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Proactive Through the Pause: Gearing up for Post Pandemic Litigation

In the next part our series on proactive and practical steps that small businesses can take to improve business operations and productivity, Yankwitt LLP attorneys turn their focus to the expected wave of contract-based litigation arising out of the COVID-19 shutdown. Taking the time to review existing agreements now from *both* offensive and defensive perspectives can position you to be well-prepared to bring and defend claims that may be brought when business returns to normal.

First, determine whether contracts provide for the following potential defenses to non-performance.

- **Force Majeure** – A *force majeure* provision can be triggered when unforeseen circumstances prevent a party from performing under the contract. Applicability depends on definition and scope of covered events. This typically excuses nonperformance, but it does *not* excuse nonpayment.
- **Frustration of Purpose** – A potential fallback defense if your contract does not include a *force majeure* provision or the provision does not cover the pandemic. Historically, this has been difficult to satisfy in New York as it requires a showing of an unforeseen change in circumstances that makes one party’s performance virtually worthless to the other party.
- **Impossibility** – Applies when the first two don’t, but it is jurisdiction-specific. Some states require a showing of strict impossibility while others follow UCC Section 2-615(a) to require commercial impracticability.

Second, consider whether the pandemic triggers a “material adverse event” provision in transactional, financing or employment/ownership contracts.

Third, review and comply with any notice requirements in default provisions or the like (to the extent they are not suspended by emergency orders and laws) so that you are well-positioned to act as soon as the court system reopens.

The attorneys at Yankwitt LLP are here to support you now and in the future. While we may not be sitting in our offices at this time, we are all working and at the ready to assist you. As always, you can reach us via email and on our office phone numbers.

Wishing everyone well!