

COVID-19: A Guide to Analyzing Risks for Marketers and Agencies

The Bottom Line

- *In this rapidly evolving and fluid situation caused by the COVID-19 pandemic, all parties at the table should keep in mind the following high level considerations when assessing their individual situation and how to proceed:*
 - *Consider how risk for all parties can be mitigated by adopting a practical and reasonable approach and negotiating fairly based on the situation as it stands today.*
 - *While this may necessitate longer discussions in the short term regarding certain payment or cancellation terms, renegotiation is likely a cheaper and less costly strategy than an adversarial strategy resulting in litigation or damage to a client or vendor relationship.*
 - *Consider whether your clients, agencies, production partners or vendors are repeat partners and will be in the future — and act reasonably to help them mitigate or re-allocate costs and stay in business going forward.*
 - *Think about the bigger picture, and consider approaches that attempt to help everyone involved rebound economically on the other side.*

The global effects of COVID-19 are being felt by businesses in every sector, and the worlds of marketing, communications, public relations and advertising are no different. In vast swaths of the United States, including critical markets such as New York, Los Angeles and Chicago, non-essential businesses have been ordered to close and millions of citizens told to stay home. Productions and events have been canceled or postponed. The NCAA and all professional sports leagues — normally a primary focus of marketing attention (and revenue) — have all been suspended. From marketers to agencies, production companies to celebrity talent, athletes to influencers and everyone in-between, the tidal wave of change has been felt by all.

For many, this change has brought uncertainty regarding important contracts. What were once clear obligations to provide or pay for services or benefits have been thrown into question by an unprecedented situation. Developments that have fundamentally changed the world around us are happening by the day and, sometimes, the hour. Companies and individuals have had to rapidly determine what is contractually expected of them and what they can expect from their clients, partners and vendors.

While every situation is unique, and each party at the table is differently situated, there are a few key considerations that are universally important.

Information Gathering

First and foremost, it is imperative to gather as much detail as possible regarding the circumstances related to the contracts at issue. For agencies and clients, this may mean confirming the agency's ability to provide services remotely and the client's ability and desire to continue receiving services at the same level as before. For events, productions and talent-related services, this means determining if the event or production can still occur as planned and, if not, if there is an acceptable alternative.

For everyone, it will be vital to determine:

1. Which funds have been paid out and to whom;
2. What work has already been performed; and
3. What third-party expenses have actually been incurred.

It is crucial that this information gathering occurs downstream as well. In order for the marketer and agency to have an informed discussion, the agency will need information from the production company and, in turn, the production company will need information from its vendors. Communication with insurance providers to determine whether any coverage can be expected will also be an essential element of having an informed discussion.

Contractual Requirements

Given the current unprecedented circumstances, it is of paramount importance to review and understand applicable contractual provisions.

Cancellation, Suspension and Termination Provisions

These clauses may already address the ability of a party to pause or cancel work at its own convenience and the effects of doing so.

Third-Party Suppliers

Certain provisions may already address whether a party is or is not responsible for the failure of third-party suppliers.

Force Majeure

Many, but not all, contracts include a “force majeure” provision. It is crucial to understand that each provision is drafted differently and the particulars of each contract and each situation must be understood to properly assess whether the force majeure provision is relevant and, if so, the consequences of invoking it by one side or the other.

Sequential Liability

Many contracts in the agency/advertiser space will include language providing that an agency is not responsible for paying a third party on behalf of the advertiser until payment has been received by the agency, and, at that time, the client is no longer liable. Until such time, the agency is not liable. While always an important clause, this may take on increased relevance where payments to third parties are at issue.

It is important to note that courts will not read a force majeure clause into a contract when none was included by the parties. However, beyond the ‘four corners’ of the contract, it will be important to also consider whether the contract performance may be excused or mitigated by legal concepts of ‘impossibility’ or ‘frustration,’ although these are typically high burdens to meet.

For arrangements covering the sale of goods, the Uniform Commercial Code may provide slightly more flexibility of performance standards where there are extenuating circumstances.

Communication

Once information has been gathered and contracts assessed, the parties will need to have an open and detailed evaluation of the schedule of costs involved for every potential scenario — from cancellation, to postponement, to proceeding with the production in a modified form, such as a virtual gathering instead of a live conference. Such costs may range from agency expenses, to talent commitments, production company costs and other vendor costs. Some may be sunk costs that are unrecoverable, while some may have been incurred on assets or services that can be re-purposed or re-used in the future.

Unless the contract in question is unusually specific about the allocation of costs, only after the full financial picture is visible can the parties align on the course forward, including how costs should be allocated amongst the parties.

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