General Counsel's Guide to Reopening

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Editor's Note

How can we be sure we're doing enough?

As businesses across the country prepare to reopen, that's the first question a lot of executives and lawyers are asking each other, and themselves. With concern about the potential liability to employees and customers who get sick, it's natural for general counsel to want to start there. At Bloomberg Law, we put together this guidebook to help answer that question.

But don't start there.

Start with the Why.

The Covid-19 pandemic has made in-house counsel, and their advisers, not just the guardians of employee safety and the corporate bottom line, but the chief culture officer and the custodian of your communications in an unprecedented time.

The executive team is looking at you. Workers are afraid. Their families are afraid. A lot of days, lawyers are being asked to answer questions that neither science nor society have answers to just yet. Before your business brings people back, push the team to consider and clearly communicate the Why. Why is the business reopening? Why do people have to go back to the office?

When it feels like a risk, every one of your employees wants to understand, especially if they have been successfully working from home for weeks. The office experience is not going to be pleasant on day one. When you have a reason, buy-in for all these new safety protocols will be higher.

There are plenty of obvious-sounding answers: Your company serves the customer better in person. Consumers rely on your products. Maybe teams really do work better when they can bump into each other.

Have one. Make sure it is language you can defend. Believe it.

There's a patchwork of local, state and federal rules for operating safely. Those rules – even the effective dates of the rules – are changing all the time. Put industry-specific procedures on top of that, and the quagmire of regulations is head-spinning.

The pandemic has forced in-house counsel to rethink the very meaning of corporate risk and answer questions that might have seemed unfathomable just months ago: What do you do if employees refuse to come to work because they fear it's unsafe? Can you take their temperature when they arrive? How much immunity will businesses have from liability suits – and how much will insurance cover for interrupted operations?

There are a lot of tips in this guide, both from top-notch firms and from our own in-house experts at Bloomberg Law. If you have a question we haven't answered, drop us a line.

But the first thing to do is to rethink where you start. You're still not doing enough without making your company answer the Why.

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Where to Start

PRACTITIONER INSIGHT

What GCs Should Expect in Reopening

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Former White House Counsel Donald F. McGahn II and former Justice Department Deputy Assistant Attorney General Brett Shumate, now partners at Jones Day, discuss five key issues that general counsel should consider when advising firms dealing with the government post-pandemic.

For most businesses and industries, the shift to a "post-Covid" (or at least post-outbreak) world will present legal challenges for which most companies have little precedent or relevant institutional memory.

Despite optimistic talk of "reopening" the economy and getting back to work, American businesses continue to face a patchwork of state and local orders dictating when they can open, how employees can work, and when consumers can leave home.

Evolving variants of these orders are likely to remain a fact of life—even after we "flatten the curve"—and the path forward will not be linear.

As businesses prepare to reopen, general counsel ought to be mindful of federal guidance, state and local orders, and related long-term litigation, investigatory, reputational, and political risks. Government—for better or worse—is now the prime mover for the foreseeable future. The interpretation and application of emergency orders and Covid-specific statutes will now be a predicate issue to many traditional legal issues facing companies.

At the same time, emerging federal guidance—putting the onus on employers to develop "appropriate policies" consistent with "federal, state, and local regulations and guidance, and informed by industry best practices"—provides little comfort. Regulations and guidance may intentionally or unintentionally impact labor and employment law, tort liability, force majeure and other principles to excuse contractual performance, and insurance coverage and recovery, among other legal issues.

1. Monitor Federal Guidance

The recent debate between President Donald Trump and the governors over who controls reopening confirmed an unstated truth: This remains a government-centric moment. That debate has for the most part been resolved, at least in the abstract: The federal government in most cases lacks the same authority as state and local officials to direct American businesses to open or close.

So the president has deferred to governors and mayors to dictate closures and reopening schedules in their states—even as he asserts the centrality of the federal government's efforts, and DOJ announces that it is monitoring state and local orders for constitutional violations.

One tool the president has within his power is the Defense Production Act, a statute passed during the Korean War. Alarmed by the

closure of meat processing plants, the president concluded that meat processors should "continue operating and fulfilling orders" and ordered Secretary of Agriculture Sonny Perdue to leverage the statute "to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA."

As the Department of Agriculture gives life to this broad directive, the focus will turn to the intersection between federal, state, and local government orders and guidance.

Food supply chain initiatives may follow what has happened elsewhere during Covid-19, where the federal government has announced national standards through guidance (as opposed to formal rulemaking). Tracking and understanding this guidance is a critical first step for companies. Examples include: The White House recently issued "Guidelines for Opening Up America Again." These guidelines suggest employers "[d]evelop and implement appropriate policies, in accordance with federal, state, and local regulations and guidance, and informed by industry best practices," regarding social distancing, temperature checks, and the like. In other words, the opening federal government salvo to supposedly "open up America again" appears to place the burden on employers to develop policies.

The Department of Homeland Security issued guidance before the outbreak on critical infrastructure sectors, which has changed and expanded during the crisis. Many state and local officials have incorporated this guidance into their orders. Some industry participants have cited this guidance in interactions with suppliers and with local authorities.

Other federal agencies –such as the Centers for Disease Control & Prevention, the Occupational Safety & Health Administration, and the Equal Employment Opportunity Commission–have issued their own guidance on various issues such as maintaining healthy business operations, temperature checks for employees, testing, and personal protective equipment

This federal guidance will help inform industry expectations, particularly on topics where there is no applicable state or local order. In some instances it may either supplant, supplement, or conflict with existing regulatory obligations. In certain cases, it may also be indicative of, and help shape, evolving standards of care asserted for state tort law purposes.

Although plaintiffs' lawyers can be expected to claim that guidance is "law," recent executive orders clarify that, absent some other legal hook, guidance does not create binding legal obligations. Similarly, a violation of guidance is not supposed to serve as the basis for federal enforcement–but time will tell as to whether overeager regulatory enforcers will attempt to improperly use guidance as a sword as opposed to its proper role as a shield.

General counsel can help their companies prepare for this onslaught by systematically documenting the steps they took to promote employee and customer health and safety before reopening. If those policies are later second guessed, the company will have done the necessary due diligence to explain and defend the reasonableness of its actions to regulatory enforcers and judges.

The first set of federal government guidelines to supposedly 'open up America again' appear to place the policy making burden on employers.

2. Follow State and Local Orders on Closing and Reopening

For businesses active in multiple jurisdictions or across state lines, navigating the evolving state and local restrictions in a return-to-work era will be particularly burdensome. In some ways, this new "reopening" phase may prove more difficult than navigating the initial wave of "stay at home" orders at the outbreak of Covid-19.

Every American business has been affected by the patchwork of state and local "stay at home" orders closing all but essential and critical infrastructure businesses. Businesses required to close must wait for those orders to expire, terminate, or be modified before reopening (or perhaps sue). Even some essential businesses are not operating at full capacity because they have been forced to limit their operations.

Now, state and local officials are beginning to issue a new patchwork of orders, slowly reopening businesses. Officials are adopting phased reopening approaches that incrementally authorize reopening and easing of restrictions for limited numbers and types of businesses at a time.

Many of these reopening orders will

place restrictions and obligations—such as social distancing, masks, and temperature-screening—on businesses before they can reopen. Many of these requirements will be new, and will potentially conflict with existing regulatory norms or even other orders.

Some states have not been satisfied with issuing dozens of mandatory orders—they have also issued guidance to "help" businesses that cover a variety of the same topics as the federal guidance. Although federal guidance may not be binding, state guidance may be treated differently under state law and by local officials.

If the initial abrupt shut down is any indication, local law enforcement will certainly treat such utterances as mandatory in many instances, leaving the legal details to be sorted out by others.

3. Watch for Conflicting Local Orders

States are only part of the puzzle as American businesses prepare to reopen. Many local jurisdictions have issued their own orders that complement—or in some cases conflict with—state orders. In California, for example, nearly every county and city has restricted individuals and businesses in their jurisdictions. Those orders sometimes conflict with state-wide orders.

In some cases, governors have expressly preempted conflicting local orders. For example, an executive order by Texas Gov. Greg Abbott (R) preempts "any conflicting order issued by local officials in response to the Covid-19 disaster." In Colorado, counties can apply for a local variance from the state order, but the governor expressly permitted local jurisdictions to adopt more restrictive rules.

Compliance will be just one piece of the puzzle. Companies also need to anticipate plaintiffs citing even superseded stricter standards as a relevant standard of care.

The bottom line is that general counsel must carefully navigate a minefield of state and state and local orders and guidance.

4. Prepare for Global Regulatory Challenges

Multinational corporations face unique challenges coordinating their efforts to reopen in the U.S. and across the globe.

Nearly every country has imposed its own restrictions on business operations during Covid-19. In some cases, global restrictions may conflict with U.S. restrictions, making it difficult to adopt and implement uniform policies throughout the company. General counsel for multinationals will have to contend with a similar patchwork of government restrictions when restarting operations overseas.

These global challenges unfold amidst a sea change in the legal and operational environment for multinational corporations. Put simply, Covid-19 threatens the prevailing business model of the past quarter century—based on global supply chains largely disassociated from geopolitics, a multi-national labor pool, and relatively frictionless business travel. The issue is not only the outbreak, but the shifts in government rules and incentives inspired by Covid-19.

Companies with international operations and supply relationships need to prepare for a new wave of restrictions, regulations, and regional fragmentation. In Washington, a version of this debate has been underway for several years, but Covid-19 has reshaped the dynamic. The Trump administration has imposed export restrictions, issued new orders linking food and medical supply capacity to national security, and encouraged domestic manufacturing and North American supply chains.

At the same time, lawmakers are considering programs to incentivize companies to shift manufacturing from overseas. Some are debating novel exceptions to the principle of sovereign immunity that, if enacted, would reshape international commerce. Analogous debates and policy shifts are occurring in key capitals throughout the world, threatening a new era of shifting and contradictory restrictions on trade and investment.

State policies are only part of the puzzle as American businesses prepare to reopen. Many local jurisdictions have issued their own orders that complement—or in some cases conflict with—state orders.

Similar considerations apply for business travel, as categorical restrictions on international travel are now a standard tool of policy embraced by advanced economies across the world.

Some aspect of these restrictions could endure for months or years, potentially in the form of intrusive health tests and background checks. Sending an employee to a meeting in another country may now involve undertaking a legal analysis of national and local travel restrictions, geopolitical tensions and related liability risks, and quarantine measures that may apply upon arrival or return.

In short, there is no institutional blueprint for what comes next on the international stage. These global regulatory challenges will test the ingenuity of multinational companies and their general counsel.

5. Brace for Litigation, Oversight, and Blame-Shifting

The Covid-19 crisis will send shockwaves through the courts, the halls of Congress, and state capitols for years to come. General counsel should prepare now for the litigation, investigations, and blame-shifting sure to follow.

The litigation effects of Covid-19 will be wide-ranging. Plaintiffs' lawyers are already signaling that companies receiving federal and state funds should prepare for False Claims Act and related qui tam suits.

Businesses should also plan and prepare for commercial disputes arising out of contractual force majeure clauses and for negligence claims from employees and customers claiming violations of an alleged duty of care during Covid-19. There is a current debate on Capitol Hill over liability protection, and certain presidential and agency orders (such as those issued pursuant to the Defense Production Act and the PREP Act) include some liability protection.

The investigations will be just as onerous. The Treasury secretary is already threatening "audits" for companies that took large loans under the CARES Act (without offering any additional detail or citation to legal authority). Of course, congressional investigations inevitably follow from major legislative action. And state attorneys general are already signaling that they intend to investigate and prosecute violations of state laws during Covid-19. These actions are unfortunately part of a predictable arc that inevitably follows a crisis.

Taken together, the future challenges for general counsel may be more complex than navigating the current crisis.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

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This article represents the personal views and opinions of the authors and not necessarily those of the law firm with which they are associated.

Three Big Considerations in a Return

Many employees will undoubtedly have concerns about returning to the workplace and what happens if they request more time away. Here are some issues likely to come up in the context of leave and the new hazards of work.

Bloomberg Law Analyst Dori Goldstein recently talked about some of the issues to consider on reopening during the coronavirus pandemic. She provided answers to some important questions:

Bloomberg Law: Can employees refuse to come to work?

Dori: Yes. The Occupational Safety and Health Act says employees can refuse to come to work if they believe they are in imminent danger. Imminent danger is, "… any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

If workers are joining together to say a workplace is unsafe, that can fall under the National Labor Relations Act provision on Protected Concerted Activity. Under the NLRA, employees who engage in "protected concerted activity for mutual aid or protection" can't be fired or disciplined for doing so.

There are limits: It has to be reasonable and in good faith. It has to be that a group of employees believe that conditions are unsafe. This applies only to employees, not gig workers.

Americans with Disabilities Act Reasonable Accommodation Requests can come up in two contexts: Employees who have disabilities or conditions that make them susceptible to serious complications from Covid-19 can request reasonable accommodations before returning to work. Reasonable accommodations can include telework, additional PPE, changes to their work schedule, etc. They can also request leave as a reasonable accommodation.

> **"Employees can refuse to come to work if they believe they are in imminent danger."**
>
> —Bloomberg Law Analyst Dori Goldstein

BL: What if schools are still closed?

Dori: If schools are closed, expect that workers will have child care issues. There isn't a super clear answer but consider the following:

- Are workers entitled leave?
- Can you allow workers to telework?
- Is work sharing an option? They may be entitled to the $600 under the federal stimulus law.
- Can you adjust their schedule so they can better share child care responsibilities?

Remember, discrimination based on family responsibilities is prohibited in some cities and states. Even if it isn't prohibited in your state, be careful to avoid gender discrimination.

BL: What if we started offering hazard pay?

Dori: The question is how do you roll that back if you've added it? You may have unwittingly created a perception that the job is hazardous. If hazard pay has been provided, there must be careful consideration regarding when it will end. Best practice is to provide it for a specified period, with notice that it will end at a certain point, to avoid state-mandated notice requirements, which vary.

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What's Legal in Covid-19 Pay Cuts Isn't Necessarily What's Fair

• Attorneys say pay cuts across the board are most defensible

For businesses cutting workers' pay to spread the economic pain of the coronavirus pandemic, what's legally defensible may not be what's fair.

That's because any departure from across-the-board pay cut formulas, even to address a single worker's dire family situation, could land employers in hot water with a potential discrimination lawsuit, attorneys said. If employers make any decision to make a narrower salary cut than an entire team or department, then those decisions should be properly justified, according to Alston & Bird partner Brett Coburn.

That holds true even if across-the-board cuts have the effect of widening existing pay gaps between women and minority workers as compared to white, male counterparts.

"In the COVID-19 era, where companies must evaluate compensation and make hard choices, sometimes empathy and fairness are not on the same page," said Reavis Page Jump LLP managing partner Heidi Reavis.

Employers across a wide spectrum of industries—from carmaker Tesla Inc. and ride-hailing app Lyft Inc. to law firm Baker Botts—have reduced salaries across job titles and corporate levels as an alternative to adding to the millions of people newly unemployed.

Some have cut by higher percentages at top levels and less toward the bottom, exempting employees who make less than a certain amount. Some chief executives have stopped taking paychecks at all. Sports broadcasting network ESPN asked its highest-paid anchors to take 15% pay cuts. Others have cut across the board by equal percentages.

Employers have to put empathy for individual workers or circumstances on the backburner, even if the cuts hit some employees harder than others, Reavis said.

"Favoring a sick colleague or a single female raising a family might seem the right empathetic choice, but result in unfairness to others and expose the company to a lawsuit from others whose compensation was reduced or whose jobs were terminated, yet not in a protected class," Reavis said.

Pew Research data shows that roughly a third of adults surveyed "say they or someone in their household has had to take a cut in pay due to reduced hours or demand for their work" due to the pandemic. Breaking that down further, 51% of Hispanic respondents and 34% of black respondents said they had to take a cut in pay, as compared to 29% of white respondents.

And lots of employers are still looking to cut salaries during the public health emergency.

"I haven't seen so many employers do this in such a short period of time ever in my practice," said Sonya Rosenberg, a partner with Neal Gerber Eisenberg in Chicago, of pay cuts across the board. "It happened in the 2008 downturn, but the frequency and urgency that we're seeing today is quite unprecedented."

'Weights' on Our Legs

Mintz member Jen Rubin said businesses will be in the most legally defensible position if the pay cuts are

Pay Cuts Due To Covid-19

Percentage saying this has happened to them or someone in their household because of the coronavirus outbreak

	Been laid off/ lost job	Had to take a cut in pay	Net either/ both
All adults	28	33	43
White	24	29	38
Black	32	34	44
Hispanic	41	51	61
Ages 18-29	35	45	54
30-49	30	39	49
50-64	28	32	42
65+	17	18	25
Bachelor's+	21	29	37
Some college	30	37	46
HS or less	32	35	45
Upper income	18	26	32
Middle income	26	32	42
Lower income	39	41	52

Note: White and black adults include those who report being only one race and are non- Hispanic. Hispanics are of any race. income tiers are based on adjusted 2018 earnings.
Source: Pew Research Center

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motivated by a "legitimate business objective," and determined based on neutral criteria like positions within an organizational chart, or rolled out across the board for employees earning over a certain dollar figure each year.

Under those circumstances, the employer isn't differentiating between workers when making salary decisions, she said.

"That is totally appropriate, and it's going to be much harder to make a mistake under those circumstances," she said, but added that "obviously individuals earning at a lower level are going to feel it more."

A National Partnership for Women and Families report, released in March, showed that overall, women are paid $0.82 for every dollar paid to men. That gap widens for black women, who usually make $0.62, Native American women, who usually make $0.57, and Latina women, who usually make $0.54.

"I expect employment decisions in the COVID-19 era to exacerbate pre-existing pay disparities and wage gaps," Reavis said. "We're starting out this marathon with weights already on our legs."

If done correctly, "across the board at the same percentage," cuts shouldn't exacerbate existing pay gaps, Coburn said. "But if some people are cut and others are not, or if different people or groups get different levels of cuts, then that could have the potential to exacerbate existing issues."

History Repeats Itself

If the effects of the 2008 recession are any indication of what is to result from the coronavirus pandemic, female workers will be harder hit, Rosenberg said. She's also president of the Chicago chapter of the Coalition of Women's Initiatives in Law.

A report published in the Indiana Journal of Global Legal Studies showed that female lawyers' salaries as a percentage of male lawyers' salaries dipped from 80.5% in 2008 to 74.9% in 2009, and then slightly improved to 77.1% in 2010. In 2011, the gap shrunk to 86.6%, but the study pointed out that disparities persisted after the recession, and women still predominantly make less than men overall in the legal sector.

The Equal Employment Opportunity Commission began collecting pay data broken down by race, sex, and ethnicity for the first time in July 2019, but won't do so in the future. Sen. Patty Murray (D-Wash.) encouraged the agency to continue collecting the data, saying the government could use the information to shrink existing and potential race and gender pay gaps.

"As COVID-19 unfolds, women are most likely to experience economic hardship and additional pay inequity," Murray said in the letter. "Given the significant economic challenges women, especially women of color, continue to face during this pandemic, we need more tools—not less—to ensure the pandemic does not widen the pay gap for women."

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Returning to a Brave New Workplace

Your first day headed back to the office will likely feel different from the minute you wake up. Imagine the morning begins with a self-administered Covid-19 symptom and temperature check. An app will report the results to your boss. If all's well, a low-occupancy company provided shuttle will take you to work. Everyone on it will be wearing a mask.

Once at the office, a second health check. Attendants will strictly control access to doors, elevators and common areas to prevent close contact. The route around the office will be one-way only. Formerly jammed open desk plans will sit half-empty. You may be encased in a makeshift cubicle made of plexiglass sheets.

To avoid overcrowding, keycards or sensors will monitor your whereabouts throughout the day. Your smartphone may vibrate to alert you to coworker traffic, like Waze for commuting to the copy machine. Lunch will come hermetically sealed. Say goodbye to communal coffee breaks.

With cities and states around the country preparing to ease virus restrictions in the coming months, companies are rethinking office life. The pre-Covid workplace, with its shared desks and common areas designed for "creative collisions," is getting a makeover for the social distancing era. So far, what employers have come up with is a mashup of airport security style entrance protocols and surveillance combined with precautions already seen at grocery stores, like sneeze guards and partitions.

Like much of the response to the pandemic, it's an evolving work in progress. But one thing is clear: It will look and feel very different than the offices many abandoned in March.

"The workplaces that we left are not going to be the workplaces that we go back to," said Joanna Daly, vice president of compensation, benefits and HR business development at International Business Machines Corp. "We're going to have to learn a new way of interacting with each other that was not the way we were interacting a few months ago."

IBM, along with Hewlett Packard Enterprise Co., JPMorgan Chase & Co., Citigroup Inc. and Goldman Sachs Group Inc. are among the large U.S. employers readying offices for at least a portion of their white-collar workforce to return over the coming months. To make that happen, they've had to rethink the entire working experience. That has meant hiring for new jobs, such as "thermal scanner" and elevator attendants, finding ways to monitor employee whereabouts and health, and retrofitting entire skyscrapers' worth of space.

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Even just getting people to the office presents issues. Many organizations will have phased returns and say they won't require most people to come back until there's widespread testing and treatment, or a vaccine. Still, for those called in sooner, a crowded subway or train is neither safe or appealing. About 60% of consumers surveyed by Deloitte the week of April 13 said they plan to limit the use of public transportation over the next three months. Before the pandemic, a third of workers in the New York metro area used transit to get to work, according to Census Bureau data.

Executives at Goldman have mulled dispatching buses to ferry traders to lower Manhattan but that option might only be able to accommodate a fraction of its workers in New York City, according to a person briefed on the discussions. The bank might also allow some employees who live in New Jersey and Connecticut to work from satellite offices in those states so they could drive to work.

Early signs point to a surge in car commuting. Many traders at JPMorgan still considered essential have been driving into its midtown tower; car dealerships in Wuhan, which started opening back up in March, are targeting those avoiding public transit.

The lack of widespread testing in the U.S. has left it up to

employers to minimize spread among workers. Hundreds of companies have already hired "thermal scanners" to monitor employees for fevers, according to the Kelly Services staffing agency. There's also been a spike in job postings for "tracers," who would track down the contacts of anyone who tests positive for the disease.

Several Wall Street banks and retail and insurance companies have signed on or are in talks to use HealthCheck, a platform that screens employees for Covid-19 symptoms and guides them on whether to stay home or go to work, said Ryan Trimberger, the co-founder of Stratum Technology, which makes the app. The technology helps employers identify hotspots and act accordingly, he said. "[If] you see symptoms coming back, you can have that team broken up into smaller teams or quarantined." (Stratum's tracking is anonymous and the company doesn't keep the data, Trimberger said.)

Convene, a co-working space provider, is launching kiosks for self-serve health screenings. The company, which has over 30 locations in major cities across the U.S., is working with health care provider Eden Health to create something akin to TSA-PreCheck for Covid. Members deemed low-risk, such as those who have recovered from the illness, will get quicker access to its offices. "I don't think people are necessarily going to be comfortable coming back to work right away," said Amy Pooser, chief people officer and chief operating officer at Convene. "They're going to want to know that they're going to be safe."

Corgan, a Dallas-based architecture firm, is borrowing ideas from airports and hospitals—places designed with security, hygiene, and crowd control in mind—said Lindsay Wilson, the company's co-president. Her team is looking into using anti-microbial surfaces found in health care settings for office spaces. BOKA Powell, another Dallas-based architecture firm, got an inquiry from a company to price out adding hands-free bathroom fixtures and automatic doors to a new building. (It added 10% to the cost.)

Companies are looking to a range of solutions to keep people away from one another throughout the day. Many of the measures already in place in China, like one-way walkways, are being considered in the U.S. IBM is looking into using existing sensors or finding new technology to detect when people are too close together or trending in that direction. Convene is removing furniture. Multiple companies are ditching buffet lunch.

The biggest casualty will be the open floor concept, said Mark Canavarro, whose company Obex P.E. Inc. has been inundated with requests for hardware and panels to add walls to the low-level partitions on shared desk spaces. In the first 3 weeks of April, his company did as much business as the entire first quarter of this year, he said. His inbox is overflowing with new inquiries and he's gaining new distributors weekly.

As eager employees are to leave telecommuting behind, they may not like the new normal, either. IBM, for its part, is planning an employee re-orientation program to set expectations. But it may just take time, said Ken Matos, director of people science at CultureAmp, a worker survey and assessment provider.

"What's probably going to be running through people's minds is: 'Everything else has been disrupted, I just wanted the office to be like it was'," said Matos, who has a PhD in industrial and organizational psychology. "Give people time to mourn the past, because you may not care about it, but they do."

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Before You Head Back

Existing Policies to Review

- Sick Leave
- Telework
- Childcare
- Travel
- Social media
- Reasonable accommodation
- Visitors

New Policies to Craft & Communicate

- Social distancing
- Handwashing
- Temperature check
- Meetings/gatherings
- Return to work after Covid19 infection

Distancing Will Mean Long Elevator Lines

The Centers for Disease Control and Prevention recommends that people maintain a "social distance" of at least six feet to combat the spread of Covid-19, the disease caused by the novel coronavirus. That begs the question: How do you do that in an elevator?

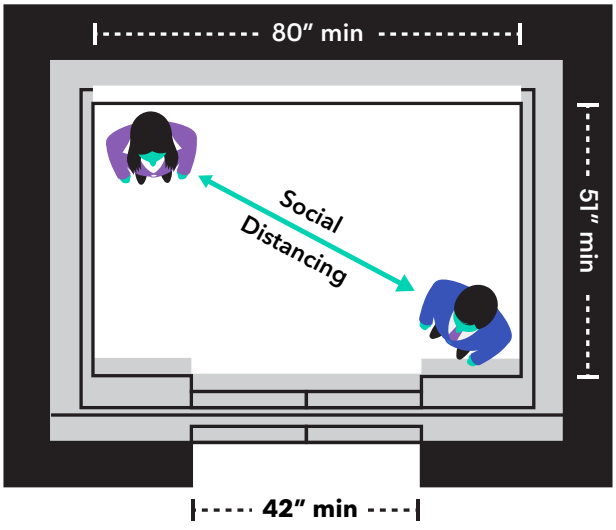
Passenger elevators must have certain minimum dimensions to comply with accessibility standards. Two people should be able to share a lift and keep the recommended distance in compliant elevators, and some freight elevators may allow multiple people in a car to keep the recommended distance, based on sample dimensions.

But it's often going to be a tight fit.

"Elevator courtesies are going to get interesting. A lot of people think they have armor on when they put their face masks on," said Katherine Dudley Helms, an office managing shareholder with Ogletree Deakins.

Elevator Distancing

One example of a passenger elevator that's compliant with federal accessibility law, demonstrating that social distancing between two workers is theoretically possible.



Source: United States Access Board

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Bottom line: Companies need to rethink how many workers can fit in a car at once, how to keep the air inside circulating, and what to do about potentially long waiting lines when they turn the lights back on.

"In our office building, if you get two people in there, you're probably six feet apart at best," Helms said. Employers should look at the dimensions of the elevators in their respective buildings before deciding on a specific policy, she said.

Businesses should also post signage reminding workers of their policies regarding elevator use, said Ashley Brightwell, a partner with Alston & Bird in Atlanta.

More Ventilation

A recent study at two hospitals in China shows the virus often lingers in the air, raising the risk of infection in crowded and poorly ventilated spaces.

Retrofitting elevators to increase airflow isn't easy, said Nellie Brown, Cornell University's School of Industrial and Labor Relations director of workplace health and safety programs. That means employees returning to the office should wear masks when they move from floor to floor, she said.

"There aren't really any guarantees to me about how you would fix an elevator problem in terms of filtration," she said. "You're relying on people masking, for things like that."

National Elevator Industry Executive Director Karen Penafiel said elevators are designed to provide plenty of fresh air for passengers, even when fully occupied. But she also said there are a number of steps that can be taken to reduce the risk of spreading the virus.

"The best way to reduce the spread of airborne germs is to reduce occupancy and adhere to CDC guidelines to wear cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores, pharmacies, and yes, elevators)," she said in an email.

Long Lines

Limiting the number of workers allowed on an elevator car at a time will inevitably create a logjam, Helms said.

"It's like coming back in to the building after a fire drill," she said.

Businesses should keep this in mind, and be as flexible as possible with workers, she added—with the caveat that this is an "extraordinary time" and attendance policies that regulate tardiness aren't permanently changing. The lines also will vary by workplace, as queues to get into a skyscraper are likely to look very different from those in smaller buildings with fewer occupants.

Although some office space managers may consider staggering work shifts and releasing a freight elevator to ease the bottleneck, Helms said, there's no definite answer to avoiding a queue. That's why it's key for employers to be flexible and understand that some employees may be delayed en route to their desks.

"It could literally take someone 45 minutes to get into the office," she said. "God forbid one of the cars shuts down."

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A New Normal

Cafeterias

Out: Communal trays of catered lunches

In: Boxed meals

Out: Soda machines, tubs of munchies like nuts

In: Canned beverages, bottled water, individually wrapped protein bars

Schedules

Out: Shifts where everyone comes in at, say, 9 a.m.

In: Staggered entrance times

Out: Workers making their own schedules

In: Even white-collar workers have assigned shifts and only come in at those times

In: Offices open seven days a week, to accommodate scheduling needs

Open Seating Plans

Out: Everyone tightly packed together, call-center-style

In: About a third of the workforce in the office at one time, sitting with several desks empty between them

In: Folks wearing masks at their desks

Communal Spaces

Closed: Those tech company volleyball courts

Open, but modified: Staircases become one-way only

New signage: Arrows on the floors of hallways and common areas marking which way workers can move

Questionable: Conference rooms may not be so necessary after all, or may be set up with fewer chairs to spread people apart

Don't Forget to Review:

Your contracts with cleaning companies. Do you need to renegotiate to get services more often, to add work on weekends, or to use different supplies?

PRACTITIONER INSIGHT

Reopening the Workplace—A Preliminary Guide

Sharon Perley Masling
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Employers need to start planning for reopening as jurisdictions begin to start easing pandemic-related work restrictions. Morgan Lewis attorneys outline key considerations for workplace spaces, testing, and the comprehensive reviews of employee benefits.

As jurisdictions contemplate lifting pandemic-related workplace restrictions, employers must start considering how best to cope with a vast array of issues, including restarting or expanding operations, reintegrating remote-working or furloughed employees, implementing new state and local orders/requirements, and protecting the safety of employees and customers.

Employers who proactively plan for these challenges will be best positioned to adapt to the "new normal."

Key Considerations for Reopening

Reopening will be jurisdiction-specific, subject to compliance with all state and local directives as well as any industry-specific requirements.

Employers should develop social distancing plans or refine and update current ones. Many jurisdictions currently require businesses to have written social distancing plans in place. Even if not legally required, these plans will help protect employees, reassure employees who fear returning to work, and may reduce employer liability upon reopening.

Key factors for consideration include:

1. Physical workspace modifications (including modifying floor plans to increase spacing/separation between workstations, closing or modifying common/high-touch areas and surfaces, and posting signs reminding customers and employees of social distancing, face covering, and hygiene expectations).
2. Limiting in-person interactions and physical contact (including fewer in-person meetings, limiting the size of in-person gatherings/events, implementing a crowd control plan that sets limits on the number of people on company premises and establishes social distancing measures for customers/guests, and ongoing restrictions regarding travel).
3. Training employees and managers on social distancing policies and protocols (including where to go and who is responsible if there are questions or complaints and how to track/consistently discipline employees for failure to follow protocols).
4. Updates to employee scheduling (including measures to reduce the number of employees present at the workplace, potentially staggering shifts, alternating teams, and/or continued telework).

Employers should consider implementing regular screening protocols for employees, customers/clients, or other workplace visitors. Key issues include whether to conduct temperature screens or other symptom checks, whether to pay employees for screening/waiting time, training personnel on how to appropriately conduct screening and maintain information collected, and best practices for telling clients/customers not to enter company locations if they do not pass the screening.

Employers should also consider providing personal protective equipment (PPE). Key issues include if masks/gloves will be mandatory for any/all positions and if so, who provides/pays for them.

Cleaning and disinfecting may require additional steps, including reviewing and renegotiating contracts with vendors that provide these services, as well as whether and how to conduct additional cleaning and providing cleaning supplies/hand sanitizer to employees and customers/visitors.

Employers should develop a safety communication plan for returning employees that explains safety protocols (what measures the company is taking and what precautions employees should take), where to report issues, and what benefits or perks the company is providing.

Tracking Covid-19 Tests

Employers should consider whether to conduct Covid-19 tests and if so, what type of test to conduct (i.e., blood, saliva, or nasal swab).

Although additional government guidance on the types of permissible tests likely will be forthcoming, employers intending to implement Covid-19 testing should consider and implement protocols concerning what type of test they will run, who will conduct the tests, how these personnel will be trained, whether the test must be performed in a clinical lab or by a licensed healthcare professional, whether a physician order is required for testing, who will be tested, how often tests will be done, how test results will be maintained, and the process for identifying contacts and sharing such information as appropriate.

Employers considering serology (antibody) tests should carefully review Food and Drug Administration (FDA) guidance and regulations as most private companies will not be able to independently conduct these highly complex tests.

Employers should consider providing personal protective equipment. Key issues: Will PPE be mandatory? If so, who pays for it?

Further practical issues that employers should consider include reinstating security/IT access, reactivating credit cards and badges, ensuring recovery of any files or equipment employees took home while working remotely, and reimbursing employees for business expenses.

Review of Existing Policies

With the collective experience gained over the last several weeks, reopening the workplace should trigger a comprehensive review of policies/CBA provisions, especially in light of recent federal, state, and local legislation. Common topics that employers should review include:

1. Leave (including how to address the web of federal, state, and local requirements and which benefits run concurrently with an employer's own paid time off)
2. Furlough (including how to bring employees back, phased rehirings, and potential new hires)
3. Benefits (including updates to health/commuter/401(k) programs and determining premium pay obligations for furloughed employees)
4. Wage and hour/compensation plans (including whether shutdown/furlough periods impact bonus/incentive plans)
5. Pandemic preparedness and business continuity plans

In light of Covid-19, companies should review and revise pandemic response plans. These plans should address processes and procedures to prepare for a potential virus recurrence/disaster, benefits available during future closures, management and HR succession planning, public relations messaging, and if a Covid-19 vaccine is developed, how to implement whole or partial workforce vaccination.

We expect there to be numerous orders and guidance issued by various jurisdictions nationwide as they begin to lift prior workplace restrictions and issue new restrictions governing workplace reopenings. This guidance reflects currently available information that employers should begin considering now to minimize difficulties as they reopen or expand current operations.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

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PRACTITIONER INSIGHT

A Fevered Pitch for Temperature Screening

President Donald Trump on April 16 announced his program for "Opening up America Again." Employers who are going to reopen will need to consider additional precautions to minimize the spread of the virus.

Temperature screening is one such precaution. Indeed, some states already require temperature screening in some circumstances.

Jonathan Segal, a partner at Duane Morris, says even though temperature screening is not risk-free, employers can take steps to minimize some of the more salient risks that accompany the benefits.

Because a fever is a common symptom of Covid-19, screening for fevers may help minimize workplace transmission. Such screening also may help to decrease the anxiety of employees, customers, etc. Managing anxiety is a critical component of becoming, or remaining, operational.

Minimizing Risks

Of course, temperature screening is not risk-free. There are steps that an employer may take to minimize some of the more salient risks that accompany the benefits of temperature screens.

1. Screening for Symptom, Not Condition. A temperature screen likely is a medical examination under the ADA. In non-binding guidance, the EEOC has taken the position that, at least during a pandemic, temperature screening is job-related and justified by business necessity.

To increase the likelihood that federal, state, and local courts will follow this guidance in construing their laws, employers should make clear that the screening is not diagnostic, that is, the purpose is not to determine whether the individual has Covid-19 or any other medical condition. The employer seeks only to determine if the individual has a symptom that may indicate Covid-19.

2. Significance of Test. A fever does not necessarily mean an individual has Covid-19. Conversely, the fact that someone does not have a fever does not mean that he or she does not have Covid-19.

These realities need to be communicated. An employer does not want to give someone a false sense of security that they do not have Covid-19. Conversely, some support should be made available immediately to an individual who is told that he or she has a fever.

3. Not Practice of Medicine. If a there is a patient/health-care provider relationship, then the health-care provider has certain obligations to the individual that go beyond the taking of the temperature and communicating the results.

For this reason, it is recommended that the employer make clear that temperature screening does not create a patient/health-care provider relationship. This is true even if health-care providers perform the screen.

4. Confidentiality of Information. The notification given to or authorization signed by the individual should state to whom the results will be disclosed. Be careful not to suggest "absolutely confidentiality" because that is neither possible nor required.

The roster of test results should be labeled as confidential and secured as same. Nothing should go into the personnel files of employees.

Reasonable efforts also should be made to prevent individuals other than the person from being screened from hearing the results of the screen. There are multiple ways to configure temperature screening to increase privacy.

5. Waiting Time. There is a question whether an employer needs to pay for an employee's waiting time to be screened (and all time thereafter under the continuous day rule.) At least under federal law, the answer to this question turns on whether the temperature screen would be integral to the employees' primary duties. There is no "per se" rule.

Note also that state law may impose a duty to pay where the FLSA may not.

Where there is an arguable duty to pay, employers can minimize (not eliminate) the risk by keeping any waiting time as short as possible. This may mean staggered starting times, more screeners, etc. This may help an employer argue "de minimis."

Some employers may wish to consider adding time which is more than the average waiting and other time before the employee clocks/logs/punches in. Demonstrations of good faith should matter.

Other Implementation Issues

There are a number of other implementation issues that employers should consider. They include, but are not limited to:

- You will note the discussion of screening is not limited to employees. It should extend to certain contractors, visitors, etc. who may wish to enter the workplace. This obviously is important for safety reasons. It also may be harder to argue "business necessity" in the context of the ADA if non-employees who may inflict equal risk are not screened.
- If you have a union, you will want to consult with it, even if you are confident (and don't be too confident) that you can implement temperature screening unilaterally under your management rights' clause. Even if you have the right to screen, you still may have a duty to negotiate with the union over some of the effects of the screening process (discussed below). Plus, the union can be an invaluable partner.
- A theme of this article is that information should be provided to employees and others screened. An authorization may be stronger but a notification may be more practical. If properly worded, the notification can create a credible argument that submitting to the screen is authorization; just make sure you have a record of each individual screened receiving the notification.
- You will need to think about what happens if an employee or other individual refuses to submit to a required screen. Consider requiring the individual to wait a specified period of time before submitting to another screen. At least try to consult with a health-care professional or infection control expert for guidance here and with regard to the next point.
- You also will need to consider how you will define and respond to a fever. Ideally, you have an infection control protocol that deals with symptoms, among other circumstances, and when an individual with a circumstance under your protocol (such as symptoms) can return to work.

Of course there are some risks in temperature screening no matter what you do. But the legal, business and human risks of not screening may be even greater.

Before You Check

- Employees' temperatures are medical information. That means you need to keep them confidential.
- Keep screenings private.
- If you send someone home, you may have a confidentiality problem if coworkers see.
- You have to take steps to protect workers who perform temperature screenings.
- You may be required to pay workers for time spent waiting for temperature checks.

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Contact Tracing Is 'Pandora's Box' for Reopening Businesses

• Privacy and discrimination concerns have some companies skittish

Businesses looking at smartphone-based tools to track their workers' contact with people infected with coronavirus will have to walk a delicate tightrope between reopening safely and protecting employee privacy.

Apple Inc. and Alphabet Inc.'s Google released initial versions of new virus proximity tracking tools April 29 so public health agencies could prepare in advance of a mid-May rollout. The applications are designed to use public health information and unique Bluetooth identifiers assigned to devices to notify people when they've come into proximity with someone with the virus. Digital contact tracing would supplement analog efforts, in which tracers try to connect the dots via phone calls, in-person screenings, and voluntary disclosures.

Other businesses, like PricewaterhouseCoopers and Ford Motor Co., are developing their own tracking devices as they prepare to eventually reopen offices and factories. Corporate lawyers say businesses are contemplating proximity-tracking wristbands and applications, among other tools to mitigate the spread of Covid-19, the disease caused by the coronavirus.

Employers might require workers to agree to tracking in order to be permitted to return to their workplace when stay-at-home orders are gradually lifted. That could mean trading privacy rights—even when they're off the clock—to keep their jobs.

"Until now, this has been a big privacy no-no," said Scott Mirsky, an attorney with Paley Rothman, of tracking employees outside of work hours. Digital contact tracing and other tracking tools "may sound like exactly what's needed in terms of public health. At the same time, it could be a Pandora's box regarding employees' privacy rights."

Some companies remain skittish because of concerns about privacy infractions and potential discrimination claims that could be grounds for lawsuits. There also could be employee revolts if digital tracking tools aren't properly deployed.

It remains to be seen how the tools will actually be used, said Ifeoma Ajunwa, an assistant professor at Cornell University who focuses on the ethical use of workplace technology.

"We don't have any kind of really clear, detailed sort of white paper from Google and Apple as to what laws are they concerned about when doing this contract-tracing," Ajunwa said.

Watching Workers?

Apple and Google released an application programming interface to select public health authorities, allowing them to build their own apps based on the contact tracing technology.

The apps would access users' anonymous Bluetooth identifiers to show when they are in close proximity to someone with the coronavirus. They would require users to opt-in for tracking and the tech giants say they won't have access to any of the data gathered.

Health-care providers like PRA Health and Sentinel Healthcare are pitching tools to track users' body temperature and heart rate for risk signs or allow them to share certain information with medical professionals.

Some companies are developing their own tracking systems.

"The more information you provide to employees, the less scary it'll be to them. In order for employees to buy in and be comfortable, they need to understand how it works, what is being collected, and for what purpose."

—Risa Boerner, chair of Fisher Phillip's data security and workplace privacy practice group

PWC's Automatic Contact Tracing mobile app "can collect proximity information anonymously and allows managers to effectively and precisely notify employees when they may have come into contact with an at-risk colleague," according to the company's website.

The accounting firm is testing the tool in its Shanghai office, Rob Mesiro, connected solutions leader at PwC said. The company has received interest from several business sectors and hopes to roll out the tracing tool broadly in the coming weeks, Mesiro said.

Ford is testing wearable technology that alerts employees when they come within six feet of each other to encourage employees to comply with social distancing recommendations, Bloomberg News's Keith Naughton reports. A Ford representative didn't respond to requests for comment.

Karla Grossenbacher, a business attorney for Seyfarth Shaw, said privacy concerns are reason enough for her to advise her clients to stick to "manual" contact-tracing policies involving interviews of the Covid-19 positive individual, in an attempt to retrace steps in the workplace.

"I have not had anyone talk about digital tools," she said. "It just seems easier to do the manual tracing from an employment perspective."

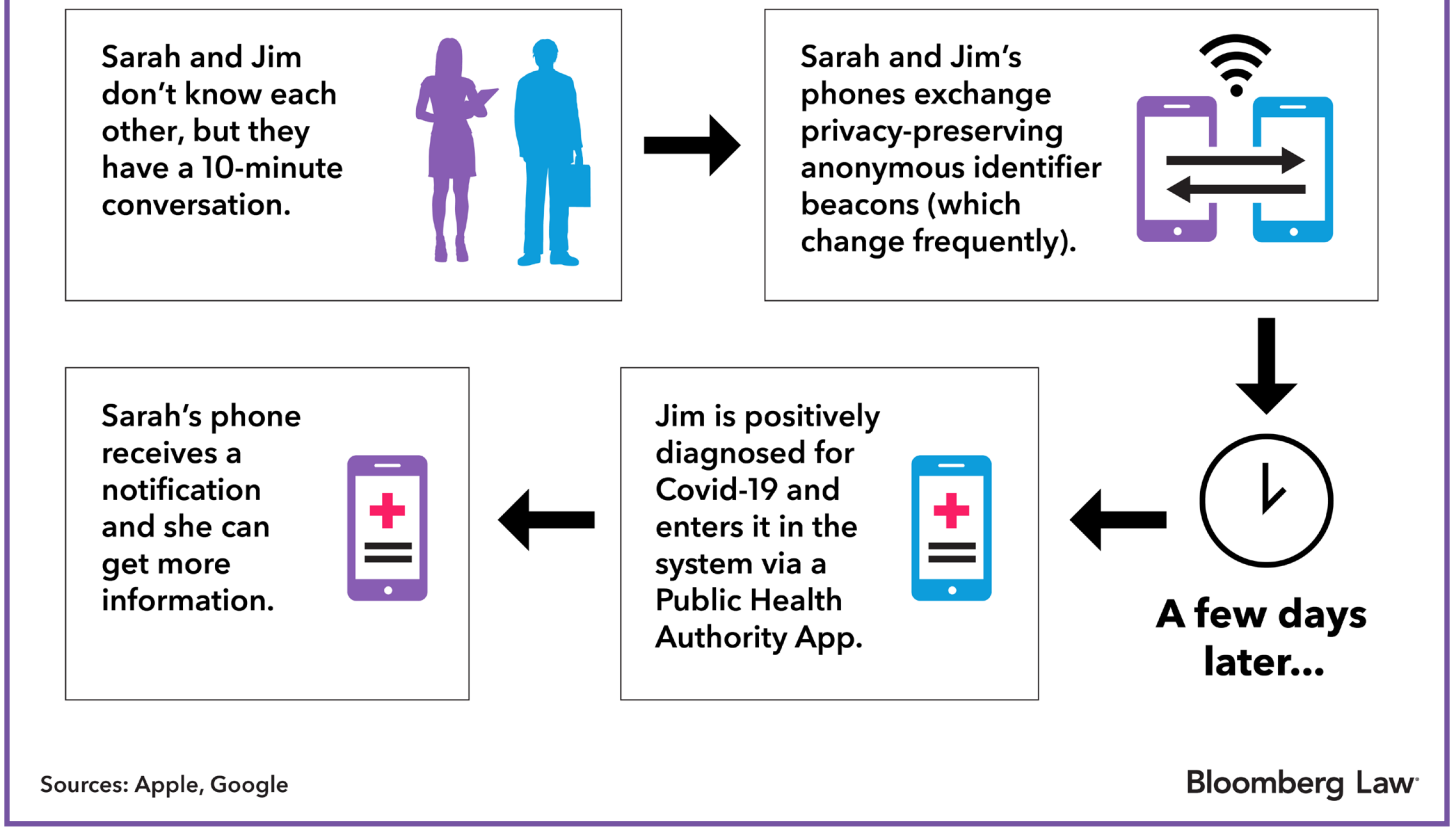
Boeing recently said it will use a traditional contact-tracing policy, and workers at Smithfield Foods Inc.'s Missouri pork processing plant called on the company in a lawsuit to come up with its own contact-tracing plan. Neither company responded to a request for comment.

Plaintiff Lawyers on Patrol

Plaintiff firms are waiting in the wings to file class actions over tracking data breaches and hacks, said Elizabeth Hinson, privacy and cybersecurity partner at Morris, Manning & Martin LLP. "Now is not the time to incur spending" on security incidents, she said.

Jay Edelson, founder of plaintiffs' bar firm Edelson PC, said some companies are using the coronavirus pandemic as an opportunity to possibly invade consumer and employee privacy. The firm was part of the recent $550 million Facebook Inc. settlement over biometric privacy issues.

How Digital Contact Tracing Tools Work



Sources: Apple, Google

Bloomberg Law

"Often they claim they are collecting information for pandemic related reasons, but their real motivation seems to be to track people more generally," Edelson said. "These types of activities are problematic and we do think, in the right circumstances, lawsuits could be helpful in curbing this illegal behavior."

Some state laws, like the California Consumer Privacy Act, create extra requirements for companies. Businesses have to give employees notice about what types of data they may be collecting in the tracking process, Hinson said.

"The more information you provide to employees, the less scary it'll be to them," said Risa Boerner, chair of Fisher Phillip's data security and workplace privacy practice group. "In order for employees to buy-in and be comfortable, they need to understand how it works, what is being collected, and for what purpose."

Cornell's Ajunwa said a patchwork of individual companies deciding whether to trace contacts is problematic.

"I believe the government actually needs to set standards for how the tracing can take place, and that it basically needs to be a universal contact-tracing for everyone," she said. "It can't be left up to the employers. This is a public health issue."

Discrimination Concerns

Federal disability law also imposes obligations on employers handling sensitive medical information, like a Covid-19 diagnosis.

The Equal Employment Opportunity Commission has advised companies to alert public health authorities if a worker discloses a positive Covid-19 diagnosis, but the agency also said employers can't disclose that worker's identity when informing other employees who may have come in contact with the ill worker. The agency declined to comment specifically on digital tracing tools.

Covid-19 information is particularly sensitive because the long-term effects of the disease are still unknown, Ajunwa said.

"There could be long-term medical issues that we don't know about," she said. "Insurance companies might then have an incentive to know who's been positive, and use that as some sort of pre-existing condition in the future."

That could lead to potential employment discrimination against workers who have had the virus and may later be subject to a host of related health issues .

Meanwhile, many employers are taking a wait-and-see approach, said Bryan Cave Leighton Paisner partner Hope Goldstein. They're focusing now on keeping the virus out of their workplaces altogether.

"Ultimately contact tracing is generally part of their plan, should the virus enter the workplace, but it's just generally part of the plan," she said. "If we hear about it having more success, we might see more adoption."

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Extra Things to Think About: Retailers

If your stores have been closed, make sure you learn the lessons of "essential" retailers whose stores remained open during the initial stages of the pandemic.

- Are there ways to limit interactions between store workers and truck drivers?
- Have you reconsidered the movement of people around your stores? Do you need to set a maximum number of people inside the store at one time to allow for social distancing? Typically, this requires a person up front with a counter. Give store managers guidance.
- Have you marked floors with arrows for narrow places to allow movement only in one direction? Do you need to mark six feet back from cashiers for waiting?
- Do your cashiers need plexiglass between them and the customers, or do you want to consider requiring them to wear masks? Are there other contactless pay options you should consider?
- Have you considered the special needs of vulnerable populations? Should your stores set aside an hour a day of shopping time only for these populations?

Extra Things to Think About: Manufacturing and Warehouses

Added safety precautions like masks and social distancing can have a big impact on these types of operations. How you communicate about added precautions, and how you instruct your facilities managers to communicate about them, has impacts on whether and how the rank-and-file comply.

- Do staffers need additional training on sanitation? Do you need to facilitate a discussion about wearing masks in all situations that don't pose a safety hazard?

Try to keep workers in factories six feet apart unless it is a safety hazard. Reconfigure break rooms and dense facility areas. Mark floors clearly and provide additional signage about social distancing.

- Do shop floors have enough hand-washing facilities?
- Are there ways to limit interactions between warehouse workers and truck drivers?

How to Think About Employee Mental Health as Workplaces Reopen

Companies grappling with how to summon staff back to work during a global pandemic must bear in mind that the race to forge a new normal in the workforce is likely to tax everyone's mental health.

Bloomberg Law asked Darcy Gruttadaro, director of the American Psychiatric Association Foundation's Center for Workplace Mental Health, what companies should do before jumping back into business as usual—particularly as employees contend with stressors including closed schools, ailing loved ones, and financial responsibilities.

Bloomberg Law: What mental health policies/ programs are mission critical right now?

Darcy Gruttadaro: Improving access to mental health and substance use disorder care. Ensuring that employees have access to timely and effective mental health and substance use care. This was a priority for employers before the pandemic and is now a higher priority.

Employers should be working with their Employee Assistance Program (EAP) vendors on innovative ways to reach employees to reinforce the importance of knowing the early warning signs of conditions that are on the rise right now—like depression, anxiety, substance use disorders, and trauma. Employers should ask their EAP vendors to share data showing employee EAP use. If the data does not show a significant uptick consistent with national reports showing mental health and substance use conditions on the rise, then strategies should be developed to remind employees of the benefit and the need to get help early.

Employers should also collaborate with their health plans and third-party administrators in examining data and strategize how the plan intends to meet growing demand for mental health services.

There are two key areas that should immediately be addressed. Tele-mental health is first. Our nation stood up the delivery of virtual mental health care in a matter of months. This was done with health plans offering reimbursement at levels consistent with office visits and, in many instances, covering both video and telephonic care. This momentum must be sustained to ensure that people have continued access to care that works for them whether that is via an office visit, video, or telephonic care delivery.

Leaders "should reassure people that the organization is doing all it can to keep employees safe."

Also, primary care providers will be on the front lines in delivering care to the growing number of Americans experiencing mental health and substance use conditions. Our nation had a serious shortage of mental health specialists—psychiatrists and therapists—before the pandemic. One highly effective way for employers to support the delivery of mental health and substance use care in primary care is to ask their health plans and third-party administrators to support the expansion of The Collaborative Care Model. This evidence-based model brings a care manager and psychiatric consult into the primary care practice.

BL: Are mid-year changes possible for work-sponsored benefit plans?

DG: Employees interested in mid-year benefit plan changes should consult with their organization's benefit managers and HR about what is needed that is not currently covered. Health plans have already responded to the pandemic with changes in plan design, including broader coverage for mental health care, so they are likely to consider further adjustments, especially if the need is great across organizations.

Employers should use their purchasing leverage to work with their health plans and third-party administrators to address these unprecedented times.

BL: Are there enough qualified mental health professionals to provide expanded coverage to corporate America?

DG: No. Our nation was experiencing a mental health workforce crisis before the pandemic. Primary care practices provide mental health care to many in our nation for common conditions like depression, anxiety, and substance use. This makes expansion of The Collaborative Care Model even more important to support primary care providers.

BL: What are three things management can do to ease concerns about returning to work?

DG: Leadership: Those at the highest level of organizations should reassure people that the organization is doing all it can to keep employees safe, enumerating specific steps that are being taken. Also, normalize what people are experiencing in high levels of stress, anxiety, and uncertainty and the toll it is taking on people, including those at the leadership level. Make mental health visible by talking openly about conditions like anxiety, depression, and substance use. It shows that leaders care about employees' mental health and well-being.

Communication: People are afraid and need continuous reassurance. So keep a steady stream of information flowing both from management to employees and from employees to management. Consider creating employee resource groups around mental health and well-being so that employees have a forum to share their experiences and strategies for staying mentally well.

Support: Organizations should take a critical look at mental health services and support offered to employees. This is the time to share warning signs for common mental health conditions with employees and reinforce the importance of getting help early. Organizations should track their data and, given the pandemic, see an uptick in EAP use and health claims for mental health and substance use care. If that is not happening, employers should work with their EAP and health plans to develop strategies to reach employees experiencing these conditions. Also, HR should continue to remind employees about the EAP and health benefits.

This interview has been edited for brevity and clarity.

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Weighing Cuts to 401(k) Matches

Companies are starting to suspend, defer or shrink the amount of money they match in workers' 401(k) accounts, with Sabre Corp. and Marriott Vacations Worldwide among those first out of the gate.

If the 2008 financial crisis is any guide, more are almost certain to follow due to the current novel coronavirus-fueled economic downturn. FedEx Corp., Motorola, Resorts International, and General Motors were among the household names that cut or reduced matching contributions to employer-sponsored retirement accounts.

In many cases, the cuts were temporary. Of 231 large companies that suspended their matches in 2008 and 2009, 75% had reinstated them by 2011, according to a Towers Watson survey.

Some companies reduced matching contributions to workers' 401(k) accounts after the 2008 financial crisis — in many cases temporarily. The coronavirus downturn has sparked the same trend.

For workers, even a one-year suspension of matching contributions can be costly. Take for example an employee making $75,000 per year with an employer matching 5% of their salary. That amounts to $3,750 that won't get stashed away for retirement--and compounded over time with lost interest, it can lead to a significant dip in retirement savings.

Teresa Ghilarducci, a New School for Social Research labor economist, said the post-financial crisis 401(k) contribution rollbacks didn't generate much resistance from shell-shocked workers "just happy to have a job."

"There was no backlash from workers," Ghilarducci said of the 2008 benefits changes. "So I suspect we'll see more of that behavior next week. Or next month."

Fielding Questions

So far, the pandemic is mostly generating questions among employers. The uncertainty has prompted benefits lawyers and financial advisers to rush out refreshers about retirement policy in recent days.

Amy Reynolds, partner at consulting firm Mercer, said her group is already fielding questions about potential tweaks to benefits offerings.

Mercer is recommending alternatives to outright cuts such as dialing back auto-escalation increases that raise employee contributions each year, or shelving matching contributions for highly compensated personnel first, Reynolds said.

"There is a focus on preparedness and contingencies," she said of the current discussions.

Critical Decisions

Large employers looking to cut costs during the last financial crisis faced some critical decisions, said Robyn Credico, managing director for retirement at Willis Towers Watson.

The most detrimental would have been to lay off or furlough staff. Adjusting health-care costs or retirement benefits, such as matching contributions, were considered much more palatable.

"That's a preferable outcome to most people. The other is, I lose my job and don't get any benefits," she said.

Alternatives WTW consultants are discussing with concerned business owners this time around include capping benefits for higher paid staff or delaying matching contributions across the board until the end of the year, Credico said.

Lynn Dudley, vice president of global retirement policy at the American Benefits Council, predicts that "retirement savings is going to take a hit" no matter what employers or lawmakers do to try and mitigate the damage.

The Long Haul

The last recession led 89% of the 260 large employers Towers Watson surveyed in 2009 to suspend their matching contributions, while 11% of respondents opted to reduce their matching funds.

A follow-up Towers Watson study in October 2011 found that 80% of the suspensions and reductions took place between January 2009 and April 2009. The data shows that others were still cutting contributions as late as April 2010.

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Liability

Ending Virus Shutdowns Too Soon Poses Legal Risk for Businesses

- Sick customers could spur wave of lawsuits seeking damages
- Companies see bankruptcy threat even from hard-to-prove claims

Whenever U.S. stores, restaurants and theaters reopen from coronavirus shutdowns, they may face an unexpected problem: lawsuits from sick patrons and workers.

Business owners hit hard by Covid-19 are eager to get back to work as the outbreak shows signs of slowing and the Trump administration pushes for a quick restart of the nation's economy. But with no vaccine for the easily transmitted virus, companies opening too soon could be blamed if more people get sick. Walmart Inc. and Carnival Corp. are among those already defending lawsuits by employees or customers.

A wave of personal-injury cases could bankrupt businesses, according to the U.S. Chamber of Commerce, which is recommending government protections. And though it may be difficult to prove that any one company was responsible for spreading Covid-19, legal experts say a surge in such claims could strain the court system.

"The liability concern is a real issue," said Harold Kim, president of the Chamber's Institute for Legal Reform. "Right now they're asking: how do we protect ourselves against risk. The worst-case scenario is that companies will not want to open their doors because the liability risk is so great."

The scope of the pandemic is creating uncertainty about how the courts will apply standard legal principles, similar to how the system was tested by lawsuits over asbestos, said David Boies, managing partner of Boies Schiller Flexner LLP in New York. Even so, the greater risk will probably come from workers, because they won't have to prove negligence in courts, he said.

Greatest Risk

"There will likely be many workman compensation claims because of the ease of filing, there is no requirement to prove negligence, and for many people their greatest contact with others, and hence the greatest chance of contracting the virus, is at work," said Boies, whose clients include numerous large companies.

The coronavirus has infected about 650,000 Americans and killed more than 31,000, forcing business shutdowns nationwide and leaving the economy in shambles.

State governors say they will coordinate the slow return of non-essential businesses across regions once the virus appears to be contained. Even then, many encourage common-sense measures like social distancing and face masks for the foreseeable future. On April 16, President Donald Trump unveiled broad guidelines states can use to determine when and who can reopen.

But following the advice of public-health officials may not be enough to limit the spread of the virus or liability for companies, said Heidi Li Feldman, a professor at Georgetown University Law Center in Washington.

'Human Lives'

"Until there's a vaccine or cure, it's not going to be advisable for businesses to say they're risking human lives to restore the economy," Feldman said.

For those that reopen before eradication, there is an increased risk that customers will claim they got sick and suffered due to the company's negligence, said John Goldberg, a professor at Harvard Law School and an expert in tort law. Plaintiffs must show, among other things, that the business breached a duty of care owed to the customers and that its actions caused them harm, Goldberg said.

In the case of Carnival, where thousands of cruise-goers were confined on a ship for more than a week, the plaintiffs claimthe company put them at risk by disregarding outbreaks in February to start other voyages in March, resulting in passengers and crew getting sick.

Princess declined to comment on pending litigation, but said, "Our response throughout this process has focused on the well-being of our guests and crew within the parameters dictated to us by the government agencies involved and the evolving medical understanding of this new illness."

For customers of millions of public shops and restaurants, where people come and go, it will be much harder to prove that a business's actions are responsible for their sickness.

"It may be easy to claim that there was undue exposure in a particular store, but very difficult to prove that that the person with Covid-19 contracted it because of exposure in any particular place," said Mike Steenson, who teaches at Mitchell Hamline School of Law in Saint Paul, Minnesota.

To prevail, an infected customer must show he or she didn't have the virus before visiting the business, said Benjamin Zipursky, a law professor at Fordham University. A plaintiff also would have to prove they had no contact with anyone or any shared spaces from the time they left home to the time they reached the business, or on the way back – a tall order.

"Most plaintiffs aren't going to be anywhere near being able to prove all those things," Zipursky said.

Long Incubation

Complicating matters is the long incubation period for the virus, which can last two weeks, said Nicholas Rozansky, an attorney with Brutzkus Gubner in Los Angeles, whose clients include retailers in the toy and apparel industry.

"How can you prove with a preponderance of evidence that you got it at a particular location – it's already difficult to do that with food poisoning, which happens a lot quicker," Rozansky said.

While proving personal injury cases will be difficult, juries may still question whether companies went far enough to protect customers, like cleaning surfaces regularly, keeping patrons far apart and checking workers for virus symptoms. Legal experts said businesses that relax enforcement measures could find themselves on the hook even if evidence doesn't show they had a direct link to the plaintiff getting sick, although businesses might then prevail on appeal.

Many companies are urging Congress to grant them limited immunity from litigation that arises from coronavirus-related issues, except in cases of gross negligence.

> **"The courts should not impose a standard of liability that results in businesses not being able to operate."**
>
> –David Boies, managing partner of Boies Schiller Flexner LLP

"There are things that we can and should do to provide a greater degree of certainty, and relieve the economy and business of unnecessary financial burden," said Evan Greenberg, chief executive of insurer Chubb Ltd. "I'm not talking about giving immunity to insurance companies. I'm talking about business and corporate America and nonprofits."

Workers' Compensation

Unlike customers, employees who get the virus have fewer legal options, with most cases confined to workers' compensation claims that don't go through the court system, said Gregory Keating, a law professor at the University of Southern California.

With such claims, employees can get compensated for work-related injuries without proving an employer was negligent. It's a lesser burden than making the case to a judge or jury, but damages are likely lower than in personal-injury lawsuits.

Still, some have taking their cases to court, including a manufacturing plant worker in Michigan who says he was fired after getting sick with coronavirus-like symptoms and the family of a Walmart employee who allegedly died after contracting Covid-19 at work.

Companies that take reasonable precautions as they resume operations should get favorable treatment from judges, their lawyers say.

"The courts should not impose a standard of liability that results in businesses not being able to operate," Boies said. "That is as damaging to the economy as an edict that says you can't open."

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Virus-Stricken Workers Face High Hurdles When Suing Employers

• Tort claims could rise linked to pandemic

Workers who contract the coronavirus on the job will face an uphill battle in proving their employers created unsafe work conditions, as an anticipated spike in lawsuits related to the pandemic would enter uncharted territory and raise novel legal questions.

Business groups have begun raising the alarm against a potential wave of personal-injury and wrongful death lawsuits filed by employees or their families, and are lobbying the government to shield them from those claims, as the nation gears up for returning to work.

However, it will be difficult for workers to win those cases, employment law professors and attorneys told Bloomberg Law. Workers often are at a disadvantage against employers in these sorts of cases anyway, and they will need to meet several high bars to prove that they became infected with Covid-19 because of employer negligence or recklessness, for example.

That's assuming those claims aren't blocked by workers' compensation laws that prevent employees from filing private lawsuits for workplace injuries. For a negligence claim, workers must prove that they got sick because the employer failed to keep them safe from harm.

"We're in territory we haven't seen before," said Lindsay Burke, who co-chairs Covington & Burling's employment practice group. "We are looking at a whole lot of different legal risks and issues. It's not clear how they will play out. Traditionally an illness you can catch anywhere isn't something you can hold your employer liable for."

Compliance with standards established by the Occupational Safety and Health Administration and the Centers for Disease Control can help protect employers. Still, attorneys say the administration has been slow to offer uniform Covid-19 guidance, which could create a difficult landscape for companies to navigate and open the door to tort liability.

Not complying with this guidance could rob employers of a defense to keep cases out of court through workers' compensation, Burke said.

Personal Injury Cases Hard to Win

Some companies have faced mass outbreaks, including a processing facility of JBS SA in Minnesota and a Smithfield Foods plant in South Dakota. Walmart Inc. and Celebrity Cruises Inc. already face legal challenges based on worker infections.

It's difficult to predict what type of situation would give rise to personal-injury liability for employers because cases are fact-specific. Companies can also raise several defenses,

Employer Defenses to Workers' Virus-Based Tort Claims

Compliance With OSHA/CDC Guidelines	Gradual Return to Workplace	Workers' Compensation Shield
Ensure proper space between employees where possible	Allow employees to return voluntarily	Ensure proper training on health, safety protocols
Provide personal protective equipment	Be mindful of workers who may be high-risk	Be aware of workers' compensation laws in all states where company does business

Bloomberg Law

including that they've reasonably met their duty to keep workers safe.

"A company will have to say, 'This is what we are doing to prevent exposure and this is how we are doing it,'" said Melissa Peters, special counsel at Littler Mendelson, who specializes in health and safety.

OSHA is already fielding an influx of safety complaints from workers related to the coronavirus. An agency spokesperson said the agency has handled 1,819 complaints, 52 employer-reported referrals, and 19 referrals by directly contacting employers and facilitating prompt actions to address alleged hazards.

While more agency guidance is needed on workplace precautions, there are already known steps employers should take to minimize or avoid risk, said James Brudney, a professor at Fordham Law School who teaches labor and employment law.

For office work, separating people by dividers or cubicles, providing adequately spaced working conditions and access to hand-washing facilities, and requiring masks in crowded settings may well be reasonable steps to take, Brudney said.

"The standard under OSHA's regulation, sustained by the Supreme Court, is working conditions that the employee reasonably believes pose an imminent risk," he said. "And reasonableness is assessed at the time employees have the belief."

Exposure Hard to Prove

Businesses could also contend that workers can't show that working conditions caused them to fall ill, given that Covid-19 can be contracted from numerous places and could be passed from individuals who show no symptoms.

"The kicker is going to be, 'How is somebody going to establish that they contracted it at work, given the spread of the virus?'" Peters said. "How are you going to be able to track that? Absent a massive outbreak in the workplace, that will be hard to prove."

An even steeper challenge for employees is bringing a recklessness claim against an employer, which requires proof that an employer knew or should have known of conditions that would expose workers to the virus.

There's an "unevenness of our knowledge about what types of exposures are likely to cause serious illness, given shifting dynamics of health assessments," Fordham's Brudney said.

Carl Rosen, president of the United Electrical, Radio & Machine Workers of America, said some employers are relying on federal health privacy laws to avoid those disclosures.

"This is a battleground right now," Rosen said. Workers fear being around people and not knowing if they've been exposed or not, he said.

Workers' Compensation Hurdles

Many workers may not be allowed to bring negligence or other "tort" lawsuits against their employers because of state laws that mandate workers' compensation as the "exclusive remedy" for work injuries. These laws cover many, but not all, workplaces—though some don't apply to employers with few workers, certain industries such as agriculture, or to independent contractors.

Some states, including Washington and Ilinois, have said they will provide workers' compensation to health-care workers and first responders who contract Covid-19.

Each state offers its own standards for getting around workers' compensation claims, said Carolyn Rashby, a partner in Covington's employment practice group.

Employees covered by workers' compensation laws can bring separate personal-injury lawsuits in limited circumstances, such as where a worker is harmed by an employer's willful misconduct or "gross" negligence—both of which are even harder for workers to prove because they must show intentional harm or conscious disregard by employers.

Still, workers' compensation claims may be a better alternative for workers, given that personal-injury claims are more difficult to pursue, said employment lawyer Rosemarie Cipparulo, who also teaches at the Rutgers School of Management and Labor Relations.

"There's not always a lot a worker can do," Cipparulo said. "This is a really gray area."

Rashby advised a slow and gradual return that doesn't force workers to put themselves in a risky situation.

"There will be a lot of employees who aren't able to return to work or unwilling to return because they are at a higher risk," Rashby said. Allowing workers to return voluntarily will mitigate employers' risk of claims, she said.

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PRACTITIONER INSIGHT

Business Immunity Will Prevent Litigation Crisis

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Businesses reopening during the pandemic do so at great risk from litigation arising from Covid-19-related claims. Hughes Hubbard & Reed attorneys and Imerys's general counsel for North America explore the statutory precedent for providing it.

Already reeling from the human toll and economic devastation wrought by the Covid-19 pandemic, American businesses could soon face a devastating aftershock: a wave of coronavirus litigation which will threaten to take down many businesses that managed to survive the first waves of the pandemic. This is a preventable situation that Congress must address now.

Americans and American businesses have demonstrated that they want to get back to work carefully and in accordance with best practices. Unfortunately, business owners are facing this challenge in an environment of extreme uncertainty and with few legal protections.

The recent release of federal guidelines for how businesses and employers should govern themselves at various stages of the crisis was an important first step. Nevertheless, American businesses will likely reopen with no identified vaccine and a well-funded plaintiffs' bar that will be seeking out claimants for all nature of lawsuits.

A Great Risk for All Businesses

To examine the impact of such litigation, consider the owner of a small suburban restaurant. After scraping by with takeout and delivery sales for months, she opens her dining room (three weeks after the governor allows it, just to be sure). She has carefully disinfected the counters, provided masks and gloves to staff, sacrificed valuable tables to expanded spacing, and abandoned cash transactions—all without raising prices in hopes of encouraging her customers to return. But one customer gets the virus and files suit, forcing her to defend her decision to reopen.

The legal fees for this uninsurable risk may well crush her already-suffering small business. And since the customer does not really know where he got the disease, his lawyer will sue several businesses, multiplying the economic disruption throughout the community.

While this concern is put in sharp focus with the example of this single small business owner, these concerns apply similarly to larger businesses, which will have bigger targets on them. The only people who will truly benefit from this litigation pandemic are the lawyers: plaintiffs' attorneys who will be able to extract settlements and potentially collect judgments, and the army of defense attorneys who will be retained to defend the onslaught of cases.

Absent immediate action, the potential cost to the economy, and to the livelihoods of millions of Americans, will be enormous and long-lasting, and will prolong and exacerbate what already is sure to be a challenging recovery.

Broad Safe Harbors Needed Now

As businesses prepare to reopen, the federal government should implement broad safe harbor protections now. Under such rules, companies that rely on and follow applicable government standards and guidance related to coronavirus exposure would be granted immunity from future claims for allegedly causing someone to contract Covid-19.

As the government learns more about the disease and how to best combat it, the rules would change, as well, and businesses would be expected to adjust accordingly. A business choosing to comply with these rules could publicly demonstrate its commitment to best-practice protections, enhancing its customers' confidence that they are in a safe place and giving those businesses a competitive advantage over the less diligent. And that's what we want—an approach that allows our economy to thrive while we discover and implement ever-better ways to keep us safe and defeat this disease.

This approach is far from revolutionary—it is already being used in this crisis, albeit to a far more limited extent. The 2005 Public Readiness and Emergency Preparedness Act (PREP Act) provides companies with immunity from liability for certain wrongful death and product liability claims related to countermeasures to Covid-19, but not for all claims.

Claims resulting from the use of respirators, for example, are covered by the Act, while those related to the use of recommended cleaning products, like hand sanitizers and soaps, are not. The recently passed CARES Act only extends liability protection to volunteer health-care providers—not to health-care providers and facilities generally.

Some states like New York have taken steps to limit this liability during the pandemic, so that health-care professionals will not have to face substantial litigation threats for their efforts to save lives during the pandemic, particularly where shortages in medical supplies result from a lack of government foresight.

Similar Measures in the Past

The federal government has taken similar measures to protect businesses from widespread litigation following large-scale disasters in the past, including the Y2K Act, the 9/11 Victim Compensation Fund, and the SAFETY Act.

In each of these cases, legislatures have realized that rational businesses need protection to provide necessary services amid a crisis, particularly one where speed is important and knowledge is limited. That is precisely the situation facing the broader American economy, and exactly why a wider application of safe harbor protection is needed now.

Of course, none of this can work without government leadership to define how we can return to work and school safely. Implementing safe harbor legislation in response to the current pandemic will require a joint effort and consistent approach at the federal and state levels. The FDA, CDC, OSHA, and state or local health departments all have a role to play to ensure that clear, medically sound guidelines are in place for businesses to follow as they prepare to reopen.

The government has the opportunity now to avoid the oncoming Covid-19 litigation crisis and the entirely preventable impact it will have on American society as we try to emerge from our homes and back into the public square. It should act immediately to do so.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

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The opinions expressed are their own.

Questions Every GC Should Ask Right Now

- Have you reviewed your company's workers compensation policies and general liability coverage? Does it cover litigation expenses? Have you reviewed your state's workers comp rules?
- What are the rules for customers put in place by your local or state government? For workers? What about the federal government? Do you operate internationally and have have you reviewed the guidance from those places? Have you designated someone to monitor changes to this guidance?
- Are there things particular to your business you need to consider that are not covered by state and local guidance?
- General liability coverage levels are going to come down to a basic question for the plaintiffs, businesses and insurance companies: Was there an accident involved? How does your insurer define accident?
- What reasonable steps have you taken already? Installed dividers? Spaced workspaces? Mask requirements?
- What are your reputational or political risks if you are subject of a lawsuit or lawsuits?

ANALYSIS

Covid-19 Litigation Poised to Boom

During any serious economic downturn, plans come apart and businesses falter. Litigation often follows.

The economic crisis precipitated by Covid-19 will be like previous downturns in some respects: We can expect to see a boost in bankruptcy, employment, and foreclosure matters. But in some respects, we could see different commercial litigation emerging from this crisis than in the previous one. That's because the 2008-2009 recession's epicenter was a financial collapse, while the Covid-19 downturn came from a public health crisis that has cut Main-Street America off at the knees.

Here are some types of litigation that may be of particular interest in the coming year.

While the latest economic downturn will boost litigation in some familiar areas, its origins in a public health crisis make it anything but typical. Bloomberg Law analyst Eleanor Tyler looks at types of litigation that may arise from the pandemic.

Contract Disputes

Contracts come undone in any recession. But in this one, disputes will be widely centered on contract clauses and defenses like force majeure, material adverse effect or change, frustration of purpose, illegality, impossibility, and duress. The worldwide nature of the crisis means that counterparty risk is truly global, and the economic hard stop some countries are enduring will upend many more agreements than in past downturns.

Expect a boom in disputes about arbitration and whether lawsuits belong before a judge at all. If parties start flooding arbitration systems, there may be a severe backup in adjudications or a sharp uptick in the price of arbitration. As a result, for routine commercial disputes, parties might reassess whether arbitration clauses belong in so many agreements. But for international disputes, there is little alternative.

Of interest going forward will be whether parties adjust drafting conventions following the crisis. If parties can agree up front on circumstances under which no reasonable merchant would adhere to the contract, they might be able to short-circuit disputes arising out of extreme circumstances. In the alternative, counterparty risk hedges might become significantly more widespread.

Unfair Trade Practices Enforcement

Fraudsters never let a good crisis go to waste, and we already have seen a spike in Covid-related fraud complaints to federal and state authorities. Along with the usual snake oil pitches, there are financial schemes tied to the novel coronavirus itself or to subsequent federal relief programs. Expect that the broader use of online communication and financial transactions will lead to some additional identity theft and credit card fraud as well.

The Department of Justice has established a task force devoted to prosecuting coronavirus fraud, hoarding, and price gouging (more on the latter below). Expect vigorous enforcement from both federal authorities and state attorneys general, who typically constitute the front line of unfair practices enforcement. Any enforcement actions will likely draw widespread private litigation as well. In fact, consumer product and protection actions of all kinds can be expected to see a boom.

Hoarding and Price Gouging

State and federal price gouging laws are usually triggered only by a declaration of emergency. Typical disasters create a localized or regional emergency, but with a nationwide emergency declaration, and one in almost every state, new problems arise for supply chains for scarce products.

These laws are varied and many are vague. While some price gouging laws specify a percentage price increase that will trigger scrutiny, others apply to charging an "excessive price" or "unconscionable price." Making pricing decisions will be exceedingly complex for impacted companies. Any attempt to coordinate or allocate resources risks running afoul of the antitrust laws.

Not only are these laws varied, they are sparsely litigated. The federal hoarding and price gouging law codified in the Defense Production Act, 50 U.S.C. § 4512, has not been meaningfully interpreted by a court in at least 50 years. But Attorney General William Barr encouraged federal prosecutors to use the statute to attack market disruptions and profiteering, so we are likely to get some litigated disputes on this law and the diverse patchwork of state statutes.

Insurance Litigation

Disasters breed insurance litigation. And this is a nationwide disaster that has severely impacted businesses in every industry.

The dollars at stake in whether business interruption, contamination, and related coverages apply to the Covid-19 crisis will be very high. Some legislatures have threatened to retroactively declare the coronavirus crisis covered under existing policies. For their part, insurers have warned that such a move would bankrupt them and leave all policyholders worse off.

Privacy

The health and economic crisis is also fertile ground for privacy litigation.

Most of the country is on an extended experiment with distance learning, working, visiting, and shopping in some form. For each of the new apps, programs, and services consumers signed onto, they clicked through user agreements that required them to accept terms regarding how the data that their activities generate will be used.

Eventually, some of those systems, stores, and services will be breached. And state privacy regulations giving some citizens stronger privacy rights make for a patchwork of potential liability. The opportunity of having more users during the crisis comes with a risk for online companies that are sitting on increased amounts of data and may not have in place security systems of attendant strength— as Zoom Video Communications Inc. discovered when it saw a spike in use during the crisis.

If track-and-trace programs become widely used, consumers will give up a remarkable amount of privacy, particularly regarding associations and movement.

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PRACTITIONER INSIGHT

Preparing for the CARES Act Enforcement Wave

The CARES Act, a $2 trillion Covid-19 stimulus law, contains $877 billion in corporate and small business relief–and significant enforcement appropriations.

The $500 billion in corporate and $377 billion in small business relief that Congress included in the law will be tapped by companies in the health-care and life sciences, defense, transportation, entertainment and other industries.

The legislation includes significant appropriations for monitoring and enforcement of fraud in connection with the funding, including a special inspector general invested with sweeping enforcement authority. In particular, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) earmarks $100 billion for hospitals and health care providers and another $27 billion for vaccines and other therapies and personal protective equipment.

While some in these industries are accustomed to living under the lens of the government's enforcement microscope, others are less well-prepared to minimize the risk that they will be swept up in an inevitable wave of criminal and civil actions that will be brought against companies and individuals that seek and receive stimulus funding.

Below are steps companies should take now to mitigate enforcement risk.

Understand Funding Restrictions

The myriad qualifications to access certain buckets of stimulus funding and restrictions on the use of those funds and even on the operation of a business that receives funding–notably restrictions on stock buybacks and certain executive compensation–are complex, nuanced, and raise questions to which there are not yet clear answers.

The CARES Act provides $877 billion in relief for affected businesses. Sidley Austin's Jaime L.M. Jones offers steps that businesses unaccustomed to enforcement scrutiny should take now to mitigate risk.

The legislation vests with the relevant agencies the responsibility to determine the particular eligibility requirements that will apply and companies should expect various certifications and attestations. For example, the Small Business Administration paycheck protection applications include certifications that the applicant is eligible to receive the loan, meets the regulatory definition of a small business, will purchase only American-made equipment and products "to the extent feasible," and "is not engaged in any activity that is illegal under federal, state, or local law."

Such attestations can later be leveraged as the basis of a criminal fraud charge or False Claims Act action if they are less than complete or materially misleading.

Applicants must leverage their internal and external legal and regulatory colleagues across disciplines before attempting to access funds to ensure that they understand the qualifications and restrictions on use and that they are positioned to comply with these requirements.

Dedicate Personnel to Monitor

The rules and guidance applicable to CARES Act funding are developing and the requirements that apply to funding at the time a company applies may well not be the final word.

Companies that seek to participate in the stimulus program must ensure they are monitoring for developments and nimbly move to comply with changed expectations.

Shore Up Compliance Programs

Companies that are experienced at government contracting or that participate in normal-course federal lending and other programs may have robust compliance programs and staff experienced in navigating

the landmines that can be buried within program qualifications, contract terms, and application certifications. Those that do not have this experience would be wise to invest in these capabilities now.

Companies should pay close attention to building out monitoring and auditing mechanisms designed to ensure that certifications made to the government are true at the time they are made and commitments to comply with laws or aid requirements are carried through.

Companies must also ensure that internal reporting systems are functioning, and, when whistleblower complaints are received, companies must ensure that they are investigated swiftly and thoroughly and that remediation, if necessary, is implemented.

Document, Track, and Repeat

Companies should ensure they have real-time documentation to substantiate representations that are made in the context of applying for stimulus funding. Not only will doing so force the careful examination of the truth and accuracy of the representations being made, but it will help to establish the company's appropriate intent if questions later are raised. Similarly, systems must be built to segregate, track, and trace funding received to ensure that it is applied in the manner intended and that the appropriate use of the funding later can be documented.

Employees charged with submitting applications or otherwise dealing with the government must be trained to document all representations made in real time as well as the factual support for each representation. Where applicants or government representatives discuss or agree on modifications to published program requirements or regulations it is critical that companies confirm in writing the new expectation.

Take Only What You Need

The temptation to tap into millions of dollars of potential funding, particularly with the promise that a loan may later be forgiven, is powerful. Even companies that are assured that they qualify for a particular source of funding should consider whether the restrictions and enforcement risk that comes with accepting the funds is worth the potential upside.

In particular, those companies that are not convinced they will need to spend the funds may be advised to pass on the opportunity and avoid enforcement scrutiny later about whether their acceptance of the money was in good faith.

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Jaime L.M. Jones, partner of Sidley Austin LLP and global co-leader of the firm's healthcare practice, represents leading pharmaceutical and medical device manufacturers and healthcare providers in civil and criminal government enforcement matters and False Claims Act litigation. She also leverages her enforcement and litigation experience to conduct confidential internal investigations, and helps clients design compliance program controls to address these risks.

Policies Stacked Against Covid Claims

Data from Washington State paints a grim picture about just how few insurers are likely to cover business insurance claims stemming from the Covid-19 crisis.

Only two of 84 insurers that responded to a state survey say they offered pandemic coverage in their base policies, Washington State's Office of the Insurance Commissioner said in April.

An additional 15 insurers in Washington State, including Chubb Ltd., Liberty Mutual Insurance Co., and the Travelers Companies Inc. offered limited pandemic coverage through add-ons to standard policies.

Washington is the first state to survey the insurance industry for pandemic-related coverage since the start of the pandemic outbreak in the U.S. The results highlight the uphill battle businesses across the U.S. face in seeking payouts from their insurers due to a drop or halt in business operations because of the global Covid-19 pandemic.

"Until this epidemic, I'm not sure that we really were aware of just how much the insurance companies had taken to heart the threat of what happened with SARS, and a quick move then toward having exclusion language in their policies," Washington Insurance Commissioner Mike Kreidler told Bloomberg Law.

"Until this epidemic, I'm not sure that we really were aware of just how much the insurance companies had taken to heart the threat of what happened with SARS, and a quick move then toward having exclusion language in their policies."

–Washington State Insurance Commissioner Mike Kreidler

Many Questions

The commission has been bombarded by questions from business owners, lawmakers and others about whether business interruption coverage policies cover the ongoing national crisis, Kreidler said.

The business community has a greater awareness of the low rate of pandemic coverage, and the magnitude of economic interruption they can cause, Kreidler said.

The American Property Casualty Insurance Association estimated that Covid-19 closures are costing U.S. small businesses an estimated $431 billion a month, according to an April 6 release.

Kreidler said he wants to make sure policyholders can have greater transparency into what their policies do and don't cover.

Insurers also need to provide the legal rationale based on the contract terms to policyholders about why pandemic-related business interruptions aren't covered, he said. "You can't just go out and say 'no, we're not covering that'."

"If they're culpable they're going to pay. If they're not culpable, we can't go after them retroactively and make them pay for what they didn't insure," Kreidler said.

Lawsuits File In

Courts in many states are seeing waves of lawsuits filed as businesses try to force the matter or seek declaratory judgments that pandemics are covered under "physical damage" clauses in insurance policies.

For small business owners, rejected business interruption claims have often come as a shock.

Julia Mayer, the owner of Santa Barbara, Calif.-based Dune Coffee Roasters, had expected the state-mandated closure of her specialty coffee roasting business to be covered under her insurance policy.

Mayer's insurer denied her claim and informed her they don't cover pandemics or viruses, despite the civil authority order. That clause would only have gone into effect had her business suffered "physical" property damage, Mayer said an agent for her insurance company told her.

"I'm not trying to put blame on anybody but it just feels in a lot of ways like the small businesses in this country have a big battle to fight, and it was already uphill for us," Mayer said.

"We're not alone, this is happening to everyone," Mayer noted. Small business, particularly in the restaurant and services industry, are waiting to see what comes of high-profile lawsuits by famed chef Thomas Keller and others against their insurers over their own business interruption claims.

"Thankfully it's him, he's so successful and vocal and known," Mayer said. "If I tried to do that it wouldn't have as much traction. Maybe it will poke holes into how the insurance system works and doesn't work."

Forcing the Matter

Insurers are facing legislative challenges in addition to legal ones.

Lawmakers in multiple states—including Louisiana, Massachusetts, New Jersey, New York, Ohio, and Pennsylvania—have introduced legislation to require insurers to pay business interruption claims related to the pandemic, even on policies that excluded disease outbreaks.

None of those state bills have gained much momentum but insurance industry lawyers said they expect similar proposals to continue cropping up as the pandemic continues.

State regulators, through the National Association of Insurance Commissioners, are opposing state legislative efforts to force insurers to retroactively provide such coverage. Requiring insurance companies to pay for claims they never covered "would create substantial solvency risks for the sector," and undermine insurers' ability to pay other types of claims, a spokeswoman for the NAIC said in an emailed statement.

Congress is also monitoring the issue. Rep. Pramila Jayapal (D-Wash.) asked nine insurance companies to provide information on Covid-19-coverage under their commercial insurance policies, according to an April 13 letter.

Several Republican senators have voiced strong opposition to the state-level legislation or other efforts to force insurers to retroactively cover pandemic-related business interruption claims.

"Insurance contracts are a foundational pillar of our economy and attempting to ex-post facto rewrite them through knee-jerk administrative action would undoubtedly undermine our insurance system and create major unintended consequences for new contractual relationships going forward," seven GOP senators said in the letter lead by Sen. Tim Scott (R-S.C.).

Industry Stance

Chubb Ltd. Chief Executive Officer Evan Greenberg said efforts to force insurers to pay pandemic-related business interruption claims "would bankrupt the industry," in an interview with Bloomberg News.

The insurance industry held $812 billion in reserves at the end of September 2019, but that surplus has fallen "significantly" since then, according to the Insurance Information Institute, whose members include more than 60 insurance companies.

"If insurers nationwide had to pay business interruption policy claims for which insurers collected no premium, it could cost the industry each month anywhere from roughly $150 billion to nearly as high as $380 billion," Michel Leonard, the group's vice president and senior economist, said in a news release.

The small amount accounts for small and medium-sized businesses that currently have business interruption coverage, and the larger amount includes those who do not, the release said.

Policyholder attorneys continue to dispute the notion that filing Covid-19 business interruption claims is a lost cause. Insurance companies may be taking too tight a view of what constitutes "physical damage," said Rhonda Orin, an insurance recovery partner in Anderson Kill's Washington office.

Physical damage doesn't mean the same as structural damage, otherwise it would be specified as such in the policies, Orin said.

"There can be invisible, nonstructural damage," such as due to carbon monoxide filling a building that would constitute physical--but not structural--damage to a business, she said.

"The insurance companies are staking their claim" on the interpretation of the word, Orin said. "Policyholders think they're wrong."

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Early Suits Seek 'Persuasive' Power in Coronavirus Coverage Fights

Insurance companies and policyholders seeking to determine whether business interruption coverage extends to coronavirus-related shutdowns are asking the courts for early declaratory judgments, a tactic more commonly used in other types of coverage fights.

Early declaratory judgment lawsuits are typically filed by insurers looking to determine whether they are expected to provide liability coverage when a policyholder gets into an accident or faces some other type of third-party claim.

A declaratory judgment ruling serves as a sort of instruction in the insurance context, with a judge stating that an insurer either has no duty to cover a claim or is required to do so, with any actual discussion of the amount of money to be paid out to be decided between the parties.

Declaratory judgment suits are now popping up in business interruption policy disputes triggered by the coronavirus and the mandatory closure of non-essential businesses by state and local governments.

Oceana Grill, a prominent New Orleans restaurant, sued Lloyd's of London in a Louisiana state court on March 17, just days after orders capping gatherings at 250 people in the state came into effect. On March 25, famed chef Thomas Keller and his restaurant The French Laundry sued The Hartford seeking a similar declaratory judgment in state court in Napa County, California.

Hundreds of lawsuits have already been filed nationwide by businesses large and small challenging an insurer's decision not to cover the costs of a coronavirus-related closing. The Oceana Grill and French Laundry suits are different because rather than challenging a coverage decision that was already made, the restaurants are seeking any early order from a judge that their claims should be covered.

Beyond the boundaries of any individual case, policyholder attorneys hope to win early declaratory judgment that could sway other courts, said Scott Seaman, the co-chair of Hinshaw & Culbertson LLP's global insurance practice.

"It's understandable that policyholder lawyers would want to get decisions from courts they think are more favorable and pass those out and use them as persuasive authority," he said.

Hundreds of lawsuits have already been filed nationwide by businesses large and small challenging an insurer's decision not to cover the costs of a coronavirus-related closing.

Triggering Event

Both restaurants argue that the orders from state and local leaders in Louisiana and California forced them to shut down, and that civil authority provisions in their policies mean that coronavirus losses should be covered by their business interruption policies, said John W. Houghtaling II of Gauthier, Murphy & Houghtaling LLP, who represents the restaurants.

"We're basically asking the court to say one document triggers the other," Houghtaling told Bloomberg Law.

If the strategy works and he wins coverage for the two restaurants, Houghtaling said he plans to try to present the orders to judges around the country.

"We expect that it would have binding effect in the district, but persuasive effect throughout the country," he said.

It's unclear how persuasive the decisions will be, however.

"Courts in one state do not set binding precedent for courts in other states, and trial courts don't set precedent for anybody, other than parties to that case," said G. Andrew Lundberg, the former head of Latham & Watkins LLP's insurance recovery practice group.

Any effect a declaratory judgment order would have in other courts "varies greatly," said Lundberg, now a managing director at litigation finance firm Burford Capital.

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PRACTITIONER INSIGHT

Companies May Be Thwarted by These Business Interruption Defenses

Businesses turning to their insurance contracts for financial help due to business closings and interruptions in the coronavirus pandemic may find themselves up against common defenses to payment. Crowell & Moring attorneys look at three defenses and how courts have interpreted them.

Businesses that have shut down or reduced operations due to the coronavirus pandemic may look to their insurance to pay their losses, but insurance coverage may not be available under "business interruption" coverage in commercial property policies.

Below are the most frequently used terms and defenses used by insurers and a look at how some courts have interpreted them.

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Crowell & Moring

Austin J. Sutta
Crowell & Moring

Businesses that have shut down or reduced operations because of the coronavirus pandemic may look to their insurance to pay their losses. Crowell & Moring attorneys look at three defenses used by insurers.

Coronavirus Doesn't Cause 'Direct Physical' Loss or Damage to Property

While the specific terms of a policy always control, commercial property policies typically require that any suspension of business operations be "caused by direct physical loss of or damage to" covered property. Examples of direct physical loss include damage caused by fire, flooding, lightning, or vandalism.

Coronavirus causes harm to persons, but is not reported to cause physical damage to property. Courts in analogous situations have often denied coverage.

Looking at examples, many restaurants today are still operating, selling take-out orders but not seating customers. Their revenue fall-off is not due to physical damage to their property, even if more frequent cleaning is required. (*Mama Jo's Inc. v. Sparta Ins. Co.* (S.D. Fla. June 11, 2018) (no coverage where restaurant remained open, even if more regular cleaning was required because of nearby road construction))

A business that shutters or reduces hours because it anticipates the possibility of physical injury occurring in the future has not suffered physical injury qualifying for coverage. (*Phoenix Ins. Co. v. Infogroup, Inc.* (S.D. Iowa 2015) and *Travelers Ins. Co. v. Eljer Mfg. Inc.* (Ill. 2001))

And while offensive odor or excessive heat occurring during remediation of an HVAC system may, like concerns about exposure to coronavirus, cause customers to stay away, there is no "tangible damage" to property supporting a finding of coverage. (*Universal Image Prods., Inc. v. Federal Ins. Co.*, 457 Fed. App'x. 569 (6th Cir. 2012))

Finally, where business losses are associated with conditions affecting the community at large, but are not directly caused by property damage at an insured location, business interruption coverage may be unavailable. (*White Mountain Communities Hosp. Inc. v. Hartford Cas. Ins. Co.* (D. Ariz. Apr. 17, 2015) (no coverage for lost business income during a general slowdown caused by local wildfire))

'Stay at Home' Orders Don't Obviate Requirement for 'Direct Physical' Loss or Damage

Insureds are already seeking coverage under "civil authority" provisions of their business interruption policies as a result of government "stay-at-home" mandates. But such civil authority provisions typically require that losses be caused by "action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises."

Thus, courts have found no coverage unless insureds demonstrate a nexus between the civil authority order and direct physical damage to property other than the insured premises.

For example, a court found that a New Orleans restaurant chain that lost business during a mandatory evacuation for an approaching hurricane was not entitled to coverage because the insured failed to show "that the issuance of the order was 'due to' physical damage to property, either distant property in the Caribbean or property in Louisiana." (*Dickie Brennan & Co. Inc. v. Lexington Ins. Co.* (5th Cir. 2011))

Likewise, where a U.S. embargo on importation of Canadian beef due to concerns over "mad cow disease" blocked an insured's shipment of uncontaminated beef from Canada, the court found that coverage was not available because the beef was not physically damaged. (*Source Food Tech. Inc. v. USF&G* (8th Cir. 2006))

Insurers May Prevail Based on Lack of Evidence of Coronavirus Contamination

Business interruption claims related to coronavirus could also founder because insureds seeking coverage are unable to bear their burden of proving with evidence that their losses were directly and physically caused by coronavirus.

Where courts have previously found business loss coverage for "contamination" of insured premises, such contamination (from substances such as E-coli or ammonia) was generally confirmed by testing and it was undisputed that the contamination rendered the premises unfit for occupancy and use. (*Gregory Packaging Inc. v. Travelers Property Cas. Co.* (D.N.J. Nov. 25, 2014); *Oregon Shakespeare Festival Ass'n. v. Great Am. Ins. Co.* (D. Or. March 6, 2017) (air quality at outdoor theater documented to be "very unhealthy" due to smoke from surrounding wildfires))

Here, however, it is likely that few businesses conducted tests to document actual contamination by the coronavirus. And because coronavirus reportedly remains detectable on hard surfaces for only a limited time, even positive tests conducted in the future should not be sufficient to support a coverage claim for past losses, because such tests would not prove earlier contamination.

So even if a business could document that its property was contaminated with coronavirus at a particular point in time, the fleeting nature of the contamination should limit the amount of any covered business interruption to a few days' losses.

Specific facts could lead to different outcomes. For example, Colorado's stay-at-home order expressly presumes that coronavirus can cause property damage because of its "propensity to attach to surfaces." (See e.g. Colorado Dept. of Public Health & Environment Third Updated Public Health Order 20-24 Implementing Stay at Home Requirements (April 1, 2020).)

It remains to be seen, however, whether a presumption stated in an order could overcome the contractual requirement that an insured prove that property damage directly and physically resulted from coronavirus contamination.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

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Questions to Ask

- Have you checked your business interruption coverage to see if it includes coverage for pandemics or viruses? Do you have a rider that provides coverage for disruption due to a pandemic or a virus? Have you discussed with your insurer whether business interruptions due to Covid-19 will be covered?
- How does your insurer define physical loss? Does the civil authority clause of your policy also require a physical loss?
- Has your state or local government written its stay at home order in a way that could allow you to claim that coronavirus caused property damage due to contamination?
- Has a court in your state issued a declaratory judgment ruling? Are you aware of any declaratory judgement lawsuits filed by insurers in your state?

C-Suite, Boardrooms Will Look Different as Businesses Reopen

C-suites and boardrooms are going to look quite different as company leaders try to prioritize safety without sacrificing involvement as they resume some semblance of normal operations.

Bloomberg Law asked Hannah Orowitz, managing director on the corporate governance advisory team of shareholder engagement and governance consultancy Georgeson LLC, what pandemic-related corporate governance issues executives and directors need to consider.

Bloomberg Law: Should boards avoid meeting in person for the time being?

Hannah Orowitz: The use of virtual meetings in the shareholder meeting context this season has been the safe and healthy option for participation for everybody. And in the current environment, that holds true for board meetings as well, particularly because board members are often far flung. The travel logistics of them getting to a board meeting, as well as the issues with contact tracing, could exacerbate the situation.

For the foreseeable future, boards probably need to take all necessary precautions in order to continue prioritizing their health and safety, and the health and safety of their management teams. That probably does mean avoiding in-person meetings. As with shareholder meetings, it's possible that you end up with some version of a hybrid meeting, particularly if you have directors or management team members with extenuating health conditions that make in-person participation difficult.

BL: Are there any legal questions that need answering before holding virtual-only board meetings?

Orowitz: It would be a state law consideration. You'd have to check with your state of incorporation whether virtual participation and decision-making is allowed. That's probably where a lot of companies need to look, the decision-making aspect of that. Check the language in your organizational documents as well.

Beyond the state corporate law requirements, one complicating factor would be where companies may be incorporated outside the U.S. at the parent or subsidiary level. There are likely to be some additional challenges for those companies to think through, as there are often restrictions on where decision making can occur to avoid adverse tax consequences.

Hannah Orowitz of Georgeson LLC discusses the pandemic-related corporate governance issues that executives and directors should consider.

BL: What changes to board and C-suite structure and function are most likely to result from the current health crisis?

Orowitz: Returning to work is going to be far more complex than the rapid exit that we all made from our offices. Companies probably had continuity plans in different states of readiness.

For those that had intact plans, executives and board members are going to need to continue to prioritize frequent updates to those plans. That's something that probably wasn't particularly high on the list before. You could also see some changes to function in terms of the responsibility for the business continuity plan decisions—more C-suite ownership of continuity planning. Another item of note is human capital management. The pandemic might elevate the scope of that topic within the C-suite and for the board.

Given the rapid and evolving nature of the pandemic, boards have been needing to meet much more frequently in most cases. And because of that the need for special committees is likely to increase, particularly for companies with several directors who sit on multiple boards. You

need to identify who has the expertise and the capacity for rapid decision making.

BL: Is there now an incentive for companies to spend more on chartering private planes for executive travel? Could executive travel be viewed differently than before the pandemic?

Orowitz: Looking at that from a governance lens, it's a perk that has gotten a lot of scrutiny in the past. Given the health and safety considerations right now, I think it's something that we could see reemerge—for understandable reasons in the short term. But I would expect if there are changes here that it would be temporary and something that investors are only likely to tolerate for the time period necessary to address pandemic-related concerns.

BL: Could we see changes to typical C-suite geographies, and might companies consider spreading executives across different corporate locations? Should executives stay virtual even as other employees as returning to the office?

Orowitz: I can see that being something to consider. There are probably pros and cons, both currently in the crisis and as it subsides, to having everyone in one location rather than in multiple locations. There may be changes that we see there, but it would be very much dependent on the facts and circumstances of each company.

In terms of executives staying remote while employees go back, a tricky thing that companies will need to think carefully about is the culture and tone implications of them making different exceptions for leadership than they would for the broader employee population.

BL: As a former in-house counsel, what issues do you think should be top of mind for general counsel when they're looking at strategies for operating during and immediately after the pandemic?

Orowitz: Labor relations and labor management is much more in the spotlight now for a lot of companies. As a result, there are probably heightened reputational considerations stemming from the decisions being made there. So I would keep that in mind.

Obviously health and safety is going to be a priority. What that looks like is going to be industry specific. But I would say that perhaps there is going to be some helpful collaborative guidance that companies could get from leveraging industry organizational partnerships and things like that.

Also consider the logistics of asking employees to return to work, to the extent they are in areas where there isn't adequate food supply or there's no child care available yet. Those issues are going to need to be thought of very carefully.

BL: How might the pandemic complicate or change the traditional role of in-house counsel?

Orowitz: The in-house counsel role is something that, in my opinion, is always evolving and adapting. Part of that role is being a problem solver and a consensus-builder within your organization. Those are skills that are going to be needed now more than ever.

One universally complicated factor for in-house counsel is what topics require board oversight and are ripe for inclusion on board committee agendas. That's something that's going to be expanding in the short term, and it's going to require some additional thinking, problem solving, and time.

This interview has been edited for brevity and clarity.

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ANALYSIS

Crisis Magnifies Need for Disclosure

The coronavirus pandemic has profoundly changed the way companies do business in just a few short weeks. The upheaval in business operations will also have a significant impact on how companies disclose information to their investors, to the markets, and to regulators.

Companies should heed the advice of regulators in making their disclosures, as an SEC enforcement action is the last thing any issuer needs during a time of economic upheaval.

In a joint public statement issued April 8, SEC Chairman Jay Clayton and SEC Corporation Finance Director William Hinman urged public companies "to provide as much information as is practicable regarding their current financial and operating status, as well as their future operational and financial planning." Chairman Clayton and Director Hinman recognized that in the short term, "earnings statements and calls will not be routine."

The pandemic's upheaval in business operations will have a significant impact on how companies disclose information to their investors, to the markets, and to regulators, says Bloomberg Law analyst Peter Rasmussen.

Forward-Looking Statements

According to the SEC officials, in this unusual circumstance, companies may need to rethink their traditional disclosure approach. "Historical information may be substantially less relevant," they said, as "investors and analysts are thirsting to know where companies stand today and, importantly, how they have adjusted, and expect to adjust in the future, their operational and financial affairs to most effectively work through the COVID-19 health crisis."

Clayton and Hinman recognized that companies are often hesitant to provide forward-looking disclosures beyond what is required by SEC rules, including specific estimates, due to the risk of Corporate Governance in the event those forward-looking estimates prove to be incorrect.

Due to this uncertainty, the SEC officials urged companies to utilize the safe harbors for forward-looking statements found in Section 27A of the Securities Act and Section 21E of the Exchange Act. They stated that, given the unique circumstances companies face during the pandemic, "we would not expect to second guess good faith attempts to provide investors and other market participants appropriately framed forward-looking information."

Periodic Reports and Company Updates

I have previously discussed the disclosure of coronavirus impacts in Form 10-K risk factors. Companies that have not filed their annual report should fully disclose the risks they face with the pandemic, and should not merely add the coronavirus outbreak to a list of potential exposures.

Companies that have already filed their Form 10-K annual reports should review the information disclosed in the risk factor section and in Management's Discussion and Analysis to determine if that information is still complete and accurate in light of the spread of coronavirus and the contraction of the economy. Issuers may update their disclosures through a Form 8-K filing, or if due soon, their quarterly reports on Form 10-Q.

The CEO Is Sick! Do We Have to Disclose That?

The coronavirus is an equal opportunity pathogen, and the C-suite is certainly not immune from the pandemic.

The answer to the question of whether companies must disclose if senior executives become ill is a simple, definitive "It depends." There is no general disclosure obligation concerning the health conditions of senior executives under SEC rules or state corporate law, and these individuals have a strong privacy interest in keeping their medical issues away from public scrutiny. SEC disclosure rules will come into play, however, if due to the virus, senior executive officers leave the company or become incapacitated to the point that they are unable to perform their duties.

The current disclosure form, Form 8-K, provides in Item 5.02(b) that companies must file a report in the event of the resignation, retirement, or termination of specified senior officials. In addition, under Item 5.02(c), companies must file a Form 8-K report upon the appointment of new senior executives. SEC rules require companies to file the

form with the Commission within four business days of the triggering event.

Under a Compliance and Disclosure Interpretation (C&DI) issued by the Division of Corporation Finance in 2008, the officer in question need not leave the company in order to trigger the disclosure requirement. In its response to Question 117.03, the staff stated that "termination" includes demotions and reassignment of responsibilities. In Section 217 of the C&DI, the staff addresses the question of the temporary absence of the principal financial officer. According to the staff, if the principal financial officer temporarily turns his or her duties over to another person, the company must file a Form 8-K under Item 5.02(b) to disclose the details of the substitution. The company must file another Form 8-K report if the original principal financial officer returns to the position.

Reading the Form 8-K requirements and the staff nterpretations together, it appears that issuers should disclose, in a current report, whenever one of the specified executive officers leaves the company or becomes temporarily incapacitated due to the virus. Companies should then file a follow-up Form 8-K report if the executive resumes the functions of the office after a temporary absence.

Other Form 8-K Disclosure Items

The coronavirus pandemic could trigger current reporting requirements under several other Form 8-K provisions. A partial list of these triggers includes events such as changes to major contracts, bankruptcies and receiverships, executive compensation arrangements, and asset disposition costs or asset impairments. Companies must also be mindful of the Regulation FD prohibition of the selective disclosure of information, and should be prepared to use Form 8-K to remedy any such improper disclosures in a timely fashion.

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Poison Pills in U.S. Added at Fastest Pace Since 2009

American companies are adopting so-called poison pills at a pace not seen since the financial crisis. More than 25 Russell 3000 Index members have added the takeover defense this year, approaching the peak in 2008. The provision generally allows investors to acquire additional shares should an activist or would-be acquirer take a significant holding in a company against the wishes of a board.

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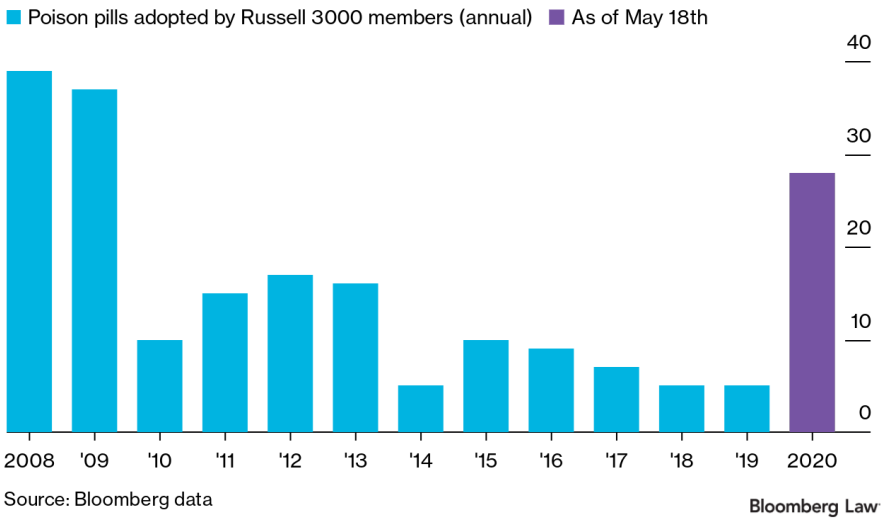
With assistance from Kenneth Sexton (Bloomberg Global Data).

Defense Demand

U.S. companies are adding takeover protection at the fastest pace since 2009.



Source: Bloomberg data

Bloomberg Law

Time to Get Serious on Overboarding?

Some institutional investors worry about directors juggling multiple board seats during business-as-usual, much less during a crisis.

"This crisis highlights now more than ever the importance for directors to have the capacity to devote to the boards they sit on," said Ben Colton, global co-head of State Street's asset stewardship team.

State Street Global Advisors is the latest investor to tighten its stance on overboarding, with new proxy-voting guidelines against directors who sit on more than four public company boards at once, down from six. Chief executives and other top executives sitting on more than one other public company board might also face opposition in director elections, its 2020 guidelines say.

Tightening Policies

The update puts State Street's voting guidelines in line with similar policies at BlackRock, the world's largest asset manager, and Vanguard, the second largest. Other institutional investors such as T. Rowe Price and AllianceBernstein have also rewritten their voting policies to pressure directors to sit on fewer boards.

"The tightening policies we are seeing on overboarding are a response to growing investor concern about directors' ability to devote appropriate time to each board commitment, particularly when there is an unexpected demand on their time," said Allie Rutherford, managing director at investor relations advisory firm PJT Camberview.

Directors' jobs have gotten more demanding in recent years amid greater scrutiny from regulators and investors. Now, with the coronavirus, many boards are ramping up communications as they grapple with issues from raising capital to reopening workplaces.

"The pandemic is likely to solidify investor views" on overboarding, Rutherford said.

CEOs are increasingly stepping back from duties on other company boards, according to data on the S&P 500 index from executive recruiter Spencer Stuart. About 60% of S&P 500 CEOs didn't serve on any other boards in 2019, compared to half of CEOs a decade ago.

"The focus on overboarding has put boards in a better place for dealing with a crisis," said Barbara Novick, vice chairman and head of BlackRock's global public policy group.

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At the Top, Salary Cuts Don't Sting as Much

"If you're going to ask your staff to give up salary, so should you," says Charles Elson, director of the University of Delaware's center for corporate governance. "The question is, how will the rest of the pay package play out?"

CEOs at S&P 500 companies receive on average $1.3 million in salary, roughly 20 times the median U.S. household income. But that sum only accounts for 10% of their total compensation. The rest comes in bonuses and stock-based incentives tied to measures like equity returns or profits.

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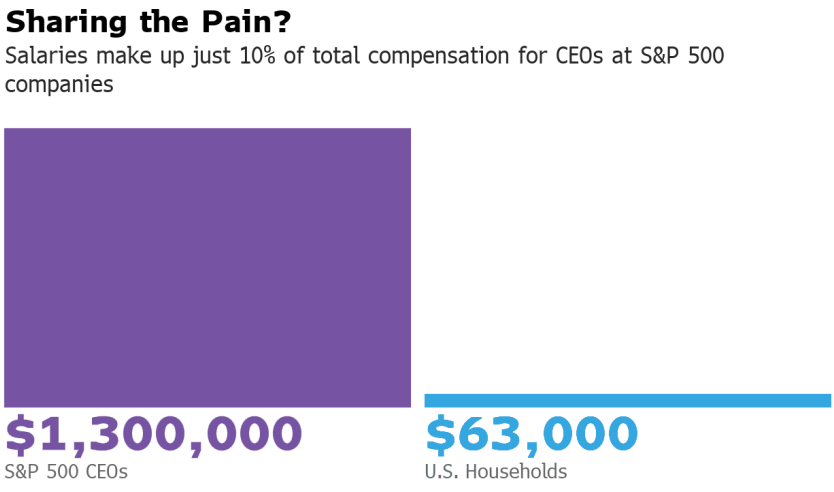

CEO Spots Get Filled in Stability Bid

More companies are filling temporary chief executive roles with longer-term appointments as the coronavirus pandemic adds urgency to succession planning.

Mozilla Corp.'s board cited the uncertainty of the Covid-19 virus when it announced that long-time chairwoman and interim CEO Mitchell Baker is taking the top spot. Months-long CEO searches have also ended recently at Bank of New York Mellon Corp. and Gap Inc.

About 50 other interim CEOs at U.S.-based companies have turned over in the first three months of this year, either becoming CEO themselves or getting replaced by someone else, according to data from executive outplacement firm Challenger, Gray & Christmas, Inc. That's compared to 10 interim CEOs who were replaced or promoted over the same period in 2019.

It's seen as a sign that companies are looking for stable leadership to weather the Covid-19 virus and other pressures on their industries. CEO turnover has also slowed, with March marking the lowest monthly total of chiefs leaving their posts in the past 20 months of Challenger's data, which covers companies in the public and private sector.

"Companies are defaulting to stability," said Challenger vice president Andrew Challenger. "They're not making major changes at the top."

CEO Searches

Responding to the coronavirus has added urgency to filling top executive roles, especially the CEO spot, and a new emphasis on making sure companies have replacements lined up if executives contract the virus.

Promoting an interim CEO to the role is more practical for companies than bringing on a new leader during a crisis, according to Matteo Tonello, managing director at the Conference Board, a think tank for businesses.

"Most companies choose the interim solution because they do not have an inside successor and they are looking for an outside candidate," Tonello said. "Now, in this environment where people can't travel and meet in person, selecting an outside candidate becomes very impractical."

Mozilla's board considered outside candidates for CEO before picking Baker, who's been with the web browser and app maker since 2003. Directors pointed to her deep understanding of Mozilla's business, saying in a blog post that her leadership is helping "navigate through the uncertainty that COVID-19 has created."

There's a new emphasis on making sure businesses have replacements lined up if leaders contract Covid-19.

BNY Mellon likewise looked externally before deciding on Todd Gibbons as CEO, who's been serving as CEO since his predecessor Charlie Scharf left to lead Wells Fargo & Co. Analysts at RBC Capital Markets have said Gibbons's long tenure at the company puts him in a good position to navigate the crisis.

Added Disruption

Gap's new CEO also came from within, which is common for the top spot. Sonia Syngal, the leader of its Old Navy brand, replaced interim CEO Robert Fisher, the son of Gap's founders. Syngal is taking over at a time when a broader shift in how consumers shop for apparel is colliding with the coronavirus's added blow to the sector.

Others like WeWork parent We Co., Tupperware Brands Corp., and Kate Spade & Co. have named outsiders to replace their interim CEOs since the start of this year.

Companies aren't forgoing outside searches during the pandemic, even if it means interviewing candidates in video calls rather than in-person, according to Jane Stevenson, vice chair of board and CEO recruiting at Korn Ferry. Recruitment that's underway is "still moving forward," she said.

Whether companies gain more stability from keeping an interim CEO in place or bringing in an outsider could depend on how much the coronavirus is disrupting their business.

"To bring in a new leader is added disruption," said John Wood, a vice chairman at executive search firm Heidrick & Struggles. So companies hiring a new leader are seeking not just stability but an ability to adapt, Wood said.

"The most valuable trait right now in any CEO is agility," he said.

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A Death at Jefferies Highlights Urgency of C-Suite Backup Plans

• Companies consider isolating some key staff during outbreak

Professionals who help companies ensure leadership continuity say the coronavirus crisis has added a new urgency to their work. Some say clients are mulling whether to further isolate key executives; other clients have made private jets a given for top leaders who still travel; some have scattered top lieutenants across the globe as an added precaution. At least one is poised to hire a new chief executive officer largely by video interviews.

"Just as the virus cascades deeper into a population, so now too does your succession plan have to cascade into the population, into the hierarchy," said Davia Temin, founder of New York crisis consultancy Temin & Co. And while bosses like JPMorgan Chase & Co.'s Jamie Dimon — a cancer survivor who just had emergency heart surgery — have a good plan in place, today's coronavirus crisis means "you have to think of the succession to the succession."

The death of Jefferies Financial Group Inc. Chief Financial Officer Peg Broadbent in March from complications tied to the coronavirus highlights the risk. Top executives at Altria Group, U.K. telcom company BT Group Plc, and NBCUniversal have been sickened by the virus. The chairman of the Portuguese unit of Santander, Spain's largest bank, also died from it in March.

Cases Surge

Based on the pervasiveness of the virus, it's likely there are other executives who are ill but haven't yet disclosed their status, said Temin, who brought aboard a medical doctor to consult with her firm. Companies are very aware of where executives are and when they have to be in public, she said. The idea of appointing a "designee" for more extensive isolation has been discussed, Temin said, without identifying any clients.

Boards are now working around the clock to react to the virus and the very definition of a key role has changed, said Jane Stevenson, global leader for CEO succession at recruiter Korn Ferry. The firm has developed a special set of recommendations for continuity in the time of Covid-19.

The CEO and CFO positions, of course, remain the top priority. But increasingly important are roles such as supply-chain managers, who might not have been as front-and-center in earlier plans. Also getting extra consideration are executives who are central to a company's morale and culture, Stevenson said.

One corporation that normally concentrates leaders at the U.S. headquarters now has dispersed the top three executives between the U.S., Europe and Asia, Stevenson said. Many clients are mandating down time for top executives, to ensure they are taking time to recharge and ensure the needs of their own families.

"We are very much in a back-to-basics environment right now," she said.

Video Interviews

Even the way executives are being selected is having to adapt to the new rules of the pandemic. When the virus was just starting to hit the U.S., the board of one company flew together on a private jet along with one of two candidates for CEO, so that none of them would have to fly commercial, said Tom Flannery, the managing partner who leads the U.S. CEO and Board services practice at executive recruiter Boyden.

Some companies are now even taking the highly unusual step of relying solely on video interviews for new leaders, said Jeff Hodge, a recruiter for Boyden in San Francisco. A CEO search he is coordinating will possibly go to an offer with some board members only meeting virtually with the candidate. In a sign of the urgency, the chairman of a large company called him on a Sunday — a rarity — with a request that Hodge talk to his board that Monday about emergency succession.

And not all the crisis planning is about an executive getting ill, said John McCrea, another recruiter in Boyden's San Francisco office. An alcohol company that is shifting to making hand sanitizer during the outbreak is using Boyden to find an executive on a temporary basis who has expertise in sanitizers, he said.

Sick Bosses

Examples will probably keep coming as the virus nears a peak. Altria Group said March 19 that CEO Howard Willard

Ill was taking a leave of absence for treatment from the virus and that his CFO will assume Willard's duties in the interim. BT Group CEO Philip Jansen went into self-isolation earlier in March with what he described at the time as relatively mild symptoms.

Broadband company WOW! Internet, Cable & Phone said that CEO Teresa Elder had been hospitalized in Denver in March after testing positive for Covid-19. The company's chief information officer will serve as acting CEO and the non-executive board chairman will take on an executive chairman role.

The death of 56-year-old Broadbent at Jefferies Group was particularly noteworthy because it marked one of the first deaths among senior Wall Street executives from the pandemic. Jefferies is one of the largest independent investment banking firms headquartered in the U.S. and the parent company's main subsidiary. His death struck a chord on Wall Street, where thousands of traders deemed essential are still heading into work every day as the pandemic ravages New York City.

"We know Peg would want his passing to serve as a reminder to all of us of how much he cared for all of his friends at Jefferies and that our priority must be the health and happiness of our loved ones," CEO Rich Handler and President Brian Friedman said in a statement.

No Boundaries

There are many reminders that the coronavirus can strike at any level. England's Prince Charles, heir to the throne, and British Prime Minister Boris Johnson have contracted the virus. In the entertainment world, actor Tom Hanks and his wife Rita Wilson, along with British actor Idris Elba are key examples of Covid-19's reach. Top government officials in France, Spain, Poland, Israel, Iran and Brazil are among those confirmed to have contracted the illness.

Many companies do have emergency succession plans, where they have identified an executive or board member they would tap at least as a stop-gap solution, said Blair Jones, managing director at consultant Semler Brossy in New York. Now the board has to consider that even the emergency candidate needs an emergency candidate, she said. All the while, leaders also have to ensure they are keeping employees safe, maintaining financial liquidity and adapting their business technology, she said.

"Prince Charles. Boris Johnson. This disease is not discriminating at all," Jones said. "For public company executives, who by nature of their position have to be out and about, the risk can be quite high."

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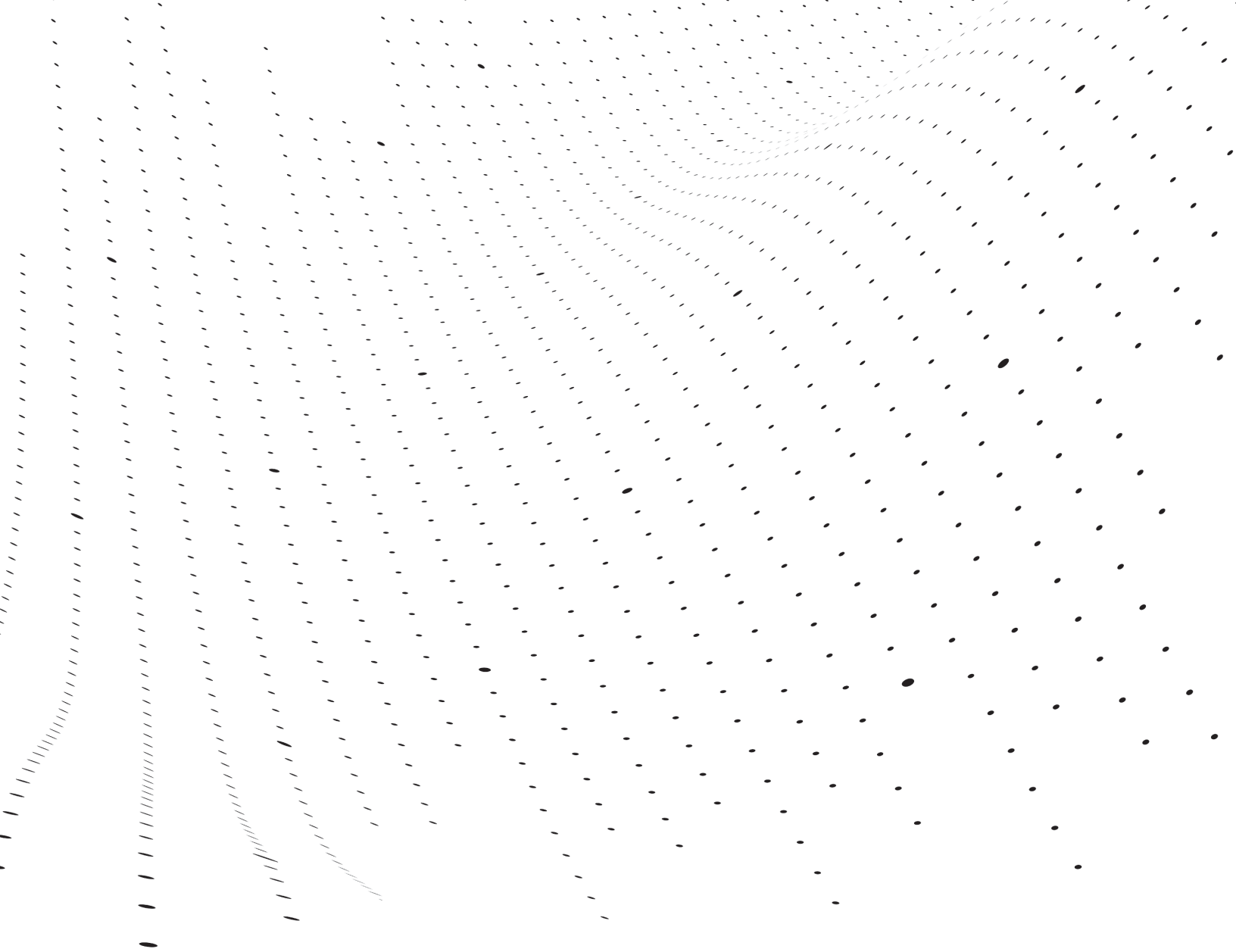
Questions to Ask

- Do you have a succession plan? If so, does it need to be revisited in light of the pandemic? Are enough positions included in that plan? Do you have a plan for short-term management if an executive becomes ill?
- If you need to hire an executive, whether on a permanent or temporary basis, do you have a plan and a procedure to do so remotely? If you have an opening, do you need to fill it now or can it be filled temporarily with someone inside?
- Should your executives be isolated rather than in the same room? Same building? Should they be scattered across the country or globe? Should you name one executive for deep isolation?
- Do you have a policy for when executives need to appear in public?
- Who are you consulting for medical and public health advice?
- Have you reviewed corporate policies relating to travel, sick days, work-from-home, large meetings and gatherings, and sanitation measures? Do you need to communicate any changes?
- Have you reviewed your business continuity plan? Time to rework it (come up with one)? Have you set minimum staffing requirements? Reviewed technology to make sure you have what's need to continue remote work?



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