

## COVID-19: Helping Clients Navigate Key Legal and Business Considerations

The disruption to businesses, the global economy and everyday life caused by the outbreak and rapid spread of COVID-19 has forced businesses to consider unforeseen circumstances and ask hard questions about how to do business during a global pandemic. The questions we have highlighted below are considerations as we all begin to navigate these uncertainties. To discuss the implications for your organization, please contact your Calfee attorney or any of the individuals included here.

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#### PRACTICE AREA APPLICABILITY

- Corporate counseling to help clients understand the available Coronavirus Aid, Relief, and Economic Security (CARES) Act/stimulus package options.
- Public company counseling.

#### CLIENT CONSIDERATIONS

- Does the company qualify for the Economic Injury Disaster Loan (EIDL) program?
- Does the company qualify for the Paycheck Protection Program (PPP) loan?
- Do the Small Business Administration (SBA) "affiliation" rules apply for purposes of company employee headcount for determining PPP loan eligibility?
- Has the company reviewed their material contracts for *force majeure* and other related COVID-19 impacts?
- What tax benefits are available to the company as a result of the stimulus package?
- Disclosure considerations, including:
  - Should the company update or withdraw earnings guidance?
  - Should the company disclose an executive's COVID-19 diagnosis?
  - What updates to risk factors and management discussion and analysis (MD&A) in periodic reports are needed?
    - Specific risks, including revenue sources, distribution capabilities, employees, manufacturing facilities and supply chains.
    - Known trends and uncertainties expected to impact revenues, income, liquidity and capital resources.
  - Are investors or analysts contacting the company directly for updates? Avoid selective disclosure.
  - Are insiders or the company trading in company securities? Consider whether public disclosure reflects all material information and whether trading windows should be open or closed.
  - Have there been any material drawdowns on credit facilities?
  - Are material impairment charges anticipated?
  - Will credit facilities require amendment?
  - Is the company at risk of covenant defaults?
  - Are new financing arrangements (including government assistance) being sought?
- Is the company's annual meeting coming up? Consider permissibility and advisability of a virtual annual meeting.
- Is the company able to timely make required SEC filings? SEC has authorized filing period extensions.
- Is the Board actively overseeing matters?
  - Assessing business risks, reviewing disclosure, evaluating liquidity, assessing vulnerabilities, considering opportunities.
  - Emergency succession planning in the event of key employee illness.
  - Board continuity planning in the event of illness of multiple directors.
  - ESG considerations (human capital management, employee and customer health and safety issues).
- Has directors and officers (D&O) insurance and other insurance (e.g., business interruption) been reviewed?

## COVID-19: Helping Clients Navigate Key Legal and Business Considerations

BUSINESS RESTRUCTURING AND INSOLVENCY	
<p><u>Gus Kallergis</u>, Co-Chair <a href="mailto:gkallergis@calfee.com">gkallergis@calfee.com</a> 216.622.8610</p> <p><u>H. Jeffrey Schwartz</u>, Co-Chair <a href="mailto:jschwartz@calfee.com">jschwartz@calfee.com</a> 216.622.8515</p>	<p><b>PRACTICE AREA APPLICABILITY</b></p> <ul style="list-style-type: none"> <li>• Contingency planning for the impact of COVID-19 related shutdowns and business disruption.</li> <li>• CARES Act/stimulus package as a source of funding to address liquidity shortfalls and corporate distress.</li> </ul> <p><b>CLIENT CONSIDERATIONS</b></p> <ul style="list-style-type: none"> <li>• Has the company/organization identified and assembled a restructuring response team?</li> <li>• What is the organization's cash conservation and liquidity preservation strategy?</li> <li>• How are obligations and creditors prioritized to avoid liquidity crisis?</li> <li>• Has the company considered ways to buy time in order to work through multiple layers of issues and options?</li> <li>• What opportunities exist to improve business operations?</li> <li>• Has the company considered evaluating restructuring alternatives and exit options to preserve and maximize value?</li> </ul>

COMMERCIAL AND PUBLIC FINANCE	
<p><u>Karl S. Beus</u>, Chair <a href="mailto:kbeus@calfee.com">kbeus@calfee.com</a> 216.622.8804</p> <p><u>Laura L. Hult</u>, Partner <a href="mailto:lhult@calfee.com">lhult@calfee.com</a> 614.621.7005</p>	<p><b>PRACTICE AREA APPLICABILITY</b></p> <ul style="list-style-type: none"> <li>• Stimulus package (state/federal) counseling.</li> <li>• Financing changes for corporate and private equity clients: <ul style="list-style-type: none"> <li>• Existing/new credit facilities;</li> <li>• ISDA/Swap arrangements;</li> <li>• Treasury management considerations and tools;</li> <li>• Workout considerations.</li> </ul> </li> </ul> <p><b>CLIENT CONSIDERATIONS</b></p> <p><b>Stimulus Packages:</b></p> <ul style="list-style-type: none"> <li>• Which financing related (federal or state) stimulus packages is the company eligible for? <ul style="list-style-type: none"> <li>• Can the company apply for more than one program?</li> <li>• What is the interplay between the various programs?</li> <li>• How does the company apply for (including what materials do they need to apply) and calculate the funding available under such programs?</li> </ul> </li> <li>• How will the financing provided under a stimulus package impact the company's existing financing arrangements?</li> </ul> <p><b>Existing Financing Arrangements:</b></p> <ul style="list-style-type: none"> <li>• Should the company draw on their revolver (and other liquidity concern-based questions)?</li> <li>• Are there implications of putting more capital into the company?</li> <li>• Are there other amendments or waivers the company should consider or be requesting under their existing facility? <ul style="list-style-type: none"> <li>• Waivers or modifications based on potential covenant defaults or material changes to the business caused by COVID-19.</li> <li>• LIBOR Floor and other pricing considerations.</li> </ul> </li> <li>• Does the company need to be concerned about Material Adverse Change representations or defaults?</li> </ul>

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### EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

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#### PRACTICE AREA APPLICABILITY

- CARES Act counseling as it relates to retirement, healthcare, leave and other benefit plan implications for employers.
- Families First Act counseling as it relates to retirement, healthcare, leave and other benefit plan implications for employers.
- Executive Compensation Arrangements.

#### CLIENT CONSIDERATIONS

- Should employers that sponsor retirement plans amend their plans to permit coronavirus distributions, and what could that entail?
  - Assessing plan “leakage?”
  - What are the tax, withholding and direct rollover implications of coronavirus distributions?
  - What types of plans may permit coronavirus distributions?
  - If an employer permits coronavirus distributions, must it permit repayment of the contributions to its plan?
- What new rules apply to retirement plan loans to participants impacted by the coronavirus?
  - Should employers increase the limits on such plan loans?
  - Must plan outstanding loan payments for 2020 be waived for such participants?
- How do waivers of required minimum distributions (RMDs) for 2020 affect plan administration?
- Does the client offer a defined benefit pension plan? If so, are they eligible to take advantage of relief provisions (e.g., delayed required minimum contributions, use of last year's adjusted funding attainment percentage in determining applicability of benefit restrictions, etc.)?
- How are paid leave requirements impacted, and is any financial assistance provided for the paid leave or similar costs?
  - Does the client have fewer than 500 employees?
  - Are they eligible for reimbursement, including via offset payroll taxes, refunds and/or credits?
- What changes must an employer make to its group health plan?
  - Requirements to cover COVID-19 diagnosis tests?
  - Should the plan cover telehealth or other remote care services and how to structure cost sharing or deductibles?
  - Removal of prohibition on using health savings account (HAS), health reimbursement arrangement (HRA), and/or flexible spending account (FSA) funds to purchase over-the-counter medicines or drugs without a prescription?
  - Classification of menstrual products as medical expenses?
- How have fully insured health plans and stop-loss policies been affected by:
  - The Ohio Department of Insurance has prohibited health insurance carriers from terminating an employee's coverage due to a reduction in hours?
  - Health insurance carriers must provide employers with a 60-day deferral period to pay health insurance premiums?
  - Other states may have issued similar orders?
- Should employers modify their executive compensation arrangements in light of adverse business conditions? Any modifications or deferrals will need to comply with Section 409A of the Internal Revenue Code.

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### ESTATE AND SUCCESSION PLANNING AND ADMINISTRATION

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#### PRACTICE AREA APPLICABILITY

- Counseling clients on changes to tax filing deadlines, etc., and assisting clients in updating estate and trust documents.
- Business succession planning: Transitions of wealth at discounted values for depressed asset prices and closely held businesses.
- Utilizing private foundations to assist the charitable sector.
- Estate administration, trust administration and probate litigation: Assistance navigating the Ohio Supreme Court Tolling Order related to statutes of limitations and response deadlines.

#### CLIENT CONSIDERATIONS

- Are there opportunities for the client to take advantage of the unique estate plan gift conditions with low interest rates plus low asset values (e.g., Grantor Retained Annuity Trusts (GRATs), Sales to Intentionally Defective Grantor Trusts, Charitable Remainder Trusts and Intrafamily Loans)?
- Has the client expressed a desire to begin or expand their current charitable giving because of the COVID-19 crisis?
- Is the client aware of new filing deadlines for taxes and required probate court filings?
- Is the client (trustee/beneficiary) aware of various issues surrounding closing estate administrations and trust administrations during the Ohio Supreme Court Tolling period and the intersection with local court orders?
- What should the client do if there are probate litigation matters already before the Probate court? When is the next hearing? Is it by phone or Zoom or WebEx? Has the client give the Probate Court contact information (e.g. phone number)?
- What should the client do if a new matter needs to progress through the Probate Court during this COVID-19 period?

### GOVERNMENT RELATIONS AND LEGISLATION (Federal, State and Local)

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#### PRACTICE AREA APPLICABILITY

- Assisting companies and organizations in navigating the complexities of additional legislation and regulation as a result of the pandemic.
- Continuing to counsel and inform clients and advocate for them at the federal, state and local levels.

#### CLIENT CONSIDERATIONS

- Has the organization applied for any of the programs set up by the government, and/or are they in need of direct communication with government officials?

## COVID-19: Helping Clients Navigate Key Legal and Business Considerations

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#### PRACTICE AREA APPLICABILITY

- Helping organizations identify and assess potential coverage for losses sustained as a result of the COVID-19 pandemic, including for their business interruption losses.
- Helping guide organizations through the claims process, from compliance with insurance policy provisions addressing the timing and content of initial claim notices to helping them assess and respond to coverage positions taken by their insurance companies.
- Helping organizations identify and take advantage of mechanisms available to fund their losses as alternatives to traditional insurance coverage, whether via direct government payments or via specialized loss-assistance frameworks negotiated between governments and insurers.

#### CLIENT CONSIDERATIONS

- What types of current and future losses and liability exposures can be covered by insurance policies (including but not limited to business interruption losses)?
- Can any of the organization's insurance policies and coverages serve as potential sources of recovery?
- Does the organization need assistance in complying with all insurance claim notice provisions with respect to both timing and content requirements?
- Does the organization have a methodology to track all losses in a manner consistent with the coverages provided for by insurers?
- Does the organization wish to keep abreast of developments in the insurance coverage landscape and with respect to other potential sources of loss recovery, such as government interventions?

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#### PRACTICE AREA APPLICABILITY

- Providing guidance, notification and counseling to organizations related to the U.S. Patent and Trademark Office's (USPTO) extension of deadlines for trademarks and patents.
- The next phase of the federal stimulus package (CARES Act) is expected to provide assistance to technology organizations that support critical innovations; Calfee's Intellectual Property (IP) group and Government Relations group members are working together to provide guidance, notification and counseling on this potential issue.

#### CLIENT CONSIDERATIONS

- Has the company determined how to handle upcoming IP-related deadlines (e.g., USPTO, Patent Trial and Appeal Board (PTAB), foreign offices, sale and disclosure deadlines), including whether any extensions are available?
- Does the company have any thoughts on a next round of stimulus relief directed to technology, current/ongoing research and development (R&D), or IP?
- Are there opportunities for the company to take advantage of business slowdowns and/or remote work environment, for example, through the generation and protection of IP or clearance of new products in the pipeline?

## COVID-19: Helping Clients Navigate Key Legal and Business Considerations

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#### **PRACTICE AREA APPLICABILITY**

- Counseling employers as to the paid-leave requirements of Families First Coronavirus Response Act (FFCRA).
- Providing guidance to employers as to layoffs/furloughs, reduction in work hours and modified work schedules.
- Counseling employers faced with presumed positive COVID-19 employees in the workforce, isolation orders and related safety concerns.
- Assisting employers with compliance as to the federal plant closing/mass layoff law (Worker Adjustment and Retraining Notification (WARN) Act) and related state laws.
- Counseling employers as to possible accommodations of employees with disabilities under the Americans with Disabilities Act (ADA) and state law.
- Assisting employers with compliance with Centers for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA) guidelines.
- Counseling employers as to workers' compensation claims alleged to have arisen due to exposure to COVID-19 in the workplace.

#### **CLIENT CONSIDERATIONS**

- Calfee's Labor & Employment team is available to assist employers with all personnel actions being considered in regard to COVID-19, including:
  - Paid leave requirements;
  - Modification of work hours and/or schedules;
  - Permanent and/or temporary layoffs;
  - Workplace safety issues;
  - Compliance with all applicable federal, state and local laws.

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#### **PRACTICE AREA APPLICABILITY**

- Counseling organizations with active litigation on their options as courts close and state Supreme Courts change "tolling" or timing requirements for filing litigation-related documentation with court systems.
- Counseling organizations on various issues related to litigation avoidance strategies, compliance issues, etc., and any dispute resolution arising from COVID-19 circumstances, including:
  - Commercial litigation disputes, including disputes arising from cancellations of events, supply or rejection of goods, *force majeure* provisions, or premises-related claims;
  - Personal injury or constitutional claims related to quarantine or other governmental orders.
- Product liability claims arising from products allegedly not fulfilling representations as to effectiveness against the virus, or other claims of negligent design associated with use of products in isolation or quarantine circumstances.

#### **CLIENT CONSIDERATIONS**

- Does the organization understand the *force majeure* or impracticability language in their major contracts and how that language will apply to interruptions and losses due to COVID-19?
- Are the organization's products at risk of being used improperly in the context of the current public health crisis?
- Is the organization monitoring and documenting major losses for which another contracting party may bear the risk, so they can potentially seek recovery of those losses in the future?

## COVID-19: Helping Clients Navigate Key Legal and Business Considerations

### PRIVACY AND DATA SECURITY

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#### **PRACTICE AREA APPLICABILITY**

- Counseling organizations on their continued obligation to adhere to applicable privacy and data security regulations.
- Counseling employers on considerations for creating a secure home workspace for employees.
- Counseling organizations on data breach incident response and breach notification obligations.
- Counseling organizations on cyber insurance issues.

#### **CLIENT CONSIDERATIONS**

- Has the employer taken steps to ensure its employees are working from a secure home workspace?
- Has the organization reviewed and updated its company policies regarding data security, confidentiality and trade secrets?
- Have employees been provided with updated policies (or a reminder of existing policies) and appropriate training regarding security obligations and potential cyber threats (i.e., COVID-19 phishing scams or malware)?
- Has the organization sustained a data breach?
- Does the organization maintain appropriate cyber insurance in light of the increased cyber threat?
- Does the company conduct business in the State of California? Enforcement of the California Consumer Privacy Act (CCPA) will begin on July 1, 2020, will not be delayed in response to the COVID-19 crisis.

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#### **PRACTICE AREA APPLICABILITY**

- Counseling landlords and organizations that lease real property on obligations related to their leased property agreements, etc.

#### **CLIENT CONSIDERATIONS**

- Does the organization need assistance determining whether it has business interruption, rental loss or other insurance coverages that might be applicable to COVID-19 related losses – and, potentially, need help complying with policy requirements or negotiating with its insurer?
- Is the Ohio-based organization aware of Am. Sub. H.B. 197, which suspended statutory deadlines for filing eviction actions, and aware of the Ohio Supreme Court's March 27, 2020 order requiring courts to consider the Federal CARES Act and Am. Sub. H.B. 197 when determining whether to proceed on eviction actions?
- Is the organization aware of Ohio Governor DeWine's Executive Order 2020-08D (issued April 1, 2020), which is intended to provide a 90-day moratorium of relief to commercial tenants and landlords, while preserving landlords' and lenders' ability to obtain payments required under their respective agreements after the COVID-19 emergency is over?
- Has an organization with a portfolio of rental properties set up a direct means of communicating with tenants on the issues and difficulties they are experiencing, so that communications are current and problem-solving tools can be deployed in a timely and cooperative fashion?
- Has an organization that is a commercial tenant or a borrower opened up informed and direct lines of communication with their landlords or lenders regarding their business needs, such as, abatements, temporary standstills or moratoriums, extended terms or respreads of payments? If so, have these been properly documented, along with all agreed upon changes to underlying agreements whether permanent or temporary?

## COVID-19: Helping Clients Navigate Key Legal and Business Considerations

### CALFEE STRATEGIC SOLUTIONS

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\* These individuals are not licensed to practice law.

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