Seyfarth

COVID-19 Litigation Trends

Seyfarth Shaw LLP

The COVID-19 pandemic has spawned a wave of litigation across a multitude of practice areas and industries. Although no industry is completely immune to litigation related to COVID-19, certain business sectors—such as travel, entertainment, manufacturing, retail and health care—have seen heightened litigation activity as a consequence of the pandemic. Seyfarth has been tracking lawsuits filed in state and federal courts across the country, and we are providing our initial impressions from the trends we have observed.

This is a summary prepared by the partners listed below for informational purposes only.

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Bankruptcy and Financial Services

Trends:

Financial services-related lawsuits filed to date concern primarily Small Business Administration (SBA) loan processing and stimulus check garnishment.

Anticipated CARES Act litigation has not yet commenced given the various moratoriums on consumer debt collection, mortgage foreclosures, and evictions; however, given the amount of debt affected by the CARES Act and other forms of temporary (voluntary, state required, etc.) forbearance or moratorium relief, a high level of consumer litigation related to debt collection, foreclosure, and eviction is likely.

Also expected are claims alleging violations of the Fair Credit Reporting Act (which was modified by the CARES Act) as well as the Fair Debt Collection Practices Act.

High levels of unemployment and the overall tightening of credit have spawned an increase in Chapter 11 bankruptcy filings (particularly in the retail sector) and this number is expected to surge.

What can companies do to prepare?

Keep accurate records on consumer accounts to ensure compliant credit reporting and to defend any forthcoming foreclosure and debt collection claims by consumers.

Evaluate and revise protocols regularly and in tandem with the evolving regulatory landscape and properly train employees.

Review and revise business continuity plans (including pandemic plans) and procedures.

Please contact one of our Seyfarth attorneys for specific legal advice or guidance.

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Consider adaptation of consumer product portfolios to customer needs for security, safety, and flexibility.

If your company is contemplating filing for bankruptcy, it may be advisable to wait as long as possible if you are in receipt of a Paycheck Protection Program (PPP) loan, which can be converted to grants (or may not need to be paid back at all, giving you more cash on hand when you ultimately do file) if certain requirements are met.

Consumer and Commercial Class Actions

Trends—Cases Already Filed:

Business interruption coverage class actions. Businesses have banded together to challenge insurance denials.

School tuition refund cases. Current wave is focused on refunds for Spring 2020 when classes and activities were suddenly converted to remote learning. Another wave is likely expected in Fall 2020 when schools do not reopen, partially reopen or change offerings due to pandemic. Some more recent lawsuits focus on Summer and "future semester." We have also seen these claims expand beyond the undergraduate level, e.g. law schools.

Product liability with Personal Protective Equipment (PPE) products. Several retailers and pharmacies were hit with class actions alleging companies have made representations about their hand sanitizers that are not supported by evidence or research. Additional suits were brought against textile companies which manufactured protective equipment that was represented as protecting against the virus or 99% effective.

Membership-based businesses. Gym, ski resort, theme park, and sports season members and ticket holders are being sued for refunds for services that were not rendered and paid for facilities, activities, options that became unavailable.

Ticket refunds. Concert venues, third party vendors, sports venues, airlines, vacation companies sued for failing to offer cash refunds for missed trips, events, etc.

What is still coming:

New waves of similar class actions:

- **University cases:** Another wave is likely expected in Fall 2020 when schools do not reopen, partially reopen or change offerings due to pandemic.
- **Membership cases:** As businesses re-open with different requirements, capacity limits, availability, restrictions, there will likely be a new wave of cases alleging that customers are not receiving the benefit for which they paid.
- **PPE misrepresentation/product labeling cases:** Businesses continuing to look for ways to advertise to the pandemic crowd will likely be pushing PPE products. Need to be cautious about the way that advertisements are phrased and products are labeled.

Retailer refund cases. Cases have been slow to ripen because, with stores closed, there has been less opportunity for in-store returns. Now that retailers are reopening, we expect to see a wave of breach of contract or breach of warranty claims for failure to honor a return policy if policies have changed since COVID-19 or customers argue that they were unable to return the product within the return window due to the shutdown. To the extent that the return policy is generally advertised and not considered to create a contract, plaintiffs may allege failure to comply is a deceptive trade practice.

Telephone Consumer Protection Act (TCPA). As retailers, restaurants, etc. reopen they will be looking for additional ways to reach consumers who have been staying home. Businesses will also start experimenting with contactless ways to accommodate customers for appointments, curbside pick-up options, reservations notifications, etc. Businesses need to be mindful of the TCPA and its requirements when collecting phone numbers and sending text messages.

Americans with Disabilities Act (ADA) claims by customers. There have been several cases filed in federal court claiming a retailer's mask policy violated the ADA because of lack of access. A business or entity defending against such a challenge would have to show that requiring masks be worn by all individuals inside a

facility is a legitimate safety requirement and that making an exception for people with claimed disabilities is not a reasonable modification of the policy.

Exposure claims seeking class treatment. Courts are mixed on whether class treatment is appropriate:

- On April 10, 2020, in one of the first rulings, a court in the Northern District of Illinois declined to certify a class of state inmates concerned about their risk of COVID-19 infection because it found that each putative class member came with a unique situation and the imperative of individualized determinations rendered the case inappropriate for class treatment. *Money v. Pritzker*, No. 1:20-CV-02093 (N.D. Ill. April 10, 2020).
- On June 6, 2020, a court in the Southern District of Florida reached a different result. Focusing on the threat of a heightened risk of severe illness, despite the need for individualized assessment of each detainee's vulnerabilities to COVID-19, it found the commonality required by Rule 23 because plaintiffs alleged common conduct, including failure to implement adequate precautionary measures and protocols, lack of access to hygiene products, and lack of social distancing. *Gayle v. Meade*, No. 20-Civ-21553 (S.D. Fla. June 6, 2020).
- We expect this issue to be addressed by courts with increased frequency now that courts are re-opening.

Budding new laws shielding businesses from exposure claims in various scenarios create an additional patchwork of guidance. Although Congress has not yet passed any COVID-19 liability shield, a growing number of states have taken steps to immunize businesses from lawsuits by employees or customers who contract COVID-19. States such as North Carolina, Oklahoma, Utah, and Wyoming have enacted broad liability protections for businesses related to COVID-19, while additional states such as Arizona and Michigan have adopted more limited protections specific to health-care providers. An additional slew of bills offering varying degrees of protection are pending in state legislatures.

Expect to see the plaintiff's bar seek to file these as class action: failure to social distance or otherwise protect customers on planes, in venues, etc.

What can companies do to prepare?

Review policies, contracts, procedures to determine whether they are reasonable under the current circumstances or if alternatives need to be offered.

Consider whether arbitration provisions or class action waivers are appropriate:

- The law remains quite good for defendants seeking to enforce arbitration provisions.
- While adding arbitration provisions will not protect you from claims where the dispute is based on past conduct, this approach could protect businesses in future disputes.
- To the extent these provisions are added now, make sure appropriate notice is provided of the changes and the provisions are clear and conspicuous.

Review current laws before making significant changes to marketing methods or use of new technology for safety procedures.

Carefully review post-pandemic marketing, especially if it is COVID-related and consider how a "reasonable consumer" would interpret the representations.

Follow and document steps taken to adhere to the federal, state, and city guidance on opening a business post-pandemic.

Commercial and Construction Litigation

Trends:

Increases in insurance claims on all product lines (commercial general liability (CGL), property, employment practices liability insurance (EPLI), directors & officers, representatives, and warranties, etc.). Insurance coverage lawsuits will increase as insurers' claims processing reflect market distress; premiums will increase as insurance market hardens; exclusions for virus/pandemic claims will become universal.

Increase in challenges to enforceability of contracts grounded in (1) force majeure clause claims and (2) common law arguments of impossibility, impracticability, and frustration of purpose. Patchwork of outcomes across the country dependent on jurisdiction; lobbying efforts driven by big business for legislative relief to

bring more uniformity. Seyfarth's comprehensive *50 State Survey of Legal Excusability: Force Majeure, Commercial Impracticability, and Frustration of Purpose* can be found here.

Efforts to bolster insurance for delay, business interruption, and injury claims, particularly as they relate to viruses and pandemics (and corresponding increases in exclusions by insurers in many policies).

Increase in lawsuits against contracting counterparties for non-payment. Corresponding increases in bankruptcies/receiverships, distress sales, contract renegotiations.

Greater emphasis on dispute resolution and mandatory arbitration clauses to respond to court stoppages and delays in resolutions of disputes.

What can companies do to prepare?

Review contracts for possible renegotiation/renewal changes to provisions, principally: (1) force majeure clauses, (2) material price/labor escalation provisions (3) limitations of damages, (4) indemnity, (5) insurance coverage requirements (policy limits, additional insureds), and (6) litigation provisions (venue, mandatory mediation and/or arbitration, prevailing party provisions).

Bolster access to credit and cash position to weather contracting counterparty non-payment and denial of insurance claims.

Ensure insurance program optimizes properly scaled coverage protections (and vet insurers — some will fail in next two years).

Real Estate

Trends:

As jurisdictions lift stays of eviction proceedings, significant increase in disputes between landlords and tenants regarding nonpayment. Many efforts are ongoing to renegotiate lease terms to preserve tenancy, but also some matters are proceeding to litigation to preserve rights or gain traction in settlement negotiations. Lawsuits will entertain competing principles of contract enforcement, force majeure clause claims, and common law arguments of impossibility, impracticability, and frustration of purpose. Lease renegotiations will increase focus on issues like co-tenancy, temporary takings, insurance requirements, and limitations on guarantors.

Increase in property manager and related third-party claims, related to exposure to virus. Many states are enacting COVID-19 liability shields, which will mitigate against these suits.

Loan defaults will increase as the cascading effect of rent non-payments flows up to landlords. Risks of default also will be balanced by landlords seeking to accommodate distressed tenants. Material adverse change clause triggers will likely be the subject of disputes between lenders and borrowers.

Deals going sour, with buyers in distress, access to credit markets remaining tight, and changes in analysis of value of deals (especially with super-low interest rate environment). Pandemic claims will encompass those for nonperformance and/or rescission under theories of nondisclosure, force majeure, impossibility, and frustration of purpose.

What can companies do to prepare?

Review contracts for possible renegotiation/renewal changes to provisions, principally: (1) force majeure clauses, (2) co-tenancy, right of access, quiet enjoyment, limitations of liability, and takings/condemnation, (4) indemnity, (5) insurance coverage requirements (policy limits, additional insureds), and (6) litigation provisions (venue, mandatory mediation and/or arbitration, prevailing party provisions).

Bolster access to credit and cash position to weather contracting counterparty nonpayment and denial of insurance claims.

Ensure insurance program optimizes properly scaled coverage protections (and vet insurers — some will fail in the next two years).

Employment

Trends:

Seyfarth's prior commentary (available here) on observed and predicted employment litigation trends resulting from the COVID-19 pandemic observed significant filings in the following areas:

Failure to provide a safe working environment. Primarily asserted as negligence claims under state law, common allegations include failure to provide workers with adequate personal protective equipment and failure to implement customer or visitor policies (such as required temperature checks or masks) to protect employees.

Discrimination claims. Age and disability discrimination claims dominate COVID-19-related filings to date. In addition, pregnancy discrimination claims arising in the context of COVID-19 workplace restrictions have appeared, as well.

Leave claims. Numerous lawsuits continue to be filed alleging that employees have been unlawfully denied sick leave or family and medical leave for reasons related to COVID-19 under the Family Medical Leave Act, the Families First Coronavirus Response Act, state and local paid leave laws, and employer sick-leave policies.

Retaliation and whistleblower claims. Frequently, these lawsuits assert that an employee was terminated for complaining about workplace safety or working conditions (including complaints about the failure to provide appropriate personal protective equipment or the failure to comply with applicable COVID-19 safety protocols) or for exercising leave rights related to COVID-19.

Wage-and-hour claims. Wage-and-hour class and collective action filings continue seemingly without regard to the pandemic, although a number of new filings have involved circumstances directly caused by COVID-19 business impacts. Wage-and-hour claims motivated by changes in working schedules or venues (e.g., work-from-home situations) and state-law-dictated expense reimbursement claims have not yet reached critical numbers, but may become a more fertile area for employee-litigants in the coming months.

Early Judicial Decisions

In some of the first cases to address these issues, courts have shown some hesitancy to impose additional safety requirements on employers, reasoning that such mandates would be premature in light of the ever-evolving nature of the pandemic and could do more harm than good if they hampered an employers' ability to adapt as circumstances change.

- For example, in *Rural Community Workers Alliance v. Smithfield Foods, Inc*., No. 5:20-CV-60603-DGK, 2020 WL 2145350 (W.D. Mo. May 5, 2020), a group of meat plant workers and an organization representing those workers sought a preliminary injunction that would force a meat processing employer to take various measures to protect workers against COVID-19, including providing masks, ensuring social distancing, giving workers access to testing, and instituting a contact-tracing policy, among other things. Before the court could rule on the motion, the employer did institute many of the policy changes plaintiffs had demanded. Ruling on the narrowed scope of the injunction, the District Court for the Western District of Missouri held that plaintiffs had not met their burden to show a sufficient threat of irreparable harm. In particular, the court held that the threat of possibly contracting COVID-19 was too speculative an injury under Eighth Circuit precedent, noting that the spread of COVID-19 at the plant was not inevitable. The court also noted that an injunction could hamstring the employer as it tries to adjust its policies in the face of ever-evolving national and local guidance and the changing circumstances of the pandemic.
- Similarly, in *New York State Nurses Association v. Montefiore Medical Center*, No. 20-CV-3122 (JMF), 2020 WL 2097627 (S.D.N.Y. May 1, 2020), the Southern District of New York denied a nurses' union's request for a preliminary injunction to force a private hospital to take steps to protect nurses from COVID-19, including increased availability of personal protective equipment, on-demand testing, and other things. The court concluded that such an injunction would not be in aid of the parties' pending labor arbitration, but rather in lieu of it, and "would 'unduly interfere' with the hospital's 'ability to make business decisions' at a time when the judicial interference could be particularly problematic." Id. at *3 (quoting *Niagara Hooker Emps. Union v. Occidental Chem. Corp*., 935 F.2d 1370, 1378 (2d Cir. 1991)).

What can companies do to prepare?

Have a return-to-work plan that addresses some of the safety concerns that occupy a central place in this recent spate of lawsuits. Seyfarth has published a checklist to assist employers with the process of bringing employees back into the workplace in a safe and transparent manner. This resource covers a number of business re-opening topics, including many of the concerns alleged in recent COVID-19 litigation. Seyfarth safety, wage-hour, and employment counseling

attorneys have also presented numerous webinars discussing a broad range of COVID-19-related compliance issues for the workplace.

Prioritize addressing systemic issues that could affect large groups of employees. Employers should make time to create solid policies (and demonstrate its efforts to comply with them) that address and minimize risks and concerns that could impact different employee populations on a collective basis.

Review existing policies and consider their application in the context of COVID-19 and examine recent guidance from federal, state, and local agencies charged with enforcing leave and anti-discrimination laws. As recently as June 17, 2020, the EEOC updated its guidance regarding the enforcement of the laws under its purview. The Commission's latest guidance addresses issues such as reasonable accommodations for employees returning to work, accommodating employees more "at-risk" of the coronavirus, discrimination issues related to providing flexible schedules or telework options, and dealing with pandemic-related harassment. The EEOC's latest guidance is a critical read for all employers returning employees to the workplace and providing alternative work arrangements. In addition, state and local agencies, such as the New York State Division of Human Rights and the New York City Commission on Human Rights, have all recently issued guidance on discrimination and harassment in light of the COVID-19 pandemic. Employers should ensure they are paying attention to this guidance, particularly in light of these agencies flagging an uptick in complaints
filed, and consider whether modification of leave policies, accommodation policies, anti-discrimination and anti-harassment policies, and wage-and-hour policies require temporary or permanent modification to address application in light of the pandemic.

Cybersecurity and Data Privacy

Trends:

Data privacy concerns related to handling employee/customer data from home. There are increased compliance requirements and risk if remote workers handle, store or transfer information that identifies individual customers, employees or marketing prospects. There are multiple federal privacy laws that place restrictions on the storage of certain categories of health, background, credit and financial information. Additionally, state privacy laws like the California Consumer Privacy Act (CCPA) have increased the stakes of data breaches with increased statutory penalties and notification requirements for the loss of many categories of personal information.

Cybersecurity issues related to employee use of untrusted personal devices, untrusted networks or vulnerable hardware to conduct corporate work. One of the unintended consequences of a remote workforce is the expected increase in cybercrime, which was already a significant corporate risk. Throughout the pandemic, there have been reports of cyberattacks targeting industries wrestling with COVID-19. Personally Identifiable Information (PII) and confidential business information are more valuable than ever. By transitioning to a remote workforce, this information becomes more susceptible to loss or misuse.

Malware. A significant uptick in malware related to COVID-19 increases the chances that employee endpoints are compromised. Threat actors are attempting to take advantage of individuals seeking the most updated information regarding the spread of the virus. In one instance, an interactive dashboard and map of real-time COVID-19 infections and deaths provided by John Hopkins University was weaponized to spread password-stealing malware.

What can companies do to prepare?

Quickly, clearly and repeatedly provide guidance to remote employees. Guidance can be disseminated through policy development, including developing, reviewing, and updating acceptable use policies. Acceptable use policies should specifically identify approved software and tools that employees should use, and the appropriate use of those tools. Acceptable use policies should specifically identify items and software that employees should not use due to security concerns. Companies should also issue guidance as to where company documents and work product should be saved, and encourage saving of documents onto network or cloud-based resources

that are regularly backed-up (as opposed to laptops or external storage devices or personal cloud services).

Establish document retention periods, policies, and practices consistent with all applicable internal and external record retention requirements. This includes legal hold compliance as well as regulatory records retention requirements. There is no "exception" to the duty to preserve potentially relevant information simply because it is stored on a newly deployed system.

Discuss with your IT or Information Security team what they are doing to protect corporate data in this era of mass remote work. Are you utilizing any virtualization technology to enable more secure remote workers? Are you enforcing two-factor authentication on logins to the corporate network? Is cybersecurity training available for your employees that focuses on data protection and cybersecurity while working remotely?

Trade Secrets

Trends:

Trade secret misappropriation by current, former, and furloughed employees. While remote work is designed to minimize the risk of virus transmission, it can increase the risk of trade secret misappropriation.

Enforcing non-competes and restrictive covenants during times of rising unemployment numbers. Tens of millions of people have lost their jobs since the pandemic began and we continue to see the numbers rise. While non-competes are an important tool to protect trade secrets, many companies are asking whether they are enforceable against employees who have been laid off. Companies should consider the actual risk that the former employee poses by working for a competitor, potential alternatives to litigation and the public relations ramifications of filing a lawsuit.

What can companies do to prepare?

Shore up employment agreements, policies, and procedures. In addition to focusing on technical infrastructure, companies should take the opportunity to review and strengthen agreements, policies, and procedures concerning the protection of confidential information and trade secrets—or implement such agreements, policies, and procedures if none currently exists—to account for a more remote workforce.

Also consider conducting a trade secret audit, as well as remote training of employees on protection of confidential information.

Enforce your rights. If any employees, business partners or other bad actors have taken advantage of this unprecedented situation to misappropriate trade secrets, companies should take legal action to enforce their rights. More courts are reopening their doors to non-emergency matters each day, and that trend will continue. Even some courts that are only hearing emergency matters are including trade secret matters as emergencies. Start your enforcement efforts with a cease and desist letter and preservation of evidence notice to suspected bad actors.

Prepare for and pursue trade secret litigation. While COVID-19-related court closings and filing limitations present a new obstacle to protecting trade secrets, there are many steps employers can and should take to protect their trade secrets and preserve their rights. Many litigation and pre-litigation tasks do not require in-person contact or even court action to commence or complete. Conduct forensic review of suspicious employee activity as you prepare for litigation. Evidence of suspicious activity in support of emergency relief is critical.

Health Care, Life Sciences and Pharmaceutical

Trends:

Seyfarth prepared a comprehensive review of *The Future of Health Care in the US: What a Post-Pandemic Health Care System Could Look Like*. Click here to request a copy.

False Claims Act (FCA). Companies can expect government investigations and False Claims Act litigation arising out of alleged fraud related to CARES Act and its new oversight agencies. With trillions of dollars being spent to prop up the national economy, enforcement actions for fraud will be aggressively pursued as unscrupulous companies seek to take advantage. Companies should ensure all government grant expenditures and reimbursement requests are handled properly and documented meticulously to avoid government investigation and possible qui tam claims.

Stark and Anti-Kickback changes. Centers for Medicare and Medicaid Services (CMS) and Office of Inspector General (OIG) issued in October 2019 proposed rules expanding types of health care provider financial relationships permitted under law including additional safe harbors for value-based medicine approaches. CMS and OIG have followed this up earlier this year with additional waivers and policy statements allowing for additional financial relationships and remuneration related to COVID-19 pandemic care. Failure to meet these standards, however, will likely result in FCA claims and government investigations. Health care providers should carefully review the waivers, temporary changes, and possible long-term rule changes to ensure compliance and avoid FCA claims once the waivers are revoked and matters return to a new normal.

State and federal immunities. Both state governments and federal agencies have issues myriad regulatory waivers and statutory schemes allowing for immunities in the fight against COVID-19. Nevertheless, the application of these waivers and immunity remain largely untested, and claims from individual plaintiffs to large class actions will be filed against entities engaged in use of COVID-19 countermeasures. Companies should seek compliance with and obtain the protections available under law, and seek collaborative COVID-19 pandemic countermeasure approaches with local, state, and federal regulators.

HIPAA/HITECH privacy issues. HHS's Office of Civil Rights (OCR) recently issued a Notification of Enforcement Discretion allowing business associates to disclose personal health information (PHI) for public health and health oversight. HHS has also recently allowed providers to adopt telemedicine platforms that would have historically not met the criteria for HIPAA compliance, as well as waiving certain patient-centered HIPAA protections. But while some of the "temporary" relaxations announced over the past several months may be here to stay, covered entities remain liable for breaches of the HIPAA Privacy Rule, and OCR will continue to seek fines and engage in enforcement actions moving forward. Covered entities under HIPAA and their business associates should stay up to date in telehealth and telemedicine developments, and track HIPAA/HITECH waivers.

Medical staff and credentialing. COVID-19 has placed a tremendous strain on this country's health care resources, including the availability of qualified physicians. In an attempt to increase that number to combat COVID-19, federal and state agencies have relaxed physician licensing requirements, waived certain conditions of participation in federally-funded health care programs, and waived fees for mandatory background checks on physicians. These legal changes have assisted in expediting medical peer review and credentialing, and hospitals are using these changes, along with various forms of temporary privileges, to augment their medical staffs. But with relaxed restrictions and expedited credentialing comes greater risk for incompetent medical care and adverse outcomes. The ultimate impact on patient care and appropriate peer review therefore remains to be seen, and litigation will likely follow.

US Food and Drug Administration (FDA) regulatory changes. FDA has taken unprecedented actions during the COVID-19 crisis to bolster medical supplies, rush testing-to-market, and help to develop potential treatments. The actions have had both positive and negative consequences, which are just beginning to emerge. At the least, FDA's response during COVID-19 will provide a guide for what to expect when the next public health emergency occurs in the United States. During the crisis, FDA stepped back from its gatekeeping role allowing some products to be commercialized without FDA review or with much less evidence than traditionally required. We foresee that trend continuing, reflecting a shift away from prevention toward enforcement, with FDA encouraging new testing, products, and treatments to reach the public as soon as possible.

What can companies do to prepare?

Ensure all government grant expenditures and reimbursement requests are handled properly, documented meticulously.

Follow HHS regulatory developments regarding Stark and anti-kickback rules.

Ensure compliance and seek protections/immunities under federal agency waivers/state statutes/federal PREP Act.

Stay up-to-date in telehealth and telemedicine developments, and track HIPAA/HITECH waivers.

Seek collaborative COVID-19 pandemic countermeasure approaches with local, state, and federal regulators.

Securities Litigation & Enforcement

Trends:

Securities class actions. Plaintiffs began filing securities class actions in March against companies that are on the front lines of the COVID-19 outbreak, and as of mid-July, there have been more than a dozen COVID-19 related securities class actions filed. They have ranged across a variety of sectors and industries such as cruise ship operators, pharmaceutical companies, healthcare software services, animal supplies and video conferencing technology. The circumstances leading to the class actions have also been varied, but generally concern allegations relating to misleading statements about the impact of the virus coupled with a stock drop.

Enforcement actions. Airlines face unique challenges due to participation in the federal bailout that could open the company up to securities litigation and/or enforcement actions. Under the Payroll Support Program, airlines that accept the payroll support money are prohibited from major staffing or pay cuts through September, must also refrain from buying back shares or paying dividends through September 2021, and must agree to limits on executive pay until late March 2022.

Alleged misrepresentation to investors. Although no actions have been filed yet concerning the Payroll Support Program, in the context of the CARES Act Paycheck Protection Act ("PPP"), a securities class action has already been filed alleging misrepresentation to investors in connection with the company's distribution of PPP funds. In addition, the SEC Division of Enforcement has also been requesting information from certain recipients of the PPP and appears to be scrutinizing misstatements or inconsistencies between application certifications and SEC filings.

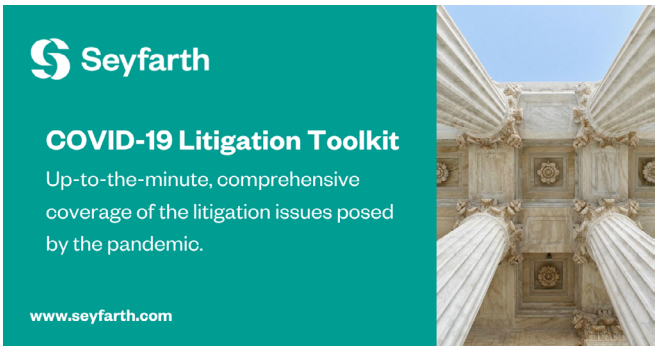
What can companies do to prepare?

Follow SEC guidance and securities laws on disclosures and document compliance with the processes. In March, the SEC released guidance regarding mandatory disclosures for public companies affected by COVID-19 and instructed companies to access and disclose operational disruptions, liquidity issues, valuation of assets, product demand, service and supply chain issues, internal control weaknesses, workforce/labor disruptions and cybersecurity threats or vulnerabilities. Supplemental Guidance was issued by the SEC in June and provides the Division's additional views on these issues.

Adhere to the specific requirements and restrictions of the PPP and carefully document compliance with the same. The SEC recommends that companies receiving federal assistance should consider the short and long-term effect of that assistance on their financial condition, operations, liquidity, capital resources, appropriate disclosures, accounting estimates and assumptions.

Boards should take proactive measures to include: focus on the process of vetting and the precise content of corporate disclosures, insider trading, and financial disclosures; creation of COVID-19 focused committees; prepare for succession and continuity planning; ensure robust flow of information; analyze liquidity issues/debt management; focus on increased cyber-security protections; attend to IT and financial controls testing; ensure full documentation of Board deliberations, analyses and plans to address all of the foregoing and any material company risks, including with formal meeting minutes.

COVID-19 Litigation Toolkit



Available at:

www.seyfarth.com/covid-19-litigation-toolkit.html

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