

The Pandemic Effect: The Outsourced Service Provider as a Resource

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This new normal, what will it look like in a few days, weeks, or months? Yes, some may physically be back at the office or having in-person meetings again, while others may be forever changing how they do business. The common factor between those returning physically to a pre-COVID existence, and those setting a new path for themselves will be a realization that our reliance on any outsourced service provider before the outbreak was nothing compared to what it will be moving forward.

What Do We Mean by an “Outsourced Service Provider?”

We mean your web/video conference provider; your IT providers who service your e-commerce platform (perhaps you never had one and now need one); your Artificial Intelligence providers (again you never had one but now you need one). It's a simple example, but consider the high-end restaurant which never would have imagined engaging in online ordering [without intermediaries] and now has to hire a company like [Seven Rooms](#) to provide it with online ordering and delivery capabilities or beyond that, a new frozen food line. Who would have thought a few years ago that by the unfortunate happenstance of a deadly virus, the transformation of large segments of our economy into virtual ones would be accelerated upon us at a great pace?

Particularly in the case of technology, the outsourced service provider will become the backbone of businesses, serving as the lifeblood for how business gets done in the post-COVID world. This is why our title is so appropriate: *The Pandemic Effect*. Along with this reliance should come an understanding that bringing an outsider into how you do your business, or, if you are a service provider, becoming a trusted resource of your customer, presents issues that both sides should address in order to avoid causing institutional weaknesses. Here are a number of issues important to both sides that will help each side understand how the players involved may see outsourcing differently.

Fit Is Important

A search for a provider begins with identifying the need. Why is the company looking outside of its ranks in order to secure the good or service, and then once you decide to find a provider, what about the provider makes it a fit for the company? The big need for many companies at this time is virtual presence and capabilities, Artificial Intelligence, data management, technology infrastructure, and

seamless support. Is the provider in that business, servicing customers that are in the same industry? Do you as the provider understand the potential customer's business if that business is in a regulated industry?

For example, a business in the healthcare or financial service space has specific privacy, regulatory, cybersecurity, and record retention requirements – has there been a clear enunciation about what those requirements may be, and what role each party will play in the process of providing the good or service? Importantly, how savvy is the provider in adapting to not only the marketplace but also the tsunami of government regulation that is to come? Ask your attorneys to assist with determining what those requirements mean and how they affect your business and the relationship between the company and the outsourced provider, as our clients discuss with us.

Business Continuity

Have the parties discussed how they will fit into each other's business continuity plan? As we previously discussed in [“Business Continuity Planning During the Coronavirus \(COVID-19\) Pandemic”](#), a business continuity plan is now more essential than ever to preserve the ability to provide goods and services during and through what is upon us in the future—another pandemic? Superstorms? Solar flares? [we better stop there...] Are you as the customer receiving top-notch services that will truly help you with disaster-time operations and continuity of operations in a seamless manner? Does the service provider share the same outlook and culture as you [let's go get'em! vs. “we'll see what we can do...”]. As the service provider, will you be able to easily incorporate the customer into your service platform when that platform is adjusted for your business continuity protocols and procedures?

This not only relates to each party's business, but it is an essential component for you to consider when deciding to work with each other; namely, does the other side have adequate plans flexible enough to adapt as you develop solutions that may be ahead of the market in overcoming disruption. Our clients like our involvement not just as their lawyers but also as trusted business people—almost as if we sat on their boards. That's the mentality of what you want from a reliable service provider—a trusted outside resource.

Contracts

When it comes to your agreements, lay out the expectations between the parties and the standard by which each of the vendor and the customer will need to act. If the vendor's services are to comply with a particular law (such as the new telemedicine requirements) then the scope of services set out in the agreement should reference the standards that apply to that service and if the vendor requires any specific support or training from the customer, lay out those customer obligations as well. Work together to develop an onboarding plan to transition to working together and include it as a joint obligation under the agreement.

Likewise, think about and include representations and warranties that will, in effect, clearly spell out the promises each party makes about their obligations under the agreement. Specify your indemnification obligations if either of you are sued by third parties (such as customers or suppliers or members of the public or even the government). Pay attention to insurance coverage and force majeure clauses. Also, be careful to always keep the other side as an independent contractor and not cross the line into a possible (and unexpected) partnership or joint venture, as that will create lots of unintended consequences. Don't do any of this alone. Involve your counsel in these negotiations so that they can help highlight the practical legal considerations involved in outsourcing.

Exclusive Versus Non-Exclusive Relationship

In general, a service provider is a free agent, not tied to provide services only to one customer. The same goes for the customer, they can secure multiple vendors to provide the same good or service. Neither party needs to be “captive” or exclusive to the other party. However, it may make sense for the parties to agree to some form of exclusive arrangement because it could create a mutual dependency that is hard to get rid of if the circumstances require it. If a future pandemic comes into play, you know you have a resource that has a vested interest in your continued operations because if your company cannot make it through they too will be affected negatively. The ugly side of this is that you don’t want the other side to run to the competition and share the fruits of your relationship with them. Where appropriate, include non-competition and non-solicitation provisions so that neither party can walk away with the precious human capital you have invested in.

Intellectual Property

What is the expectation as to ownership of intellectual property developed in connection with the goods or services provided? If there are work-for-hire provisions, then you would have a stronger claim that such works are property of the company customer. But is this intended and appropriate in light of the parties’ expectations? Even if the company customer is to own the intellectual property that is developed through the process, should know-how, processes, or methodologies be carved out and retained by the service provider? What licenses does each party need (if any) with respect to know-how or the finished deliverable? Counsel should be able to work through protecting each party’s interests related to IP and can help strike a balance between the needs to protect those interests.

Service Levels

The parties need to establish a firm understanding of performance service level expectations and guarantees. What is included in that service level and will it apply in all circumstances even under times of increased stress or demand? For instance, does the normal service level guarantee for an IT provider hold true for the current lockdown situation where customer demand is at a high point not contemplated during more normal circumstances? Will lockdowns and lack of access to roads, highways, and government facilities have an impact? Also, at what point will there be a financial consequence (and what will that consequence be) for not meeting that measurable level, and if a party exceeds that level, will there be any upside for the provider?

The Outsourced Service Provider as a Resource

Buyers and sellers of outsourced services can be the best team players to make it through future pandemics and other “force majeure” type events, but beyond that, it has become very clear that we all will depend on a flock of “artificial intelligencers/virtual white knights.” Working alongside each other to ensure there is a clear understanding of need, and reasonable contracting basis and transparent expectations as to the nature and scope of the relationship should help the parties avoid entering into a relationship that they would otherwise not have selected in hindsight. Sometimes, even the best teams break up and a transformative economy does not necessarily mean transformative human nature. Unfortunately for Shakespeare (and hopefully not too many of you, lol), lawyers are here to stay. Collectively work through and plan for the next pandemic, hurricane, or earthquake, and decide now how to handle shelter-in-place orders which cause labor shortages or disruptions, and adapt, adapt, adapt, as unexpected circumstances will surely come our way.

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