COVID 19 – What Your Nonprofit Needs to Know

Legal Issues Arising from the Novel Coronavirus

George E. Constantine
Partner | +1 202.344.4790 | GEConstantine@Venable.com

Michael C. Davis
Partner | +1 202.344.4545 | MCDavis@Venable.com

Ronald M. Jacobs
Partner | +1 202.344.8215 | RMJacobs@Venable.com

Jennifer G. Prozinski
Partner | +1 703.760.1973 | JGProzinski@Venable.com

Anne K. Gerson
Counsel | +1 202.344.4209 | AKGerson@Venable.com

John B. Mavretich
Associate | +1 202.344.4119 | JBMavretich@Venable.com
Topics for Today

1. Introduction
2. Insurance
3. Events
4. Employment
5. Communication
Background

Part 1
Background on Coronavirus (COVID-19)

- What is COVID-19?
  - Coronavirus are a large family of viruses that cause acute, upper respiratory infections.
  - COVID-19 is an ongoing, worldwide outbreak of a novel coronavirus. It has been detected in almost 90 locations internationally.
  - The disease is spread through coughs, sneezes, and contact with saliva. People become ill between 2 and 14 days after infection.
  - The CDC notes that current circumstances suggest it is likely this virus will cause a pandemic. Reported illnesses range from very mild to severe.

- What has been International and U.S. Response?
  - Efforts to contain the spread and mitigate the impact.
    - Limitations on movement and activity, quarantine, travel advisories
Travel Restrictions

- Quarantine of 11 million people in Wuhan, China
- Travel and all public events prohibited in Northern Italy; schools and universities suspended until March 15; bars, restaurants, and shops must observe a one-meter distance between patrons
- Hong Kong imposes a 14-day quarantine on travelers from mainland China
- U.S. travel advisories:
  - Level 4 – Do Not Travel: China
  - Level 3 – Reconsider Travel: Italy, South Korea, Iran
- U.S. Department of State website says U.S. citizens, particularly travelers with underlying health conditions, should not travel by cruise ship
Restrictions on Employee Travel
- Nonessential travel prohibited by many organizations

Event Cancellations
- SXSW, HIMSS in Orlando, American Academy of Allergy, Asthma & Immunology in Philadelphia

Work Changes
- Increased remote work options
Insurance Coverage

Part 2
Insurance May Cover Some Coronavirus Losses

- Certain losses caused by coronavirus may be covered by insurance.
- Examples of potentially applicable policies include:
  - Event cancellation
  - Business interruption
  - Commercial general liability
  - Environmental
  - Employment practices
  - D&O/E&O
- Policies are frequently individually negotiated, and terms vary from insurer to insurer, so you need to review the specific language at issue.
Insurance Best Practices

- Speak with your insurance broker.
- Gather all insurance policies and read the particular provisions and endorsements.
  - The unique terms of your policy will determine whether there is coverage.
- Provide timely written notice to all insurers (not just to your broker).
- Mitigate losses to the extent possible.
- Document losses, costs, and expenses and retain relevant records.
- Be aware that internal and external communications may be discoverable.
  - Consider before sending: could this communication hurt our argument for coverage?
  - Communications with brokers are not privileged.
  - Consultation with coverage counsel can mitigate risk.
Event Cancellation Insurance

- Typically written to cover specific events
- Typically specialized, manuscripted coverage
- Potential coverage: Lost revenues, increased expenses, diminished attendance, costs to reschedule, etc.
  - CAUTION: Some policies contain an exclusion for cancellation due to communicable disease (or fear or threat of such)
- Potential coverage for voluntary refunds to participants/exhibitors
  - Example: Policy provides that “actual net revenue” (which is deducted from what is recoverable) does not include “refunds made, whether contractual or voluntary.” This is useful language.
- Potential coverage for “hotel penalty” when room commitment is unfulfilled
  - Example: “It is hereby understood and agreed this policy is extended to indemnify the Named Insured in respect of the penalty imposed by the hotel in respect of each hotel room falling short of the Hotel Room Commitment...”
Business Interruption Insurance

- Potential coverage: Lost income resulting from suspension of (or decrease in) operations
- Suspension may be caused by spread of virus or government orders related to virus (e.g., mandatory quarantine, ban on travel, etc.)
- **CAUTION**: Loss must be caused by “covered cause of loss” and not otherwise excluded
- **CAUTION**: Coverage *may* only be triggered by direct physical loss
  - Example: “We will pay for the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ The ‘suspension’ must be caused by direct physical loss of or damage to property at premises which are described in the Declarations...”
- “Contingent business interruption” coverage endorsement may apply when a supplier/customer/vendor suspends operations and causes loss to the insured. What triggered the interruption is key.
Third-Party Insurance

- **Commercial General Liability Insurance**
  - Potentially triggered by third-party claim against insured alleging bodily injury (which, based on policy language and applicable state law, could include emotional distress).
  - **CAUTION**: Various exclusions (including exclusion for “contaminants,” “microbial matter,” and/or “organic pathogens”) may apply to claims related to coronavirus.

- **Environmental Insurance**
  - Potential coverage for first-party and third-party damages related to dispersal of contaminants/viruses and for remedial costs.
  - Policy may provide coverage for expenses related to disinfection.
  - **CAUTION**: May contain exclusion for communicable diseases.
Events

Part 3
Whose Event?

Ours: Hosting

Theirs: Attending
Decision to be made

Go

No-Go
Other Events: Do we send people?

- Risk to employees
- Fairness to employees
- Importance of attending
Our Events: Do we cancel?

Balancing financial exposure from cancellation with health and safety concerns

Cancellation of Contracts
- Termination Fees and Liquidated Damages
- Force Majeure

Attendee/Exhibitor/Sponsor Issues
- Payment rights
- Reputational Impact

Liability Concerns
- Event Insurance
- Limiting liability for Nonprofit Host of Event

Practical Considerations for Proceeding/Cancellation
Cancellation of Contracts

- **Termination Fees and Liquidated Damages**
  - Cancellation terms are typically established within the contract; liquidated damages can be expressed to anticipate the value of a breach.
  - Termination Fees may increase over time, based on calendar targets.
  - Even without cancellation, damages may be included for underperformance.

- **Force Majeure – Cancellation without Penalty**
  - A contract clause that excuses performance when supervening circumstances outside of the parties’ control prevent or impede performance.
  - Expressly addressing the risk of supervening events in the contract is preferable to relying on the narrow common law doctrines of impossibility or frustration of purpose.
  - Usually enforceable, but narrowly construed.
Four Elements of a Force Majeure Clauses

- List of supervening events
  - E.g., “acts of God, strikes, natural disasters, acts of terrorism”
  - Medical Epidemic may require statements by World Health Organization, U.S. Department Center for Disease Control, Department of Homeland Security
  - Formal disruption of travel; may include a percentage of attendees whose travel is prevented
- “Catch-all” phrase
  - E.g., “and any other occurrence beyond the parties’ control”
- Phrase governing standard for excuse
  - E.g., “rendering performance illegal or impossible”
- Operative phrase
  - E.g., “the parties shall be excused from performance”
  - Not always a total release: pre-paid fees, expenses, or payments may be excluded
Applicability of Force Majeure Clause

- Standard *force majeure* clauses in meeting contracts usually aren’t sufficient to completely protect against liability if a supervening event derails a meeting:
  - usually drafted narrowly;
  - lack specificity with regard to the types of supervening events that could present significant obstacles to meeting its performance obligations; and
  - commonly excuse performance only if it would be “impossible” to perform.

- More flexible *force majeure* provisions permit excuse of performance when it would be “*inadvisable*, commercially impracticable, illegal, or impossible” to perform.

- Any *force majeure* clause may require litigation to enforce.

- Note: Contracts with various vendors for the same event may have different provisions e.g., convention center contract, event management contract, and exhibitor contracts may all have separate terms and thresholds.
Attendee/Exhibitor/Sponsor Issues

- **Payment Issues**
  - Does agreement contemplate a refund or credit for future events?
  - Does the agreement have any *force majeure* provision?

- **Communication with Stakeholders**
  - Messages are time-sensitive; the outbreak is still developing.

- **Postponement**
  - Are there practical options for rescheduling the event?

- **Logistical Concerns**
  - How do you proceed or cancel in the current climate?
Liability Concerns

- Does the Nonprofit have Event Insurance?
  - Check coverage for *force majeure* events and any general exclusions.
    - There may be an exclusion for medical epidemics, based on H1N1 and SARS.
  - Be aware of timing or notice requirements for claiming coverage.

- Limiting liability for Host of Event
  - Who holds a duty to attendees?
  - What precautions can the Nonprofit take to prevent potential harm to attendees?
Option 1: Proceeding as Scheduled

- If a Nonprofit decides to proceed as scheduled with holding an event, the following should be considered:
  - Send communication to attendees, exhibitors, sponsors, speakers confirming that the event is proceeding.
  - Development of a plan for enhancing sanitation / health with the convention center, or otherwise limiting any activities that may increase risks.
  - Identifying any back up services needed in event that any service providers back out of the conference.
  - Determination of whether the Nonprofit should bar attendees from certain countries or locations.
  - Policies for attendees/vendors that cannot attend due to company policy or government restriction.
  - Prepare for potential decreased attendance and underperformance.
Option 2: Cancelling an Event

- If a Nonprofit decides to cancel its event, the following should be considered:
  - Send communication to attendees, exhibitors, sponsors, and speakers confirming that the conference is cancelled.
  - Determine how to handle issues related to requests for refunds.
  - Manage contractual negotiations / discussions with contractual partners.
  - Follow up with insurance carrier.
  - Investigate alternative options for holding other events to carry out mission.
Employment Issues

Part 4
Maintaining a Healthy Workplace for Employees

- Legal obligation under OSHA
- Ill employees and employees confirmed to have been exposed
- Reports of COVID-19 in the workplace
- Travel
  - Business
    - Essential/Nonessential
    - Consider ADA implication
    - Employee relations issues
  - Personal
- Consistent administration
Office Closure Issues

Wage and Hour

- Nonexempt employees
- Exempt employees
  - General rule
  - Options
    - No work for a full workweek
    - Require use of PTO for time during workweek when no work is performed
    - Reduce hours and pay

Unemployment

WARN Act
Communications

Part 5
Different Audiences

**Board**
- Level of involvement
- Cancellation decisions
- Budget issues

**Members**
- Event cancellation
- Reduction in member services
- Providing relief/donations (corporate social responsibility)

**Employees**
- Remote work
- Safety information
- Dealing with cancellations
- Putting them at ease
Communications Considerations

- Right message to the right audience
- Preserve rights
- Consider privilege

- Consistency
- Transparency
- Accuracy
Questions?

George E. Constantine  
Partner  
+1 202.344.4790  
GECostantine@Venable.com

Michael C. Davis  
Partner  
+1 202.344.4545  
MCDavis@Venable.com

Ronald M. Jacobs  
Partner  
+1 202.344.8215  
RMJacobs@Venable.com

Jennifer G. Prozinski  
Partner  
+1 703.760.1973

Anne K. Gerson  
Counsel  
+1 202.344.4209  
AKGerson@Venable.com

John B. Mavretich  
Associate  
+1 202.344.4119  
JBMAvretich@Venable.com
© 2019 Venable LLP.
This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.