

## INSIGHTS + NEWS

### Client Alert: How to Close Restaurant and Retail Businesses During Coronavirus and Plan for a Successful Reopen

BY DAVID A. MAWHINNEY • MARCH 22, 2020

As the novel coronavirus impacts economies across the world small business owners are facing unprecedented challenges and making extremely difficult decisions. Retailers are closing their doors, distilleries are making hand sanitizer, and restaurants are experimenting with new “curb side” delivery to keep employees working and revenue coming in. Once we get through this – and we will – small businesses might struggle to reopen for a variety of reasons, not least of which could be a lack of cash. What can you do now, to ensure that your business is set up for success tomorrow?

Drawing on the expertise of many professionals at our firm, Bowditch and Dewey has created the following “checklist” for small business owners on how to shut down so that they can successfully reopen.

#### 1. CONSERVE YOUR OPERATING CAPITAL

- Dollars that you spend today running your business during the quarantine are dollars you won't have next quarter. Business owners need to take an unflinching look at what revenue returns they can reasonably anticipate if they continue to operate in this environment. If that return is negative, it might make sense to batten down the hatches and save cash that will be needed to restart later.
- If you know that you'll be shut down for a period of several months, and your cash reserves are significant, talk to your bank about whether it makes sense to move it to a money market account or purchase a certificate of deposit. Given the Federal Reserve's recent interest rate cuts, opportunities for ROI might not exist, but it is worth talking to your bank.
- A caution on gift cards. Many on social media are advocating the purchase of gift cards or “dining bonds” as a way to support retail and hospitality businesses. If you are going to maintain a gift card window while closed, just be aware that you are taking down payments today for services you will have to honor tomorrow. If the volume of gift card purchases is higher than usual, ensure that you are tracking it and building it into your budget projections.

#### 2. SENDING YOUR EMPLOYEES HOME

- **Termination or Furlough?** As an alternative to terminating employees, employers might furlough them under certain conditions. A “furlough” is an employer's order not to report to work for a defined period of time, generally measured in weeks and not months. If the employer expects regular (or, something approximating regular) business operations to resume in the relatively near term and intends to call back all current staff to start moving the business forward again, a furlough may be a better option than an outright termination.
- **WARN Act Responsibilities.** Employers with more than 100 employees (excluding those who work less than 20 hours per week) must be mindful of potential responsibilities under the Worker Adjustment and Retraining Notification (“WARN”) Act. Generally, the WARN Act requires 60 days' advance notice of a “mass layoff” or “plant

closing,” terms which are defined by statute. There are some exceptions to this 60-day requirement in cases of unforeseen business circumstances (which the current crisis undoubtedly would satisfy), but even in those cases notices must go out as soon as possible.

- **Pay outs on the last day of work.** Massachusetts law requires terminated employees to be paid all of their final wages (including accrued vacation time) on their date of discharge. Here, the difference between a temporary furlough and a permanent layoff may make a huge difference. A temporary furlough does not end the employment relationship; it is expected that the employees will return to their regular shifts once the short-term furlough is over. However, the longer a furlough goes on, the more it starts to look like a permanent layoff, raising the specter of Wage Act liability for wages not paid immediately.
- **Employee Agreements.** Employers should review any employment agreements with employees to determine whether the terms of those agreements restrict the employer’s options. In particular, agreements that guarantee a salary or bonus for an employee would need to be addressed.
- **Abrogating vacation time to save money?** Some employers may wish to preserve cash on hand by prohibiting employees from using vacation time during a COVID-19 related absence. While an employer is able to design its own vacation policy, once the time is accrued it is considered a “wage” for employees; changes to how employees can use their vacation time can apply prospectively only, and employees must be given reasonable advance notice of the change. Thus, in practice, it could be difficult to limit employees’ rights to use accrued vacation in the near term (and, in any event, allowing employees to use vacation time now reduces an employer’s future wage obligations in any event).
- **Unemployment.** Regardless of whether the employee’s departure is classified as a temporary furlough or a permanent layoff, the employee will be eligible to file for unemployment benefits. Allowed claims will affect the unemployment tax rate that the employer must pay, though adjustments to that may be included in forthcoming relief bills.

### 3. CONTINUING EMPLOYEE HEALTH INSURANCE

- Regardless of whether you decide to furlough your employees or terminate their employment, what matters with respect to health insurance is what your plan requires for continuing eligibility. Typically, eligibility turns on hours worked in a defined period.
- If the employer has confidence that the furloughed employees will be back within a defined period of time, it can work with its benefits broker and the insurer to permit employees to remain on the plan. Of course, the premiums will need to be paid and the employees will have just lost their income. If the employer can afford it, it can continue its subsidy. There’s a risk, however, there that you will end up subsidizing health insurance for an employee who won’t return to work when they’re called back because they have found another job.
- The Consolidated Omnibus Budget Reconciliation Act (“COBRA”) mandates that an insurance program give some employees the ability to continue health insurance coverage after leaving employment. Former employees have to pay the entire share of their coverage including the part that the employer previously covered. Typical family health insurance in the US costs just under \$20,000 a year. Even with unemployment benefits, that’s a lot of money, especially for low paid employees. If the employer can afford it, they can continue to subsidize the premiums for their former employees.
- If the employer itself goes out of business, however, or cancels its health insurance because it can’t afford it, the COBRA rights for former employees will also go away (even if the former employees are paying the full premiums by themselves).
- In Massachusetts, state-sponsored plans through the Connector are of excellent quality and provide individuals and families a range of plans from low premium with potentially high out of pocket costs to high premium with relatively low exposure to out of pocket costs. Employers are required to provide a COBRA notice to departing employees. It is a good idea to provide information on Connector plans too.

### 4. EMPOWER YOUR EMPLOYEES

- Once you have shut down, your employees cannot perform work for you. This does not mean that you cannot create a sense of community with them, however. Leverage social media and private message groups to build a sense of togetherness. Keep employees informed about operations and share useful information with them. If you have the HR infrastructure, assisting employees with benefits questions will be especially important.
- Ensure that employees feel taken care of, even though you can't pay them a salary right now. The goal is to maintain the loyalty of your staff so that they are ready to come back to work once you reopen.

## 5. IF YOU LEASE, TALK TO YOUR LANDLORD

- Many retail leases contain covenants that require the tenant to be open for a minimum amount of time each day or week. Force majeure provisions in commercial agreements, might excuse performance under certain circumstances, including COVID-19. Even if the lease does not mandate that the tenant continue operating, commercial tenants will typically have obligations to maintain, insure, and secure the premises that continue whether or not the tenant continues to operate its business.
- Your landlord probably faces similar pressures from a loss in rent revenue. With many tenants requesting “rent holidays,” state and federal governments are currently debating whether to facilitate a moratorium on mortgage payments. If such relief becomes available to commercial landlords, then tenant businesses may be able to negotiate with their landlords regarding ongoing obligations to pay rent and their share of common area maintenance fees.
- It is imperative that both landlords and tenants review their leases – preferably with the assistance of counsel – to fully understand their contractual rights and any remedies that may be available. Keep in mind, however, that even if certain remedies are available, a preferred strategy may well be communication and negotiation between the lease parties, inasmuch as the courts will understandably be sympathetic to parties forced into default due to hardships caused by COVID-19 and the specter of bankruptcy may incentivize both sides to reasonably negotiate down time rent obligations.

## 6. WILL INSURANCE COVER YOUR LOSS?

- Are you seeking coverage for allegations that you acted negligently in responding to the virus; to disinfect your business; for lost business income; or for expenses concerning a cancelled event? Each claim will be fact-dependent.
- Pay attention to notice provisions in your policies and make sure you document all potential claims and losses.
- It's anticipated that coverage for first party claims under traditional policies will be a battle. Nonetheless, you should not make any statements to acknowledging that you don't believe your business has insurance coverage for such a loss.
- There are many types of coverages that *could* apply to Coronavirus claims. Consult your lawyer as to how to best frame the facts of your claim to potentially trigger coverage and leverage ambiguities in your insurance policy.
- Review [Client Art: Will traditional business insurance policies apply to claims related to the Coronavirus?](#)

## 7. SHOULD YOU BORROW MONEY?

- Every situation is different, but if you are going to shut down then it probably does not make sense to take on more debt unless you need funds to cover existing liabilities that could grow at unfavorable interest rates while you are closed. For example, it might make sense to draw down on an existing line of credit to make a final payroll, pay insurance premiums, or quarterly taxes. Before you do so, you should review the provisions in your lending agreement, to ensure that you can comply with any financial covenants, representations and warranties at the time you draw the funds. To the extent your loan documents in fact contain certain promises and statements of fact concerning the borrower's operations and financial health, it may be in the interest of both lenders and borrowers to agree to an amendment or waiver due to the unforeseen and unsettled circumstance brought about by the coronavirus.

- Federal, state and local agencies have rolled out certain working capital and small business loans, in addition to others that will likely become available in the near future. We will cover these in greater detail in another post, but the guiding principal should be to think carefully about how you will use the money. The goal is to minimize your restart costs and increasing your debt during a shutdown will work against that. Instead, it might make sense to wait until you are ready to reopen before accessing new credit.

## 8. DON'T RAID YOUR PAYROLL AND OTHER TRUST FUND ACCOUNTS

- This is illegal and the owner is personally responsible for the money.

## 9. WHAT ABOUT TAXES?

- If you are going to close down now, ensure that you have reserved sufficient funds to pay your upcoming taxes.
- Corporate taxpayers can defer up to \$10 million of federal income tax payments due on April 15, 2020 until July 15, 2020, also without penalty or interest. You must still file tax returns or seek extensions by April 15, however.
- The Commonwealth of Massachusetts has postponed the collection of regular sales, meals, and room occupancy taxes that would be due in March, April and May so that they will instead be due on June 20. All penalties and interest that would otherwise apply will be waived.

## 10. CAN VENDORS TAKE BACK GOODS?

- Under certain circumstances, a seller can reclaim and take back goods delivered to an insolvent buyer *provided* a demand for reclamation is made within ten days of the buyer's receipt of the goods.
- This reclamation right is subject to the rights of buyers in the ordinary course of business and other "good faith" purchasers, however. A majority of courts hold that a secured lender with a "blanket lien" on all of the businesses assets is a "good faith purchaser," meaning that once the goods are received at your businesses, they become part of your lender's collateral and the seller cannot take them back. It depends on the extent of your lender's lien.

## 11. LIQUIDATE ACCOUNTS RECEIVABLE

- Just because you have shut down operations doesn't mean that you have to forgo collecting your existing accounts receivable. Use the down time to organize your "back-office" operations.
- Talk to existing vendors and customers and work on collecting and liquidating as much as you can. Deposit the cash into your operating account, increasing your re-start fund.

## 12. STAY IN TOUCH WITH CUSTOMERS

- Leverage social media to keep your customers informed on your operations and when you plan to reopen.