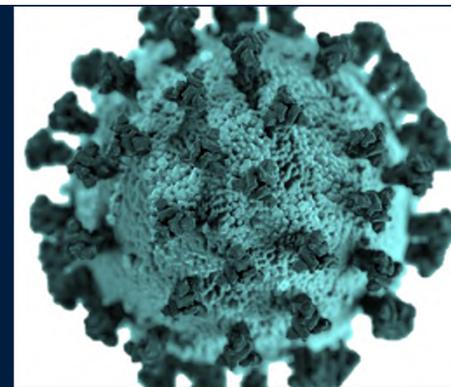


COVID-19 – What Government Contractors Need to Know

Legal Issues Arising from the Novel Coronavirus



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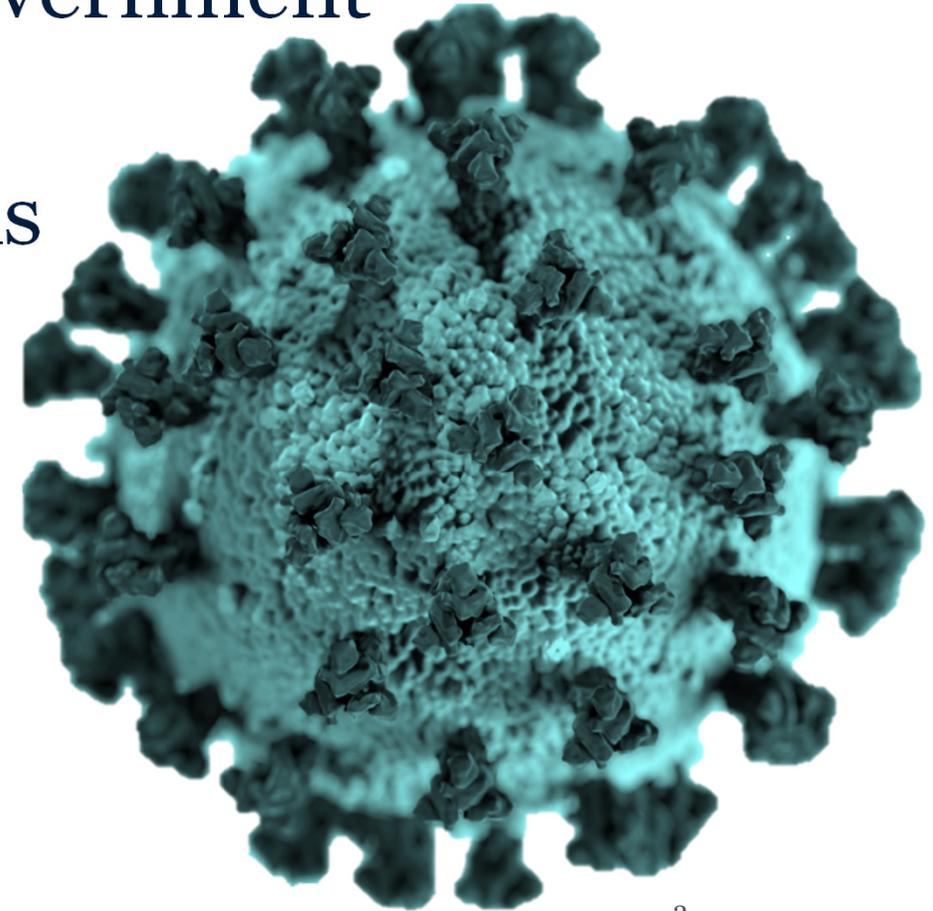
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Topics for Today

1. Introduction
2. Special Considerations for Government Contractors
3. Other Business Considerations
 - a. Insurance
 - b. Events
 - c. Employment
 - d. Communication



Background

Part 1

Background on Coronavirus (COVID-19)

What is COVID-19?

- Coronaviruses are a large family of viruses that cause acute, upper respiratory infections.
- COVID-19 is an ongoing, worldwide outbreak of a novel coronavirus, which has been declared a pandemic by the World Health Organization.
- The disease is spread through coughs, sneezes, and contact with saliva. People become ill between 2 and 14 days after infection.

What has been the international and U.S. response?

- Efforts to contain the spread and mitigate the impact.
 - Limitations on movement and activity, quarantine, and stay-at-home orders
 - Closing of non-essential businesses
 - Government employees being encouraged to work remotely
 - March 20, 2020 – OMB issued Memorandum, “Managing Federal Contract Performance Issues Associated with the Novel Corona Virus (COVID-19)”

Effect on Government Contractors



Impact on Availability of Customer Employees and Agency Priorities



Restrictions on Employee Travel

- Nonessential travel prohibited by many organizations



Event Cancellations



Work Changes

- Increased remote work options



Special Considerations for Government Contractors

Part 2

Office of Management and Budget, MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENT AND AGENCIES, SUBJECT: Managing Federal Contract Performance Issues Associated with the Novel Corona Virus (COVID-19), March 20, 2020 (“OMB Memo”)

On March 20, 2020, the Office of Management and Budget (OMB) issued guidance to all executive departments and agencies regarding the federal government’s management of federal contract performance issues arising due to the novel coronavirus (COVID-19).

The OMB Memo sets forth a number of steps that government personnel should take to protect the safety of both government and contractor employees, and to ensure that contract performance continues wherever possible in consonance with Centers for Disease Control and Prevention (CDC) guidelines.

OMB Memo (cont.)

Federal employees are urged to work with contractors to determine whether and under what circumstances telework can be used to perform current contract requirements and to utilize telework to the maximum extent possible.

Agencies are instructed to be flexible in their administration of government contracts if telework is not a feasible option for contract performance, and, as a result, a contractor may not be able to fulfill its contractual obligations in a timely manner.

OMB Memo (cont.)

Agencies are encouraged to utilize the emergency procurement authorities at their disposal due to the President's issuance of an emergency declaration under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 ("Stafford Act").

OMB Memo (cont.)

Highlights of the “frequently asked questions” include the following:

- Agencies are encouraged to work with their contract partners to determine whether telework is feasible under the terms of the contract so that contract performance can continue to the maximum extent possible;
- Agencies should modify contracts to permit telework if the work can be performed remotely;
- If telework cannot be used to perform the contract requirements, agency personnel should be flexible on contract delivery and completion dates;
- FAR clauses 52.249-14, 52.212(f), and 52.211-13 cover excusable delays, which may cover delays arising from COVID-19 quarantine restrictions;

OMB Memo (cont.)

Highlights of the “frequently asked questions” include the following:

- If a contractor cannot perform due to COVID-19 issues, the government should consider terminating the contract for convenience or a no-cost termination;
- Requests for equitable adjustments, including requests to cover the cost associated with implementing CDC-recommended safety measures (such as the closure of an office building when telework is not feasible), should be considered on a case-by-case basis;
- Whether work is continued or stopped should be determined on a case-by-case basis;
- In-person activities (industry days, debriefings, etc.) should be replaced with virtual activities if warranted;

OMB Memo (cont.)

Highlights of the “frequently asked questions” include the following:

- Government personnel and their contract partners need to communicate in a transparent and timely manner;
- Current SAM registrants “with active registrations expiring May 17, 2020” will be afforded a one-time extension of 60 days; and
- Agencies should utilize the flexibilities afforded them in FAR 18.202, which increases the threshold and makes it easier for agencies to follow simplified acquisition procedures.

Considerations for Government Contractors

Which, if any, of our company's contracts would be suitable for telework?

Does the contract permit my company to telework, or will my company need to have its contract modified?

Does my company have the needed IT and cybersecurity infrastructure that will enable our employees to work remotely in an effective and secure manner?

Does my contract contain an excusable delays provision (e.g., FAR 52.249-14, 52.212 4(f), or 52.211-3), and have I notified the Contracting Officer of impending delays in a timely manner?

Considerations for Government Contractors

Has the government changed the terms or scope of my contract? When? How? Will it require unforeseen effort, cost, etc.?

Am I able track added cost and level of effort as a result of the disruption?

Should I file an equitable adjustment or a claim?

Can the government modify my contract to address “security, logistics, or other functions” to assist with the pandemic response?

Does my company employ any key personnel that the government may want to keep in a mobile state?

What are my company’s obligations to our subcontractors?

Considerations for Government Contractors

- FAR 52.243 – Changes – Fixed Price
- FAR 52.212-4 – Contract Terms and Conditions for Commercial Items
- FAR 52.249-14 – Excusable Delays
- FAR 52.242-17 – Government Delay of Work
- FAR 52.242-15 – Stop-Work Order
- FAR 52.250-1 – Indemnification Under Public Law 85-804

Traditional Changes Clause

FAR 52.243-1, Changes – Fixed Price

Unilateral changes – Authorizes the contracting officer to make changes within the general scope of contract

- Drawings, designs, or specifications
- Method of shipment or packing
- Place of delivery

Right to equitable adjustment

- “(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.”
- Similar for FAR 52.243-2, Changes – Cost Reimbursement

Must assert right to adjustment within 30 days of written order

Constructive Change

“A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order under the Changes provision of the contract, due either to an **informal order** from, or **through the fault of, the government**. If the CO or other authorized person, without issuing a formal change order, requires the contractor to perform work or to utilize materials which the contractor regards as being beyond the requirements of the pertinent contract specifications or drawings, the contractor may elect to treat the CO’s directive as a constructive change order and prosecute a claim for an equitable adjustment.” *Lamb Engineering & Construction Co.*, ASBCA No. 53304 et al., 06-1 BCA ¶ 33,178 at 164,417 (citations omitted).

Commercial Changes Clause

FAR 52.212-4, Contract Terms and Conditions – Commercial Items

- “(c) *Changes*. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.”

“If a contract’s Changes clause does not authorize unilateral action by the contracting officer, then an erroneous contract interpretation by the government is not a constructive change. It might generate a breach of contract.” *Tkacz Eng’g, LLC*, ASBCA No. 60358, Dec. 7, 2017, 18-1 BCA ¶ 36,940

Suspension of Work

FAR 52.242-14 Suspension of Work

- Applies to construction contracts
- Covers actual and constructive suspensions
- Contractor is entitled to a price adjustment (excluding profit) for increased costs caused by unreasonable suspensions or delays

Government Delay of Work

FAR 52.242-17 Government Delay of Work

- Applicable to fixed-price supply contracts and is optional for service contracts
- Covers only constructive delays of work
- Contractor is entitled to a price adjustment (excluding profit)
- A PoP schedule adjustment is available under this clause

Stop-Work Order

FAR 52.242-15 Stop-Work Order

- Applicable to fixed price, cost reimbursement supply, service, or R&D contracts
- Covers only actual suspensions
- Suspensions are limited in duration (90 days but can be extended by agreement of the parties)
- Contractor is entitled to an equitable adjustment (i.e., increased costs, profit, and schedule adjustment)

How Should a Contractor Preserve Its Rights (and What Should the Government Expect of the Contractor), Should Problems Arise?

Notice to the government

Complete records of the issue

Segregate and track costs

Where to Start from a Cost Perspective

Start document and cost collection early

Create new project numbers

Federal Pricing Instructions

Consistent Accounting Practices

- By cost element
- Estimated and/or Actuals. Actuals are preferred over estimates.
- Consistent with company policies

Impact by Cost Element

Direct Labor

- Added Work
- Larger Crews
- Overtime
- Idle Time or Layoffs
- Detection or Correction of Problem
- Discussions with Government
- Coordination with Subcontractors
- Loss of Efficiency & Learning
- Impact on Labor Rates

Materials, Subcontracts, & ODCs

- Material Prices
- Pricing Inventory
- Scrap, Spoilage, Rework, Obsolete Materials, etc.
- Storage
- Market Conditions
- Supplier Terms

Indirect Costs

- Consistency with Current Accounting Practices
- Application of Forecasted Rates due to Timing of Scope
- Shifting of Work between Years
- Corporate Allocations
- Change in Sales
- Impact on Other Costs

Sources of Supporting Documentation

Accounting Records

Engineering Log Books

Time Records

Travel Records

Visitor Logs

Meeting Documentation

Correspondence

Program Status Reports

Activity Reports

Documenting Claim

Ensure the Cost Workbook Is Realistic and Well Organized

Organizational Impact

- Technical, accounting, legal

Narrative: State the Case

- Entitlement and quantum

Calculations: In Detail

- Best practice is to start with the proposal and work from there

Charts and Attachments

Dealing with the Auditors

- It's a negotiation

Documentation Is the Key to Recovery

Courts will give greater weight to contemporaneous written documentation than they will to live testimony and expert analysis that is presented years after the fact.

Follow established document retention procedures (Exception – Do not destroy documents if litigation is imminent).

Incumbent upon management to:

- Consider written guidance on appropriate use of e-mail and instant messaging
- Instruct employees on how to take notes
- Instruct employees on the importance of taking a professional tone in every piece of correspondence

PL 85-804

Public Law 85-804 “empowers the President to authorize agencies exercising functions in connection with the national defense to enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying contracts, whenever the President considers that such action would facilitate the national defense.” 48 C.F.R. § 50.101-1(a).

Under certain circumstances, this may include the “authority to indemnify against unusually hazardous or nuclear risks” imposed on contractors performing work for the federal government. 48 C.F.R. § 50.102-1(d). Thus, contractors may submit to the government “requests for the indemnification clause” found at 48 C.F.R. § 52.250-1 “to cover unusually hazardous or nuclear risks . . .” 48 C.F.R. § 50.104-3(a).

PL 85-804

As required by 48 C.F.R. § 50.104-1, “[n]o contract, amendment, or modification shall be made under Pub. L. 85-804’s authority . . . [u]nless the approving authority finds that the action will facilitate the national defense,” and “other legal authority within the agency concerned is deemed to be lacking or inadequate.” 48 C.F.R. § 50.102-3(b). Similarly, “[t]he authority conferred by Pub. L. 85-804 may not . . . [b]e used in a manner that encourages carelessness and laxity on the part of persons engaged in the defense effort,” or “[b]e relied upon when other adequate legal authority exists within the agency.” 48 C.F.R. § 50.101-2(a) (mandatory under 48 C.F.R. § 50.104-1).

PL 85-804

Approval requires that “the approving authority . . . sign and date a Memorandum of Decision containing” a series of statements, including “[a] concise description of the supplies or services involved,” “[t]he decision reached and the actual cost or estimated potential cost involved, if any,” and “[a] statement of the circumstances justifying the decision.” 48 C.F.R. 50.103-6(b)-(d) (mandatory under 48 C.F.R. § 50.104-2(a)). In addition, the contract itself must contain “[a] recital of the finding that the action will facilitate the national defense.” 48 C.F.R. § 50.103-7(a)(3) (mandatory under 48 C.F.R. § 50.104-2(b)).

PL 85-804

Another requirement for receiving approval for indemnification under Public Law 85-804 is that “[r]egardless of dollar amount, authority to indemnify against unusually hazardous or nuclear risks, including extension of such indemnification to subcontracts, shall be exercised only by the Secretary or Administrator of the agency concerned . . .” 48 C.F.R. § 50.102-1(d). Though requests for indemnification are submitted to the contracting officer, see 48 C.F.R. § 50.104-3(a), contractors must wait for the agency to complete its internal review process up to the highest level to obtain approval.

PL 85-804

FAR contains special procedures for seeking indemnification related to unusually hazardous or nuclear risks, including requirements that the request provide the following:

- “Identification and definition of the unusually hazardous or nuclear risks for which indemnification is requested, with a statement indicating how the contractor would be exposed to them,” 48 C.F.R. § 50.104-3(a)(1)(ii);
- “A statement, executed by a corporate official with binding contractual authority, of all insurance coverage applicable to the risks to be defined in the contract as unusually hazardous or nuclear, including—(A) Names of insurance companies, policy numbers, and expiration dates; (B) A description of the types of insurance provided (including the extent to which the contractor is self-insured or intends to self-insure), with emphasis on identifying the risks insured against and the coverage extended to persons or property, or both; (C) Dollar limits per occurrence and annually, and any other limitation, for relevant segments of the total insurance coverage; (D) Deductibles, if any, applicable to losses under the policies; (E) Any exclusions from coverage under such policies for unusually hazardous or nuclear risks; and (F) Applicable workers’ compensation insurance coverage,” 48 C.F.R. § 50.104-3(a)(1)(iii);

PL 85-804

“The controlling or limiting factors for determining the amount of financial protection the contractor is to provide and maintain, with information regarding the availability, cost, and terms of additional insurance or other forms of financial protection,” 48 C.F.R. § 50.104-3(a)(1)(iv);

“Whether the contractor’s insurance program has been approved or accepted by any Government agency; and whether the contractor has an indemnification agreement covering similar risks under any other Government program, and, if so, a brief description of any limitations,” 48 C.F.R. § 50.104-3(a)(1)(v); and

Certain additional insurance information “[i]f the contractor is a division or subsidiary of a parent corporation,” 48 C.F.R. § 50.104-3(a)(1)(vi).

Other Business Considerations

Part 3

Insurance Coverage

Part A

Insurance May Cover Some Coronavirus Losses

Certain losses caused by coronavirus may be covered by insurance.

Examples of potentially applicable policies include:

- Business interruption
- Commercial general liability
- Environmental
- Employment practices
- Cyber

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

Review your contracts with relevant subcontractors to assess other potential sources of insurance 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

Business Interruption Insurance

Potential coverage: Lost income resulting from suspension of (or decrease in) the insured's operations

Suspension may be caused by spread of virus or government orders related to virus (e.g., mandatory quarantine, ban on travel, etc.)

“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.

Potential Roadblocks to Coverage Under Business Interruption Insurance

Potential roadblocks to coverage from both traditional business interruption and contingent business interruption losses:

- Loss must be caused by “covered cause of loss” and not otherwise excluded
- 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...”

Other Potential Sources of Coverage

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.

Event Cancellation Insurance

- Potential coverage for lost revenues, increased expenses, diminished attendance, voluntary refunds, costs to reschedule, etc.
- **CAUTION:** Some policies contain an exclusion for cancellation due to communicable disease (or fear or threat of such)

Other Potential Sources of Coverage

Employment Practices Liability Insurance

- Potentially triggered by employees and former employees against the insured alleging certain types of employment conduct, including wrongful termination, failure to pay overtime, etc.

Cyber Insurance

- Potential coverage for first-party and third-party damages related to breach of personal data, including confidential data.
- Policy may provide coverage for losses and claims related to data breaches that occur when employees are allowed to work remotely with lesser security measures than normally provided by the insured's on-site cyber security measures.

Events

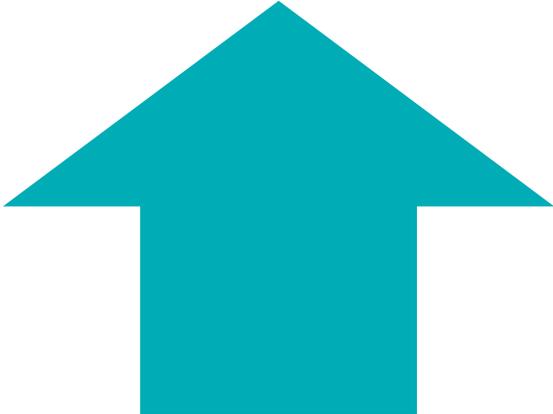
Part B

Whose Event?

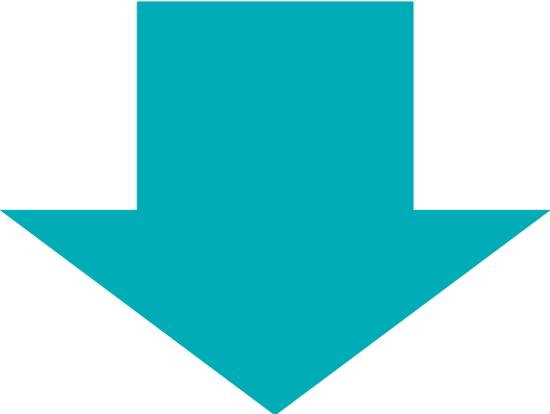
Ours: Hosting

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?



Cancellation of Contracts

Termination Fees/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.

Elements of a *Force Majeure* Clause

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

Notification requirements

- Timing and method of notice

Applicability of *Force Majeure* Clause

Standard *force majeure* clauses in 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 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).

Employment Issues

Part C

Families First Coronavirus Response Act (FFCRA)

General

- Who is covered?
- Who is eligible?

Types

- Paid Sick Leave
 - Qualifying reasons
- Expanded Family and Medical Leave
 - Qualifying reasons

Interaction with other types of paid leave

Office Closures, Furloughs, and Layoffs

Office Closure

- Not enough work for full-time remote work
- No ability to work remotely

Furlough

- FFCRA leave
- Health Insurance
- Other Benefits
- Unemployment

Layoff

- Health Insurance
- Unemployment

WARN

WARN Act requires most employers with 100 or more employees to give 60 days' notice of plant closings or mass layoffs

Mass layoffs

- Labor cutbacks impacting 500 or more employees
- Cutbacks impacting 33% of the workforce if your company has fewer than 500 employees
- Unforeseen business circumstance exception
 - Applies to circumstances not reasonably foreseeable at the time notice would have been required
 - Sudden, dramatic, unexpected action outside the employer's control
 - Unforeseen business circumstance is not a total bar to the obligation to provide notice to employees; rather it merely permits less notice to be provided in certain circumstances

Communications

Part D

Different Audiences



Board

- Level of involvement
- Cancellation decisions
- Budget issues



Employee

- 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?



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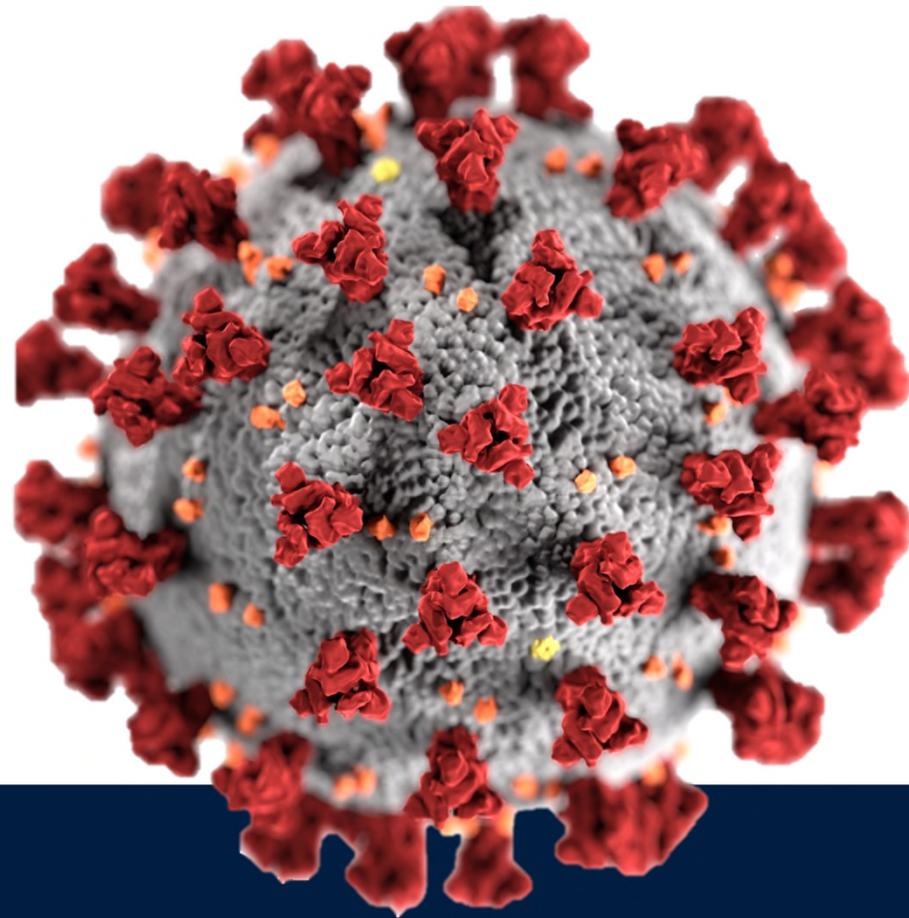
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