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Top 10 Legal COVID-19 Q&As

Evolving issues for association events

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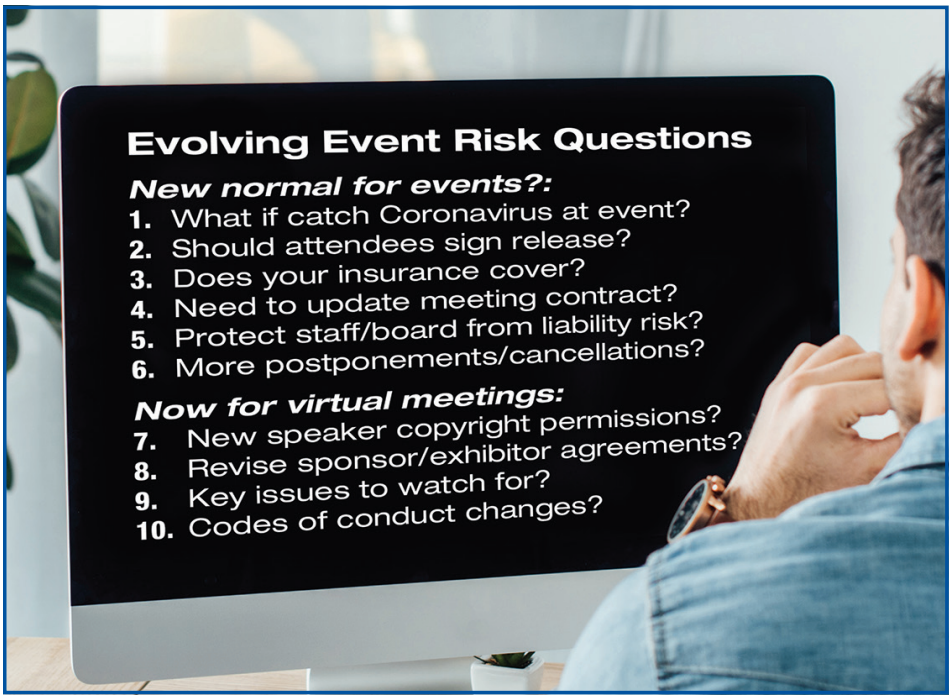

As association leaders begin to contemplate and plan in-person meetings and conferences -- at the same time that they continue to hold and plan virtual ones -- there is no shortage of legal considerations. While by no means exhaustive, here are high-level answers to 10 of the top legal questions you should be asking about both in-person and virtual meetings in the evolving COVID-19 era.

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

The general standard for such liability in connection with a typical association meeting is one of negligence. In other words, presuming the association owes a duty to provide a reasonably safe and healthy environment for its attendees, the primary question is whether the association has met the prevailing "standard of care" for doing so that exists at the time. That standard of care is evolving.

In this context, it generally will be determined by a combination of applicable state and local government mandates, (non-binding but compelling) federal guidance (such as the Centers for Disease Control and Prevention's (CDC) comprehensive June 12, 2020 guidance for large gatherings), and industry best practices. If association leaders can demonstrate that they largely met all or most of these standards for health and safety that were within their control -- and they did all that they reasonably could to ensure that the event venue (e.g., hotel) did the same -- then if an attendee contracts the novel coronavirus at the event (and can prove it was contracted at the event), it would be difficult for that attendee 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 added responsibilities -- such as those articulated in the June 12 CDC guidance -- due primarily to the costs and burdens of doing so.

It is important to ensure that the venue agrees in writing to undertake -- and pay for -- a specific, appropriate list of health and safety measures, even if it is just in an email exchange. This will help to safeguard your attendees' health and safety and help to mitigate your association's negligence liability risk.

2. Should our association require all attendees to agree to a liability release and waiver as a condition of attendance, assuming the risk of attendance and agreeing not to hold our association liable if the attendee contracts the novel coronavirus at the event?

If an association's leaders believe the organization can get most of its prospective attendees to agree to such a waiver, it cannot hurt from a legal risk management perspective. It might well help to require such waivers. That being said, waivers are regularly challenged and nullified by courts for a variety of reasons. They can virtually never be viewed as a complete liability shield and should never be relied on as such. If the association does end up utilizing attendee waivers, consider adding a provision to the form whereby attendees affirmatively agree to engage in certain health-and-safety-beneficial conduct while attending the event (e.g., wearing a mask at all times in public areas, engaging in appropriate social distancing, not venturing off-site to risky environments (e.g., crowded bars), and not attending the event if ill).

Waivers are no substitute for the association -- and the event venues -- undertaking the necessary health and safety measures described above.

3. In the event of a claim against our association in connection with our upcoming

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in-person meetings, will our insurance coverage protect us?

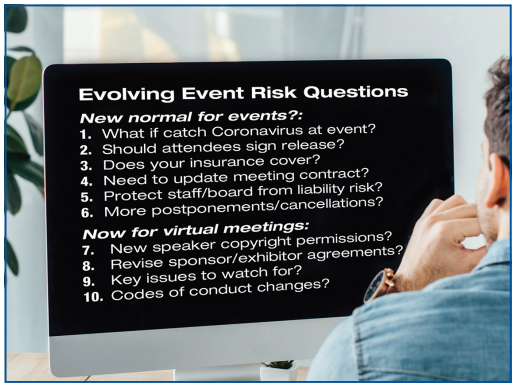
In the event that your association is subject to a claim that one of your attendees or employees contracted the novel coronavirus at your meeting and that your association was negligent in its health and safety measures -- causing them to contract the virus at your event -- the association's commercial general liability insurance and workers' compensation insurance policies should, at a minimum, provide a legal defense. Neither of those policies contain exclusions for communicable disease-related claims (as of yet).

Whether the insurance carriers would cover the cost of judgments or settlements is a different story, in part due to the difficulty of proving causation. Try to get the venue (e.g., hotel) to name the association as an additional insured on its commercial general liability insurance policy. Finally, while it is a form of property (and not liability) insurance, event cancellation insurance coverage is still available to purchase. Association managers should recognize that (i) none of the major insurance carriers are providing any coverage for communicable diseases (COVID-19 or otherwise) right now, even for an added premium, as had been the case in the past, and (ii) such coverage, while still worthwhile, has gotten more expensive in light of the recent claims history.

4. 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?

If your association leaders are planning to proceed with any in-person meetings in the short- or immediate term future, it is critical to amend your hotel, convention center, vendor, and other meeting contracts to modify them for social distancing guidelines and mandates. There should also be proportionate reductions in sleeping room and food and beverage minimums, attrition penalties, and cancellation penalties.

Very significant reductions in the number of attendees will be necessary to accommodate social distancing requirements, unless, of course, the venue can provide your association with all of the needed additional meeting space (at no extra charge to the association). Whether coming from state and local government mandates or federal (e.g., CDC) guidance, these social distancing requirements must be complied with by event venues.



Without question, in virtually every instance, this will require amendments to existing contracts to deal with the meeting space issues, the commensurate reductions in sleeping room and food and beverage minimums, and attrition and cancellation penalties. Should the venue be unable or unwilling to make the necessary social distancing accommodations, it could arguably be in "anticipatory breach of contract" (also known as "anticipatory repudiation"), providing an opportunity for the association to be released from its contractual obligations.

5. In connection with our future in-person meetings while COVID-19 is still a threat, beyond the steps necessary to protect attendees, are there additional steps we should take to protect our staff and board members (and to protect our association from these liability risks)?

Because your association arguably has more control over its own staff and possibly even board members (and other volunteer leaders) attending your in-person meetings, it is advisable to provide written guidance to these individuals as to expected conduct and steps they should take and avoid while attending your meeting. For instance, should your staff venture offsite to a crowded bar (with little social distancing or mask-wearing), contract the virus there, and then come back and infect others at your meeting, it could be argued by an enterprising plaintiff's lawyer that your association was negligent in not directing your staff to avoid such conduct.

While active policing of staff and board member conduct is likely not needed, providing such guidelines to association staff and others and receiving written acknowledgement of receipt and a commitment to honor them can help to mitigate the association's negligence liability.

6. As our association is still struggling with potential cancellation or postponement of upcoming in-person meetings, how has the strategy and analysis for associations doing so (ideally without penalty) 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 effectuate penalty free cancellations is very much still in play and remains the desired outcome for many associations.

As has been the case since the start of the pandemic, because hotels and convention centers will undertake the force majeure analysis as of the date of cancellation (effectively locking in place the conditions that existed as of such date), written notice (detailing all of the reasons supporting the force majeure termination) should be provided 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 (e.g., CDC) admonitions against large gatherings, and the inability of a large number of your prospective attendees to travel to the meeting (due to employer-imposed bans on travel and/or professional development) are important. It is timing that remains the most critical factor in this regard.

With most states, cities and counties now engaged in a phased reopening of their economies, it has become more difficult to reasonably gauge when larger association meetings will be permitted in most places. In the alternative -- particularly for meetings which are further out -- negotiating 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 remains a viable strategy. Try to avoid paying large or any deposits up front.

Should the venue be unable or unwilling to make the necessary social distancing accommodations to host your meeting, it would arguably be in "anticipatory breach of contract," providing an opportunity for the association to be released from its contractual obligations.

7. For in-person meetings that have been or will be transitioned to virtual ones, do we need to get new or different copyright permissions and releases from our speakers to use their materials and record their sessions?

It has always been critical and a best practice for associations to obtain copyright licenses and releases from speakers at its meetings – a copyright license for the speaker's PowerPoint presentation and handouts and a release to permit the association to (audio or visually) record the speaker's remarks and identify them with biographical information. Failure to do so will strictly limit the association's ability to make use of this valuable intellectual property in other ways after the meeting has ended.

The same legal principles apply to virtual meetings. Just be sure that the copyright license and release forms you are using are appropriately drafted to cover the virtual meeting setting. In addition, it might provide a good opportunity to revisit speaker forms and agreements more generally to ensure they are current, comprehensive, clear and easy to understand, and sufficiently protect your association.

To help mitigate the association's liability risk for contributory or vicarious copyright infringement and other potential liability, speakers should attest that their remarks and presentation materials and handouts are their own original work, that any work of others' is used with permission, and that their remarks and materials will not defame anyone, discuss any antitrust-sensitive topics, violate anyone's privacy, serve as an advertisement for their products or services, etc.

8. For in-person meetings that have been or will be transitioned to virtual ones, do we need to revise our agreements with our corporate sponsors, exhibitors and the like?

Most association agreements with corporate sponsors, exhibitors and others in connection with in-person meetings will need to be amended -- some significantly -- to apply to a virtual meeting that is replacing it. The considerable changes needed can be effectuated through either an amendment/addendum to the contract or the execution of a new one that supersedes the prior one. Alternatively, where such agreements do not have any applicability in the successor virtual meeting or the sponsor or exhibitor has no interest in doing so, association managers will want to look to the contracts' force majeure and termination clauses to help determine their options.

Despite what those clauses say, most association leaders are working proactively and cooperatively with sponsors, exhibitors and others to find solutions that work for them, including converting the agreements to the virtual setting, transferring the contracts to next year's meeting, or refunding fees or deposits already paid, among other options.

9. As we enter into new agreements with vendors in connection with our new virtual meetings, are there key issues or terms to which we should pay special attention?

While some associations have entered into new contracts with technology platform providers to host and help carry out the virtual meeting -- along with new contracts with virtual education consultants, moderators and others -- many are working with vendors with whom they already have some form of agreement in place. Irrespective of the construct, it is critical -- as it has always been with technology vendor contracts -- to carefully focus on provisions such as performance standards, exclusivity, term, termination, force majeure, intellectual property ownership and use, and fees, among others. Be sure to review your association's current contracts in this area to ensure that there are no exclusivity or first-right-of-refusal clauses that would give these existing vendors any unexpected preferential rights with respect to your virtual meeting(s).

10. As codes of conduct for in-person meetings have become more widely adopted in recent years, should our association also have a code of conduct for virtual meetings?

Associations leaders have increasingly adopted in recent years -- and often have had to enforce -- codes of conduct for in-person meetings. It has become a best practice to do so. In the online world, it also has been a best practice for many years for associations to adopt terms of use for their online member forums.

Such terms of use – particularly when drafted properly and when members are required to "click and accept" prior to using the forums (very important from a legal enforceability perspective) – are important to advise members as to prohibited conduct and discussions (e.g., defamation; copyright or trademark infringement; antitrust-sensitive topics; invasion of privacy; harassment or bullying; slurs based on racial, ethnic, gender, or similar protected characteristics; advertising or marketing).

They provide provide a solid legal basis for taking adverse action in the event of violations, and help protect the association from liability for the actions of such violators.

In the virtual meeting context, a "code of conduct" will generally more closely resemble the member forum terms of use than the code of conduct for in-person meetings, but it is advisable for associations to craft a new code of conduct for virtual meetings that addresses the key issues and risks and is tailored to the virtual meeting setting. **NPT**

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