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Managing the COVID-19 Organizational Chaos

Key legal considerations for navigating an
unprecedented crisis

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Overview

- ▶ Core principles for managing the chaos
- ▶ Major Legal Issues In Contracts
- ▶ Insurance
- ▶ CARES Act
- ▶ Questions

Core principles for managing the chaos - some lessons learned

- ▶ Be prepared to be cooperative and flexible
- ▶ Avoid Normalcy Bias
- ▶ Look for opportunities
- ▶ Use your support system (advisors, insurer, partners)

Legal Issues

- ▶ Legal issues should be weighed alongside practical concerns, anchored in your answers to the following -
 - ▶ What is my desired outcome?
 - ▶ For existing contracts - Postpone, cancel, move ahead, amend
 - ▶ For new contracts -Timeline? Deliverables? What needs to be built into the contract to account for the new reality?
 - ▶ What is the party on the other side going through?
 - ▶ Mass cancelations, business disruption (e.g., store closures, reduced customers), increased demand for charitable services
 - ▶ Document your challenges
 - ▶ Governmental directives, cancellations, increased costs
 - ▶ Consult with your contract partner and counsel!

Legal Issues - relevant concepts

- ▶ A non-exhaustive list
 - ▶ Force Majeure

 - ▶ Cancellation

 - ▶ Amendment

 - ▶ Impossibility

Legal Issues

- ▶ Examine how relevant clauses allow you to move forward (a non-exhaustive list of questions)
 - ▶ Is it mutual or one sided?
 - ▶ What are the conditions precedent, if any?
 - ▶ How much discretion does either party have?
 - ▶ “Reasonable” or “absolute and sole”
 - ▶ EULAs (end user license agreements) are excellent examples of one-sided, fully discretionary agreements.
 - ▶ Who bears financial risk?

Force Majeure

▶ Force Majeure

- ▶ A contract clause that exempts one or both parties from performance when conditions make performance impractical or impossible.
 - ▶ The performance of this Agreement is subject to any circumstances making it illegal or impossible to provide or use [Venue] facilities, including Acts of God, war, government regulations, disaster, strikes, civil disorder or curtailment of transportation facilities. This Agreement may be terminated for any one of the above reasons by written notice from [Venue].

Force Majeure

- ▶ Is it one sided or mutual?
- ▶ Is the threshold “impracticality” or “impossibility”?
- ▶ How is financial risk distributed?
 - ▶ Refund of deposit?
 - ▶ No future obligations?
 - ▶ Payment of pro rata fees for actual services rendered?

Force Majeure (sample clause)

- ▶ Force Majeure (one-sided, limited)
 - ▶ “The performance of this Agreement is subject to any circumstances making it illegal or impossible to provide or use [Venue] facilities, including Acts of God, war, government regulations, disaster, strikes, civil disorder or curtailment of transportation facilities. This Agreement may be terminated for any one of the above reasons by written notice from [Venue].”
- ▶ All power to the Venue.

Force Majeure (sample clause)

- ▶ Force Majeure (mutual, broad)
 - ▶ The performance of this Agreement is subject to any circumstances making it: (i) impractical for either Party to perform its obligations under the Agreement or (ii) otherwise make the Agreement's intended activities impractical; such circumstances include, but are not limited to, Acts of God, war, infectious disease, government regulations, disaster, strikes, civil disorder or curtailment of transportation facilities. This Agreement may be terminated for any one of the above reasons by written notice from either Party, upon which all monies paid by either Party shall be refunded, less any funds spent by [Venue] pursuant to the Agreement.
- ▶ Mutual, with financial risk borne equally.

Force Majeure (strategies)

- ▶ For future agreements, ensure “infectious disease” and “government restrictions or regulations” are included as possible causes of force majeure
- ▶ Ensure either party can invoke force majeure, but be thoughtful of the threshold

Cancellation & Termination

- ▶ Event contract cancellation provisions often
 - ▶ Are one-sided
 - ▶ Increase penalties as the date approaches
- ▶ Depending on the type of contract, nature of cancellation & termination rights vary, and obligations post cancellation/termination vary

Cancellation (sample clause)

“Should your organization cancel definite arrangements with the [VENUE], cancellation will only be accepted in writing and be effective on the date of receipt of the [VENUE]. The following schedule will apply:

Notice Received Prior to Arrival	Assessment Per Person Per Day
6 months or more	No Charge
Under 6 months to 90 days	Deposit forfeited
90 to 30 days	50% of contracted cost
Less than 30 days	100% of contracted cost

If your organization books and consumes a comparable function, agreed upon by both parties within 12 months of the cancellation, the cancellation fee will be applied toward that function. [VENUE] believes this to be a fair and adequate policy designed to be mutually beneficial to our clients as well as the [VENUE].”

Cancellation (strategies)

- ▶ Strategies for the cancellation clause Reduce the amounts from revenue to expected profit
 - ▶ Include a provision that if the VENUE is able to replace your event with one of equal or greater value, the cancellation fees are waived
 - ▶ Include provisions related to a cancellation by VENUE

Impossibility

- ▶ Common law principle you can use to terminate a contract if your contract doesn't have an adequate cancellation or force majeure clause
- ▶ Will differ based on jurisdiction
 - ▶ [T]he excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law." *Kel Kim Corp. v. Central Markets*, 70 N.Y.2d 900 (1987).
- ▶ Factors considered:
 - ▶ the foreseeability of an event occurring
 - ▶ the fault of the nonperforming party
 - ▶ the severity of harm, and other circumstances affecting the just allocation of risk.

Amendment

- ▶ Common clause that typically requires written agreement by both parties -
 - ▶ “This Agreement shall not be modified or amended except in writing signed by the authorized representatives of each Party.”
- ▶ Less common as a standalone clause because some consider it unnecessary

Event Contracts

- ▶ Timing of your decision?
 - ▶ How far out is the event
 - ▶ How certain is the disruption
- ▶ Partners - what do we need to do with each?
 - ▶ Sponsors
 - ▶ Convert to different type of acknowledgment / recognition
 - ▶ Re-designate funds
 - ▶ Consider converting sponsorships to donations
 - ▶ Service providers (caterers, IT)
- ▶ Performers, awardees

Event Contracts

▶ Attendees

▶ Timing of notice

- ▶ Don't get ahead of your sponsors and other partners

▶ Refund? Roll over?

- ▶ If a portion of the cost of attendance was tax-deductible, that portion was a donation, rather than an exchange for goods & services
- ▶ Refunds of donations are generally at the discretion of the charity
 - ▶ Possible tax consequences of a refund of a donation

Insurance

- ▶ Consider all of your policies
 - ▶ For events, focus on Property / Business Interruption, but there are a number of other types of policies that might cover other COVID-related losses, such as -
 - ▶ Event Cancellation.
 - ▶ General Liability.
 - ▶ Directors and Officers Liability.
 - ▶ Employment Practices Liability.
 - ▶ Professional Services.
- ▶ Contact your broker early and stay in touch

Insurance

- ▶ Pay close attention to exclusions
 - ▶ There is a COVID-19 exclusion that some major insurers have begun including in policies, but only starting in January 2020
- ▶ Document your claim(s)
 - ▶ Restrictions for any physical locations
 - ▶ Time frames, transportation disruptions
 - ▶ Lost income / extra expense
 - ▶ Governmental directives

CARES Act

- ▶ Main programs
 - ▶ PPP (Paycheck Protection Program)
 - ▶ Designed for “Small Businesses”
 - ▶ A work in progress - guidance changing on an ongoing basis
 - ▶ Economic Injury Disaster Loans & Advance
 - ▶ Was available - now only available to agricultural businesses
- ▶ Congress is currently considering additional legislation

PPP Loan Eligibility & Forgiveness

▶ Eligibility

- ▶ 501(c)(3) - this may be expanded in the next round
- ▶ Fewer than 500 employees
 - ▶ “Employees” refers to full-time and part-time
 - ▶ SBA publishes size standards that relate to revenue
- ▶ Payroll for 2.5 months, based on 2019 payroll costs

▶ Certification

- ▶ Certify in good faith that the loan is “necessary” to support ongoing operations due to the uncertainty caused by the pandemic.

▶ Forgiveness

- ▶ Still in the works, but generally speaking, the loan will be forgiven if used on payroll costs to retain workers.

Reopening

- ▶ Need to be cautious
- ▶ Rely on state and local guidance for the threshold issue of whether you can reopen and conduct programming
- ▶ If state and local guidance for reopening is comprehensive, rely on it - if not, look to available federal guidance.
- ▶ Consider what similar organizations are doing
- ▶ Take appropriate safeguards

Questions

- ▶ Appropriate expenses to use from my PPP loan
 - ▶ PPP can be used for anything - if at least 75% is used for payroll expenses and you maintain headcount, the loan will be forgiven*
 - ▶ An EIDL loan can be used anything
- ▶ HR Policies
 - ▶ For the most part, you need to maintain your HR policies. If you have vacation policies, they still apply during quarantine if you have staff working