Four Issues to Consider When Negotiating Event Contracts Amid COVID-19

B-to-C Events, B-to-B Events
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As part of the unraveling of event programming this year, and beyond, marketers have had to dig into their contracts to determine what they're on the hook for, what they're not, and how to move forward. And when events do ramp back up the legal landscape will be a trickier one to navigate. We tapped two legal experts for insights on the top legal issues facing conference and experiential marketers as teams power down and power up event programming in the wake of COVID-19.

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CONTRACT RENEGOTIATIONS

The reality is, many existing event contracts, especially those contracts already signed for 2021 and beyond, will probably need to be renegotiated. Typically, a renegotiation means one party is asking to breach the contract and both parties have to decide whether there should be damages paid for that breach.

But the pandemic has created a "rare" situation where valid contracts may not be enforceable as they were originally written since the terms have changed—there will be fewer people at the event, and those fewer people are going to cost more money, according to attorney Steven A. Adelman, vp of the Event Safety Alliance.

There will also be a number of factors within the contracts to renegotiate. Food and beverage, for example, is probably not going to look the same. It will require more space to serve fewer people, but food and beverage vendors will be working at the same level due to enhanced safety guidelines. As Adelman puts it, "There is a tension between what the law allows versus what business continuity is going to require."

“The law allows you to insist on performance of a valid contract. The necessity of business continuity requires that people negotiate in good faith, because everyone is subject to a new reality,” he says.

FORCE MAJEURE

Scores of legal experts have rendered opinions on the application of force majeure—“superior force”—in the wake of COVID-19 and what it means for event organizations and their shows. And if your contract includes a force majeure clause, it allows parties to breach the terms of a contract because of unforeseen “Acts of God.” Unforeseen being the key word. Typically, this might include natural disasters or acts of war.

Some contracts list specific events the parties agree would trigger force majeure, like public health emergencies. Others are more ambiguous. Even without a specific force majeure clause, most event contracts include a provision on “unforeseeable events beyond the parties’ reasonable control,” which in the case of the pandemic might include the impact of not only a communicable disease, but travel bans and citywide shelter-in-place orders.

Ultimately, it’s up to courts to decide whether what was included in the contract holds up to this kind of declaration. Whether a pandemic or a public health emergency in a post-COVID world will be classified in the eyes of the court as “unforeseeable” going forward is to be seen.

LEGAL LIABILITY

You’ll need to brush up on your understanding of tort law to determine liability, and whether you could face lawsuits from attendees or staff should they contract COVID-19 after attending your event. In fact, Sen. Mitch McConnell has led a proposal to overhaul tort law amid the pandemic to protect venues and employers from lawsuits. But experts say the issue may not need legislating, because it will be hard for a plaintiff to prove all of the elements of tort law—among them, duty of care.

“Every venue, workplace, wherever, has to provide premises that are ‘reasonably safe’ under the circumstances,” Adelman says. “And here are the circumstances: we’re dealing with a highly contagious disease, which has inadequate testing, no contact tracing and no vaccine right now.”

The question is how you define what is reasonably safe under the circumstances in a pandemic-impacted world. Cities and states across the country have reopened because it’s an economic necessity. People, potential attendees, may be asymptomatic or live with others who are. They will go to work and grocery shop. They will go out to eat. And at the end of the day, they will have likely come into contact with multiple people and surfaces.

“It is going to be virtually impossible for victims to say they contracted coronavirus [from your event] and not from all of the other places they’ve been to the prior two weeks,” Adelman says. “Almost all of these lawsuits are likely to fail because proximate cause cannot be proven.”

However, it will be up to event organizers to create a “reasonably safe” site, which means following guidance from the CDC, World Health Organization and other groups to maintain high standards of cleanliness and sanitation, so as not to potentially be in breach of duty of care.

INSURANCE CLAIMS

In the wake of event cancellations, organizations are digging into their insurance policies to determine what types of coverage their policy provided and what type of loss is “explicitly” excluded. It’s part of the wave of financial reverberations the virus has set off since it took hold in North America. Insurance brokerage firm Willis Re, which advises insurance companies, released information that stated COVID-19-specific claims, including claims for event cancellations, are expected to pay out between $30 billion and $100 billion.

The biggest hurdle organizations face as it pertains to event insurance is when the policy was sold. Many insurance policies sold prior to the middle of January 2020 likely include coverage for event cancellations due to communicable diseases. It’s possible that in the future this coverage will be excluded from new policies or it will require a separate premium, much like what occurred after the SARS outbreak in 2002.

According to Jonathan M. Feigenbaum, a Boston-based attorney specializing in insurance litigation, it’s important that people review and understand what is explicitly excluded from their policies. Typically, ambiguities in insurance policies are “construed in favor of the insured and against the insurance company.” The insurance company has the burden of proof on the applicability of exclusions in coverage.

“Don’t rely on what you read in the press about insurance issues such as force majeure and other insurance exclusions,” Feigenbaum says. “Insurance law is determined by state laws, and that means many different results depending on the state where the policy was issued, in what state loss occurred, and in what state the claim is made.”

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