

Advising Business Clients in the Coronavirus Age

September 25, 2020

The Honorable Jeffrey T. Trauger

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With Guest Speaker Patricia Collins, Esquire

2020 Bucks County Bar Association Bench Bar Conference

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Contracts and Business Relationships

- Force Majeure Clauses
 - When applicable
 - Impact and remedies
 - Requirements
 - Risk of anticipatory breach
- Absent Contractual Provisions
 - Common Law - Impossibility, Impracticability and Frustration of Purpose
 - Sale of goods under UCC
- To Have or Not to Have?
- Post-Pandemic Litigation of Claims (have there been any)?

Contracts and Business Relationships

- Drafting Considerations Related to Force Majeure

Crappy Example – Force Majeure. The parties will be excused from any delay or failure in their performance under this Agreement where the delay or failure is due, in whole or in part, directly or indirectly, to a cause beyond such party's reasonable control including, without limitation, labor difficulties, fire, casualty, accidents, acts of God, war, civil disorder, terrorism or governmental acts or restrictions.

1. Incomplete listing of events - *Contract construction*: If it's not specifically listed, it's excluded.
2. Catch-All – "... beyond party's reasonable control" *Contract construction*: Limits the meaning of a catch-all to the same type of events. Add "whether similar or dissimilar..."
3. Does it excuse a delay in payment?
4. Must the non-performing party use reasonable diligence to minimize damages and resume performance?
5. Require notice from the non-performing party re the event, expected delay, impact, status updates.
6. Draft with the client's needs in mind.

Contract Terms

Force Majeure. Notwithstanding any provision of this Agreement to the contrary, Contractor is not liable for any act, omission, result or consequence (including but not limited to any delay of performance or payment) which is: (i) due to any act of God; war, territorial conflict or other armed dispute; governmental regulation, Order or requirement; terrorism; riot; pandemic, epidemic or national health emergency; extreme weather; local labor shortage; fire, flood, explosion, smoke, water, environmental contamination, or other casualty or damage to the property; shortage or failure of raw materials, supplies, fuel, power or transportation including as a result of an embargo; breakdown of equipment; death, disability or health emergency of Contractor's principal or an immediate family member; or **any other causes beyond Contractor's reasonable control** whether similar or **dissimilar to those listed above**; or (ii) due to any strike, labor dispute or difference with workers **regardless of whether Contractor is capable of settling any such labor problem.**

Families First Act Provisions

- Families First Coronavirus Response Act:
 - 2 types of paid leave:
 - Childcare Leave
 - COVID-Related Emergency Sick Leave.
 - Applies to employers with fewer than 500 employees.
 - Effective April 1 to December 31, 2020.
 - Employers must return the employee to the same or equivalent position upon return to work. There is an exception for employers who employ less than 25 employees – if the position no longer exists due to the Covid-19 crisis, the employer must make “reasonable efforts” to restore the employee to an equivalent position over a one-year period.
 - Tax credit: dollar for dollar credit for quarterly payroll taxes.

Families First Act Provisions

1. FMLA Expansion (Childcare Leave):

- A combination of paid and unpaid leave for a period of up to 12 weeks.
- The employee is unable to work or telework to care for a child of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable, due to the COVID-19 crisis.
- Eligible employees receive two weeks of unpaid leave and then 10 weeks of paid leave.
- The employer has no obligation to pay for the first two weeks (may be covered by Emergency Leave under the Act), but the employee is free to use paid time off during this period.
- The employer cannot require the employee to exhaust paid time off.
- Two-thirds of the employee's usual rate of pay.
- The maximum amount of paid childcare leave under the Act is capped \$200 per day and \$10,000 in the aggregate (10 weeks).

Families First Act Provisions

2. Emergency Sick Leave:

- A. Paid leave for 80 hours if an employee must take sick leave due to COVID:
- Is subject to a quarantine or isolation order;
 - has been advised by a health care provider to self-quarantine;
 - is experiencing symptoms and seeking a medical diagnosis;
 - is caring for an individual (not limited to family members) who is subject to a quarantine order, has been advised to self-quarantine, or is experiencing symptoms; is caring for a son or daughter whose school or place of care has been closed or the child care provider is unavailable; or
 - is experiencing similar conditions to any specified by the Secretary of Health and Human Services in consultation with the Secretaries of Labor and the Treasury.

Families First Act Provisions

B. Caps (Emergency Sick Leave):

- Where leave is required because the employee is subject to a quarantine order, has been advised to self-quarantine or is experiencing symptoms and seeking a diagnosis, paid leave shall not exceed \$511 per day and \$5,110 in the aggregate.
- Where the leave is necessary to care for another or a child or due to a school or childcare provider closing, paid leave is limited to two-thirds of average pay, and shall not exceed \$200 per day and \$2,000 in the aggregate.

Families First Act Provisions

3. Small Business Exemption:

- The leave requested would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee would cause substantial risk to the financial health or operational capabilities of the business because of the employee's specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers to perform the labor or services provided by the employee, and these labor or services are needed for the small business to operate at a minimal capacity.

Business Interruption Coverage and Claims

- “All Risk” policies with business interruption coverage
- Industry Wide Denial Based On:
 - Explicit policy exclusions regarding virus
 - No physical loss or property damage (which is req’d)
- Over 1,000 cases filed nationwide – Judicial Panel on Multidistrict Litigation refused to consolidate nationwide.
- So far, insurers have won in almost every case decided. (See articles attached).
- *Studio 417* - The Western District of Missouri denied The Cincinnati Insurance Company’s motion to dismiss ruling that plaintiffs had provided sufficient allegations of the virus’s physical presence at the salons and restaurants such that the property was unsafe and unusable, which “could” constitute “direct physical loss or direct physical damage” under the policy. Note – no virus exclusion in these policies.
- Status of Pennsylvania Class Action Litigation
 - *Erie Insurance Exchange* (3 class actions, consolidated cases from Allegheny, Philadelphia and Lancaster in Allegheny County – July 23, 2020)
- House Bill – Business Interruption Relief Act: voluntary program for insurers to pay claims and receive reimbursement from the federal government.
- Some states have proposed Bills to **require** insurers to pay claims, but none have advanced and the enforceability is questionable.

Waivers and Assumption of the Risk

- Use of acknowledgments and waivers in various industries
 - Construction
 - Schools/Education
 - Sports Leagues/Gyms
 - Certain Private Businesses/Private Clubs
- Effectiveness
 - Common law negligence principles
 - Common law principles of assumption of the risk
- Drafting Tips
 - Keep simple, plain English, one page (or less)

Business Failures

Preparing for Business Failure

- Bankruptcy vs. State Law Dissolution
 - Bankruptcy: No discharge (Ch 7); trustee; judge; creditors committee; very public
 - Dissolution: You control; no trustee, judge or court. Flexibility. But, no automatic stay.
- Dissolution and Liquidation (Voluntary and Involuntary)
- Voluntary Dissolution (Statutory – BCL)
 - Corp. - 15 Pa C.S. §1971 – §1979
 - LLC - 15 Pa C.S. §8871 – §8878
 - LP - 15 Pa C.S. §8681 – §8690
 - GP - 15 Pa C.S. §8481 – §8486
 - Non-Profit Corp. - 15 Pa C.S. §5971 - §5980 (may require OAG review and Orphan's Court approval; See 15 Pa. C.S. §314(c) and §5976(b))

Business Failures

Procedure for Voluntary Dissolution

1. Prepare Plan of Complete Liquidation and Dissolution (BOD or can appoint liquidating trustees). (See example - LLC).
2. Board resolution to dissolve and adopts Plan, elects to proceed under §1972 (pre-dissolution provision for liabilities) or Subchapter H (post-dissolution provision for liabilities). (See example - LLC).
3. Plan presented to shareholders – majority vote.
4. Set bar date for submission of creditor claims. Claims due not less than 60 days “from date notice is given.” Claims barred if not timely submitted - §1992(d)).
5. Notice to creditors and taxing authorities, and published. (See example – Corp.).
6. Must cease actively doing business other than as necessary to wind up; liquidate.
7. File IRS Form 966 within 30 days after adoption of the Plan (or any amendment).
8. Pay claims in the order of priority (pro rata among creditors of the same class). Any excess after payment of all claims to shareholders.
9. Notice/payment to creditors.
10. Tax Clearance (Department of Revenue and Department of Labor).
11. File of Articles of Dissolution with the State. File last and final tax returns.

Business Failures

Effect of Voluntary Dissolution

1. Two year statute on limitations on all claims (against the corporation, shareholders, directors and officers) (§1979(a)).
2. Shareholders are only liable to the extent they receive distributions in dissolution (or while insolvent) (§1979(c)).
3. Directors and officers have normal duties, but as long as they follow the rules, there is no personal liability to creditors or claimants (§1978(b)).

Business Failures

- Receivers and Involuntary Dissolution
 - Receivers - types and function
 - Receiver Pendente Lite (15 Pa C.S. §1984 (corp.)) – Carry on the business and preserve the corporate assets until a hearing or other determination regarding the future of the business.
 - Liquidating Receiver (15 Pa C.S. §1985 (corp.)) – Liquidate the business.
 - Appointment
- Bucks County Procedures

Status of Executive Orders and Legal Challenges

- Legal Challenges in Federal Court
 - PA Opinion on Constitutionality of Wolf Closure Order
 - Analysis and Impact
- Future Proceedings?
- Advice for Businesses

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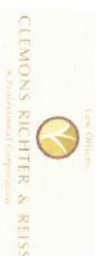
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