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Law in the Time of COVID-19: Legal Considerations Amidst a Growing Crisis

There is no doubt that the global **pandemic** of “coronavirus disease 2019” (“COVID-19”) has drastically taken over numerous aspects of our society. With **hundreds of thousands of confirmed cases** worldwide and counting, most of which are in the United States, COVID-19 has become a source for widespread panic and human tragedy. As a result, **efforts** to deter the spread of the virus have made their way to the pinnacle of national priority. States have instituted **shelter-in-place** orders requiring residents to avoid going outside unless necessary. Schools, parks, and **non-essential businesses** have been forced to close, leaving only “essential” businesses such as grocery stores, health care facilities, banks and law enforcement. **Gatherings** involving large numbers of people have been banned. **Courts** have closed their doors and limited their proceedings.



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As growing disruption and uncertainty from the pandemic rises, so does the increased potential for litigation. Individuals and businesses negatively impacted by COVID-19 are turning to the legal system for respite—it is, after all, the [American Way](#). And, while the extent of the legal effects of the pandemic have yet to be seen, changes in certain practice areas have already begun to surface.

EMPLOYMENT

The jarring effect of COVID-19 on the labor market is undeniable. Due to business closures aimed at reducing the spread of the virus, employers have been forced to downsize. [Job cuts and mass layoffs](#) have already been seen throughout the nation, with businesses across all industries suffering from the effects of the outbreak.

From the increased unemployment comes the surge in claims for unemployment benefits. In California, workers who have lost hours or who have been laid off may apply for benefits through the Employment Development Department (“EDD”). Under normal circumstances, the EDD requires a worker to serve a one-week unpaid waiting period before they receive benefits. However, pursuant to the [Executive Order](#) issued by California Governor Gavin Newsom, the EDD has waived this waiting period to better respond to the pandemic. This waiver, issued in anticipation of a rise in unemployment, would enable

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those who are unemployed and underemployed as a result of COVID-19 to receive more immediate relief. As the restrictions on businesses and social interaction persist, the unemployment rates in the country can only be expected to worsen.

Furthermore, substantive claims may arise under various employment law statutes as a result of the outbreak. Employers, in dealing with the effects of COVID-19, may be opening themselves up to future litigation in the process. For instance, under the federal [Worker Adjustment and Retraining Notification \(“WARN”\) Act](#), employers are required to provide their workers with at least 60 days’ notice if the employer plans on executing a plant closing or a mass layoff. Employers that do not meet the notice requirement before effecting job cuts would be subject to civil penalties under the statute.

There are, however, exceptions to this requirement. Employers need not provide the requisite 60-day notice if it is found that the closing or layoff was due to an unforeseeable business circumstance. Notably, [20 C.F.R. § 639.9\(b\)\(1\)](#) recognizes that “[a] government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.” Although it has yet to be litigated, the business closures and subsequent layoffs resulting from COVID-19 will likely fall under this exception.

California has its own state WARN Act enshrined in its [Labor Code](#) that articulates a similar notice requirement. However, pursuant to another [Executive Order](#) by Governor Newsom, and for the purpose of mitigating the effects of the COVID-19 pandemic, the provisions of the California WARN Act have been conditionally suspended. Employers must meet certain eligibility requirements if they wish to qualify for the suspension.

In addition to possible WARN claims, COVID-19-related claims may also arise under the [Occupational Safety and Health \(“OSH”\) Act](#), [Family and Medical Leave Act \(“FMLA”\)](#), [Fair Labor Standards Act \(“FLSA”\)](#), and the newly enacted [Families First Coronavirus Response Act \(“FFCRA”\)](#). These Acts protect worker’s rights and are potential avenues for workers to recover should they be affected by the pandemic. It is imperative for employers to adhere to the requirements of these statutes in order to reduce the likelihood of litigation.

HEALTHCARE

The potential for litigation in the healthcare sector is highly foreseeable during the time of a global pandemic. Medical facilities and health product manufacturers involved in the detection and treatment of COVID-19 are more susceptible to future lawsuits if left unadvised of the [legal considerations](#) in this time of crisis.

For instance, healthcare providers must remain in compliance with federal regulations in order to minimize the risk of litigation. The [Health Insurance Portability and Accountability Act \(“HIPAA”\)](#) provides privacy standards that covered entities must observe in order to protect an individual’s health information. Notably, the Office for Civil Rights (“OCR”) at the U.S. Department of Human Health Services (“HHS”) has provided special [guidance](#) on when the disclosure of patient information is appropriate in light of the COVID-19 pandemic. Covered entities may disclose a patient’s information:

(1) to treat the patient or another patient; (2) to carry out public health activities; (3) to family and friends of the patient; (4) to prevent a serious and imminent threat to the health and safety of the public; and (5) to the media under certain conditions. The HHS also issued a [limited waiver](#) of certain provisions of HIPAA’s privacy rule.

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However, this does not mean that the privacy protections provided by HIPAA are to be completely disregarded. Covered entities must still be mindful of patient privacy and make use of reasonable precautions to protect patient information from uses and disclosures that are not permitted under the statute.

In order to avoid future liability, healthcare providers must also continue to carry out their duties to patients with the requisite legal standard of care. This is particularly relevant in order to avoid medical negligence lawsuits. Healthcare providers and facilities have the duty to act as reasonable healthcare providers or facilities would under similar circumstances. This duty does not change in light of COVID-19. Courts have also found [instances](#) wherein providers owed duties of care to non-patients in cases where it is reasonably foreseeable that the non-patient would be harmed by the provider’s negligent conduct.

CONTRACTS

As efforts to mitigate the outbreak get more restrictive, businesses across all industries are struggling to fulfill their contractual obligations. This surge of nonperformance would almost certainly expose these businesses to claims of breach of contract. Businesses

in this situation may want to consider various legal defenses available in the time of this pandemic.

Corporations may want to search for *force majeure* clauses in the language of their contracts. *Force majeure* clauses protect parties from contractual liability in the event of non-performance if the non-performance was caused by an external force that could not have been reasonably avoided by the parties (i.e., an “act of God”). In California, the *force majeure* or “act of God” defense has been codified in [Cal. Civil Code § 1511](#).

The issue of whether COVID-19 and its subsequent effects would be enough to constitute *force majeure* turns on the specific language of the contract, the local laws involved, and whether the pandemic had a strong causal connection to the party’s non-performance. Notably, businesses such as [Dick’s Sporting Goods](#) and [DHL Global](#)

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[Forwarding](#) have already declared *force majeure* in order to absolve themselves of any contractual liability resulting from the pandemic.

CONCLUSION

COVID-19 has resulted in the destabilization of several aspects of human society, which may potentially cause an influx in litigation in certain practice areas such as employment, healthcare, and contract law. Although the legal effects of the pandemic have yet to be seen in their entirety, having knowledge of the potential legal issues better prepares individuals and businesses in dealing with this increased risk of litigation and could possibly help mitigate the circumstances caused by this viral, unprecedented attack on humanity.

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Justice Tecson is a member of the Class of 2021 at Golden Gate University School of Law. Prior to law school, she graduated from the University of the Philippines with a Bachelor's degree in Chemistry. Her legal interests include international law, family law, immigration, and employment law.