Five Legal Questions About Resuming In-Person Events as COVID-19 Continues

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By: Jeffrey S. Tenenbaum

As the coronavirus pandemic drags on, questions about if, when, and how to bring back in-person events are top of mind for most associations. Here are answers to five key questions about mitigating legal liability when you resume your face-to-face meetings.

As associations begin to contemplate the return of in-person meetings and conferences—while they continue to hold and plan virtual ones—there is no shortage of legal considerations to take into account. These five legal questions in particular are likely to be on association professionals' minds about in-person meetings at this point in the ongoing COVID-19 crisis.

What can our association do to mitigate our liability risk in connection with future in-person meetings, especially if one or more of our attendees or employees contract the coronavirus at our meeting?

In general, for this type of liability, a negligence standard applies. In other words, the primary question is whether the association has met the prevailing standard of care for providing a reasonably safe and healthy environment for its attendees. That standard of care is evolving. In this context, it generally will be determined based on a combination of applicable state and local government mandates, nonbinding but compelling federal guidance (such as the Centers for Disease Control and Prevention's **guidance for large gatherings**), and industry best practices.

If your association can demonstrate that it met all or most of these standards for health and safety for factors that were within your control—and that you did all you reasonably could to ensure that the event venue did the same—then it would be difficult for an attendee who contracted COVID-19 at the event to hold the association liable for negligence.

Note that while the venue certainly has a shared responsibility for providing a safe and healthy environment for attendees, venues have been pushing back on recent association attempts to contractually obligate them to assume these broad responsibilities. However, you should seek to get the venue to agree in writing to undertake—and pay for—a specific, appropriate list of health and safety measures. This will help to protect your attendees and mitigate your association's negligence liability risk.

Should our association require all attendees to agree to a liability release and waiver, assuming the risk of attendance and agreeing not to hold our organization liable if they contract the virus at the event?

It cannot hurt from a legal risk management perspective, and may well help, to require such waivers. But waivers are regularly challenged and nullified by courts for a variety of reasons, and you cannot rely on them as a complete liability shield. Most courts, for example, will not enforce a waiver if it finds that the plaintiff was harmed by gross negligence.

If you do use attendee waivers, consider adding a provision whereby attendees agree to take specific precautions while at the event—such as wearing a mask at all times in public areas, engaging in appropriate social distancing, and avoiding risky environments like crowded bars—and whereby they also agree not to attend if they are ill or had recent exposure to a COVID-19 case. It goes without saying, but waivers are no substitute for the association and the event venue undertaking the necessary health and safety measures.

If someone makes a claim against our association in connection with our upcoming in-person meetings, will our insurance coverage protect us?

If an attendee or employee makes a claim that they contracted the virus at your event due to your association's negligence, your commercial general liability and workers' compensation insurance policies may, at a minimum, provide a legal defense. Earlier standard versions of these polices did not contain exclusions for communicable-disease-related claims, but some newly issued commercial general liability policies have contained non-negotiable endorsements excluding coverage for such claims. Expect that trend to continue. Whether the insurance carriers would cover the cost of judgments or settlements is a different story, in part because it is difficult to prove causation. Before the meeting, if possible, try to get the venue to name your association as an additional insured on its commercial general liability insurance policy. Coverage is policy-specific, however, so it is prudent to ask your insurance broker about your scope of coverage in advance.

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If we decide to go ahead with in-person meetings in the near future, do we need to make any changes to our existing meeting contracts to mitigate our legal and financial risks?

Yes, if you are going to proceed with in-person events, it is critical to amend your meeting contracts to ensure compliance with social-distancing guidelines and mandates, as well as to make proportionate reductions in sleeping room and food and beverage minimums, attrition penalties, and cancellation penalties. Significant reductions in the number of attendees will be necessary to accommodate social-distancing requirements—unless, of course, the venue can provide the needed additional meeting space (at no extra charge).

Event venues must comply with social-distancing requirements, whether coming from state and local government mandates or federal guidance. In virtually every instance, this will require amendments to existing contracts. If the venue is unable or unwilling to make the necessary accommodations, it could arguably be in "anticipatory breach of contract," providing an opportunity for the association to be released from its contractual obligations. Make sure that you understand the specific state and local mandates applicable to your meeting when you begin these conversations with the venue.

How has the strategy and analysis for associations cancelling or postponing in-person meetings changed since the early days of the pandemic?

Meeting cancellation challenges for associations do not appear to be going away anytime soon. The primary strategy of utilizing the force majeure clauses in meeting contracts to obtain penalty-free cancellations is still in play, and for many associations this remains the desired outcome.

Hotels and convention centers generally will undertake the force majeure analysis as of the date of cancellation, effectively locking in place the conditions that exist on that date. Therefore, you should provide written notice—detailing all of the reasons supporting the force majeure termination—as close to the event dates as possible (ideally not more than 60 to 90 days out). Factors such as the specific language of the force majeure clause, state and local governmental restrictions on large gatherings in the meeting's location, federal government admonitions against large gatherings, and the inability (not just unwillingness) of a large number of your prospective attendees to travel to the meeting are important, but the *timing* of the cancellation remains by far the most critical factor.

With most states, cities, and counties now engaged in a phased reopening of their economies—and some pulling back from reopening because of a surge in cases this summer—it has become more difficult to gauge when larger association meetings will be permitted in most places. For meetings that are further out, it remains a viable strategy to negotiate with the venue to cancel now and then hold a future meeting at the property in exchange for a reduction or elimination of cancellation penalties. If you do this, try to avoid paying deposits, especially large ones, up front.

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Jeffrey S. Tenenbaum

Jeffrey S. Tenenbaum is managing partner at the Tenenbaum Law Group PLLC in Washington, DC.

Email (mailto:jtenenbaum@TenenbaumLegal.com)

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