

# Preparing for COVID-19 Contract Litigation

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*As the novel coronavirus disease (COVID-19) outbreak spreads throughout the country, businesses in every industry are struggling to meet or enforce contractual obligations. Though the global deterioration of supply chains and ordinary commerce will inevitably lead to substantial litigation, parties should not sit on their hands, waiting for courts to open or lawsuits to be filed. Most businesses can take steps now to evaluate and manage their litigation risk, as well as prepare for the inevitable. Below is a list of steps that can be taken to prepare for likely contract litigation:*

## Review All Contract Documents

In order to understand the extent of potential liability and/or recovery, look first to the relevant contract documents. This includes any master contracts, amendments, addendums, agreements incorporated by reference, and commercial documents containing terms and conditions (e.g., purchase orders and invoices).

- Effective Date:** Identify the relevant contract by checking the effective dates. Does the contract still govern the parties' relationship? If the contract term has ended, have the parties continued "business as usual" since the expiration date?
- The Parties:** What are the legal names of the parties to the contract? Was the actionable conduct performed by a party to the contract? If not, is any party to the contract responsible or liable for the actionable conduct by virtue of its relationship to the party that engaged in the actionable conduct (e.g., parent, affiliate)? Does the contract refer to any parties that could be considered third-party beneficiaries?
- Notice of Breach:** Are the parties required to give notice of breach of contract? How much notice is required? To whom must notice be given? Are the parties required to give an opportunity to cure after receiving notice?
- Right to Terminate:** Does either party have an express right to terminate the contract? Under what circumstances? What process must be followed to terminate the contract?
- Dispute Resolution:** Have the parties agreed to any alternative dispute resolution options such as arbitration or mediation? Is the dispute-resolution provision valid under the applicable law? If so, what procedures must be followed?
- Indemnity:** Is there an indemnity provision? Is the indemnity unilateral or mutual? What parties are entitled to indemnity? What claims or damages are indemnified? Are the parties required to support their indemnity obligation(s) with insurance? Does the indemnity provision comply with applicable anti-indemnity statutes?
- Additional Insured:** Does the contract require that a party be named as an additional insured on an insurance policy? By endorsement or some other means?
- Choice of Law:** What law will apply to litigation concerning the subject matter of the contract? How does application of the designated substantive law affect when and how a lawsuit is brought?
- Venue:** Does the contract have a provision that identifies an appropriate venue for litigation over the contract? Is the venue provision mandatory?
- Limitation of Liability:** Does the contract limit the liability for damages of either party for breach of the contract? What is the limitation? Are consequential damages recoverable? For noncontractual claims, are punitive damages recoverable?
- Liquidated Damages:** Is either party entitled to recover liquidated damages under the contract? What are the liquidated damages, and when do they start accruing? Is the liquidated damages provision enforceable under the applicable law? Is the liquidated damages provision actually a penalty?
- Force Majeure:** Does the contract contain a force majeure provision? Does the specific language of the provision excuse performance in the event of a pandemic? Does it excuse performance for an "act of God"? Does commercial disruption caused by COVID-19 trigger the contract's force majeure clause?

## Identify Insurance Coverage

In advance of a lawsuit, it is important to evaluate potential exposure, either as a defendant or as a counter-defendant. To make such an evaluation, you will need to identify all relevant insurance policies and investigate the following:

- What Policies Apply:** Aggregate all policies that may provide coverage in the event of a loss. Do you have a business interruption policy? Is it a contingent policy? Do you have a commercial property insurance policy? Does it cover business income losses sustained as a result of “civil authority” prohibiting access? Does your commercial general liability policy cover loss resulting from breach of contract? Are any other coverages implicated?
- Extent of Coverage:** What are the limits (per occurrence/aggregate) for each potentially applicable policy?
- Exclusions for Viruses:** Do your potentially applicable policies contain an exclusion for viruses or diseases? Are there any other exclusions that might preclude you from being indemnified by your carrier?
- Prompt Notice:** What does the policy say about notice to the insurer of a potential claim? Have you put your carrier on notice in compliance with the policy’s requirements?

## Document Retention

One of the most important steps in preparing for and participating in litigation is the retention of relevant documents for discovery.

- Internal Litigation Hold:** Is a litigation hold necessary? A litigation hold is a correspondence to all employees in your organization who may have documents or materials relevant to the anticipated COVID-19 litigation, including your information technology department, if you have one. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure preservation of relevant documents. Emphasize the need to preserve all electronically stored information (ESI) concerning the potential dispute.

- Preservation Letters:** Consider whether it is necessary to send letters to parties that may have documents or materials relevant to prospective COVID-19 litigation demanding that relevant materials, including ESI, be preserved.
- Aggregate Relevant Documents:** It is critical that a party anticipating litigation identify and isolate the universe of potentially relevant documents. This often can require engaging with your IT professionals and providing them both (1) the names of records custodians and (2) search terms. In aggregating relevant documents, you should be sure to capture all communications with other parties regarding the impact of COVID-19 on the parties’ contractual performance.

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*If you have any questions about potential liability, risk management or steps your company can take to limit exposure through litigation, please do not hesitate to contact a BakerHostetler attorney or visit BakerHostetler’s Coronavirus (COVID-19) Resource Center at <https://www.bakerlaw.com/Coronavirus-COVID-19>. BakerHostetler was named a “go-to law firm” for litigation by Corporate Counsel® magazine’s general counsel survey of in-house law departments at the nation’s top companies. With nearly 400 litigators in offices coast to coast, we represent market-leading clients in virtually every type of case and proceeding. Our seasoned litigators and trial lawyers can help you prepare for litigation and guide you to an ultimate resolution that best serves your business needs.*

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