THE BKCG
BULLETIN
SUMMER 2020 EDITION

BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

Zoom - Is Your Business Information Secure?

Many of our clients take great measures to protect their business's proprietary, confidential and trade secret information. Also, our clients recognize their legal obligations to protect certain employee and customer information. Now many of us are practicing physical distancing and abiding by stay at home orders to slow the spread of COVID-19 and this has caused many businesses to use cloud-based platforms for video and audio conferencing with clients and colleagues.

One of these, Zoom, has gained a certain notoriety for not being a secure platform for business use. For instance, some of us have heard horror stories of students using Zoom to remotely attend class only to have those classes "zoombombed" or "zoom raided" by uninvited individuals who disrupt the session with lewd, obscene and racist statements or images. Some of us have also likely heard that some encryption keyed issues by Zoom to Zoom customers were issued from Zoom servers located in China even though the participants of the Zoom meeting were all located in the United States. Of course, using a platform that is breached so easily and which provides a Communist regime unbridled access to private company information has caused numerous clients to think twice before using Zoom.

The good news is that Zoom's response to security concerns has been swift. For example, on April 3, 2020, Zoom Chief Executive Officer Eric S. Yuan acknowledged in a blog post that certain Zoom meetings were connected in China "where they should not have been able to connect." Mr. Yuan assured users this issue had been corrected and paid Zoom account users are now able to choose the region of the world through which to route their information while users utilizing Zoom's free services now have their data handled only by servers in their region. Zoom also has a "bug bounty" program that pays hackers to find vulnerabilities. In addition, Zoom launched version 5.0 of its desktop software on April 26, 2020 that purports to address other security issues by, among other things, providing the ability to exclude zoombombers from disrupting sessions, putting everyone waiting for a Zoom session to start in a virtual "waiting room", and adding a security icon to the host's screen as well as better encryption to Zoom meetings.

That leaves, the question, should a business use Zoom for virtual meetings? It depends. To ensure that private information stays private, the platform should probably be avoided for meetings where that type of information will be discussed. On the other hand, if a meeting will only involve a routine discussion of information that is not particularly sensitive, Zoom is an option. Please contact us should you have any questions about the type of information you should avoid discussing on Zoom and other cloud-based platforms.

Please contact Ros Lockwood at rlockwood@bkcglaw.com or call (949) 975 7500 if you have any questions about any issue discussed in this article, or any other related matter.

Preparing For A Post-COVID Workplace

The White House recently issued "Opening Up America Again," the federal guidelines to reopen the U.S. economy through a three-phase approach. As California establishes its own framework to lift stay-at-home orders, employers should prepare to reopen their physical workplaces and returning employees to work in offices in order to minimize risk of litigation and liability. You should consider the following issues when you begin to transition back to an operational physical workspace:

- *Assess physical workplaces.* Consider creating a multi disciplinary task force to prepare for and to monitor the reopening of physical workplaces and to coordinate with landlords and property management companies to determine any restrictions on modifying the physical workspace.

- *Make appropriate physical changes to offices and worksites.* Subject to landlord restrictions, your options may include creating barriers by installing plexiglass or solid screen dividers, reconfiguring work spaces, and limiting equipment use.

- *Conduct a Risk Assessment.* The Occupational Safety and Health Act ("OSHA") requires employers to provide employees with a workplace free from "recognized hazards that are causing or likely to cause death or serious physical harm" and has issued Guidance on Preparing Workplaces for COVID-19.

- *Protective Coverings, Personal Hygiene and Cleaning.* You consider requiring employees to wear protective coverings and providing coverings upon request. You should also provide appropriate hygiene guidance and review cleaning procedures.

(continued on page 6)

In This Issue

COVID-19 Update: Restauranteur Thomas Keller Files Suit

Insurance coverage is premised on spreading risk to a large number of properties with the expectation that only a small percentage of insureds will have covered claims. When actual claims are out of whack with the actuarial charts, insurers react harshly and litigation explodes as businesses are forced to stand up for their rights. This occurred during the 1980s and early 1990s where courts were swamped with lawsuits concerning coverage for damage due to asbestos. Fast forward to 2020 - COVID-19 is resulting in another "out of whack" moment for insureds and their insurers.

Our last article addressed the issues surrounding a civil authority and business interruption claim to cover losses to your business caused by COVID-19 and the associated closures mandated by the government. Since that time, the government ordered shut down expanded from a few California counties to the entire state and beyond. As a result, businesses have been shuttered leading business owners to inundate insurers with business interruption claims. In all likelihood, the insurance industry is viewing the onslaught of claims as an "out of whack moment" akin to the 1980s asbestos claims. As a result, many insurers are quickly denying the claims in large numbers and – you guessed it – a lot of business owners have been forced to file lawsuits to obtain coverage that is deserved.

One of the first lawsuits – and a potential test case - was filed by Thomas Keller, a well-known chef with Michelin-starred restaurants in Napa Valley County and elsewhere. His restaurants employ over 300 people, all of whom had to be furloughed. After the Civil Authority order was issued, Mr. Keller submitted a claim to his insurer, The Hartford. The policy provides property and business interruption coverage. Also, like most property policies, there was an additional coverage for business closures by order of Civil Authority as a result of a covered cause of loss. The Hartford denied the claim and Mr. Keller filed suit for declaratory relief.

In his lawsuit, Mr. Keller alleges that (1) there was an order of civil authority, (2) that prohibited access to Mr. Keller's restaurants; and (3) there were no exclusions in the insurance policy for "virus." Mr. Keller further alleged that the civil authority order triggered coverage for business interruption losses as the closures *were necessitated by physical loss or damage*. In short, his complaint ticks off the elements needed to demonstrate a covered claim under the policy.

While The Hartford has not articulated its coverage position in the pleadings, a large number of insurers have denied claims by arguing that the virus does not constitute "physical loss or damage." Most all policies require some type of physical loss or damage to trigger coverage. Mr. Keller, however, alleges that COVID-19 infects and remains active on surfaces for days or lingers in the air for a period of time thereby creating a dangerous condition that satisfies the "physical loss or damage" requirement. In fact, there are cases where ammonia, gas, and other odors were sufficient to constitute physical loss or damage. If the Court ultimately sides with Mr. Keller, it is likely that The Hartford will be required to pay the insurance claim and the case can be used as persuasive authority (at a minimum) in other lawsuits.

Many businesses have insurance policies similar to the one purchased by Mr. Keller. If you have a business that has been closed pursuant to California's shut down order, you should contact us to discuss your property insurance coverages as there may be an avenue of recovery for your business.

Please contact Keith Butler at kbutler@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

Information contained in this publication should not be construed as legal advice or opinion or as a substitute for the advice of counsel. The content provided is for educational and informational purposes for the use of clients and others who may be interested in the subject matter. We recommend that the reader seek specific advice from counsel about the particular matter of interest.

Burkhalter Kessler Clement & George Is Pleased To Announce That Michael P. McConnell, Esq. Has Joined Our Litigation Team

Mr. McConnell graduated from the University of California, Berkeley with a B.A. in Political Science. He then went on to receive his J.D. from the University of California, Irvine School of Law. During his time at UCI Law, Mr. McConnell served on the inaugural staff of the UCI Law Journal of International, Transnational, and Comparative Law.

Prior to joining BKCG, Mr. McConnell managed his own solo legal practice which focused on business law. Mr. McConnell cultivated professional relationships with individuals and corporate clients of all sizes by effectively resolving business disputes and working to protect his clients from potential legal exposure. With experience in both transactions and litigation, Mr. McConnell can address any legal issue your business may face.

Please contact Michael McConnell at mmcconnell@bkcglaw.com or call (949) 975-7500 if your business needs legal assistance, or visit our website at www.bkcglaw.com

The SECURE Act & The CARES Act Both Contain Significant Tax Law Changes

In response to the Coronavirus pandemic, Congress passed the Coronavirus Aid, Relief and Economic Security Act or the CARES Act. Though the bill is 800 plus pages long, we will only be reviewing certain tax provisions within the CARES Act.

The bill calls for direct payments of $1,200 for all taxpayers who earn $75,000 or less for single taxpayers and $2,400 for married couples earning $150,000 or less. If a single taxpayer earns more than $75,000, the payment is phased out up to income equal to $99,000, such that single taxpayers who earn $99,000 or more and married couples who earn $198,000 or more are ineligible to receive any payments. There is also a $500 per dependent child payment taxpayers will receive, subject to same phase out limits above. By the time of the printing of this newsletter, those of you who qualify and have already filed your 2019 income tax returns, should have already received your relief payments. These payments are not subject to income taxes.

The all too familiar deadline of April 15 to file your income tax returns and pay your taxes for 2019 has been automatically extended to July 15, 2020. For the self-employed and others who pay quarterly estimated taxes, the first installment is normally due April 15th and the second installment is normally due June 15th. The CARES Act provides that those installments need not be made until July 15. Both the first and second installments are due on the July 15th date. The due dates for the third and fourth installments remain September 15, 2020 and January 15, 2021, respectively.

Funds in retirement accounts such as an IRA, 401k or 403B represent funds that have not yet been taxed. When the funds are withdrawn, the taxpayer must pay income tax in the year the funds are withdrawn. The withdrawal rules prior to this year provided that retirement funds may be withdrawn without penalty once the account holder turns 59 ½, with the withdrawn funds being subject only to income taxes. If a taxpayer withdrew funds from a retirement account prior to age 59 ½, such withdrawals are normally subject to a ten percent (10%) early withdrawal penalty. The CARES Act allows taxpayers under 59 ½ to withdraw up to $100,000 in 2020 from their retirement accounts without incurring the ten percent (10%) early withdrawal penalty.

Prior to 2020, taxpayers were mandated to begin taking required minimum distributions (RMD) from their retirement accounts beginning at the age of 70 ½. The RMD is based on joint life expectancy tables issued by the government. The SECURE Act passed in December of 2019 changed the age when RMDs must begin from 70 ½ to 72. Additionally, the CARES Act provides that taxpayers who would normally be required to take an RMD in 2020, do not have to take an RMD from their retirement accounts this year. This allow taxpayers who don't need the funds to keep them invested tax deferred.

The SECURE Act also changed the rules on how a retirement account must be distributed at death when the beneficiary is a non-spouse. Prior to 2020, if, for example, an 85 year old passed away with a $1,000,000 retirement account that she left to her 50 year old daughter, the daughter could elect to receive the $1,000,000 retirement account over a term of years equal to her life expectancy. Assume that the 50 year old daughter has a 30 year life expectancy. The old rules provided that she may receive the $1,000,000 proportionately over a 30 year period and only pay income taxes on the amount she receives every year. By the time she is 80, she will have withdrawn the entire retirement account and paid the corresponding income taxes.

Under the SECURE Act, our hypothetical 50 year old daughter must withdraw the entire $1,000,000 over a ten (10) year period. No required distributions are mandated to be made during the ten (10) year period. However, by December 31 of the year that contains the ten (10) year anniversary of mom's death, daughter must have withdrawn the entire $1,000,000. This new rule shortens the period of time that children may spread out the receipt and taxability of inherited retirement funds. Older taxpayers who have traditionally taken only the minimum from their retirement accounts may want to reconsider this strategy.

Another change effective for 2020 was an increase in the lifetime estate and gift exemption. The exemption for 2020 has increased from $11,400,000 to $11,580,000. For married couples, the exemption amount is doubled to $23,160,000. These rules are subject to change and clients should make certain their estate plans are up to date.

Please contact William George at wgeorge@bkcglaw.com or call (805) 373-1500 if you have any questions about any issue discussed in this article, or any other related matter.

Is COVID-19 An "Irresistible, Superhuman Cause" Which Excuses Performance Of Your Contract?

By now, we are all far too familiar with the disastrous effects of the coronavirus infectious disease-2019, more commonly referred to as COVID-19. On top of the immense physical suffering and skyrocketing death toll it has caused, the COVID-19 pandemic has also devastated the global economy. This leaves many businesses wondering what to do when COVID-19 delays performance or renders performance impossible under a contract.

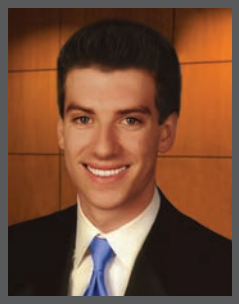
In our Spring Bulletin, we discussed how a force majeure clause in your contract can be used to excuse your performance in these circumstances. However, many contracts do not feature force majeure clauses, and without an express force majeure clause, California law only allows for a force majeure defense in cases involving the sale of commercial goods. What then can businesses do to protect themselves when force majeure does not apply?

Fortunately, California Civil Code § 1511 may provide relief in these cases. Section 1511 excuses performance, or delay of performance, when performance is prevented by "operation of law" or by an "irresistible, superhuman cause." Governor Newsom's executive order requiring all non-essential businesses to close, and greatly limiting essential business functions, will certainly prevent many businesses from performing under their contracts, or at the very least delay performance. In these cases, section 1511 may be applied to provide protection should any contract disputes arise.

Consistent with just about everything else happening at this point, this is very much uncharted territory. Indeed, the law is not as clear about whether a disease–much less COVID-19 in particular–qualifies as an "irresistible, superhuman cause." This means that businesses may invoke section 1511 as a defense to delay or nonperformance until the courts definitively settle the issue. For example, section 1511 may provide protection in cases where businesses cannot perform due to employees falling ill with COVID-19 (as opposed to performance being prevented by operation of law), or where performance is prevented due to COVID-19 disrupting a supply chain.

In these cases, the central issue will be whether COVID-19 constitutes an "irresistible, superhuman cause." California courts have held that an "irresistible, superhuman cause" has the same meaning as an "act of God." An "act of God" in California is defined as a natural phenomenon whose effects could not be prevented through the use of care, diligence, or prudence. Unlike force majeure, an "act of God" analysis excludes considerations of human agency, meaning that the cause of any nonperformance must be natural and not due to human intervention.

Based on these criteria, COVID-19 almost certainly qualifies as an "irresistible, superhuman cause." Although the precise origins of COVID-19 still remain uncertain, pandemics and viral diseases more generally are natural occurrences which almost no degree of care, diligence, or prudence can completely prevent. From the so-called Spanish flu a century ago, to the more recent outbreaks of SARS, avian flu, and swine flu, outbreaks of virulent diseases are tragic, yet inevitable, natural occurrences. Moreover, we have all seen first-hand the extreme care, diligence, and prudence exercised by governments and citizens alike in the fight against the COVID-19 pandemic. Indeed, the virus continues to spread despite our best collective efforts at human intervention. While some leaders and individuals choose to ignore the advice of medical experts, the vast majority appear to be exercising extreme caution and faithfully complying with medical guidelines relating to COVID-19.



Thus, COVID-19 very likely satisfies all of the criteria for an "irresistible, superhuman cause" that would excuse delay or nonperformance of a contract under Civil Code § 1511 because it is an extraordinary natural phenomenon whose spread even the utmost care and diligence could not prevent.

If your business is having difficulty in timely performing under a contract, Civil Code § 1511 may provide protection. BKCG's experienced attorneys can assist you with any contract disputes your business faces as a result of COVID-19.

Please contact Dan Kessler or Michael McConnell at dkessler@bkcglaw.com or mmcconnell@bkcglaw.com if you have any questions about any issues discussed in this article, or any other related matter.

California Courts Now Allow Wrongfully Terminated Employees To Recover Additional Money To Reimburse Them For Their Extra Tax Burden Caused By Receiving Future Lost Wages In A Lump Sum

In a wrongful termination lawsuit, one type of damages that employees seek is called "lost wages", meaning that employees attempt to recover the wages that they contend they would have received over time if their employer had not terminated them unlawfully. In many cases, employees seek to recover lost wages for several years post-termination, sometimes for as long as five years or more. This means that an employee who earned only $50,000 per year, for example, may attempt to recoup from her employer more than $250,000 for future lost wages.

Until recently, employees and employers often battled over whether the law permitted the employee to recover additional damages to compensate her for extra tax liability if she received a lump sum payment for future lost wages. Because the United States' income tax system is progressive, a taxpayer who earns $50,000 per year, for example, pays a substantially lower percentage of her income in income taxes (currently 22%) than a taxpayer who annually earns $250,000 (currently 35%). This means that if an employee who earned $50,000 per year received $250,000 in a lump sum after prevailing in her wrongful termination lawsuit, she would pay significantly more in income taxes than she otherwise would have paid if she had remained employed, earning only $50,000 a year over a five year period. For this reason, plaintiffs' lawyers have long argued that the law should permit employees to recover additional money from the employer to offset this additional tax burden. This concept is generally referred to as a "tax-adjusted loss calculation", or "tax neutralization".

Under California law, whether an employee could recover additional damages for their increased tax liability was an open question that no California appellate court had answered. Other courts in other states answered this question in differing ways and until recently, the only court in California, a federal court in the Central District, ruled in *Godinez v. Alta-Dena Certified Dairy, LLC* (CD Cal. 2016) 2016 WL 756460 that an employee could not recover additional money to offset the greater tax liability. However, none of these decisions from other states or federal district court were binding on California state courts, which allowed California trial judges to resolve this question in whatever manner he or she saw fit.

Unfortunately for California employers, this issue is open-ended no more. In the 2019 case, *Economy v. Sutter Bay East Hospitals* (2019) 31 Cal.App.5th 1147, a California appellate court upheld an award that included damages "to offset the increased tax burden on [the] plaintiff resulting from a lump sum award of damages as compared to what plaintiff would have owed in taxes if the earnings had been received sequentially each year." The California Supreme Court recently refused to review this decision, rendering it the law of the land in California.

Despite this law, employers may still try to persuade juries that they should not award employees damages for tax neutralization because those damages are too speculative (i.e., future tax brackets are uncertain, it is not possible to know what tax deductions an employee may later utilize, etc.). However, while an employer can try to convince a jury that it should not award a wrongfully terminated employee extra damages to offset the added tax liability, the law no longer allows a California employer to argue these types of damages are prohibited.

Please contact Josh Waldman at jwaldman@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

Preparing For A Post-COVID Workplace (continued from page 1)

• *Implementing Social Distancing practices at work:* Develop a concrete plan to maintain recommended social distancing including by limiting gatherings, using in-office videoconferencing, adjusting work schedules or considering staggered shifts, and continued telecommuting.

• *Update Employment policies as needed:* Review your employment policies with respect to sick leave, family and medical leave, employee leaves of absences, teleworking, vacation and paid time off to ensure both compliance with applicable law and practicability in the post-COVID-19 workplace, particularly with regard to the CARES Act.

• *Review Employee Leave Requests and Tracking Procedures.* You should also ensure that your employee leave policies clearly state the process by which your employees may request time off so that any grants or denials of such requests are made in accordance with applicable law and that any time off is tracked. Tracking time off is particularly important with respect to time off taken under the FFCRA, for which employers may seek refundable tax credits from the Internal Revenue Service.

• *Reporting Concerns and Investigating Complaints.* You should also make sure that your employees know how to file complaints, report concerns and request reasonable accommodations. The pandemic has created the potential for increased bias, discrimination and harassment based on national origin, race, ethnicity and disabilities. Be prepared to investigate and address such complaints and situations promptly and effectively.

• *Dealing with Requests for Continued Remote Work.* You may receive many requests for continued remote work arrangements after stay-at-home orders are lifted. Under the ADA and California law, a "qualified individual with a disability" is entitled to a reasonable accommodation that allows the employee to perform the essential functions of the job. While the definition of a qualified individual is broad, there is no automatic requirement that you must grant a remote work request once your workplace reopens. You should, however, pay close attention to particularly vulnerable employees, including pregnant women, elderly employees or employees with other preexisting health risks.

Your specific plans and needs will certainly depend upon your workspace, your employees and the nature of your business. BKCG can advise you on the prudent steps to take to ensure a healthy and successful return to some sense of normalcy.

Please contact Mike Oberbeck at moberbeck@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

The BKCG Bulletin is Published By:
Burkhalter Kessler Clement & George LLP

2020 Main Street
Suite 600
Irvine, CA 92614
Attn: Alton G. Burkhalter
949.975.7500
949.975.7501 fax

340 North Westlake Blvd.
Suite 110
Westlake Village, CA 91362
Attn: William C. George
805.373.1500
805.373.1503 fax

Please review our firm at www.bkcglaw.com

BKCG

Visit our web site at www.bkcglaw.com

Be sure to visit us on LinkedIn

Burkhalter Kessler Clement & George LLP (BKCG) advises and protects businesses and high net worth individuals through experienced litigation and transactional lawyers. Core practice areas include: Business litigation in state and federal courts, as well as FINRA, AAA and JAMS arbitration and mediation; Corporate, transactional and employment law documentation; and Estate Planning and Probate services through the Firm's State Bar certified Estate Planning Specialist.