

Practice Update

Hotel Closures Due to COVID-19: What to Consider

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The hospitality industry is being devastated by the impact of the coronavirus outbreak. As social distancing is becoming the new normal, airlines cancel flights and state and local governments impose travel restrictions and institute quarantines, many hotels are dealing with unprecedented turmoil and are confronting a decision that was unthinkable just a few weeks ago – whether to shut down.

Hotel closures raise many issues and need to be implemented carefully to avoid creating additional adverse consequences. [Akerman's Hospitality Sector Team](#) and [Coronavirus Task Force](#) are working with hotel owners to help them during this tumultuous time. While every closure needs to be considered in light of its unique facts, below are some of the things hotel owners should do now as part of a hotel closure/suspension analysis:

- Understand the existence of governmental restrictions on operations (partial or complete).
- Coordinate with legal counsel to review any management or franchise agreements, including force majeure and other provisions that would excuse performance or give a party the right to suspend operations.^[1]
- Communicate with your third party management company and/or franchisor. Many brands have already put in place suspension/hibernation

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protocols in light of the pandemic, and you may be required to follow their procedures, including completion of applicable suspension and other forms. Among other things:

- Work with the brand to ensure that new hotel reservations are not being taken for an agreed period.
- Understand whether any centralized services will continue during suspension of operations, and explore ways to eliminate/reduce ongoing centralized services charges.
- Understand the brand's policies regarding refunds of deposits (both for independent travelers and group bookings), some of which may be more favorable to the guest than hotel-specific policies.
- Review management agreement performance tests, with a specific focus on any force majeure exclusion (as well as the definition of force majeure).
- If the hotel will only close in part, consider which services to suspend (e.g., restaurants, room service, fitness center).
- Review your loan agreements/ground leases for continuous operating covenants and reserve funding requirements (and potentially the right to use reserve funds for operating shortfalls during the closure period). In addition:
 - Review debt service ratios and other financial covenants.
 - Consider forbearance agreements. If you have a federally backed mortgage, check with counsel regarding mortgage relief under the Coronavirus Aid, Relief and Economic Security (CARES) Act.
 - Determine whether receipt of any Small Business Association (SBA) loans or other governmental economic relief would violate restrictions on additional indebtedness under loan agreements.

- Consult with legal counsel to discuss whether it is advisable to reach out to your lender to advise of status.
- Work with legal counsel to review your group sales and marketing contracts, third party leases, concession agreements and other contracts with vendors and service providers to assess rights and responsibilities.
 - Among other things, review force majeure provisions (including the definition of force majeure and whether notice of force majeure is required to be given in order to rely on the exclusion), termination rights, casualty and condemnation provisions, dispute resolution provisions and penalties for not meeting purchase requirements/thresholds; consider stop orders, limit orders, hold orders, etc. Consider defenses of frustration of purpose and impossibility.
 - Analyze space leases and how shutting down hotel operations would impact tenants. For example, can or should the restaurant remain open for delivery and carry-out?
- Notify guests, third party vendors and individuals holding reservations of the closure.
 - Guests may not be aware of local, state, or national orders requiring your hotel to close and vacate guests. Ensure proper communication with each guest in advance of their required departure date and time. This can and should be accomplished by providing the salient information via email to the guests, as well as by paper slipped under the hotel room door, and with a phone call and voicemail, if the call is unanswered, to each hotel room. Social media posts regarding the hotel's impending closure are also recommended.
 - Train staff to respond appropriately to guests. This is equally as important to do with front desk clerks and customer service representatives as it is with bell hops and

housekeeping. Anticipate guest complaints and inquiries will be made to any hotel employee with whom guests may make contact. Provide staff with the tools to ensure questions, comments and concerns are answered uniformly and consistently, and to direct guests to the appropriate staff members who are trained and prepared to handle such matters more fully.

- Be prepared to provide refunds and/or goodwill gestures such as courtesy credits to guests. This means authorizing the appropriate staff members in advance, in order to streamline the process, as lines to speak to front desk clerks can be expected to be long.
 - Assess whether the hotel has the financial capacity to refund deposits and, if not, consider alternatives.
- If there is ongoing construction at the hotel, consider whether it should continue, be phased back or ramped up (subject to any governmental directives). Consider impact of the crisis on availability of materials, availability of labor, ability to obtain inspections, loan advances, and construction generally.
- Consider mixed-use considerations when there is a condo hotel or residential component, including:
 - Notification of residential owners of the hotel's closure and what services remain available.
 - Service delivery requirements (basic and à la carte, essential versus non-essential).
 - Provision of basic services provided by the hotel based upon a shared cost allocation.
 - Ability to require adjustment of cost allocations.
 - Communication with condominium association board.
 - Rights and obligations under property covenants and restrictions.

- Right to terminate unit rental agreements and advance registrations for occupancy of condominium hotel units.
- Obligation to refund deposits.
- Restrictions on unit owner access to hotel facilities, e.g., parking, gym and swimming pool.
- Consider alternative options/uses for the hotel – e.g. , hospital overflow, temporary housing for first responders. Determine whether to sell inventory/donate inventory/give employees packages of food or perishables.[2]
- Consider impact of frequent guest program (e.g., communications to awards members, credit for status levels and canceled reservations).
- Compile a list of creditors.
- Undertake a bankruptcy analysis for long-term issues or ability to use the threat of bankruptcy as negotiating leverage. Review non-recourse carve-out guarantees in light of any bankruptcy considerations.[3]
- Consider labor and employment issues.[4]
 - Reduction in hours, terminations and closures and layoffs[5]
 - Families First Coronavirus Response Act (FFCRA) effective April 1, 2020
 - WARN Act
 - State “Mini-WARN” Acts
 - Benefits[6]
 - FMLA, FLSA
 - Union considerations
 - Analyze the hotels’ collective bargaining agreement (CBA) to determine whether the decision to close and other work changes would violate the CBA and how layoff decisions are to be made. Consider whether the CBA includes a ‘force majeure’ clause

that grants broad authority to the employer to make unilateral decisions to change or not comply with the CBA in situations of defined extreme emergencies.

- Requirements under additional, ongoing legislation.
- Requirements for dealing with foreign workers.
- Check/learn about benefits, protections and subsidies being provided federally, locally and statewide, including Small Business Association (SBA) loans under the Coronavirus Aid, Relief and Economic Security (CARES) Act.[7]
- Consult with insurance experts to review business interruption coverage.
 - Whether or not business interruption coverage is likely under a hotel’s policy, the hotel should file any notice required by the policy so that potential claims are not extinguished on procedural grounds.

Akerman’s Hospitality Sector Team and Coronavirus Task Force are closely monitoring and analyzing the coronavirus outbreak’s implications for the hotel industry. Please check back for frequent updates to our Coronavirus Resource Center. For questions or more information, please contact any member of the Akerman Hospitality Sector Team.

[1] The Coronavirus and Force Majeure Clauses in Contracts

[2] Responding to COVID-19: What to Do with Excess Alcohol Inventory

[3] Current state-by-state summary of bankruptcy court news, accessibility, and closures

Short Term Liquidity Solutions Available in Chapter 11

[\[4\] Employers - Charting a Course in the Midst of Coronavirus](#)

[\[5\] Notice Requirements When Furloughing or Laying Off Workers in the Pandemic](#)

[\[6\] Top 10 Employee Benefit Plan-Related Tips for Employers in a Time of Coronavirus](#)

[IRS Issues Helpful Coronavirus-Related Guidance for Employers with High Deductible Health Plans](#)

[\[7\] Senate Passes the CARES Act](#)

[Summary of Key Tax Provisions in Historic \\$2.2 Trillion CARES Act Law](#)

[The CARES Act - Impacts to Employer-Sponsored Health and Welfare Benefit Plans](#)

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