



# COVID-19: Legal Issues and Considerations

## Client Advisories

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As COVID-19 (coronavirus) continues to impact companies and affect workforces and supply chains, Archer has established an inter-disciplinary COVID-19 Task Force in support of our clients' short and long-term business needs.

We realize many of you are dealing with issues you have never encountered before. Over the past several weeks, we have fielded questions from clients related to how COVID-19 is impacting their businesses. We thought it would be helpful to share some of the legal issues we have been addressing in case you are encountering the same questions and to direct you to Archer attorneys who can help you get the answers you need. We have also been monitoring the rapidly-changing regional executive orders that are impacting so many of our clients' lives and businesses, and this alert summarizes the current state of closure orders in New Jersey, Pennsylvania and Philadelphia.

Our attorneys remain available and stand ready to help. Please contact your Archer attorney or any member of the [Taskforce](#) with any questions you may have.

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COVID-19 (coronavirus) Resource Guide

## Summaries of Current Regional Executive Orders

### New Jersey

*Gubernatorial Executive Order 104 (March 16, 2020) closes schools indefinitely, shuts gyms, movie theaters and casinos, allows restaurants to provide take-out/delivered food only, and limits the hours of non-essential businesses to 5 a.m. to 8 p.m. While discouraged from traveling, the public is not subject to a curfew. Please be aware that some counties or municipalities may have additional closures and restrictions.*

On March 16, 2020, New Jersey Governor Phil Murphy signed Executive Order 104 in response to the outbreak of COVID-19 in New Jersey. The Order sets forth aggressive measures to stem the proliferation of the virus in the State:

- Public and private schools are closed indefinitely, effective March 18, 2020.
- Gyms, movie theaters and casinos are closed.
- Restaurants may only provide take-out or delivered food going forward.
- “Non-essential” businesses must close between the hours of 8:00 p.m. and 5:00 a.m.
- The Order does not impose a curfew on the State’s residents nor does it bar travel during any period. That said, the Governor was clear in his recommendation that people avoid travel.

Key provisions of the Order are set forth with more specificity below:

- Gatherings of people are generally limited to 50 people or less. This limitation does not apply to:



- Airports
  - Bus and train stations
  - Medical facilities
  - Office environments
  - Factories
  - Industrial/manufacturing centers
  - Construction sites
  - Grocery/consumer goods retailers
- All schools at all levels are closed, effective Wednesday, March 18, 2020, and will remain closed until the Governor rescinds the Order. Public and private schools (including parochial, charter and renaissance schools) providing instruction at the preschool, elementary, and secondary levels are subject to the Order. The Department of Education will ensure the continuity of education through home instruction. The Commissioner of the Department of Education – upon consultation with the Commissioner of the Department of Health – may determine that certain school facilities may remain open to provide meals or other non-educational services needed by the community.
  - Higher education institutions must cease all in-person instruction as well unless a waiver is granted by the Secretary of the Office of Higher Education.
  - Gyms, fitness centers (including class-based fitness), movie theaters, casinos, racetracks, concert venues, nightclubs, and performing arts centers are closed to the public.
  - Online and mobile sports/casino betting are not prohibited despite the closure of the physical casino and/or racetrack.
  - All non-essential retail, recreations, and entertainment business must remain closed between the hours of 8:00 p.m. and 5:00 a.m. During open hours, occupancy must be limited to no more than 50 persons. Examples cited in the Executive Order as business excluded from the definition of non-essential include:
    - Grocery and food stores
    - Pharmacies and medical supply stores
    - Gas stations
    - Healthcare facilities and ancillary stores within healthcare facilities
  - Restaurants – whether serving liquor or not – may only offer take-out or delivered food. If alcoholic beverages are to be sold from a restaurant, dining establishment or bar with a liquor license, such sales shall be limited to original containers sold from the principal public barroom.



- All retail sales of alcoholic beverages by limited breweries, wineries, craft distilleries, cidery and meadery licensees must be in original containers and must be delivered by licensed entities or customer pickup.
- The State Police Superintendent may enact traffic regulations and/or restrictions, but the Order does not include a curfew or travel ban.
- On March 19, 2020, the State Director of Emergency Management signed Administrative Order 2020-2 closing all personal care businesses, such as spas, hair salons, barber shops, massage parlors, tattoo parlors, and tanning salons . The Order also closed all public and private social clubs, including American Legion, VFW, Knights of Columbus and other social clubs.

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## Pennsylvania

On March 19, 2020, Governor Wolf signed an Executive Order immediately closing all but “life-sustaining” businesses in Pennsylvania. The state created a spreadsheet that identifies by industry those that qualify as “life sustaining,” which can be accessed here: <https://www.documentcloud.org/documents/6815335-20200319-Life-Sustaining-Business.html#document/p1>

On March 16, 2020, pursuant to Pennsylvania’s Emergency Management Code, 35 P.S. § 7301, Governor Wolf “strongly urged” all “non-essential stores” in Pennsylvania to close effective at 12:01 a.m. Tuesday, March 17, 2020. This admonition extends guidance from the Governor’s office that previously applied only to non-essential retail businesses in Bucks, Chester, Delaware, and Montgomery Counties. The Pennsylvania Department of Health and of Community and Economic Development jointly issued guidance, originally pertinent to the four counties, but now applicable statewide, that makes clear that the Governor’s direction is intended to apply to retail businesses.

Non-essential businesses and services include the following:

- Entertainment
- Hospitality and recreation facilities, including, but not limited to:
  - Community and recreation centers
  - Gyms, including yoga, barre and spin facilities
  - Hair salons and barber shops, nail salons and spas
- Concert venues
- Theaters
- Sporting event venues and golf courses



- Retail facilities, including shopping malls, except for pharmacy or other health care facilities within retail operations

Essential services and sectors are included, but not limited to the following:

- Food processing
- Agriculture
- Industrial manufacturing
- Feed mills
- Construction
- Trash collection
- Grocery and household goods (including convenience stores)
- Home repair/hardware and auto repair
- Pharmacy and other medical facilities
- Biomedical and healthcare
- Post offices and shipping outlets
- Insurance
- Banks
- Gas stations
- Laundromats
- Veterinary clinics and pet stores
- Warehousing
- Storage and distribution
- Public transportation
- Hotel and commercial lodging

You can find details here: <https://dced.pa.gov/resources/>

Additionally, the Pennsylvania Department of Labor and Industry (DLI) has announced some guidance for the availability of unemployment and workers' compensation benefits for workers whose jobs have been impacted by COVID-19. Workers may be eligible for unemployment benefits if:

- Your employer temporarily closes or goes out of business because of COVID-19



- Your employer reduces your hours because of COVID-19
- You have been told not to work because your employer feels you might get or spread COVID-19
- You have been told to quarantine or self-isolate, or live/work in a county under government-recommended mitigation efforts

Applications for employment benefits can be submitted online.

DLI will also consider workers' compensation benefit claims arising from COVID-19 exposure:

- Notifying your employer to file a typical "disease-as-injury" WC claim, which requires an employee to provide medical evidence that the employee was exposed to COVID-19 in the workplace.
- Notifying your employer to file an "occupational disease" WC claim, which requires an employee to show that COVID-19 is occurring more in the employee's occupation/industry than in the general population.

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## Philadelphia

The City of Philadelphia today issued an Emergency Executive Order invoking Section 6-206 of the Philadelphia Code to temporarily prohibit the in-person operation of non-essential businesses in the city effective from 5:00 p.m. on Monday, March 16, 2020, through at least March 27, 2020. The order expressly excludes virtual and remote operations from the prohibition. It also defines essential businesses in several categories: Retail, Infrastructure and Industrial, Healthcare and Social Services. Note that the order makes explicit that "no office-based business or organization, other than an Essential Business, may operate the business generally with personnel located in such office." A copy of the detailed executive order is linked here.

<https://www.phila.gov/media/20200317124459/Order-and-Explanation-of-Prohibition-on-Non-Essential-Businesses.pdf>

Section 6-206 of the Philadelphia Code allows the Health Department to impose restrictions on contact among individuals to protect the public health. City officials expect that businesses will comply with the order. However, if enforcement actions become necessary, warnings will likely be issued before harsher action is taken.

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## COVID-19 Related Issues We Have Been Addressing

### Health Care

Health care providers are on the front lines whenever there is an infectious disease outbreak and COVID-19 (coronavirus) is no different. The virulence of COVID-19 and its global pandemic status present unique challenges and stressors, as providers strive to treat patients, manage their potentially diminishing work force and address public health concerns amid increased protocols, supply chain disruptions and the privacy



obligations of state, federal and international law. Further, employers that sponsor self-insured health plans face unique challenges given their access to employees' protected health information (PHI) held not as an employer, but due to their status as a covered entity under the Health Insurance Portability and Accessibility Act of 1996, as amended (HIPAA).

Our COVID-19 Task Force includes members of Archer's Health Care Practice Group who are helping providers and other covered entities tackle the legal challenges that these circumstances present. The issues we are addressing include:

- May employers with access to employee PHI (due to treating such employees or because they have a self-insured health plan) use and/or disclose an employee's PHI to protect other employees or the general public?
- What additional steps should providers take to ensure the privacy of patient PHI and to limit employee access to information that is of great interest to the general public?
- Are providers obligated to disclose PHI to public health officials and are there limits to any such obligations?
- Can providers use PHI for "research purposes" without patient authorizations and what constitutes "research?"
- Should providers limit visitors to their facilities? What protocols should be put into place to limit exposure risk?
- Does a provider have a reporting obligation if there are supply chain interruptions?
- Are Medicare conditions of participation conditions for coverage, EMTALA or requirements and licensure regulations relaxed in this type of public health emergency?
- How do force majeure provisions affect enforceability of supplier contracts, and are exclusive vendor provisions enforceable against the health care provider if the vendor is unable to meet its obligations to provide certain items or services?

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## Business Interruption and Commercial Insurance

The COVID-19 (coronavirus) pandemic has caused a global health emergency, resulting in a growing number of governmental restrictions, mandates, and advisories. In turn, businesses are feeling the impact on their operations and revenues caused by employee illness, event cancellations, and disruptions in global supply chains. Many businesses are evaluating whether their existing insurance policies will provide coverage for these types of losses. As with all such inquiries, the scope and extent of available insurance coverage may depend on a



number of factors, including the terms and conditions of the specific policies and the circumstances causing the losses. If the potential for coverage exists, we can assist you in filing a claim with your insurance company and handle the coverage disputes that will inevitably arise.

The following are a few types of commercial insurance coverages that may respond to COVID-19 related claims and losses:

- **Business Interruption:** Standard commercial property policies contain business interruption coverage (for losses sustained as a result of disruptions to the policyholder's own operations) and contingent business interruption coverage (for losses sustained as a result of disruptions to the operations of a policyholder's supplier). Available coverage may depend on whether there is "direct physical loss" to the policyholder's (or supplier's) property as a result of COVID-19. Whether a property rendered uninhabitable by the presence of COVID-19 is sufficient to constitute a "direct physical loss" (and whether other exclusions apply) will be a hotly contested issue.
- **Civil Authority Action:** Many commercial property policies contain a provision that provides coverage for business losses due to an "action" taken by a civil authority – such as curfews, evacuations, and similar restrictions that prevent access to the policyholder's business. This coverage may apply where a federal, state or local governmental body restricts access to a geographical area where a COVID-19 outbreak has occurred.
- **Commercial Liability Insurance:** These policies may provide coverage against third-party claims of customers/guests who contend they were infected due to the policyholder's alleged failure to exercise reasonable care in warning of, and protecting against, the risk of exposure to COVID-19. Such policies may include Commercial General Liability (CGL), Directors and Officers (D&O), and Errors and Omissions (E&O).

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## Immigration and International Travel

The COVID-19 (coronavirus) pandemic has created a global impact on travel and ever increasing restrictions on travel both to the United States and internationally. These restrictions are impacting the ability of businesses to both move their existing employees across borders and plan for further transfer of their employees globally.

Some of the most pressing issues businesses face include:

- From which countries are citizens currently banned from traveling to the United States and will this list be expanded? How long is this travel ban going to last?
- Do these travel restrictions affect United States citizens and permanent residents? What about foreign nationals who have already been granted visas to enter to the United States?





- For foreign national employees already abroad, are they permitted to transit through a non-restricted country to return to the United States?
- Are all airports in the United States currently open for business to receive foreign travelers? What should travelers returning to the United States expect in terms of medical testing and quarantine?
- Do countries around the globe currently have or contemplate similar restrictions on travel?

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## Labor & Employment

The COVID-19 (coronavirus) pandemic and the resulting travel restrictions, cancellations, quarantines and closures have created many issues and questions for employers as they endeavor to minimize the negative business impact while keeping employees and the public safe.

Archer's Labor and Employment Group is prepared to assist you as you navigate COVID-19-related employment issues. Some of the employment issues our clients have been facing include:

- **Health Inquiries and Testing of Employees:** In an attempt to maintain employee health and stop the spread of the virus, employers may wish to take steps to ensure that employees who are in the workplace are not actually sick. However, actions such as health screenings and asking questions about employee health can raise issues under the Americans with Disabilities Act (ADA) and the New Jersey Law Against Discrimination (NJLAD).
- **Telecommuting Issues:** Many employers are moving toward having employees work from home instead of coming to the workplace. This raises a variety of issues, including tracking employee working time and managing productivity for home working employees.
- **Reasonable Accommodations:** The ADA and the NJLAD require employers to make reasonable accommodations for employees with disabilities. Although it is not clear that having COVID-19 would rise to the level of a disability for most employees, employees who are particularly susceptible to complications if they were to contract the disease may be eligible for reasonable accommodation. Further, unique or unusual reasonable accommodation requests may arise due to steps businesses are taking to control the spread of the disease, such as mandating telecommuting.
- **Job Protected Leaves of Absences:** The Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJLFA) both offer job protected leaves under a variety of situations, such as employee sickness and absences to care for sick family members.
- **Wage and Hour Issues:** The Fair Labor Standards Act (FLSA) and state wage and hour laws create a variety of potential landmines, such as tracking employee working time and whether employees have to be paid for



days on which the employer decides to close for business.

- Pay and Benefits during Absences or Closures: Many employers will face questions regarding pay and benefits, such as the use of paid sick or vacation time, the availability of unemployment or temporary disability benefits, and the continuation of health insurance benefits in the event of a lengthy closure.
- Changes to Federal and State Laws: Congress and state legislatures are readying a series of laws to address the employment implications of the COVID-19 pandemic. This will likely include some version of paid leave benefits that employers may need to provide. Every employer will need to stay current with these changes to ensure compliance.

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## Archer Public Affairs

The COVID-19 (coronavirus) pandemic has required states to respond to the nationwide emergency. Archer Public Affairs (APA) is positioned to assist clients as they navigate the governmental response to COVID-19 at multiple levels. APA has strong relationships with decision-makers through our New Jersey, Pennsylvania and Washington D.C. offices. These offices are staffed with former elected representatives, state cabinet officials and policy leaders. Examples of APA's ability to guide clients during this period include:

- Analysis of - and ability to participate in - legislative efforts to curb the spread of the virus and recover from the economic impacts thereof.
- Outreach to various governmental departments and agencies in New Jersey including:
  - Department of Labor & Workforce Development
  - Board of Public Utilities
  - Departments of Health and Human Services
  - Law & Public Safety
  - Community Affairs
  - Treasury
  - Banking & Insurance
- Ability to interact with the New Jersey Office of Emergency Management during the declared period of a statewide emergency and the potential activation of the Regional Operations Intelligence Center.
- Ability to speak with leadership in the New Jersey Governor's Office to discuss real-time response efforts and recovery strategies.



- Similar opportunities for outreach and access to various governmental departments and agencies of Pennsylvania; access to decision-makers in the Pennsylvania legislature and its solutions to that State's solutions to the virus' impact.
- Strong relationships with county and municipal officials in New Jersey and Pennsylvania - access to information and guidance related to local measures (including, medical testing, closures and curfews).

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## Data Privacy and Cybersecurity

Online scammers are exploiting the COVID-19 (coronavirus) pandemic to launch new, and too often successful, ways to hack into computers and steal people's information and money. The U.S. government has warned that cybercriminals are posing as legitimate medical and health organizations and distributing mass emails with attachments that supposedly contain important and pertinent information regarding the coronavirus. Instead, the emails actually contain malware that infects computers or fools people into entering their usernames and passwords for their email or computer system. Also, a rise in teleworking increases the risk from cyberattacks that prey on employees' anxieties, as well as exploit technical vulnerabilities that may be greater when they access their employer's network using home computers or mobile devices.

Our COVID-19 Task Force includes members of Archer's Cybersecurity and Data Privacy Practice Group who are helping businesses and individuals tackle the legal challenges that these circumstances present. The issues we are addressing include:

- What legal risks do businesses run if they ignore the increased threats of cyberattack that accompany the Coronavirus outbreak?
- What technological solutions should businesses consider to help secure a workforce that is working remotely in ever increasing numbers?
- What policies or guidelines should businesses have to address remote access to their computer systems and their employees' using personal devices for business?
- What should businesses do to help assure that their workforces are vigilant, particularly to social engineering attacks like phishing?
- How do privacy laws affect a business's right to obtain and/or disclose health and medical information about their own employees, guests on their premises and employees of other businesses with whom they come in contact?

Contact Robert Egan at 856-354-3079 or [regan@archerlaw.com](mailto:regan@archerlaw.com), or any Archer attorney with whom you regularly work for assistance.

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# Business Contracts and Related Disputes

The COVID-19 (coronavirus) pandemic and its practical business consequences have caused a number of disputes concerning the duties and responsibilities of parties to a variety of agreements. Many of our clients are encountering the question of whether performance might be excused given the circumstances of the pandemic. Each case we have encountered is different, and not surprisingly requires an analysis of the specific agreement language and the circumstances surrounding the parties' contract and business relationship, and the actual impact of the virus on the expected performance.

Some examples include the following:

- Some business contracts contain a force majeure provision (sometimes referred to as an "Act of God" provision). Such clauses could excuse performance if unforeseen circumstances prevent one of the contracting parties from fulfilling its obligations. When should a force majeure notice be issued? How should a company respond if it receives a force majeure notice?
- Some businesses have encountered issues caused by supply chain interruption, particularly with suppliers from mainland China, and the inability to fulfill delivery commitments because they are unable to obtain raw materials or finished products for resale. What steps should a company take if it cannot supply its customers? Does the inability to supply customers raise other notice obligations, such as the requirement in many financial agreements that notice be provided of any material adverse change affecting the business?
- Other businesses have experienced the cancellation of events due to governmental restrictions on social gatherings above a certain size or simply because people who signed up to attend backed out due to health concerns, including concerns about community spread, which raises issues about whether the contract be canceled, and the return of cancellation fees and deposits.
- In still other circumstances, one party has been unable to meet contractual delivery dates and other requirements because its employees or contractors are unavailable due to health conditions or generalized concerns.

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## Nonprofit Organizations

Nonprofit providers of educational and rehabilitation services, behavioral healthcare, substance use disorder treatment, domestic abuse counseling, food pantries, and other social services are often conflicted whenever



there is a national crisis like the COVID-19 (coronavirus) pandemic, which tends to affect our nation's most vulnerable populations, who typically are the consumers these nonprofit providers serve.

Such a national crisis presents unique challenges, as providers strive to treat consumers, manage their potentially diminishing work force, deal with the payroll and other employment-related issues and health care concerns, as well as struggle to keep up with, and implement expeditiously, daily changes in protocols for dealing with consumers, handle supply chain disruptions, decide to cancel key fundraising events, and meet the privacy obligations of state and federal law. Many nonprofit providers face unique challenges as a covered entity under the Health Insurance Portability and Accessibility Act of 1996, as amended (HIPAA) given their access to protected health information (PHI) of consumers.

Our COVID-19 Task Force includes members of Archer's Nonprofit Practice Group who are helping nonprofit providers tackle the legal challenges that these circumstances present. The Issues we are addressing include:

- The interpretation of "force majeure" clauses in contracts to determine the obligations of providers to provide services, and the potential liability resulting from non-performance of services during the duration of quarantine periods.
- The cancellation of significant fundraising events and the fall-out from donors and sponsors, and dealing with vendors who may not get paid due to the cancellation.
- The staffing of critical services with properly credentialed individuals, and the decision to suspend or cancel certain services due to the lack of sufficient credentialed individuals when employees fail to show up for work.
- The implementation of policies to avoid hoarding of food and other resources by consumers and staff in light of the panic generated by the pandemic and shortages at grocery stores.
- The cancellation of outings for consumers based on restrictions on crowd size, age of consumers, and/or inability to maintain appropriate social distance based on location where outings are to occur.
- The proper notification of consumers when services are suspended or cancelled.
- Additional steps providers should take to ensure the privacy of consumer PHI and to limit employee access to information that is of great interest to the general public.

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## Family Law

The closure of schools and other activities in response to COVID-19 (coronavirus) pandemic may raise questions about parents' custody/parenting time agreements and the responsibility to care for children during the extended closures. Each situation is d



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## Attachments

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Client Advisory- COVID-19- LEGAL ISSUES AND CONSIDERATIONS

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