

# Five things retailers should consider in the COVID-19 era

May 6, 2020

As the world learns how to navigate the new normal, businesses have become accustomed to dealing with what used to be considered exceptional – managing mass shut-downs, disrupted supply chains, the collapse of demand, and the navigation of government programs. It is a sobering thought that this may be something that will continue to be, if not the norm, then a norm for the next couple of years. But, as lockdowns lift and social distancing measures are eased, the business and policy environment will start to shift.

Governments around the world now face the question of how they revive their economies from their current suppressed state while protecting their populations, in particular the vulnerable, from the risk of infection. How will businesses manage this changing environment when different nations and regions will ease restrictions at different paces? This alert looks at those questions and considers what retailers should look for as the world changes.

## Addressing workforce concerns

The U.S. retail industry faces significant impacts from the COVID-19 pandemic. Many retail stores have been deemed “nonessential” by state or local law, requiring their temporary closure, however, states and localities are beginning to permit certain businesses to begin reopening so long as they abide by safety protocols. Closures and economic uncertainty have caused retailers to consider layoffs and furloughs, triggering potential notification requirements under so-called “WARN” Acts. Stores able to remain open, or which are reopening, must alter the way they do business to ensure compliance with social distancing, hygiene, and other guidelines to protect employees and customers alike, including recent retail-specific [guidance](#) from the Occupational Safety and Health Administration (OSHA). Stores have attempted to use solutions such as demarcating six-foot distances with floor tape in checkout lanes, permitting drive-thru or curbside pick-up, requiring employees to wear cloth face coverings, and similar strategies. The federal CARES Act has provided some financial [relief](#) for retail employers who have been able to weather the storm in the form of forgivable loans or short time compensation, but this relief may not be sustainable.

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In France, retail and fashion companies are strongly impacted by the Government’s decision (in force since March 14th, 2020) to close all non-essential stores welcoming the public, as well as, more generally, by the impact of COVID-19 on manufacturing and sales activities (slowdown of purchases, supply and logistics issues, protection of the security of the employees in the work place, etc.).

In this context, most companies of this industry have taken the following approach, by having recourse to the exceptional measures taken by the French Government:

- Implementation of partial activity/furlough which allows employers directly or indirectly impacted by the COVID-19 crisis to reduce the working hours of their employees down to 0 percent and pay an indemnity representing 70 percent of their gross salary (100 percent for employees receiving the minimum wage) and be reimbursed for that amount by the French State; it is worth noting that several companies in the fashion industry have continued to pay 100 percent of the salary of the employees put under partial activity, the employer paying the difference itself;
- Wide recourse to teleworking (which the employer can impose on employees in an epidemic situation) whenever possible;
- Implementation of the mechanism allowing employees who have children impacted by the schools' closures ordered by the French Government to claim a specific sick leave indemnified by French Social Security (although only one parent can benefit from this measure); it is worth noting that this mechanism will progressively come to an end after schools start re-opening, as from May 12th, 2020.

The Government is planning to lighten confinement measures as from May 11th, 2020, but it is likely that store closures will continue beyond that date.

*Thierry Meillat, Partner, Paris*



COVID-19 heavily interferes with the consumer sector, e.g. interruption of supply chains, closure of retail shops and liquidity bottlenecks, preventing some employees from being utilized fully. In Germany, there are specific employment-related options for employers, including:

**Short-time work:** During such period employees work less or zero hours. Their remuneration would be reduced commensurately. The German government would partly compensate employees for their losses. Employers save a lot of money immediately. Downsides: complex application process and contractual arrangements required.

**Working from home:** Where possible, employees could work from home. This can prevent or limit the spread of Covid-19 in the operation and shops. Experience shows that many employees could work quiet well from, also due to modern communication means. Downsides: introduction of working from home only by mutual consent and the workplace at home must meet employment protection regulations. Data protection regulations must also be complied with. European Act on determination of employment terms & conditions. In some cases employers have to discuss with their works councils co-determination issues.

**Vacation shifting:** Problem: During the crisis, employees could not really work, in particular sales personnel. After the crisis, employees have accumulated huge vacation claims. Employers can try to make their workforce using vacation time during the shutdown rather than later.

Option 1: Encouraging employees to take vacation days during the shutdown. Downsides: For individual employees: in principle only possible by mutual agreement. For all employees of an operation: only possible by agreement with the employees' representatives of an operation (works council).

Option 2: Imposing a holiday ban for a certain period in the second half of 2020. Downsides: Only possible in exceptional cases (e.g. in the event of catastrophes).

*Eckard Schwarz, Partner, Hamburg*

## Rent and other real estate matters

Consumer occupiers across jurisdictions are making broadly similar requests: rent suspensions, rent deferrals or "holidays," or reduced rents under their leases for the duration, or at least a portion of, the COVID-19 lockdown. Landlord responses differ on a case-by-case basis. Those taking new leases or negotiating renewals are also looking to protect themselves by including "COVID-19" clauses suspending rent in the event of future pandemics. Some governments have introduced measures to protect occupiers from repossession action for non-payment of rent, but the devil is in the detail. Certain well-funded occupiers, however, have seen the current situation as an opportunity to secure new space in key locations on attractive terms.

Consumer traders will be concerned about the security of their stock in closed premises, and about the implication of keep-open obligations for their stores whilst legislation usually requires non-essential stores to be closed.

Hogan Lovells has created an [interactive map](#) that clients can use to find the latest real estate COVID-19 advice relating to their jurisdictions and carry out comparisons across jurisdictions.

*Adam Balfour, Associate, London*

## **Beware of price gouging**

Unfortunately, price gouging abounds in times of crisis. The COVID-19 crisis is no different. Retailers should be aware that pricing practices are under scrutiny by authorities around the world. Particularly in the U.S. and Europe, we have already seen significant enforcement efforts in response to rapidly increasing complaints of price gouging activity related to products that are in high demand or designated as essential by statute or executive action as a result of the crisis. Governments are already investigating pricing practices on the basis of a variety of legal instruments, such as competition rules, consumer protection laws, and price gouging prohibitions.

Retailers should focus on several aspects of price gouging laws and recent enforcement:

- First, normal supply and demand rules may not apply during a crisis—that is, sellers who normally respond to increased demand by increasing prices may violate consumer protection or price gouging laws which prohibit price increases over a certain amount during emergencies.
- Second, online marketplaces (i.e., platforms) are also facing scrutiny from enforcers for allowing sellers to price gouge on their sites. Some competition authorities have reached out to online marketplaces for a better understanding of the pricing practices of their users and threaten with enforcement action.
- Third, price-gouging laws and enforcement priorities vary state-by-state and country-by-country. A single pricing decision may be lawful in one jurisdiction, but unlawful in another.
- Fourth, responses to price gouging during this pandemic are still evolving. Some jurisdictions have taken executive and legislative actions to bolster their existing price gouging laws and enforcement actions to allow for a more targeted response to the COVID-19 crisis, and more are sure to follow.
- Finally, companies with market power should be aware that charging excessive prices could constitute an exploitative abuse and subject to significant fines under European rules.

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## **Change control during COVID-19**

From shut downs and supply chain and trade issues to liquidity concerns and unprecedented swings in consumer demand, COVID-19 has caused consumer companies to consider their options under existing procurement and customer contracts in ways they never anticipated, and all of this is complicated by the global effects of the pandemic. Buyers who are part of a chain of supply might find themselves in the middle if one of their suppliers declares force majeure. Each contract in the chain may of course be on different terms or subject to entirely different governing laws, and this can create substantial challenges for the buyer, as the interpretation of a force majeure clause is often highly dependent on the jurisdiction and the exact definition of what constitutes a force majeure event.

Many contracts are likely to be governed by rules (under the contract itself or applicable law or civil code) which apply where one party is prevented or hindered from fulfilling its obligations under the contract due to circumstances outside their control. The language of a contract will be important in determining the events giving rise to a force majeure event, the extent to which performance must be impeded for a party's non-performance to be excused and the applicable processes and procedures. Generally, a force majeure clause might cover the COVID-19 crisis if the contractual definition of a force majeure event expressly includes an epidemic/pandemic or the force majeure clause covers extraordinary events or circumstances beyond the reasonable control of the parties. Action by a government authority explicitly requiring a party to suspend operations is likely to constitute force majeure. In contrast, if a contracting party takes steps in

response to government advice or can't fulfil its obligations because staff is in self-isolation or one of its suppliers cannot deliver, the assessment as to whether force majeure applies will be more complicated and uncertain.

In common law countries, generally to benefit from a force majeure provision a party must show that the event was not foreseeable when entering into the contract and directly caused the inability to perform. In the absence of a force majeure clause, parties may look to rely on arguments of impossibility, frustration or impracticability, although the bars for successfully establishing these are very high. In civil law countries, contractual provisions can provide an exemption from a party's obligation to perform if the party is prevented from doing so by force majeure. In such countries, contractual force majeure provisions might render inapplicable any statutory provisions allowing a party to suspend performance until performance becomes possible or providing for adjustment of a contract that becomes economically infeasible. Equally, however, a court might adjust a contract according to the statutory legal principles in some circumstances. This applies, in particular, if the force majeure clause only provides for a termination and no adjustment of the contract to account for changed economic circumstances. In addition, if performance is merely difficult or expensive and not impossible, a civil law court might order specific performance. In all jurisdictions, parties will have an obligation to mitigate.

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What can parties do?

Now that coronavirus and its effects are arguably a foreseeable event, in addressing and updating force majeure clauses, parties should consider the following:

- COVID-19 will most likely not be covered by general, catch-all force majeure clause
- An explicit reference to COVID-19 or an explicit exclusion might be necessary for a court to find force majeure.
- Companies purchasing goods might wish to build in the right to terminate after a reasonable period of time if the supplier has not performed.
- Companies supplying goods might wish to build in the ability to suspend or extend performance where it is prevented from doing so as a result of COVID-19.
- Parties should consider other potential alternative means for performing obligations and steps to avoid or mitigate the coronavirus outbreak and its consequences.

With respect to contracts entered into before the pandemic began:

- Start with the contract. Technical provisions matter. These may limit a supplier's ability to make a claim even if the supplier is in breach, or they may require notice or other formalities to be followed.
- Consider other parts of the contract (for example, "change control" provisions) can provide opportunities to seek to renegotiate obligations in some circumstances.
- Consider applicable law. In common law jurisdictions, the contract is likely to govern the arrangements in all but the most extreme of situations, but in civil law jurisdictions, the statutory overlay must be considered.
- Don't overestimate the effect of force majeure. This will ultimately depend on the specific law and circumstances, but the most common effect is suspension of the performance obligations. Although there might also be termination rights, these often won't apply until the interruption has lasted for some time.
- Also remember that, even where suspension is permitted, you may still be required to perform obligations other than those which were directly affected by the "force majeure" event.
- If you are seeking to avoid performance, wherever possible do not expressly admit to a breach of a contractual obligation or acknowledge that a customer or supplier has suffered a particular amount of loss or damage as a result. Instead, talk about the practicalities of rescheduling or suggest changes. Where a customer or supplier tells you "not to worry about it in the circumstances" or some other language which suggests that they accept your non-performance, note that down and ideally find a way to confirm it in writing.

- If you are seeking to enforce a contractual obligation, do the opposite of what is outlined above.
- Think carefully before taking an aggressive approach. Balance potentially exercising your legal rights with the damage to important relationships (and, of course, if performance is impossible in the current situation, being aggressive won't solve the problem).
- It will often be better to talk to customers or suppliers as early as possible to identify work-arounds or mitigate the effects of COVID-19 on your supply chains or critical markets. However, if you do this, it is important to confirm in writing with the customer or supplier that discussing alternative approaches does not affect your legal position and that you are reserving your legal rights.
- Of course, there may be relationships which are already difficult or where you are looking for opportunities to terminate or walk away from the contract. In which case, this may provide an opportunity to do that.
- If a supplier or customer withholds payments or asks for extended grace periods, consider the longer-term relationship and engage in open conversations, but expressly confirm you are reserving your legal rights and, if the counterparty is insolvent or approaching insolvency, obtain legal advice on how best to protect your claim.
- Where customers have taken delivery of goods but haven't paid everything they owe, consider any rights you might have to recover the goods (and practical challenges to doing so).
- If circumstances require that you carry out or commission work to be carried out in a way different than was originally agreed between the parties, retain records of any agreed actions, detailing specifically where instructions differ in scope or timing to the position agreed originally in your contracts. Also consider if your existing contract requires changes/variations to be recorded in a particular way. This is important as we may need to rely on such records if disputes occur at a later date.
- Consider your insurance policies wherever issues arise. Also, remember that customers or suppliers might have insurance which covers the current situation – in which case asserting your legal rights may be a mechanism which enables you to get the benefit of those policies (because you can claim against the customer or supplier and they will recover the amount they owe you from their insurers).

*Kelly Tubman Hardy, Partner, Baltimore and Washington, D.C.*

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## Financial distress – restructuring and bankruptcy

We expect to see a substantial uptick in retail bankruptcies, particularly toward the end of 2020 and beyond. While bankruptcy courts today are eerily quiet, most expect this will soon change. Many highly-levered retailers are already beginning to engage restructuring advisors to help them explore restructuring options, including chapter 11. We expect that by the third and fourth quarters of this year, and continuing into 2021, the number of retail bankruptcies will rise significantly.

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Given the symbiotic complexities the pandemic has caused, we recommend that retailers – healthy and distressed alike – keep open lines of communication with their landlords, lenders, customers and suppliers. Many may also benefit from hiring restructuring advisors, as experienced professionals can often help companies to identify and implement solutions and strategies to avoid a bankruptcy filing altogether, or to preserve the company's operations if a bankruptcy proves unavoidable.

*Erin N. Brady, Partner, Los Angeles*

## Retailers reopening – what's next?

As the country prepares to re-open for business, retailers confront basic, yet complex, questions such as: When is the right time to reopen? And how do we avoid hosting an outbreak? These businesses wish to alleviate employee and consumer concerns, manage reputational and litigation risks, and comply with evolving state and local guidance. Retailers should consider the following measures:



- Documenting all health and safety compliance measures, including employee trainings, as well as HR policy revisions;
- Implementing staggered shift work or extending telework where appropriate;
- Implementing or continuing social distancing practices for customer-facing activities, such as contactless payments, curbside pickups, expanded delivery options, and floor markers to demonstrate six-foot gaps in checkout lines;
- Implementing social distancing practices in the workplace, including adjusting seating and/or layouts in shared spaces such that employees can remain six feet apart;
- Posting signage in multiple languages to make employees and consumers aware of any new policies, such as those relating to face masks;
- Monitoring and implementing changing requirements and/or recommendations, such as OSHA's COVID-19 guidance for retail workers, CDC recommendations, and state executive orders regarding occupancy limits and sanitation;
- Ensuring that anonymous ethics hotlines are known to employees and actively monitored, and appropriately investigating health or safety concerns;
- Implementing public relations and reputation management procedures including internal and external communication protocols, particularly involving social media. Proactively communicating with customers about the carefully considered decision to reopen stores, and the process for doing so safely, will further promote trust and protect the retailer's reputation.

Above all, retailers must intensify communication with employees – and, where appropriate, governmental agencies and the public – to ensure that they are providing clear and accurate directives and properly responding to concerns.

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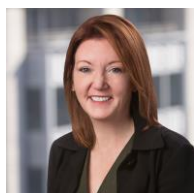
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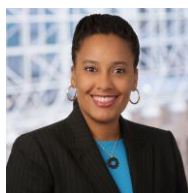
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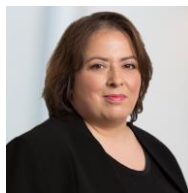
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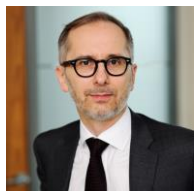
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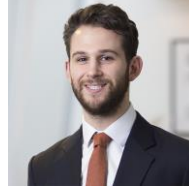
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