



MANAGEMENT ADVISORY

Pandemic Risks

Emergency management is the process of preparing for, responding to, and recovering from an emergency situation and the subsequent business disruption. Recent concerns over a possible viral pandemic should remind professional service firms to update their plans to address possible interruptions related to mass illnesses. All firms should reassess their abilities to meet contractual obligations and business continuity requirements. A massive disruption in the operations of a firm caused by a pandemic—or a government response to a pandemic—could result in performance or business failures. Even in robust business cycles, preparation enhances a company’s image and credibility with employees, clients, colleagues, and the community. In addition, it may reduce property and business insurance premiums.

The Risks

Any firm can experience temporary difficulties completing projects if one or several key personnel are sickened at the same time by the seasonal flu or another “bug.” Pandemics, however, present a more serious situation due to the number of people infected and the likely government response. A pandemic could last for months, and perhaps as much as 75% of the workforce could be absent from work due to illness, prevented from working at their normal place of employment by government restrictions or quarantines, or rendered essentially unproductive because

of childcare obligations, communication deficiencies, or transportation difficulties.

Professional service firms need to prepare for the interruption of day-to-day business activities that could result from the inability of employees to report to work. Firms should take special precautions to protect employees, but they must also keep in mind that work may be interrupted even if none of its own staff gets sick. An interruption caused by mass illness or governmental action to control the spread of illness could cause a loss of productivity and critical delays on projects due to diminished staffing. These delays may result in the violation of the firm’s contractual obligations to its clients.

Many situations in which delays in the performance of professional services lead to harm can be attributed to negligence and therefore are subject to professional liability insurance coverage. However, a poor firm management decision, such as the failure to plan for employee absence or to mitigate the impact of illness, is not one of those circumstances.

Contractual Strategies

Examine current contracts to determine milestones, time constraints, and any events that could lengthen performance time. While the inability of a firm’s staff to carry out duties in a timely manner because of illness

is not usually considered a “force majeure,” it could be so defined by contract. Working with legal counsel will provide firms with a plan for addressing delays on existing projects and crafting provisions specific to new projects.

Government intervention in the form of transportation restrictions or quarantines would probably be considered a valid purpose for modifying contractual performance obligations. However, such interference might be seen as something that could have been anticipated. Clients might recognize that professional services could be performed by employees working at home or in remote offices, or assisted by subcontracted firms in non-restricted areas. Firms might want to include an “Act of Government” provision in contracts to prevent such disputes.

Even if government restrictions are not enacted, pronouncement of a pandemic could delay performance of services. Contracts should state that firms are not responsible for strict deadlines when a declared pandemic creates an impossibility of performance. It may be possible that a declaration of a pandemic could be recognized as a deadline-delaying event under a “force majeure” provision.

Firms also need to review and understand subcontracts. Prime design professionals and any other firms relying on and taking responsibility for others need to recognize the potential impact of mass illness on their supply chain. It does little good for a prime design professional to structure methods to achieve timely performance of its responsibilities if it remains vicariously liable for the inability of consultants to perform in an adequate manner.

Business Management Strategies

Basic to any emergency planning is a procedure that specifies under what circumstances a facility will close, who will make the decision, how the decision is communicated, and whether employees are compensated. Updating the plan includes reviewing company policies on preventative efforts, including how off-site productivity can be achieved. This distancing of employees is vital during epidemics. Firms also need to determine what imperative processes must be maintained at a central location and how those processes can be carried out.

Employee illness is only one cause of reduced productivity. Employees might have to be absent due to family illness or simply because of the closure of schools or childcare facilities. It is unlikely that these disruptions would be seen as unanticipated or uncontrollable. Clients and courts might examine whether contingency plans were possible and management actions reasonable.

While developing business continuity and crisis management plans, it is essential that insurance coverage is obtained. In assessing coverages, explore business interruption insurance, extra expense coverage for temporary relocation, and extended indemnity to allow extra time to get a firm back up to pre-emergency levels.

Recognize the Consequences of Disruptions in Construction

Clients should be made aware that a disruption in the construction workforce could severely affect the timing and quality of projects and could have a significant impact on the ability of design firms to provide construction phase services. While a pandemic might be recognized as a natural phenomenon, those responsible for construction (as with design service providers) probably would not succeed with the argument that the pandemic’s effects could not have been anticipated or avoided by the exercise of due care or foresight. Thus, contractors could miss meeting contractual obligations and hinder construction, delaying the services involved in office or field construction phase services. This possibility of workflow disruptions and increased costs needs to be addressed by firms in practice management procedures and contracts.

Conclusion

A pandemic may challenge the business health of professional service firms. Design professionals need to monitor developing situations and assess whether they can survive a significant disruption in operations. Keeping employees and the firm running is essential to meeting contractual commitments and keeping clients satisfied.

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*Victor Insurance Managers Inc. (fka Victor O. Schinnerer & Company, Inc.) recently filed in all U.S. jurisdictions to re-brand and change its name. This name change has become effective in almost all states while still pending in several states, which we expect will complete their approval processes shortly. In CA, dba Victor Insurance Services | CA Ins. Lic. # 0156109

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