THE MONITOR

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Monthly Charges and Annual Passes During the COVID-19 Pandemic – Do Consumers Get a Refund?

The COVID-19 pandemic has resulted in a massive number of unforeseen cancellations of events and the inability to use paid subscriptions, memberships, and season passes. These range from gym and amusement park closings, to postponed sports seasons, to concert and vacation travel/accommodation cancellations, to daycare center shutdowns, to ski resort closures. Consumers often pay for these services and activities in advance and often in the form of a direct monthly charge to their credit or debit cards, or third-party payment accounts.

Are consumers entitled to refunds? Common sense suggests the answer is a resounding "Yes," but under the letter of the law and the language in the contracts, this question may be far more difficult and complicated to answer.

Consumer advocates argue that it is unfair, and likely unlawful, for businesses to charge for services they cannot provide and that these businesses are unjustly enriching themselves while not providing the promised services. Yet they are doing it, nonetheless. Businesses argue that parties are free to contract however they choose. Class action lawsuits are being filed across the country addressing these very issues.

It's time to analyze the contract language. Consumer advocates suggest that consumers who have been charged for services that are not being provided should first reach out to the service provider to inquire about a refund. If no refund is forthcoming, then consumers should carefully review their contracts (and request a copy from the service provider if they do not have one). Many consumer contracts contain any number of provisions which can make it difficult, if not impossible, for consumers to obtain refunds, individually and/or on a class wide basis. These include arbitration and class action waiver provisions and force majeure clauses.

Many membership and subscription agreements contain provisions mandating that disputes be resolved solely through arbitration—with individuals waiving their rights to bring an action in a court of law, individually, and on a classwide basis. The costs of an individual arbitration (filing fees,

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attorneys' fees, and time) will often far exceed any recovery on an individual basis. Consumer contracts may also include unilateral change and force majeure clauses. These clauses, while they may not be as common as arbitration and class action waiver clauses, may enable a company to make and enforce a unilateral change to the contract—such as choosing to extend the customer membership period rather than refunding membership fees. While frustration of purpose or force majeure provisions may allow contract termination, they may also allow delayed or different performance, including membership extensions—without refunds—for facility closures and event postponements/cancellations. The current and forthcoming class action litigation will likely test the interpretation and enforceability of such force majeure provisions.

If consumers are not getting a refund after paying for services that are not being provided, they should first review their contracts to confirm whether there are arbitration and/or class action waiver provisions that would prevent the filing of a class action lawsuit, and then contact an experienced law firm that has a track record for success in class actions. Similarly, if businesses are receiving requests for refunds, they should look at their contracts to determine whether they may be required to issue refunds and whether they may have exposure to class actions seeking refunds.

Portfolio Monitor

Johnson Fistel recognizes that there are inherent risks when investing in the stock market. But the risks that an investor assumes do not, and should not, include the risk that the company or its officers and directors will make false and misleading statements to artificially inflate the company's stock price or sell their own stock based on insider information.

Our Portfolio Monitor is designed to alert institutional and individual investors when one of their investments may be affected by securities fraud, corporate waste, or other wrongdoing. Our Portfolio Monitor is available to both U.S. and foreign investors. There are no minimum portfolio requirements or costs to participate.

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California Employment Considerations in the Wake of the COVID-19 Temporary Shutdowns

In response to the coronavirus, cities throughout California have issued emergency orders and placed temporary restrictions on certain business, such as restaurants, bars, salons, movie theaters, concert and sporting event venues, golf courses, bowling alleys, gyms, and retail facilities such as department stores and clothing boutiques, to name but a few. If an employer has temporarily shut down its operations to comply with these orders, several employment issues should be considered:

Paychecks

This issue is one that must be approached carefully. There may not be a need to issue employees a paycheck at the time they are being informed of a temporary shutdown if the employer expects a continuing employment relationship. Employers should make clear that the employment relationship is expected to continue, and should endeavor to provide an expected return date, subject to reconsideration as circumstances develop. The California Labor Code has very specific requirements regarding final pay checks for terminated employees. Employers and employees should consult legal counsel to ensure compliance with the applicable requirements.

Furloughed Work and Entitlement to Compensation

Is an employee who is placed on furlough and who performs work remotely entitled to compensation under California law and/or the Fair Labor Standards Act (FLSA)? The answer under applicable law would seem to suggest that "yes," the employee must be paid, despite what may or may not be permitted by the employer's policies for furloughed employees. But this is not all cases. Whether an employee is ultimately entitled to pay for furloughed work really must be analyzed under the particular facts and circumstances of each case. Determining whether and how to pay both exempt and nonexempt employees who perform work while on furlough can be complex and employers and employees should consult legal counsel to ensure compliance with the applicable requirements.

Filing for Unemployment Insurance

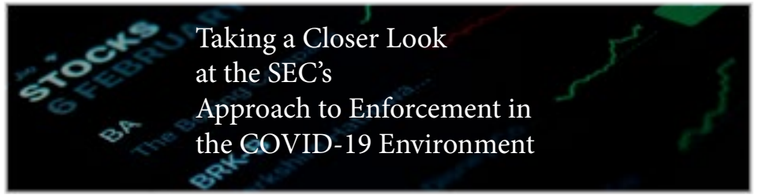
If an employer reduces hours or shuts down operations due to coronavirus, employees can, and often should, file an Unemployment Insurance (UI) claim. Generally, UI provides partial wage replacement benefit payments to workers who lose their job or have their hours reduced, through no fault of their own. Employees should be notified of their right to apply for unemployment compensation. Certain claimants may also be eligible for increased benefits and the duration of benefits may also increase in light of the pandemic. It is advisable to provide furloughed employees with a link, to the relevant state website, which should be checked regularly. For more information, see: https://edd.ca.gov/Unemployment/Filing_a_Claim.htm

Paid Sick Leave Under State and Local Laws

Employees may be eligible to use paid sick leave under state and local law. For example, California's Labor Commissioner has issued FAQs on California's paid sick leave law during the COVID-19 period and explains, "Paid sick leave can be used for absences due to illness, the diagnosis, care or treatment of an existing health condition or preventative care for the employee or the employee's family member. Preventative care may include self-quarantine as a result of potential exposure to COVID-19 if quarantine is recommended by civil authorities." Employers and employees should consult legal counsel to ensure compliance with the applicable requirements.

Federal Bill: Families First Coronavirus Response Act

The Family First Coronavirus Response Act (passed March 16, 2020 and effective through December 31, 2020) requires certain employers to provide their employees with two weeks of paid sick leave for reasons related to COVID-19. The Act also expands the Family and Medical Leave Act (FMLA) to provide up to 12 weeks of job-protected leave. After the employee has taken the two weeks of paid leave, the employee will be able to take the additional FMLA leave at two-thirds of the employee's usual pay. The bill requires employers to pay the employees during these leaves, and then provides reimbursement of this cost through a refundable tax credit.



Taking a Closer Look at the SEC's Approach to Enforcement in the COVID-19 Environment

The COVID-19 crisis has seen erratic stock market swings and with those swings, the Securities and Exchange Commission's (SEC) approach to new challenges in enforcement. With increases in volatility, the expectation is a surge in investigations of potential violations from outright fraud to disclosure issues.

The SEC issued an investor alert on COVID-19 in February 2020, noting that online stock promotions claiming certain publicly traded company products or services could "prevent, detect, or cure coronavirus" were being tracked. Shortly after the investor alert was issued, the SEC suspended trading in Aethlon Medical and Eastgate Biotech Corp. for making COVID-19 related statements in online promotional materials.

Throughout March 2020, the SEC has continued to address enforcement issues in context of COVID-19, stating "where a company has become aware of a risk related to the coronavirus that would be material to its investors, it should refrain from engaging in securities transactions with the public and to take steps to prevent directors and officers (and other corporate insiders who are aware of these matters) from initiating such transactions until investors have been appropriately informed about the risk."

Those perpetuating schemes directly related to COVID-19 may generate the largest increase in investigations from the SEC and other regulatory bodies, based on the SEC's February 2020 investor alert. Other types of investigations may take longer to develop, particularly if earnings reports or required SEC disclosures are delayed due to COVID-19. "It makes sense that the SEC would be aggressive in pursuing those companies and insiders seeking to profit illegally off of this global pandemic or those that are trying to evade disclosure requirements by not transparently disclosing the impact this pandemic is having on its business or using it to hide negative news that existed prior to the pandemic by disclosing it now while attention is rightfully focused elsewhere," said Michael I. Fistel, Jr., one of the founding partners of Johnson Fistel. Mr. Fistel continued "the SEC's role is even more vital in times like this in order to maintain the integrity of the markets; however, the SEC cannot police every scam artist and wayward fiduciary, and that is where private shareholder litigation comes in as an important deterrent and, when necessary, to provide additional enforcement of the securities laws to help keep Corporate America accountable."

If companies or advisers falsely claim certain stocks or investments are immune to the pandemic or fail to disclose the impacts of the pandemic on their funds, litigation may ensue. A secondary outcome is severe market declines exposing previously undetected misconduct within

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companies A strong market can hide problems, but volatility can expose issues – in some cases revealing problems that existed long before the COVID-19 pandemic. Failure to adequately disclose how the COVID-19 crisis is affecting a company or may affect a company in the future could lead to claims of failure to comply with disclosure requirements or even fraud.

In a volatile environment where certainty feels ephemeral, the SEC and other regulators are bracing themselves for a surge of investigations, disclosure issues, and outright fraud. The SEC, however, are taking on this monumental task while working remotely and in some cases, with a reduced staff.

Shareholders play an important role in the face of investigations, disclosure issues, and fraud by holding companies and advisers accountable. This role is even more important when regulatory agencies are operating in an unprecedented, global pandemic environment. In fact, it appears likely that a significant number of shareholder complaints against companies may serve as a lighthouse for the SEC, FINRA, and other regulatory agency investigations and enforcement.

Companies or investors with questions or concerns regarding COVID-19 related disclosures, or about their rights should contact the attorneys at Johnson Fistel to determine how we may help assess and secure your legal rights. You may contact us at the contact details on the back page or this Newsletter or on our website.

Is Rent Still Due? – Whether COVID-19 Can Be Considered a "Casualty" Event Triggering Rent Abatement in a Commercial Lease Agreement

As the global COVID-19 fight marches on, the myriad of legal issues destined to arise from this unprecedented pandemic are beginning to become apparent. One of these issues is the impact that government orders forcing the temporary closure of non-essential businesses will have on whether these businesses must continue to pay rent despite not being able to utilize their leased premises. If landlords continued to collect full rent under threat of default, they may also be forced to refund such payments. Imagine the millions of dollars commercial landlords have continued to collect, while their tenants' businesses sit by idly, unoccupied, and unable to open their doors by order of law.

Justice and fairness suggest rent should abate (not be due) during this pandemic; general principals of law (and common sense) dictate that one should not have to pay for something for which they cannot legally use. However, the specific language in each lease agreement will likely control. Thus, the first step is to look at the operative lease agreement. Commercial lease agreements often have express provisions that rent shall abate if the premises are physically damaged or are otherwise unusable due to a casualty event making the premises untenantable, provided of course that tenants are not making use of the premises. If such an express provision exists, businesses should determine whether the lease defines the terms "untenantable" or "casualty event." If so, these express definitions will control. If not, these terms will be interpreted according to their normal and usual meanings and the mutual intention of the parties.

So what are the normal and usual meanings of "untenantable" and "casualty event"? A building is "untenantable" if it is not capable of being lived in or occupied. If the landlord has closed all common area amenities in the building (e.g., locker rooms, sitting areas, parking areas, restricting access to necessary and essential personnel, etc.), that conduct will provide further evidence that the government orders have caused a building to be untenantable. A "casualty event" is one that arises from an unexpected or unforeseen event.

Applying these definitions, commercial tenants operating non-essential businesses who have a rent abatement clause in their lease should have no obligation to pay rent during the COVID-19 "casualty event" because the leased premises are "untenantable." Indeed, the government orders requiring non-essential businesses to temporarily close make the leased premises unable to be occupied by order of law, and certainly nobody foresaw COVID-19 having such a physical, financial, and/or psychological impact on so many people around the globe.

So how are landlords responding? Recognizing the tremendous neg-

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ative economic impact the government orders may have on their tenants, and perhaps recognizing that 100% of the rent is abated, many landlords have immediately offered commercial tenants 50% discounts, regardless of what the lease provisions say. These landlords are not only showing compassion, they also recognize that if they do not offer such discounts, many tenants will be faced with no choice but to default on the lease. When tenants default on the lease, landlords will not only miss out on the past, current, and future rent from these tenants, they will find themselves searching for new tenants at substantially lower rental rates. Professionals in the commercial real estate industry believe the rental rates are dropping significantly and will go down even further in the near future as businesses begin to reopen realizing that they can succeed while having their employees work from home. Thus, it serves their business interest for landlords to work cooperatively with their tenants.

If landlords are not compassionate, take a myopic approach, insist on recovering 100% of the rent, and argue that rent is only abated when the premises are untenantable as a result of "casualty events" such as fires, earthquakes, floods, and related casualties which cause physical damage to the premises, they will face losing tenants, losing rent, and searching for new tenants who will only be willing to pay significantly lower rates. Such landlords will also likely be on the losing side of lawsuits seeking to collect unpaid rent. In the absence of express definitions, tenants can argue that if the landlord wanted "casualty events" to be limited to causalities causing physical damage to the premises, it could have included such a clause in the lease agreement. By not having done so, the mutual intention of the parties for what constitutes a "casualty event" should include the unforeseen impact of COVID-19. Indeed, the law in California is clear that an interpretation "of a lease cannot lead to unfair or absurd results but must be reasonable and fair."

If a lease has a vague rent abatement clause, landlords should consult with counsel to determine whether they can even collect rent. Tenants should consider whether they are entitled to rent abatement or a refund if they paid rent but were unable to use the leased premises.

Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
AnaptysBio, Inc.	05/26/2020
HF Foods Group Inc.	05/28/2020
VMware, Inc.	06/01/2020
Mesa Air Group, Inc.	06/01/2020
Gossamer Bio, Inc.	06/02/2020
Zoom Video Communications, Inc.	06/08/2020
Intelsat S.A.	06/08/2020
eHealth, Inc.	06/08/2020
Fifth Third Bancorp	06/08/2020
ServiceMaster Global Holdings, Inc.	06/09/2020
iQIYI, Inc.	06/15/2020
Bed, Bath & Beyond Inc.	06/15/2020
GSX Techedu, Inc.	06/16/2020
Baidu, Inc.	06/22/2020
Phoenix Tree Holdings Limited	06/26/2020
Groupon, Inc.	06/29/2020
SCWorx Corp	06/29/2020
Hallmark Financial Services, Inc.	07/06/2020

JF JOHNSON FISTEL

Johnson Fistel was founded on the following five core values: trust, hard work, determination, integrity, and excellence in everything we do. Our interests are aligned with those of our clients — their success determines our own. We embrace and embody those ideals in everything we do. Whether we're pursuing damages for or against a billion-dollar corporation or we're challenging a small transaction, Johnson Fistel devotes the necessary resources to secure the best result possible.

We believe we are only as good as our people, and Johnson Fistel recruits only the best, brightest, and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts, and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch of a small firm.

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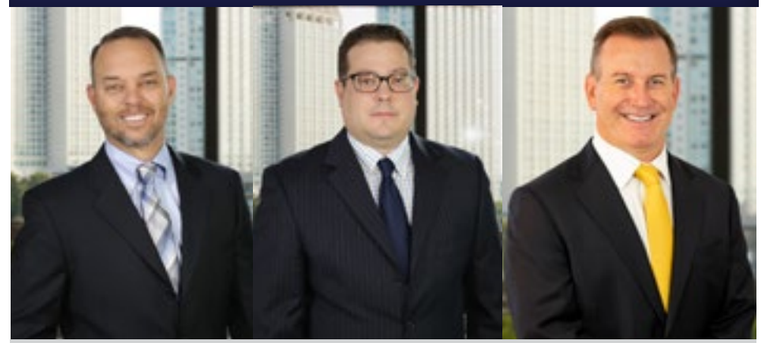

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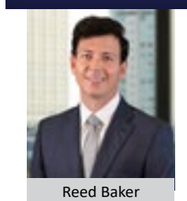

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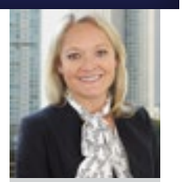

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