

## Coronavirus Litigation Issues for the Energy Industry

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### **I. Introduction**

The coronavirus and related damage to the world economy will pose numerous challenges for the energy industry. This article focuses on the potential effects to litigation that will likely arise in this industry and how best to prepare.

### **II. Prepare and Protect**

These times are unpredictable. You cannot control the economy or the actions of others, but you can take steps to protect your company by preserving every legal tool possible. In dealing with coronavirus, this includes paying attention to notice provisions, especially in relation to *force majeure* (and similar provisions) and insurance claims. Reviewing such contract provisions is critical to ensure that you know how soon to give notice to insurers or counter parties.

Notice periods of 5 or 10 days are common, and failure to provide the requisite notice may prevent you from taking advantage of your rightful protections.

Collective bargaining agreements can contain notice requirements as well. If your workforce is unionized, you must understand your obligations related to notice and work changes.

Similarly, it is critical to work with your regulatory counsel to determine what must be disclosed under SEC or other financial disclosure regulations. Financial impacts from the virus may need to be reported. This can prevent litigation down the road.

### **III. Understand Force Majeure Rights**

Force majeure and similar provisions are coming under increased focus due to coronavirus. It is imperative to review such provisions to completely understand your rights and obligations.

Pay attention to wording such as “prevent,” “hinder,” “impede,” and “delay.” Many jurisdictions focus on the parties’ choice of words to determine the parties’ rights, and a specific word can impact the interpretation of force majeure provisions. “Prevent” can mean something different than “impede.” Look for words such as “epidemic” or “pandemic,” and be aware of whether a list of force majeure events is an open-ended or exclusive list.

Contracts should also be reviewed to see if changes in government regulation are included in force majeure or similar clauses. Understanding your force majeure rights and obligations may be especially important in evaluating any offtake agreements you have.

While force majeure interpretation tends to focus on contract wording, doctrines such as “impossibility,” “impracticability,” or “frustration” can differ between states and countries. For example, English, Chinese, and French Law each have unique interpretations of these concepts. Thus, it is vital to understand how different governing laws impact your rights.

#### **IV. Bankruptcy Litigation**

There may be a rash of bankruptcies resulting from the coronavirus crisis. To prepare for possible bankruptcy litigation, you must protect yourself as a potential creditor. Be vigilant in monitoring your market space and performance of vendors. Some vendor contracts require notice when a vendor can no longer cover its debts or is otherwise insolvent. But do not assume that vendors will provide such notice. Instead, protect yourself by dutifully monitoring bankruptcy filings. There are monitoring services and governmental websites that can help. Your outside counsel may also provide assistance.

Bankruptcies may be more prevalent in the alternative energy sector. For example, many players in the wind energy space took advantage of the four-year safe harbor beginning in 2016 under the Production Tax Credit subsidy. In 2020, those safe harbors are beginning to close, and these companies must start showing profit—a difficult task in the current market. If Congress does not extend these safe harbors, then the wind segment may suffer. Government funding, tax credits, and other support for alternative energy resources may dry up as governments are swamped with corona-related spending. However, government action can be difficult to predict. A new US presidential administration and new Congress later this year could end up increasing funding for alternative energy.

#### **V. Prepare for Delay**

Social distancing rules have forced courts to delay many cases, trials, and hearings. Once courts open again, there may be a flurry of activity just to get caught up. Exactly what new litigation will arise due to the coronavirus is not yet known, but there could be a rush of such cases. As a result, courts may be overloaded for the foreseeable future. If you are considering litigating a particular matter, keep in mind that it could take much longer than usual to reach a resolution. Assess whether this fits your strategy and whether less aggressive measures might obtain a quicker resolution. While litigation may still be the best option, it is important to bear in mind at the outset that it may progress more slowly than usual.

#### **VI. Employee Issues**

Employment matters will be ripe for litigation in this economic downturn. Some sectors will have layoffs or wage reductions. There may be litigation relating to the transmission of the coronavirus filed by infected employees claiming their employer did not implement remote working soon enough or otherwise maintained an unsafe workplace.

Regarding unsafe workplace claims, employers are subject to the requirements of Section 5(a) of the Occupational Safety and Health Act (OSHA). Employers must provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” 29 U.S.C. § 654(a). Avoiding and prevailing in unsafe workplace litigation could depend

on your company's compliance with OSHA, guidance from the Centers of Disease Control (CDC), applicable laws, or regulatory guidance.

It is important to ensure that you comply with local or state paid sick leave laws and the Family and Medical Leave Act of 1993 (FMLA). Employers should document their safety efforts, including protective measures taken within the workplace and efforts to seek guidance from healthcare professionals. Such efforts may include postponing all non-essential travel for work-related matters.

Unfortunately, termination of employees or wage reductions will likely be a side effect of the coronavirus for some employers. Carefully consider all options short of termination as during any litigation arising from terminations, juries are expected to be even less sympathetic than usual to employers. Thus, terminations and wage reductions should always be undertaken after understanding the applicable work contracts, employment manuals, and applicable laws.

## **VII. Conclusion**

Every company should protect itself, especially in unpredictable times like these. The uncertain nature of litigation is a risk to all parties involved. The onset of the coronavirus and resulting government regulations make litigation more volatile and so it may benefit all parties to keep this in mind and try to find other resolutions. Inevitably there are times when litigation is unavoidable, and it is therefore critical to ensure to abide by notice provisions, monitor bankruptcies, and document all efforts to protect employees and comply with applicable laws so that you can prepare the best defense possible.