

COVID-19 NEWS OF INTEREST

Unprecedented Times Call for Unprecedented Measures

March 28, 2020

AUTHORS

Maria-Leticia Ossa Daza | David Mortlock | Jorge H. Kamine | Anna Martini G. Pereira

The continued proliferation and severity of COVID-19 has prompted U.S. local and state governments to adopt extraordinary shutdown measures to slow its spread (and flatten the curve). These measures include “stay at home” orders that require individuals to stay at home (exceptions are made for essential needs and critical jobs), and orders requiring non-critical infrastructure or non-life-sustaining businesses to shut down.

Since the outbreak began, the federal government has been announcing a variety of measures to limit the impact of the pandemic on businesses, employees and the economy in general. Such measures come in the form of financial relief packages, tax extensions and reduction in examination activities, including the \$2 trillion coronavirus relief bill, which the president has just signed into law.

We highlight below the legal developments and government responses stemming from the COVID-19 crisis and assess their impact on our clients’ businesses.

1. **Business Shutdowns.** Following a trend set by California and Pennsylvania, the majority of the states in the United States have now instituted workplace shutdowns in response to the COVID-19 outbreak. For states that have not yet issued a business shutdown, many highly-populated counties within that state have issued their own business shutdowns. We expect that within the coming weeks, most (if not all) states will have implemented some form of business shutdown, and foresee that Latin America will experience (and it is already experiencing) similar situations and challenges.
 - The orders generally exempt essential businesses from the shutdown. Naturally, states and counties have been providing different responses to “what constitutes an essential business.”

Unprecedented Times Call for Unprecedented Measures

- Pennsylvania has adopted a more stringent approach of only permitting “life sustaining” businesses to remain open. Other states, such as Louisiana, have taken a softer approach and only focused on closing recreational and entertainment businesses. Most states, however, have taken a middle-of-the-road approach of allowing only essential businesses to remain open, with the concept generally being defined based on the critical infrastructure guidelines provided by the federal government.
- Some orders allow businesses that are not *de facto* essential to voluntarily apply to be designated as “essential”. This is the case in New York and Connecticut.
- Any businesses that remain open must continue to practice social distancing and mitigating measures.
- From a practical standpoint, companies should carefully assess the nature of their businesses in an objective manner when deciding on how to respond to any such state-mandated shutdowns (in some Latin American jurisdictions, the central government has issued shutdown decisions superseding municipal and/or state orders). When operating under an exemption, having written materials on premises that explain why the business is essential may be helpful in the event of a government visit.

The Willkie team and our LATAMCOVID-19 Task Force has been on the forefront of this constantly developing area and is advising client business teams as to whether their businesses should remain open and, if so, how to conduct their operations in light of such shutdowns orders.

2. **Employment and Workplace.** Subject to certain exceptions, employers with fewer than 500 employees are required to provide mandated paid sick and family leaves for uses related to COVID-19 by no later than April 1, 2020. The paid leave requirements expire on December 31, 2020. The full cost of such paid leave will be offset by an employer tax credit of equal value. With the rapidly changing landscape, employers should be prepared for additional regulations on the subject and for additional protections by states and cities. While an employer’s main focus should be on compliance during these challenging times, employers should also update their written policies as soon as practicable.
3. **Cybersecurity Issues.** The massive shift to remote work has significant implications for cybersecurity and the risks that companies have to consider. First and foremost, in most instances, the pandemic does not excuse compliance with privacy laws. Second, the shift introduces new attack vectors for threat actors, such as unsecured home devices and networks, and the use of personal cloud storage accounts to save confidential information. Companies should take the appropriate steps to address these risks and continue to keep their workforce informed and alerted to potential scams.
4. **Tax.** The IRS and Treasury have provided relief for certain taxpayers by extending the deadline for both filing and paying U.S. federal income taxes from April 15, 2020 to July 15, 2020. Interest, penalties, and additions to tax with

Unprecedented Times Call for Unprecedented Measures

respect to such tax return filings and payment will begin to accrue on July 16, 2020. Many states have also followed suit by announcing similar extensions.

5. **Litigation and Contractual Obligations.** Given disruptions to supply chains, volatility of the global markets, factory closings, and other unforeseen circumstances due to the COVID-19 outbreak, the topics of force majeure in contracts as an excuse for non-performance and the availability of material adverse effect provisions as a closing condition in M&A transactions have taken center stage. These discussions will be to some extent different in a civil law context; however, in both systems, the equitable considerations will play a key role.
 - a. **Force Majeure:** Whether the COVID-19 outbreak constitutes a force majeure event under a particular contract will depend on (a) the express language of the contract, (b) the relationship between the outbreak and nonperformance, and (c) the applicable law governing the contract. This is a fact-specific inquiry that will turn on the particular reasons that the outbreak and its effects have inhibited or prevented performance, as well as the law of the particular jurisdiction. Non-performing parties should not rely too heavily on a force majeure provision, as such clauses tend to contain boilerplate language and are narrowly construed by U.S. courts.
 - b. **Material Adverse Effect:** Under Delaware law, the impact of the MAE must be, among other things, “durationally significant” to the other party’s business prospects. Given the many uncertainties surrounding the overall impact of the COVID-19 outbreak, it is too early to tell whether that doctrine can be invoked by a party seeking to avoid closing on a deal. Further, many standard MAE provisions include carve-outs for epidemics, general market downturns, and “acts of God.”
 - c. **Equitable Considerations:** Parties can look beyond the four corners of the contract and consider equitable defenses to excuse non-performance. Such defenses include: impossibility, impracticability, and frustration of purpose. Impossibility occurs when an unforeseeable event renders performance under the contract objectively impossible. Impracticability arises where a party’s performance is made particularly onerous or unreasonable by the occurrence of an event, the nonoccurrence of which was a basic assumption on which the contract was made. Frustration of purpose applies when an unforeseen event undermines the basis or foundation of the contract so completely that, as both parties understood, without it, the transaction would make little sense.
6. **Financial Relief for Businesses.** On March 27, the President signed the much debated \$2 trillion coronavirus relief bill, known as the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The final version of the legislation includes:

Unprecedented Times Call for Unprecedented Measures

- a. A one-time direct payment of \$1,200 to most American adults earning \$75,000 per year or less, with married couples earning up to \$150,000 receiving \$2,400, with an additional \$500 per child.
 - b. A significant boost to unemployment insurance, expanding eligibility and offering workers an additional \$600 a week for four months, on top of what state unemployment programs pay. Coverage would be expanded an additional 13 weeks through the end of the year. Funding would support hourly workers who have had their hours reduced.
 - c. A \$367 billion-dollar loan program for small businesses overseen by the Small Business Administration. The loans are potentially forgivable if employers maintain payroll over a certain period of time. Loan money that small businesses use to cover payroll expenses, rent, interest on mortgage obligations and utilities will be forgiven. The legislation would also provide billions of dollars in debt relief on existing loans.
 - d. A \$500 billion lending fund for industries, cities, and states. The loans would be subject to limitations on stock buybacks, dividend payments and executive compensation.
 - e. \$150 billion directly to state and local governments struggling with the costs related to combating the virus outbreak.
 - f. A grant program to provide \$100 million to healthcare providers, and an additional \$16 billion towards medical equipment.
7. **Financial and Regulatory Responses.** The Federal Reserve has announced some adjustments to its supervisory approach during the coronavirus pandemic, which include the following:
- a. Focus on monitoring and outreach to help financial institutions of all sizes understand the challenges and risks posed by the spread of the outbreak.
 - b. Temporary reduction of its examination activities, especially at the smallest banks, and the granting of additional time for resolving non-critical existing supervisory findings. The Fed also announced that it will completely stop (temporarily) examinations for banks with less than \$100 billion except where the examination work is critical to safety and soundness or consumer protection, or is required to address an urgent or immediate need.
 - c. Allowing small financial institutions with \$5 million or less in total assets to delay reporting requirements.

Unprecedented Times Call for Unprecedented Measures

In order to better monitor how firms are managing their capital in the current environment, the Federal Reserve has stated that large banks should still submit their capital plans, developed as part of the Board's Comprehensive Capital Analysis and Review, by April 6, 2020.

Willkie has multidisciplinary teams working with clients to address COVID-19-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, the SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by COVID-19. For advice regarding COVID-19, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Maria-Leticia Ossa Daza	David Mortlock	Jorge H. Kamine	Anna Martini G. Pereira
212 728 8146	202 303 1136	202 303 1376	212 728 8373
mossadaza@willkie.com	dmortlock@willkie.com	jkamine@willkie.com	amartini@willkie.com

Copyright © 2020 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Palo Alto, San Francisco, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.