

# To Our Clients and Friends

# Memorandum

April 22, 2020

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## *Preliminary Thinking on Reopening a Business: Planning for the End of Stay-at-Home*

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Companies have begun to think about what a reopening of business will look like. The Fried Frank Coronavirus Task Force Resource Center (available [here](#)) will be compiling reopening orders and guidance as they become available. The following are issues that companies should begin to consider.

### **General Considerations**

- **Task force.** Reopening will be a major undertaking, with numerous business, financial, human resource, and legal issues, all unfolding in a rapidly changing environment. Consider appointing a task force or specific individual(s) who will be responsible for planning and implementing the company's reopening process--including with respect to workplace arrangements; office space safety; employee policies; client outreach; future opportunities; contracts review; financing; available governmental assistance; potential claims; required disclosure; etc.
- **Board-level oversight.** Keep in mind that, at a public company, there must be board-level oversight of the critical risks facing the company. These risks may include those associated with a reopening.
- **Emphasis on personal safety considerations.** Every executive and employee will have a deep personal interest in how a reopening unfolds. Among the concerns will be issues relating to their own and others' personal safety in the new environment. There may be a high level of discomfort among many personnel as to whether it is safe in general to be returning to work and whether the company is proceeding appropriately to create a safe environment. Communication about the steps the company is taking, the guidance it is following, and the overall concern for employees' welfare will be critical. Employee complaints about perceived safety issues should be considered seriously and without retaliatory action being taken.
- **Consistency.** Whatever decisions are made with respect to a reopening, there are likely to be individual executives or employees who disagree with one or more of the approaches taken. There will be a need to deal with varying personal, idiosyncratic views and reactions (to what some will consider life-and-death safety issues). A company should seek to establish, disseminate, and enforce clear policies that will be applicable to all. Adopting *written* plans and policies should help to ensure clarity and consistent application.
- **Non-discrimination and privacy.** All policies must be designed and applied to be non-discriminatory (with respect to disability or otherwise) and consistent with employees' privacy rights.
- **Potential legal liability.** Companies may face claims for alleged non-performance of contractual or other obligations while closed. Potential legal liability related to a reopening includes possible claims

by employees, clients or customers who contract COVID-19 after the reopening, or who challenge company policies adopted and actions taken in response to the pandemic (including those taken based on government requirements and recommendations). A number of U.S. business lobbying groups are advocating that federal legislation be enacted what would protect companies from COVID-19-related lawsuits, including through safe harbor-type protection from liability for employers who follow governmental health and safety guidelines. It is unclear whether this type of legislation is likely to be enacted.

### **Legal Requirements and Available Guidance**

- **Governmental orders.** State, city and local orders, when issued, will prescribe the basic parameters for what is permissible relating to a reopening. Notably, these orders are likely to change frequently and with little notice, and they may conflict with one another. On April 16, 2020, the President announced an “Opening Up America Again” plan (the “Federal Reopening Plan”), with non-binding guidance for state and local officials as they plan, on an individual basis, for relaxation of their stay-at-home and non-essential-business-closure orders. The Plan recommends that state and local officials implement a phased reopening of businesses, with the selection of the phase depending on, among other factors, the prevalence of COVID-19 cases and the available hospital resources in the area. The Plan states that employers should (i) develop and implement appropriate workplace safety policies regarding social distancing; temperature checks; testing, isolation and contact tracing; sanitation; disinfection of common areas; and business travel; (ii) not permit people with COVID-19 symptoms at the workplace; and (iii) following a person at the workplace testing positive for COVID-19, develop and implement policies and procedures for workforce contact tracing.
- **Other guidance.** The Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA), and the Equal Employment Opportunity Commission (EEOC) have published guidance relating to reopening and these likely will be updated periodically. Company policies and procedures should be informed primarily by the existing and future guidance issued by these agencies, as well as guidance issued by state and local health authorities. There may also be helpful guidance provided by industry or trade groups.

### **Workplace Safety**

- **Return of the workforce.** Depending on the legal orders relating to a reopening, and based on business needs and the nature of the company’s personnel, consider whether the reopening should involve reduced staff, with a phased-in approach to a return of all employees. Reduced staff initially should make employees both safer and more confident and facilitate adjustments as events unfold (such as any new waves or lessening of COVID-19 cases, further availability or lack of testing, and/or availability or lack of treatments and vaccines). Some companies are considering the following:
  - **Prioritizing employee returns.** Consider which employees: are permitted to return based on governmental orders; are most critically needed at the workplace; are most vulnerable if they become infected; can most easily and safely return (for example, live close to the workplace or drive rather than using public transportation); have the results of appropriate COVID-19 testing; and/or want to (or do *not* want to) return to the workplace.
  - **Continued “telecommuting.”** Consider continuing telecommuting and work-at-home approaches that have worked well during the stay-at-home period. Consider whether having certain employees or groups of employees continue to work from home on a more long-term (or

even, potentially, permanent) basis would be beneficial (in reducing required office space, providing more flexibility to employees, etc.).

- **Alternating teams.** Consider alternating “teams,” with, for example, “Team A” in the office every Monday, Wednesday and Friday and “Team B” every Tuesday and Thursday--so that the risk of exposure to the members of each Team is limited to the members just of that Team.
- **Staggered hours.** Consider staggered hours for starting and ending the workday--to avoid crowded situations during the commute and at the workplace (in lobbies, elevators, etc.).
- **Can an employee refuse to return to the workplace?** Generally, employees have a legal right to refuse to work if they believe they are in “imminent danger” (as defined under the Occupational Safety and Health Act). Under the National Labor Relations Act, employees are permitted to act together to seek to improve their employment terms and conditions (such as by talking among themselves about their working conditions and refusing to work in unsafe conditions). Companies should follow OSHA and CDC guidance, and take other appropriate steps, to ensure that employees are not in imminent danger.
- **Safety of the physical space.** Reasonable precautions should be taken to provide for a safe physical space in the current context. CDC and similar guidance should be followed. Companies have been considering the following:
  - **Sanitation.** Sanitation precautions should include:
    - Increased rounds of cleaning and disinfection (particularly in higher traffic areas), including during the work day;
    - Ready availability to all employees of soap and water and hand sanitizers for handwashing, as well as sanitizers for heavily used items (such as door knobs, handrails, shared equipment, etc.);
    - As practicable, an end to or limiting of shared use of space and equipment;
    - In the case of lessees, checking on what the building maintenance regimen will be; and
    - When possible, opening windows for fresh air (and checking regarding any building airflow issues).
  - **Space modifications.** Modifications to enforce social distancing may include:
    - Limiting access to, reducing the number of tables and chairs in, and/or closing common areas, such as conference rooms, dining areas, lounge spaces, etc.;
    - Considering whether spaces can be “cocooned” to limit exposure to others (*i.e.*, whether certain groups of employees can be located entirely in spaces that are closed off to others);
    - Adding floor markers in common spaces to spread people out at 6-foot or more intervals, as well as floor markers to create a one-way flow of traffic in hallways (to avoid “head-on” contacts when passing);

- Placing signs in appropriate places to remind people of precautions they should be taking (hand-washing, social-distancing, staying home if ill, etc.);
  - Placing signs to create self-enforced limits on the number of people who can occupy certain spaces at the same time (such as bathrooms, conference rooms, dining areas, etc.);
  - Installing automatic doors (not requiring use of a door handle) in high-traffic areas; and
  - Installing plexiglass barriers (or other partitions) to protect persons whose jobs involve more exposure (such as receptionists, cashiers, secretaries serving a group of people, etc.).
- **Employee health.** A company will need to adopt policies and procedures relating to employees who are ill when arriving at work, become ill while at work, or are exposed to someone who is ill. CDC guidance recommends that companies implement procedures to encourage employees who are sick to remain at home; establish routine, daily employee health checks; monitor absenteeism and have flexible time-off policies; have an action plan if an employee becomes inflicted with COVID-19; have emergency communication channels for employees; and establish communication with state and local health authorities.
- **Medical checks.** Some companies are considering the following to monitor for possible COVID-19 infections:
- Temperature checks for employees before they enter each day (current CDC guidelines cite a temperature above 100.4 degrees Fahrenheit as being problematic); and/or
  - COVID-19 testing, or requiring submission of the results of testing or a doctor's note, on a periodic basis (however, there are concerns about whether reliable testing will be available on a widespread basis, and whether doctors will be available to provide notes on a timely basis).

The EEOC expressly permits temperature checking of employees during the COVID-19 pandemic. Further guidance with respect to testing is expected once testing becomes more widely available. Procedures will have to be developed for these checks or testing, including who will perform them (and safety measures for that person), where they will be performed (and how privacy will be ensured), and how to handle situations where the employee does not agree to the test or to leave the workplace. Due to privacy concerns, employees' temperature readings should not be collected and retained, but should be used only to admit or deny access to the workplace at that time.

- **Require notification by employees.** Employees should be required to notify the company if the employee begins to experience COVID-19 symptoms while at work, begins to experience symptoms while not at work, or has been exposed to a person who has or may have COVID-19.
- **Procedure if an employee tests positive.** If the company becomes aware that an employee has tested positive for COVID-19, the CDC recommends that the employer inform employees who may have been exposed--but, due to privacy concerns, without identifying the employee. The Federal Reopening Plan suggests that the infected employee be asked to identify those who, within the 48 hours prior to the onset of symptoms, were working within 6 feet of the employee for a period of at least 10 minutes (or 30 minutes, depending on the circumstances--such as if they were not working very close together and equipment was not shared). Companies are

considering requiring that a person who has tested positive not return to the workplace until medically cleared; and that persons who were in close contact with that person not return to the workplace for a period of time (such as 14 days) after being symptom-free. Employers may also be required to notify certain health authorities and, under OSHA guidelines, may need to decontaminate office space after a COVID-19 case is identified. Many companies are considering retaining third party vendors to handle contact tracing and other aspects of response to an identified case of COVID-19 exposure. These policies should be informed primarily by governmental guidance issued on the subject.

- **Company policies.** Companies should review their current policies and consider the need for new policies and/or modifications to the existing policies, including with respect to the following:
  - ***Sick leave and other policies.*** It will be critical to consider the company’s sick leave policy and whether it is consistent with the need to encourage sick employees to stay home. Other policies to be considered include medical insurance, family leave, vacation, and overtime.
  - ***Commuting.*** Commuting to and from the workplace on public transportation may be among the greatest concerns for employees. A company should review its policy (if any) on reimbursement of commuting expenses in this new context. CDC guidance recommends that a company encourage “alternative” commuting and telework.
  - ***Meetings, visitors, and travel.*** Companies should consider instituting policies that require or encourage: meetings by phone or videoconference rather than in person (and, when in person, that limit the number of people present); limiting visitors to the workplace; and limiting travel to essential-travel only (and following CDC guidance regarding isolation following certain travel).
  - ***Food.*** Companies should consider closing common dining facilities or converting them to pre-packaged take-and-go food only (with staggered hours, appropriate floor markings, and/or limitations on numbers of people permitted in the space at one time). Companies that have not previously provided food to employees should consider doing so to avoid the need for their employees to leave and return to the premises during the work day. Companies may also want to organize procedures and physical spaces for food deliveries to employees.
  - ***Mail.*** The company should consider any appropriate modifications to the mail delivery system at the workplace to limit exposure of the mail-handling employees as well as employees receiving mail. Companies are considering limiting interoffice mail delivery to once per day; holding mail for 24 hours after receiving it; checking with employees as to which mail they want to receive promptly and which can wait; and/or installing UV lighting systems to sanitize the mail.
  - ***Cybersecurity and confidentiality.*** Companies should consider updating their cybersecurity and confidentiality policies, trainings and protocols for the current environment in light of increased remote and online work. (See our memorandum, [COVID-19: Remote Working and Cybersecurity](#), March 18, 2020.)
  - ***Other policies.*** Companies may want to consider new policies that would help to ensure safety in the workplace, such as discouraging shaking hands, permitting or encouraging the wearing of facemasks, etc.

- **Special accommodations.** Companies should consider whether special accommodations should be offered to persons who are in groups that are particularly vulnerable to COVID-19 or to others with particular challenges (such as caretaking responsibilities, particularly if schools are still closed). CDC guidance recommends that a company not reopen until it has protective measures available for employees at higher risk--these might include, for example, arrangements for teleworking or reassignment to tasks that minimize contact with others.

### **Business Review**

- **Business plan update.** A company's business plan, projections, and budget should be updated based on the current situation. Potentially, the company's overall strategic approach will have to be reevaluated. Financing arrangements should be reviewed and new sources of financing may have to be considered. (See our memoranda, [Possible Expanded Utility of PIPE Transactions for Companies to Raise Funds in the Current Environment](#), April 13, 2020; [Navigating Discounted Debt Repurchases](#), April 3, 2020; [NYSE Temporarily Waives Shareholder Approval Requirements for Certain Security Issuances](#), April 15, 2020; [Considerations Relating to Precautionary Revolver Borrowing in Today's Turbulent Environment](#), March 13, 2020; and [Strategic Debt Obligations for European Issuers in the Time of COVID-19](#), April 22, 2020.)
- **Government assistance and restrictions.** A company should review whether there are government assistance programs available to it (including through the recently enacted CARES Act). In addition, it should be kept in mind that if a company received assistance through certain governmental programs under the CARES Act, there may be restrictions on corporate actions that can be taken (including with respect to employee firings or furloughs and compensation levels, share repurchases, dividend decreases, and other matters).
- **Client and customer outreach.** Staying in front of and connected to your existing clients will be critical. Consider the most effective ways in the new environment to continue to service, communicate with, and check in on your clients. Consider also any future business opportunities arising out of the current situation.
- **Suppliers.** If the company has developed (or may develop) supply chain issues, consider whether it is desirable and possible to diversify suppliers (in terms of their number and geographical location).
- **Personnel.** A company will have to consider its needs to replace personnel who have died or become incapacitated due to COVID-19 (or otherwise during the shut-down); and may wish to consider opportunities for new personnel whose employment situations have been affected by COVID-19.
- **ESG issues.** Companies should maintain a focus on employees' and other corporate stakeholders' needs in this unprecedented and extreme environment. The COVID-19 pandemic may accelerate the attention that has been developing over recent years to "environmental, social and governance" issues and the interests of non-shareholder corporate stakeholders (including employees, suppliers, and the community generally).
- **Technology.** Consider whether the company's existing technology (including with respect to cybersecurity) is adequate to meet the company's current and future needs for remote work, teleconferencing, etc.

**Potential Legal Liability**

- **Employee claims.** Potential legal liability in the current environment could include claims by employees for their allegedly: becoming sick with or being exposed to COVID-19 at the workplace; not being afforded appropriate flexibility to deal with a COVID-19 sickness or caretaking responsibilities for a family member with the illness; being required to return to work before it is sufficiently safe to do so or under conditions at the workplace that are not sufficient to ensure safety; being treated discriminatorily; or having privacy rights violated. At the same time, an employee conceivably could bring claims for being blocked from the workplace based on symptoms of illness, or being prevented from functioning effectively at work due to company policies or decisions. In the case of an employee with an employment agreement, there may be claims for violations of the agreement.
- **Business claims.** A company may face claims from its contract counterparties, or from customers or clients, for non-performance or inadequate performance. A company should review existing contracts to determine areas of vulnerability (for example, any non-payment, non-performance, covenant breaches, inaccuracy of representations, end dates no longer being feasible, etc.) and a strategic approach should be developed to address concerns. A company also should review existing contracts to determine if the company should make claims against others for their non-performance. Form agreements, and agreements negotiated but not yet signed, should be reviewed to determine whether risks from COVID-19 (and other public health emergency) issues are appropriately addressed. Companies should ensure that they are prepared to respond effectively to any lawsuits, including by maintaining appropriate records and identifying appropriate counsel. (See our memoranda, [Continuing Early Trends in Commercial Litigation Relating to the Coronavirus Pandemic](#), April 13, 2020; [Department of Justice and State Attorneys General Crack Down on Unscrupulous Business Practices During COVID-19 Pandemic](#), March 20, 2020; and [Evaluating Whether COVID-19 Constitutes a MAC Under M&A and Financing Agreements](#), March 18, 2020.)
- **Insurance review.** The company should review its insurance policies to determine if any insurance recoveries can be claimed (including with respect to business interruption, property, cyber, bacterial riders, etc.). The company should consider whether changes to coverage should be made to cover future risks relating to COVID-19 or other public health emergencies. (See our memorandum, [COVID-19 Pandemic: Business Interruption Insurance Issues](#), March 25, 2020.)
- **Creditor claims.** Companies that may be operating close to insolvency (*i.e.*, approaching the so-called “zone of insolvency”) must keep in mind that, once the company is insolvent, directors’ fiduciary duties (under Delaware law) shift from being to the shareholders alone to being to all residuary claimants of the corporation (and the residuary claimants include the corporation’s creditors). Given that there is no bright line test for insolvency (and thus the time that a company became insolvent is typically determined in a litigation and with the benefit of hindsight), directors should monitor carefully whether the company may be insolvent at any given time and should take into account creditors’ interests as appropriate. (See our memorandum, [Director Fiduciary Duties in an Insolvency Context](#), March 20, 2020.)
- **Shareholder engagement.** Ongoing engagement with major shareholders will be critical during this time, both to communicate the company’s plans and identify shareholder concerns. Many companies have transformed their upcoming annual shareholders meeting to a virtual-only meeting in order to support social distancing efforts. (See our memorandum, [Changing to a Virtual Annual Shareholder Meeting in Response to COVID-19](#), March 24, 2020.)

## Other Legal Review

- **Privacy issues.** Maintaining the privacy of employees' personal information, including related to health, is of utmost importance. As discussed above, a company may implement various COVID-19-related screening measures for employees, should inform employees of possible exposure to an employee who has COVID-19, and may have reporting obligations to health authorities if an employee has COVID-19. Certain governmental authorities, including the EEOC and the CDC, have issued guidance for employers to follow with respect to what information a company may ask of its employees, how best to conduct screenings, and what information can and cannot be provided to others about employees. In all cases, a company must comply with applicable laws concerning anti-discrimination and privacy, including with respect to the confidentiality of personal health information. These laws include, for example, the Americans with Disabilities Act, other federal and state anti-discrimination laws, federal and state consumer privacy and protection laws, state data breach laws, international data privacy laws (such as the General Data Protection Regulation (EU) 2016/679), and, for companies that maintain self-insured employee health plans (and other "covered entities"), the Health Insurance Portability and Accountability ACT (HIPAA) and related guidance from the U.S. Department of Health & Human Services.
- **Governmental orders.** Companies will have to review and stay updated on applicable governmental orders relating to COVID-19 (regarding essential workers; non-evictions; etc.).
- **Public disclosure.** Consideration should be given to whether the company's existing public disclosure is sufficient, and what new disclosure should be made, in connection with any SEC filings, earnings guidance, etc. (See our memoranda, [Division of Corporation Finance Publishes Guidance on Disclosure Obligations with Respect to COVID-19](#), March 27, 2020 and [SEC Enforcement Division Reminds the Market that Inside Information Can Also Spread](#), March 25, 2020)
- **Restrictions.** Consider restrictions on corporate actions if the company has obtained or will obtain COVID-19-related governmental assistance (for example, with respect to employee count and compensation; stock buybacks; dividends; etc.).
- **Defensive posture.** The company's defensive posture with respect to an unsolicited takeover attempt or shareholder activist campaign should be considered. The current environment, with extreme stock price volatility and declines, as well as significantly reduced prospects in many cases, creates an environment in which bidders and activists may seek to press their own interests at the expense of the other shareholders (such as by attempting to acquire control of a company without paying a premium to all shareholders). Based on these concerns, many company boards have recently adopted short-term shareholder rights plans (so-called "poison pills") or have prepared such plans (*i.e.*, "put them on-the-shelf") so that they can be quickly deployed if needed. (See our memorandum, [A Turn Back to "Poison Pills" in Response to the Coronavirus Pandemic?](#), March 23, 2020.) Also, leading proxy firm Institutional Shareholder Services (ISS) recently issued guidance to indicate that it generally would not oppose the adoption of these plans without shareholder approval. (See our memoranda, [ISS Releases Guidance on Its Policies in Response to the Coronavirus Pandemic—Poison Pills, Share Repurchases, Dividends, Virtual Meetings, and Compensation](#), April 14, 2020, and [Going Private Transactions](#), April 2, 2020.) A company should review whether the overall structure of its corporate governance is state-of-the-art to provide appropriate protection from abusive takeover or activist tactics. (See our memorandum, [The Coronavirus, Corporate Governance and Shareholder Value](#), March 26, 2020)

### **Additional Considerations Related to Real Estate**

- **Preparing Building Common Areas.** In addition to the focus of employers on preparing their physical workplaces for a safe reopening, landlords as well as owner/occupiers should consider protocols for the safe operation and maintenance of building common areas, similar to the concerns raised above with respect to workplaces themselves. Again, any protocols that are implemented should comply with guidance issued by local and state authorities. Areas of consideration include:
  - Ensuring building systems are operational and examining enhanced air filtration measures;
  - Procedures for controlling building access and paths of travel, including use of different entry points, separation of building tenants from visitors, modified elevator usage and, in the case of multi-tenanted and other non-owner occupied facilities, whether temperature testing or other screening measures should be performed by landlords or by individual tenants;
  - Security procedures and lobby use, including visitor check-in procedures, installation of protective screens at lobby desks, use of signage, floor markings and/or partitions to manage foot traffic, messenger center and delivery protocols;
  - Procedures regulating use of other public and common spaces and amenities (such as seating in lobbies and public spaces, building cafeterias, gyms and conference space); and
  - Review of all cleaning protocols in light of current standards and expectations.
- **Landlord/Tenant Issues.** Many of the general considerations discussed in this memorandum also apply to the relationship between landlords and tenants, including the need for consistency, applying protocols in a non-discriminatory matter, protecting the privacy of employees and visitors, and liability concerns of both landlords and tenants. In addition, collaboration and communication between landlords and tenants to address the following issues (and others as they arise) will be instrumental in creating a safe return to the workplace:
  - Procedures (which should be applied consistently and communicated clearly to tenants) for when a person in the building (either a tenant, worker or visitor) shows signs of being sick; and
  - Disclosure by tenants to landlord and by landlord to tenants when an employee or visitor of the building is diagnosed with COVID-19, as well as cooperation among landlord and tenants regarding contact tracing.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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