

MSF CLIENT ALERT

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Coronavirus Guidance – Contracts

NOTICE PROVISION PITFALLS AND CONSEQUENCES IN LIGHT OF COVID-19 – THE EASY FIX.

Last week, Meister Seelig & Fein LLP provided guidance advising all companies to review their contracts to understand their obligations, rights and exposure. Since that guidance, several States have announced shelter-in-place and other restrictions that are causing most companies to embrace a remote workforce for the foreseeable future and are causing some companies to reduce work force or cease operations. It is important, as a priority, to review your contracts to understand your notice requirements and response timeframes.

Most contracts that contain notice provisions also contain obligations for the parties to update their notice contact information. If you do not update your contact information, there is a real risk that you will be deemed to have been notified of something under your contract even though you never see the notice because it was mailed to your currently vacant office. This creates several risks, as some contracts provide for short response times and there are consequences for non-responsiveness. For example, a contract may provide that if the party “receiving” the notice does not respond within a specified period of time, such party is deemed to have accepted the content of the notice. Using an M&A transaction as an example, assume that there is a post-closing adjustment to your purchase price and your contract provides that buyer will send to seller within sixty (60) days following closing a calculation of the adjustment. Assume further that the contract provides that seller will have thirty (30) days from the date of the notice to dispute buyer’s calculation, and that if seller does not timely

dispute the calculation seller is deemed to have accepted it, creating the real possibility that seller loses significant purchase consideration. This is just one real world example. Another example is that you “receive” notice of default from a lender or landlord, and you do not respond because you never actually received the notice – as long as the party providing the notice under the contract followed the then current notice provisions from the contract, you may be stuck with the consequences regardless of the fact that you were unaware of the notice.

There is no way of knowing now how strictly courts will enforce these provisions in the face of the COVID-19 crisis. However, the risk is that the courts may strictly enforce notice provisions. We recommend that you conduct an immediate review of your contracts, or at least your material contracts, to determine what notice provisions need to be updated. You should then notify your contract counterparty(ies) as to either your new contact information to be used during the COVID-19 crisis, or, we recommend, keep your old contact information in place but add a second set of contact information. This will allow you to seamlessly transition back into the office at the end of this shelter-in-place period of time without needing to make any changes additional changes at that time. A few hours of review and a few mailings can save you millions of dollars and protect you from an avoidable default or adverse consequence.

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For more information or if you have any questions about how this new development may affect your business, please contact a Denis Dufresne or a member of our Corporate Team.



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