

COVID-19 E-BOOK

Considerations for Healthcare In-House Counsel



A PUBLICATION OF



PHIFLOW

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Foreword

When the ball dropped over Times Square this past New Years', very few people could have predicted what was in store for 2020. We are all living in historic times where our "new normal" vocabularies consist of words and phrases such as *Outbreak. Pandemic. Covid-19. Coronavirus. Work From Home. Distance Learning. Paycheck Protection Program. Personal Protective Equipment. Surge. Ventilators. Capacity. Essential Workers. Furlough.*

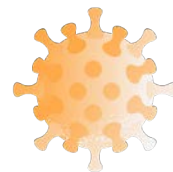
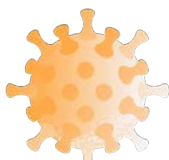
Healthcare legal departments have been challenged every step of the way as healthcare organizations across the United States see-saw between the surges.

The two articles included within this Covid-19 E-Book are great resources for healthcare in-house counsel looking for suggestions during this unfamiliar time. No one has ALL the answers - we certainly do not.

Best,

Greg Waldstreicher

CEO, PHIFLOW



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Post-Surge Vendor Contract Negotiations in Healthcare: Re-evaluating Key Contractual Provisions

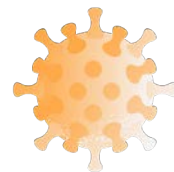
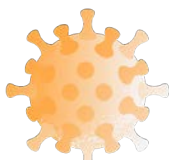
by Greg Waldstreicher



Introduction:

As Covid-19 related hospitalizations continue to fluctuate, healthcare counsel should prepare for the next wave by re-evaluating the terms of vendor contracts to adapt to the "new normal". In this article we examine some of those terms.

As healthcare counsel know, parties to any vendor contract want to retain flexibility for themselves while limiting it for their counter party. This is an inherent tension in any healthcare-vendor negotiation. The pandemic has shifted the calculus for the probability of facing a major disruption in operations. In contracting with vendors, hospitals now see a greater need to lock-in critical supplies and services, while coveting more freedom to reallocate non-essential financial and material resources on-the-fly. Vendors, conversely, want to hold hospitals to capital expenditure commitments and favorable payment terms, while leaving themselves flexibility to manage their own, suddenly-more-uncertain, supply chains and products. Those emerging priorities inform each of the following provisions.

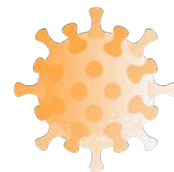
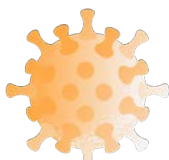


Term: Defined vs. Automatic Renewal vs. Evergreen

Hospitals and other facilities may want to reassess vendor contracts to determine which provide essential supplies and services. For those key agreements, healthcare legal departments may opt to seek fixed pricing and quantity/service guarantees that renew at the healthcare enterprise's option. Healthcare counsel will, in any event want terms that avoid scenarios in which they must renegotiate agreements for must-have supplies and services under duress or during a time of scarcity pricing. No healthcare provider that recently paid hundreds-of-times the normal price for PPE ever wants to face that situation again.

Termination Rights

Even while taking steps to protect critical agreements, healthcare legal departments may also require more flexibility to terminate agreements deemed non-essential. Of course, vendors will resist giving **termination for convenience** rights to hospitals, because those terms effectively force vendors to bear all the risk of a pandemic-level disruption by eliminating a basic claim for breach. Large medical providers may have the leverage to demand these rights in exchange for a modest price increase or an agreed upon prorated rate.

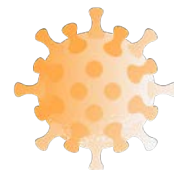
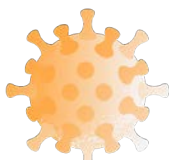


Force Majeure

On a related note, healthcare counsel and outside counsel nationwide have taken renewed interest in [force majeure](#) or "Act of God" contract clauses, which previously received little-to-no attention in a negotiation. These clauses generally give one or both parties a right to terminate in the event of an unexpected, cataclysmic event beyond anyone's control that renders performance impossible. Should vendor contracts identify a "pandemic" as one such event? Pre-coronavirus, many contract parties might have assumed so. However, now that they have lived through the strain of an outbreak, healthcare legal departments may prefer to exclude "pandemic" from the defined scope of a force majeure excusing vendor performance, especially in essential supply and service agreements.

Business Continuity Provisions

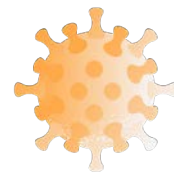
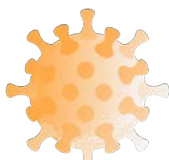
Healthcare legal departments may also want to seek terms that designate certain events or contingencies as ones during which special contracting rights apply. Think of these terms as a potential complement or stopgap alternative to assorted termination rights; covenants stipulating that mission-critical contracts



will remain in effect and that vendors will continue to perform under them during times of an existential threat to the healthcare enterprise. Counsel might also strengthen these provisions through stipulated waivers of the hospital's payment defaults when crisis conditions exist, and through specific performance and/or liquidated damages clauses inuring to the hospital's benefit.

Just in Time Critical Supply & Inventory Requirements

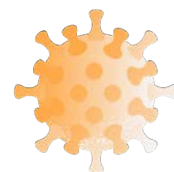
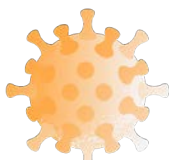
Now that healthcare facilities have a newfound appreciation for their most critical supply chains, they could seek covenants from vendors that guarantee minimum supply levels according to benchmarks tailored to demand (such as springing quantity adjustments that are triggered by an increase in patient traffic). Providers also now appreciate that although surplus supply comes in handy at the peak of a crisis, it becomes a burden when demand wanes. To address the potential for dramatic fluctuations in supply needs, hospitals and other medical providers may want to consider seeking put-back rights to return unused or expired supplies. Finally, providers also now appreciate the potentially extreme infection risks



of a novel virus, which may entail seeking more detailed and iron clad vendor covenants on sterilization and re-sterilization of goods and equipment.

Support/IT Service Level Agreements (SLAs)

In the same vein, hospital legal departments may also want to give added scrutiny to SLAs to ensure the continued functioning of critical systems during a crisis. The pandemic has forced virtually all businesses to shift to work-from-home and other remote solutions for which many were not adequately prepared. To protect against disruptions owing to this kind of shift in how work gets done, healthcare counsel may, for instance, seek vendor representations and warranties that backups and redundancies are in place to ensure uninterrupted support and service to the provider under a range of crisis scenarios. They may enhance these terms with default waivers and stipulated remedies.

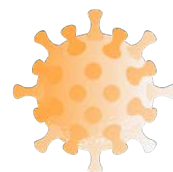
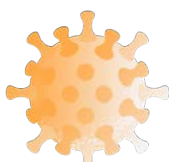


Payment Terms

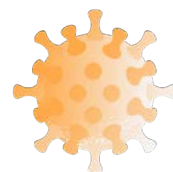
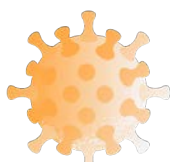
Another lesson learned: a pandemic might cause a surge for one particular department (in this case the Emergency Room and Intensive Care Unit departments), but on the whole, it suppresses demand for medical services, particularly elective procedures that ordinarily represent a key revenue generator for healthcare facilities. Paradoxically, many hospitals have experienced cash crunches in the middle of a health crisis, which is an outcome that administrators might not have foreseen, but will likely never forget. Legal departments that want to avoid any future instance of negotiating payment extensions under the duress of a pandemic can do so by seeking longer-duration or more flexible payment terms, springing payment default waivers, and strong continuity of business covenants.

Dispute Resolution

Finally, many healthcare legal departments now appreciate the daunting challenges of resolving a contractual dispute in the midst of a pandemic. Private dispute resolution mechanisms, like mediation and arbitration, offer parties more flexibility than state and



federal litigation alternatives. The majority of vendor contracts already rely on mandatory ADR by default, but post-pandemic, healthcare lawyers will likely press for more-detailed provisions in arbitration/mediation clauses that speed-up the procedural timeline of any litigation, expressly limit and streamline discovery, and consent to remote work-friendly processes.



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From the Operating Room Table to the Kitchen Table – Can Healthcare Organizations Successfully Adapt to Working from Home? By Robert Porr

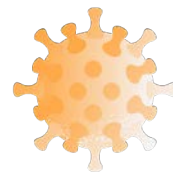
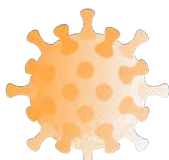


Introduction:

The coronavirus pandemic has significantly fueled the adoption of telecommuting as thousands of organizations have transitioned to remote working to ensure social distancing. However, while the shift is essential, it may be inapplicable for essential workers, especially healthcare personnel. Can employees work from other locations besides their healthcare facilities? If yes, can the move ensure comfortable working environments and adequate services? In this article, we address work-from-home issues for healthcare organizations.

Clinical and Non-clinical Staff- Work from Home vs. Work from Anywhere?

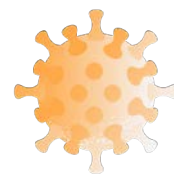
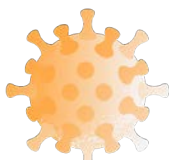
Since the beginning of the coronavirus pandemic, health officials have sensitized the population on the need for social distancing measures as part of curbing the spread. The [non-clinical](#) workforce, especially those without patient facing responsibilities, can work with a secure connection from anywhere. Staff with sufficient internet access, direct support from IT consultants, secure software, and a home office, provides the ingredients to enable remote work.



Physician consults with patients online has grown thanks to the adoption of [telemedicine](#). With the right technical support, reimbursement from Medicare and agreements with insurance providers, primary care providers can now seamlessly deliver consultations to patients through telemedicine.

However, all clinical and non-clinical employees need to embrace the risks that come with the use of technology. Increasing security threats are a cause for concern for all stakeholders, primarily due to handling of protected health information (PHI). Hospitals need to train staff to look out for threats such as email phishing and ransomware. Organizations also stand to benefit from utilizing cloud-based software for accessibility and secure data storage. There is also a need to encourage personnel to:

- Continually update their software as soon as new updates are released.
- Only use secure networks and VPNs to log into hospital systems including electronic health records (EHRs).
- Use hospital devices provided and/or limit the use of personal devices for work.

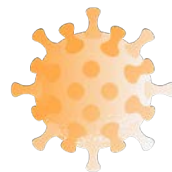
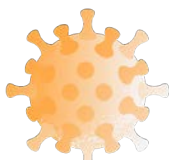


- Use multi-factor authentication for any personal and business logins.
- Use apps and software recommended by the in-house or recognized IT team.
- Request voice authentication for financial transactions and information requests.
- Verify all email addresses and webpages before responding to emails.

Zoom and Other Video Conferencing Technologies

[Zoom for healthcare video calls](#) are helping physicians, nurses, and other clinical service providers meet with each other and patients on video calls. Fortunately, for both providers and patients, virtual meetings help curb the spread of coronavirus, lower transport costs, and limit crowding inside hospitals.

However, health organizations should always keep Health Insurance Portability and Accountability Act (HIPAA) requirements front and center.

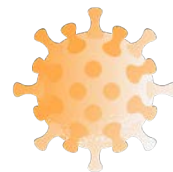
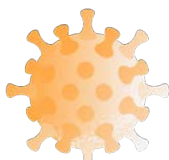


Plans for Re-Opening Administrative Offices

Health experts are easing the restrictions on provider-patient contact, especially for non-COVID related treatments and procedures. It is therefore essential for health organizations to devise strategic ways to reopen without the risk of infection. Fortunately, the [Centers for Medicare & Medicaid Services](#) (CMS) published a guide in April to help facilities plan their reopening. First, facilities should seek compliance with relevant regulations provided both at the national and state government levels. The guides provide adequate advice on stocking up on personal protective equipment (PPE), staffing, cleaning, testing, and quarantine for exposed staff and patients.

It is likely that over the next few months facilities and services will open incrementally to prevent crowding, and also to identify problems early and quickly implement solutions. Administrative staff may continue to work remotely, while physicians may trade some online consultations for physical examinations and schedule elective procedures.

However, while facilities can reopen, administrators need to consider the [legal risks](#) and exposure to litigation. It's essential

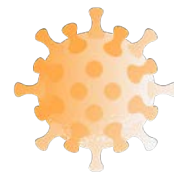
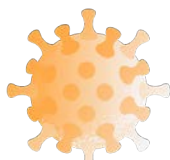


to contact malpractice insurers to ensure that you and your physicians are shielded from lawsuits related to the coronavirus pandemic.

Changes Needed to Employee Handbooks

Employers and managers will need to update [employee handbooks](#) to tackle any possible exposures to COVID-19 and control measures to prevent spread if positive for infection. The handbooks should include new policies such as:

- Encouraging employees who are sick to stay at home and communicate immediately. Besides remaining in quarantine, employees also have a responsibility to stay home until a qualified physician certifies their health. It's essential for workers with friends and family at home that have coronavirus to communicate with their supervisors.
- Performing daily temperature checks at work, wearing masks, and keeping distance in the workplace. Employers should also encourage workers to sanitize regularly.

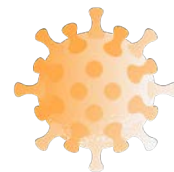
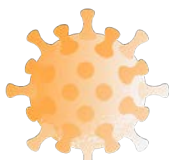


- Policies that eliminate hazards for example, sharing equipment and utensils are potential hazards.
- Policies that encourage cybersecurity through the use of approved devices, secure internet connections, software, and security procedures.

Staying Prepared for The Next Wave

While the natural desire is to return to the pre-coronavirus lifestyle, it's essential to acknowledge the new normal and prepare for the next wave. The remote workforce will remain relevant post-crisis because it could safely protect them from highly contaminated populations and enable continued productive work, particularly during a surge. There are also potential cost savings due to smaller office spaces and supply requirements. Clearly, not all employees can work remotely, however consider the possibility of creating a hybrid system that encourages flexibility for example; single parents with children.

Robust surveillance systems are also essential to prepare for the next wave of infections. As work and transport reopen, more people are bound to interact with coronavirus. Can your current systems contact trace quickly?



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