

5 Tips for Managing Business and Legal Risk for Manufacturers and Supply Chains during the COVID-19 Pandemic

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Porzio Client Alert

We are living in uncertain and unprecedented times, and businesses are not exempt from the impact of COVID-19. Government shutdowns, workforce restrictions, and the stock market's plunge have unsteadied the economy and affected businesses large and small as they fight to adapt to the "new normal" while trying to maintain a "business as usual" approach. Business owners need to manage today but must look ahead to identify and prepare for risk caused by the COVID-19 virus. This series of 5 Business Tips identifies some of the business and legal issues business are confronting and offers guidance on how to manage them:

1. **Governmental Orders:** News and updates are flying fast and furious. Some "Must Do's":

- Carefully review all governmental orders and other mandates to determine how they affect your operations and other companies in your supply chain, including foreign operations and companies.
- Communicate the orders and restrictions they impose to your employees.
- Follow them.

2. **Essential Business:** Can I continue to work? Is your company manufacturing a product that is an essential product (e.g., surgical masks, rubber gloves, etc.) or manufacturing a component of an essential product? On March 17, 2020, the President enacted the Defense Production Act requiring companies to make needed medical supplies to treat COVID-19 patients. How will this Act affect your business?

- Monitor Executive Orders from the states in which you have operations. New Jersey and New York's governors issued Executive Orders last week defining what are "essential businesses" that can remain open. The Orders largely permit manufacturers to remain open and operational because of their importance to the public and the economy. For example, Governor Murphy declared "manufacturing, industrial, logistics, ports, heavy construction, shipping, food production, food delivery, and other commercial operations may continue operating, but should limit staff on site to the minimal number to ensure that essential operations can continue."
- Companies with multi-state operations should review the Orders from the states in which they operate, because each state defines "essential business" differently.
- Porzio Governmental Affairs (an affiliate of this firm) is working on legislation to ensure business operations that manufacture essential products in this crisis environment are permitted to operate.

3. **Contracts:** Review your contracts! Your contracts might protect you from lawsuits for claims related to the virus. You should:

- Review, purchase orders and product manufacturing agreements and evaluate notice provisions, cancellation provisions, force majeure triggers, dispute resolution clauses, and remedy provisions for damages (e.g., lost profits, consequential damages, etc.).
- Force majeure clauses might allow you to avoid damages and contractual responsibilities because of the virus, even if only on a temporary basis.
- If unsure, contact a lawyer experienced with contract review to understand your legal rights.

4. **Insurance:** Locate and review your insurance policies with your broker and legal counsel, specifically your business interruption insurance which could provide coverage for any physical loss. You must understand what losses your insurance covers and what losses are not covered.

- Physical loss is an interpretive requirement and should be scrutinized.
- Prospectively, many claims will be filed by manufacturers, suppliers and sub-suppliers for loss profits due to closures or reduced work-force.
- Insurance companies may or may not correctly interpret your business interruption clause, which may result in a claim against your insurance carrier for these losses.
- Courts ultimately will decide what losses are covered because of the Coronavirus pandemic.

5. **Lawsuit Preparation:** There will be many lawsuits over allocating losses caused by the Coronavirus-related supply chain problems. Steps should be taken now to prepare:

- Managing contracts effectively and handling disputes proactively will increase your chances of successfully and efficiently resolving issues.
- Engage with your suppliers and customers in a cooperative and reasonable manner. At the same time, take all necessary steps to protect your legal and evidentiary position in the event a dispute escalates.
- Develop an action plan in place to deal with your workforce. (A subsequent article will be forthcoming from this firm regarding employment and labor issues.)
- Proceed with a "litigation hold" mindset – preserve all communications with third parties, save all contracts and other important documents, and involve legal counsel early on in the process in order to protect attorney-client privilege.
- Porzio can assist with an early case assessment and determine whether it is in the company's best interest to litigate or seek a settlement.

We have served as outside and in-house counsel over a combined 60 years of practice and can advocate for your company during this unprecedented crisis.