

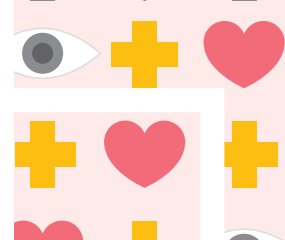
Quick Guide for Staying in Business During the COVID-19 Virus Outbreak

Introduction

The recent outbreak of the COVID-19 virus is now a global health emergency and has caused a massive impact on all aspects of our society. On 7 February 2020, the Ministry of Health of Singapore raised the risk assessment under the Disease Outbreak Response System Condition (“DORSCON”) from Yellow to Orange. As the crisis develops, it places an increasingly heavy strain on businesses, giving rise to significant legal and business issues and challenges.

How best should your business prepare for the disruption? What are the potential legal risks which may arise as a result of such disruption?

Legal and business considerations



M&A

Typical sale and purchase agreements contain the term “material adverse effect” or “material adverse change” (MAC). This may be set out as a transaction closing condition, or may feature as a qualification of certain representations and warranties or even an event of default. As MAC clauses may vary for different contracts, the question of whether business interruptions caused by the COVID-19 virus will constitute a material adverse change will depend on how the term is defined in the relevant agreement. More often than not, it is drafted rather extensively and may be triggered by a material adverse effect in a party’s overall financial condition, its business and/or prospects. If a purchaser wishes to walk away unilaterally from a deal by relying on the MAC clause, it would be important to carefully review the definition to assess whether the MAC clause will apply. If it transpires that the MAC does not kick in, then the purchaser may end up being liable for breach of contract by wrongfully invoking the MAC clause.

Business Contract Management

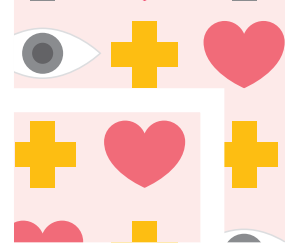
Existing contracts which are core to the business should be reviewed with a focus on amendment, renewal and termination rights. There may be situations where your business or your counterparty may find that the disruption to supply chain has, for example, prevented the fulfilment of legal obligations under certain contracts. If so, there may be a need to examine if there are any rights of termination or whether there is an ability to invoke the force majeure provisions. The force majeure clauses in contracts may be drafted in a general manner and, in the event of a dispute, will be interpreted based on the governing law of the contract.

If your counterparty is the one who is unable to fulfil the contract terms, do note that you should try to find ways to mitigate your loss. In the above case, for example, you should try to source for an alternate party to ensure continuity in the supply chain. In the case of any dispute, courts will generally expect the complainant to take steps to reduce the damages they may suffer as a consequence of the counterparty’s breach.

When negotiating new contracts, you may wish to assess how the COVID-19 virus may impact the parties’ obligations, and include the relevant language to deal with this with different scenarios in mind. For example, if banks or foreign exchange markets close unexpectedly, this may have an impact on the calculation of “business days” and performance timelines in contracts or finance documents.



Legal and business considerations



Management of Employees

Employers have a duty under the law to provide a safe workplace. Thus, employers have to implement measures to take reasonable care of your employees. The Singapore statute, Workplace Safety and Health Act, requires employers to implement, as far, as reasonably practicable, necessary measures to ensure the safety and health of employees at work and breach of the provisions in the Act could constitute a criminal offence.

Workplace measures

In this regard, the tripartite partners – the Ministry of Manpower, the National Trades Union Congress and the Singapore National Employers Federation have helpfully issued a general advisory to employers regarding the appropriate workplace measures that employers should adopt to continue running their operations while minimising the risks of community spread of the COVID-19 virus.

The recommended measures include the following:

- (i) Business Continuity Plans (“BCPs”): Employers should be prepared with BCPs and may refer to the Guide on Business Continuity Planning issued by Enterprise Singapore on 7 February 2020 in order to develop such BCPs.
- (ii) Split team arrangements: Physical segregation of teams of employees to avoid the risk of infection between teams.
- (iii) Flexible work arrangements: Where backend staff are not required to be in office, employers are encouraged to allow them to work from home or to implement split team arrangements.
- (iv) Temperature screening: Depending on the nature of the business and environment, employers may consider introducing measure to control and log access of visitors / customers to their workplaces and implement temperature screening where necessary.
- (v) Cancellation or deferment of non-essential large-scale events: If necessary, implementing precautions such as temperature screening and maintaining a list of participants’ contact details.

Thus, employers should step up the preparation and implementation of BCPs and implement necessary measures to fulfil your duties to ensure the safety and health of your employees at work.

Business travel

Employers may become liable for damages suffered by employees in the course of their work duties. Before you send employees on business trips to countries with a high number of reported cases of COVID-19 virus infections, you should undertake an assessment of the evolving situation and the potential risks involved. An employee who is directed by an employer to travel to high risk areas and then subsequently contracts the virus may have a cause of action against his employer.

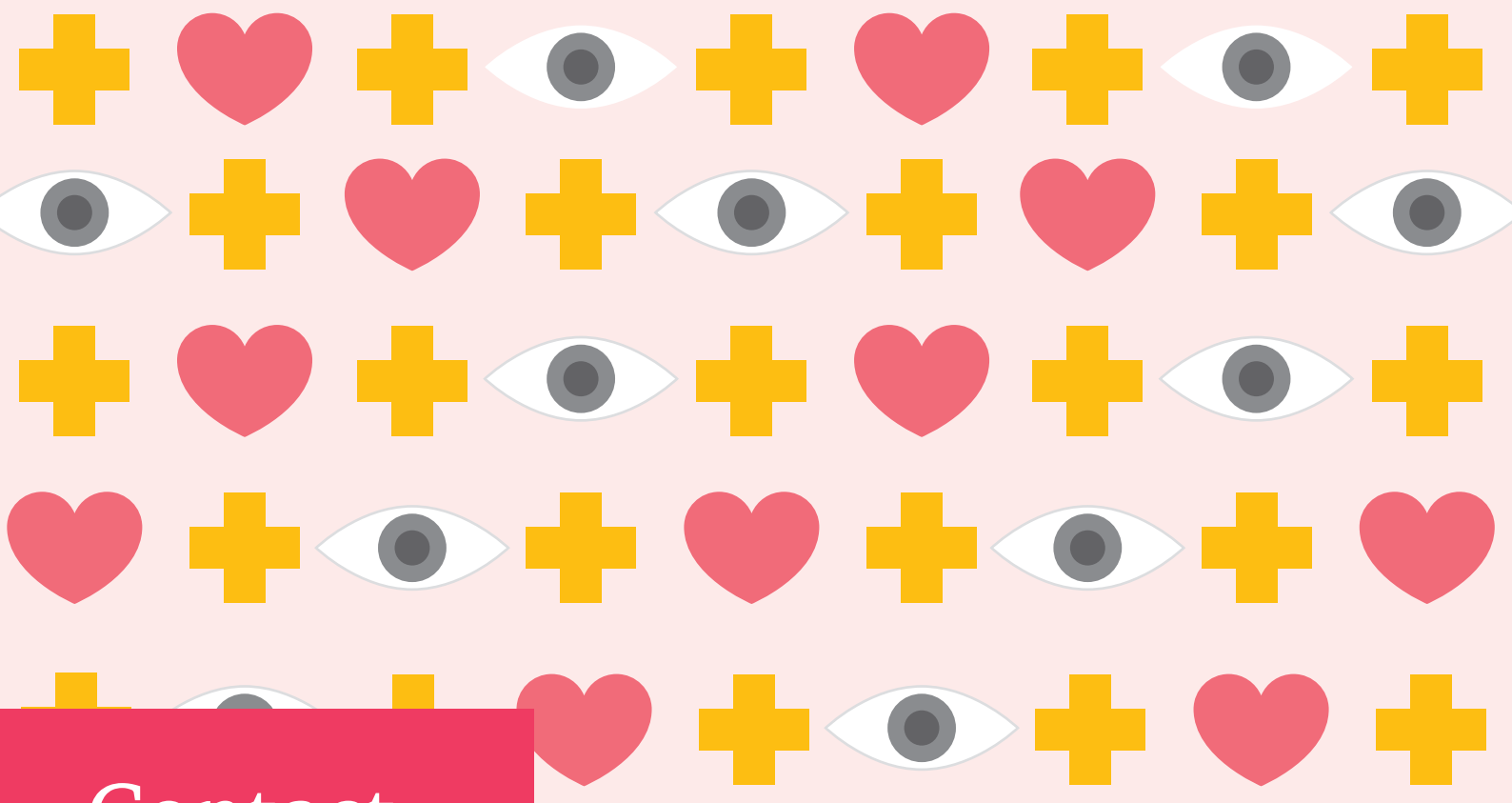
Thus, it would be prudent for you to analyse the specific need to send an employee to the area, any negative travel advisories issued in relation to the area, the details of possible precaution measures to be adopted for the trip, and possibly also whether there are means of evacuating the employee in the event of an emergency.

Some employers may have taken out insurance covering the risk of liability for breach of employer’s duty of care. It may be helpful to check the insurance policy and ascertain if the policy covers damages suffered by, or death of, an employee from COVID-19 virus infection contracted during the business trip.

Takeway

Amidst the handling of the COVID-19 virus outbreak, it is advisable for businesses to react swiftly and be proactive in setting up an action plan to address potential issues relating to legal risks and employee management.





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