving through Congress provides several additional avenues for businesses to receive government loans with proposed benefits like no collateral requirement, no personal guaranty requirement and principal forgiveness.

Employment: There is no doubt COVID-19 is having a profound impact on employment relationships. As businesses work through these challenging times, below are several key employment related issues businesses need to address as part of their business continuity planning.

Warn Act Compliance: The Warn Act applies to employers with over 100 employees and is designed to ensure 60 days’ advance notice in cases of qualified plant closings and mass layoffs. If your business is considering shutting down operations and furloughing or laying off employees, then consideration must be given to Warn Act compliance.

New Federal Sick Leave and FMLA Rules: The Families First Coronavirus Response Act (HR 6201) was signed into law on March 18, 2020 and becomes effective April 2, 2020. The new Act amends the Family and Medical Leave Act to set up a temporary emergency paid leave program through December 31, 2020. The Act requires private employers with fewer than 500 workers to provide up to 12 weeks of leave for employees who are unable to work or telework due to the need to take care of a child. The Act also requires employers with fewer than 500 employees to establish paid sick leave for employees who are unable to work or telework due to circumstances arising from the coronavirus. Under the Act, full-time employees can receive up to 80 hours of paid sick leave. To help alleviate some of the costs of these new requirements, the Act provides payroll tax credits for employers required to provide emergency paid sick leave or family medical leave under the bill.

Unemployment: North Carolina Governor Roy Cooper has issued Executive Order 118, expanding unemployment benefits for North Carolina employees effective March 17, 2020. Unemployment benefits are now available for employees who, as a result of COVID-19, are separated from employment, have had their hours of employment reduced, or are prevented from working due to a medical condition caused by COVID-19 or due to communicable disease control measures. Employers’ accounts will not be charged for payments made due to COVID-19 claims,

and as long as the State of Emergency remains in effect, the following requirements for unemployment benefits will be waived:

1. the one-week waiting period;
2. the “able to work” and “available to work” requirements;
3. the work search requirements;
4. the actively seeking work requirements; and
5. the “lack of work” requirements.

At the federal level, Senator Chuck Schumer announced Monday afternoon that part of the Federal Government stimulus package looks to expand unemployment insurance to grapple with a surge in claims. While the details of the new bill are not available yet, the bill proposes to significantly increase the weekly maximum for unemployment payments. Moreover, this money would be in addition to what states pay as a base unemployment salary.

For a detailed overview of the new federal sick leave, FMLA and unemployment rules, see the client alert prepared by our attorneys J. Scott Dillon and Kenneth R. Keller by clicking here: [Coronavirus Related Leave Issues](#).

Workplace Liability: Under the Occupational Safety and Health Act, employers have an obligation to provide a safe working environment for employees. Issues can arise in several different forms, from risks associated with exposure to employees as well as handling a situation where an employee has a confirmed case of coronavirus. Employers need to put in place appropriate provisions to alert coworkers of potential exposure risks, to reduce the risk of exposure, as well as maintain proper policies to ensure employers do not overreach their boundaries by violating HIPAA regulations and Wage and Hour provisions.

Inevitably, there may be some employees who refuse to report to work due to fear of potential exposure. Employers will need to determine whether it is appropriate to discipline such individuals or handle such absences under the employer’s current sick leave, short-term disability, FMLA, family leave, vacation or paid time off policies. Employers also need to consider whether they are legally obligated to or will choose to continue paying employees, if they close offices and employees will not be working remotely. All of these issues implicate North Carolina’s Wage and Hour Act.

Insurance Policies/Claims: As business operations are interrupted and halted, inevitably companies will look to their insurance policies for reimbursement of lost revenues. Many businesses have stop/loss coverage or business interruption coverage to address lost revenues due to the business’s inability to carryout normal operations. It will take a careful read of these policies to determine if the current pandemic is a qualifying event under the policy. Many of these policies are essentially property insurance policies that address interruptions to operations resulting from a loss of a building due to fire, hurricane, or some other physical destruction of the property. Under these policies it is likely claims resulting from COVID-19 would not be covered.

If employees are exposed to the virus at work, another area of concern will be workers compensation claims. Again, it will take a careful read of the policy document to determine if the claim is covered.

Loan Document Review: Businesses with interruptions to their operations and cash flow will inevitably find themselves having difficulty making current loan payments. It will be important to review loan documents to understand what loan covenants are in place and what actions trigger a default under the loan. For example, many loans have a covenant that requires the borrower to make a good faith effort to continue the operation of the business, or requires the borrower to maintain a certain debt to income ratio. In addition, businesses with multiple loans with different banks likely have cross default provisions that trigger default under one loan if the borrower is in default under another loan. Thus, a business can be in compliance with all of its loans, but have a single event of default under one loan, and now all of a sudden the business is in default under multiple loans. As a result of this domino effect, a business can find itself in a very difficult position quickly.

Fortunately, the government stimulus bills seem to be keyed in on these concerns and are rapidly working to help businesses get access to capital to avoid a doomsday scenario (see Access to Capital Section above). Nevertheless, a business cannot rely on the unique circumstances we are facing as an excuse for not complying with loan covenants.

Contract Document Review: As with loan agreements, businesses need to actively review essential contracts to make sure the company is in compliance with all obligations under the agreement. Many contracts have provisions that require the company to make a diligent effort to continue operations, or produce a certain number of products per month, or maintain a minimum level of inventory, etc. Undoubtedly businesses will have difficulty staying in compliance with these provisions, and then will have to look to other provisions in the contract to assess the potential exposure to damages or to find a way out of performance obligations.

One such provision is the “force majeure” provision found in many contracts. Force majeure provisions provide for the postponement or suspension of performance of certain obligations because an unforeseeable circumstance beyond the control of a party prevents or delays that party’s performance. Typically, a party looks to force majeure protection if the party is unable to perform material or time sensitive obligations, such as the obligation to continuously operate the business.

Contracts differ substantially, but force majeure clauses typically offer protection from a litany of events like acts of God (i.e., tornadoes, floods and hurricanes), unavailability of utility service, action by governmental bodies, riots, war, terrorism (post 9/11), labor strikes and embargos resulting in the stoppage of delivery of goods and services. As a result of the current pandemic, an increasing number of factors are unquestionably blocking and disrupting commerce, including, notably, governmental action, disruptions in labor forces and interruptions in supply chains, resulting in significant downstream effects.

Although contracts might not expressly reference pandemics, epidemics or widespread impacts from communicable diseases as force majeure events, it seems reasonable that force majeure provisions that mention “unforeseeable events” or “events or circumstances beyond either party’s control” may cover disruption in performance caused by COVID-19. Again, it will take a careful read of the contract to determine whether the current pandemic is contemplated under the force majeure provisions.

Lease Obligations: Not only will reductions in cash flows impact businesses ability to make rent payments, many commercial leases, like the contracts mentioned above, have covenants that obligate the tenant to make a good faith effort to continue operations or to operate for a minimum number of business hours and/or to operate “fully staffed.” Leases also have covenants that obligate the tenant to continue to occupy the premises or state that “abandonment” of the premises is a default.

Businesses should review their leases to understand what the various staffing and operating requirements are. Even if a lease is silent on operating requirements, prudent businesses planning on closing offices for indefinite or extended periods should communicate with the landlord about their intentions. Inevitably, businesses will need to address these issues with landlords as businesses cease operations and vacate the premises, at least temporarily. Businesses need to actively engage with their landlord to understand, plan for and document appropriate modifications of lease requirements regarding operations.

Tax Return Filings: If all of the above is not enough to worry about, it is tax season. Fortunately, Treasury Secretary Mnuchin has moved the filing date for calendar year 2019 tax returns (C-corporations, individuals, trusts, and estates) from 4/15/2020 to 7/15/2020. North Carolina has followed suit and moved the deadline to 7/15/2020, except the NCDOR cannot waive interest penalties under North Carolina law, so it will be important to make any payments owed by April 15th to avoid interest accruing.

Conclusion: These are unprecedented and rapidly changing times. Businesses need to proactively review material contracts, loan agreements, leases and insurance policies to gain a complete understanding of their obligations and areas of exposure. Once those exposure areas have been identified, businesses should proactively and openly communicate with their customers, vendors, suppliers, lenders, insurance companies and

landlords to coordinate efforts to mitigate the potential impact from the COVID-19 pandemic. All parties are being adversely impacted by the spread of the virus, so this is not a time for the parties to engage in gamesmanship to try to gain an advantage over one another when no one ever anticipated these circumstances. **If your business is in doubt over its position or what your customers, vendors, suppliers lenders, etc. may or may not do or be able to do, now is the time to communicate.**

Carruthers & Roth, P.A.
(336) 379-8651
235 North Edgeworth Street
P.O. Box 540 (27402)
Greensboro, NC 27401