

Retail Industry Best Practices During the COVID-19 Pandemic

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Overview

As more states issue "stay-at-home" orders to reduce the spread of the coronavirus, a majority of retailers have shuttered all of their stores – for the first time ever. With the retail industry facing unprecedented pressure to keep up with the daily changing landscape, the following best practices address the primary issues retailers are grappling with daily.

To Be or Not to Be ... 'Essential'

On March 19, 2020, California was the first state to issue a mandatory statewide order restricting all activities, except for essential needs (groceries, health care, care for others, or fulfilling an essential job). Other states have followed, issuing similar mandatory stay-at-home orders for non-essential workers and businesses: Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia and Wisconsin. While Kentucky and Nevada have closed non-essential businesses, they have not issued mandatory stay-at-home orders.

Determining whether a business is "essential" requires evaluation of the specific orders and guidelines issued by state and local governments – many of which continue to revise and update their definition of what qualifies as essential. For example, on March 22, 2020, California released much-needed guidance listing "Essential Critical Infrastructure Workers" who are not required to stay at home. We covered California's updated guidance in detail in a recent client alert. With respect to local governments, cities and counties are also issuing separate orders, which can often be even more restrictive. Just this week, on March 31, 2020, seven San Francisco Bay Area counties – Alameda County, Contra Costa County, Marin County, City and County of San Francisco, San Mateo County, Sonoma County, and Santa Clara County – revised their stay-at-home orders in a manner that has been interpreted to further limit what qualifies as an essential business. The revised orders also now require all essential businesses to create, post, implement, and provide to all employees a Social Distancing Protocol, enforceable by law enforcement and through civil remedies (e.g. restraining orders or revocation of applicable permits/licenses).

The Cybersecurity & Infrastructure Agency (CISA) issued a memorandum providing guidance for state and local jurisdictions, as well as private industry, with the "identification of essential critical infrastructure workers during COVID-19 response" (Guidance). CISA's Guidance can be found [here](#). Steptoe also covered CISA's guidance at length in "Identifying Who is 'Essential' During COVID-19." Many states, like California, have adopted lists of essential workers that largely mirror CISA's Guidance.

CISA's Guidance identifies 16 critical infrastructure sectors that may continue working: healthcare/public health sector, emergency services (law enforcement, public safety, first responders), food and agriculture, energy, waste and wastewater, transportation and logistics, public works, communications and information technology, critical manufacturing, hazardous materials, financial services, chemical and defense industrial sectors. Generally, retailers that can demonstrate they supply these essential sectors likely have a good argument that they can remain operating notwithstanding stay-at-home orders.

On March 24, 2020, the National Retail Federation (NRF) and the Retail Industry Leaders Association (RILA) jointly submitted a letter to the White House Coronavirus Taskforce and CISA requesting an expansion of categories of the workforce deemed essential to the nation's critical infrastructure, including: workers in distribution, warehouse and call center facilities; hardware, home improvement and appliance retail businesses; pet supply retailers; workers that supply other essential businesses and people working from home; and workers who can support retail purchases through methods that augment social distancing requirements, such as curbside pickup or delivery. The letter requested that CISA create a specific "essential retail worker" subcategory within the Guidance. On March 28, 2020, CISA amended its guidance to Version 2.0 to include many of NRF and RILA's suggestions, including "workers supporting ecommerce through distribution, warehouse, call center facilities, and other essential operational support functions" and "workers in hardware and building materials stores, consumer electronics, technology and appliances retail, and related merchant wholesalers and distributors."

To avoid supply chain disruption, retailers providing essential services should contact suppliers and transportation/logistics partners to notify them that your business qualifies as an essential service under applicable orders and the partners' services are necessary for you to operate. Because retail employees in some jurisdictions with stay-at-home orders have been cited en route to work, retailers should provide employees with a letter explaining that they work for an exempt essential service business, permitting them to travel for work. Clear communication to employees explaining the essential business issues specific to the retailer is key.

Keep Your Customers and Workforce Safe... and Tell Them How You're Doing It

Retailers should refer to and comply with guidance from CDC, OSHA and related health agencies on preventing workplace exposures to and reducing the spread of COVID-19. Given the unique challenges faced by essential businesses keeping stores open to the public, those retailers should post prominent notices in store, as well as provide a COVID-19 link on their homepage identifying the specific efforts taken to keep customers and workers safe in stores, including:

- in-store cleaning protocols;
- social distancing requirements in store;
- order fulfillment options such as curbside pickup;
- provision of hand sanitizer/effective disinfectant at appropriate areas;
- efforts to protect vulnerable guests (e.g. special store hours for seniors).

The Bay Area counties' Social Distancing Protocol also includes a detailed checklist essential businesses must complete outlining their efforts to promote employee and consumer safety on their premises.

Additionally, some retailers are explaining on their informational materials how they are meeting the demand for essential goods (e.g. prioritizing essential goods through the supply chain and place quantity purchase limits), and any COVID-19 benefits, increased compensation, special bonuses, and any new leave policies offered to employees.

Workforce Considerations

Retailers should understand the key concerns of their workforce. For employees being sent home as a result of stay-at-home orders for non-essential businesses, their primary concerns will likely revolve around pay, benefit continuation, and job status. For those working in essential businesses, their most immediate concerns will likely focus on workplace safety and, by extension, the safety of their families from potential secondary exposure.

For idled employees, consider reduced hours or furloughs instead of layoffs given that many states (with help from federal stimulus) now offer unemployment compensation benefits for those scenarios, which allow employees to retain employer-sponsored health coverage (depending on plan terms; seek a waiver if needed). Also, a reduced hour/furlough approach will create employee loyalty for the long-term and allow your business to ramp back up post-COVID-19 more efficiently and with much less cost and effort. Regardless of the approach, if an employer reduces headcount, it must understand and comply with both state (if any) and federal WARN Act notice requirements depending on the number of employees affected. Those WARN requirements vary from state to state and may vary from the federal WARN requirements. The federal government and some states have waived the prior-notice requirements, but still require the distribution of the substantive content of the notice requirements "as soon as possible." Similarly, the furlough v. layoff decision may impact severance benefits depending on employer policies and employment contracts, if any, as well as state-mandated termination-of-employment requirements.

For "essential business" retailers, the employer must find ways to incentivize employees to come to work despite federal stimulus grants that may motivate employees to stay at home with children whose schools are closed. Such employers must also constantly demonstrate their commitment to the safety of the working employees with proper and exhaustive PPE/cleaning/distancing protocols, to include training and regular oversight review. Employers must remember that financial incentives may, under certain circumstances, change the regular rate calculation for overtime work.

Employers with newly telecommuting employees must implement rigorous procedures for work-time accounting and productivity, including procedures to deal with telecommuting employees who need to intermittently use the newly minted modified FMLA leave (i.e., taking care of kids at home).

Employers must also ensure they comply with myriad new paid-sick and expanded-family/medical laws, remembering that state law may have definitional or jurisdictional provisions that differ significantly from federal law or the laws of other states. Those expanded rights also intersect and overlap with furlough and shelter-in-place scenarios, and the employer must comply with concurrent/non-concurrent use requirements. Similarly, employers must understand their modified rights with respect to employer-imposed quarantines and basic medical testing (temperature checks, doctors notes, fitness-for-duty exams, etc.) under the ADA as a result of the pandemic.

In the event an employee or customer reports a COVID-19 infection, employers must implement proper reporting, quarantine, containment, and recovery strategies while, at the same time, complying with applicable privacy requirements.

Of course, all of the foregoing takes on even a much more complex dimension in a union environment, which creates an additional overlay of legal and practical problems.

Relief Options Under Recently Enacted CARES Act

President Trump signed the "Coronavirus Aid, Relief, and Economic Security Act" (the CARES Act) on March 27, 2020. The CARES Act's estimated \$2+ trillion price tag includes: extraordinary public health spending to confront the COVID-19 pandemic; immediate cash relief for individual citizens; a broad lending program for small business; and, targeted relief for hard-hit industries.

Retailers should consider relief options available under the CARES Act. Steptoe issued a recent alert providing an Overview of the Small Business Relief Under the CARES Act providing answers to commonly asked questions about the Paycheck Protection Program designed to encourage employers to maintain payroll and help small businesses cover their expenses (e.g., payroll, mortgage, rent, utilities, etc.) in the near-term. (See more detailed discussion on the CARES Act and how to qualify for relief in our full client alert on the legislation).

'Force Majeure' Clauses in Commercial Contracts

As more and more retail operations are forced to shut down, businesses are searching for ways to excuse performance in commercial contracts, such as "force majeure" clauses. Generally, contracts that contain a force majeure clause excuse performance when certain events occur beyond the control of the contracting parties. However, courts interpret these provisions narrowly and refuse to excuse performance unless the specific event is identified in the force majeure clause. The International Chamber of Commerce's model clause includes a template for contracting parties seeking to include pandemics as performance-excusing events to include the specific events: "plague, epidemic, pandemic, outbreaks of infectious disease or any other public health crisis, including quarantine or other employee restrictions."

Common law doctrines of impossibility, frustration of purpose, and impracticability may also excuse performance. Steptoe recently covered these defenses in depth for New York contracts in the client alert "New York Contracts and the Corona Crisis."

While these principles could potentially allow parties to excuse nonperformance due to the coronavirus crisis, ultimate resolution of these issues of course depends on the specifics of the contracts and the facts in each case, as well as executive orders and legislation. In the meantime, we recommend measured and principled negotiation between contracting parties to reach interim solutions as the best response.

Regulatory and Criminal Risks in Price Increases During a Crisis

Reports of widespread shortages of specific consumer goods, including toilet paper, hand sanitizers and masks, were quickly followed by claims of price gouging, a practice of profiteering in a time of public crisis that is prohibited under a patchwork of state and federal laws. These laws can be enforced by federal authorities, state attorneys' general, and, in certain states, by a private right of action that can support an award of penalties and other remedies if the conduct is proven. An understanding of this regulatory framework is imperative for companies that may find it necessary to raise prices on regulated products during a crisis. Steptoe recently covered state and federal enforcement of anti-price gouging laws in an article published in the *Recorder* on March 24, "Price Increases in a Crisis: The Regulatory and Criminal Risks."

Companies in the business of distributing goods to consumers are facing tremendous financial pressures as a result of the COVID-19 crisis. Before substantially increasing prices on goods that might be considered necessities, businesses would be well-advised to consult counsel familiar with the detailed state and federal laws regulating such conduct in emergency conditions.

Conclusion

As retailers respond to the COVID-19 outbreak and implement measures to protect and support their employees, consumers, and their operations, Steptoe's cross-disciplinary team of lawyers can advise on the countless legal, regulatory, and policy issues companies are now navigating.

For additional guidance, please refer to Steptoe's COVID-19 Resource Center, which includes our COVID-19 State Regulatory Tracker outlining all of the state regulatory responses and all of our client alerts.

Practices

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