

Practice Update

# How to Protect Boards From COVID-19 Governance Risk

June 16, 2020

Government committees, whistle blowers, the plaintiffs' bar, activists, customers and special interest groups all appear to be readying to assail company boards, for failing the public trust. It also appears inevitable that unemployment will continue to rise and vitriolic public elections in the fall of 2020 will fan the flames of public anger, which will predictably spill over into calls for more accountability of companies and their boards.

It is with this backdrop that the country is now looking to reopen. With inconsistent and often vague guidelines being provided by various levels of government, companies and their boards are largely facing reopening decisions alone. The decisions that they make in the coming weeks and months will be prove to be fundamental to the company's survival.

Stakeholder trust is essential. Companies will either gain their stakeholder's trust paving the way for recovery or they will bungle the response raising additional hurdles in their return. Companies and their boards who did all that reasonably could be expected in light of the knowledge of best practices at the time, will not be viewed as responsible for health and economy misfortunes suffered by their stakeholders.

Companies and boards who are viewed as having not done the right thing will be prime targets for

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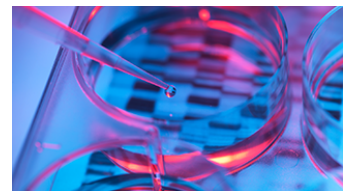
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opportunists. Boards should take four important steps now to ensure to build the stakeholder trust that can inoculate them from becoming a target.

## Create Culture of Health and Economic Well-Being

The board's highest priority should be creating a culture of protecting the health and economic well-being of company employees and stakeholders. Like most board decisions, the decision to reopen operations is a risk-reward proposition, but this decision takes on heightened significance as one risk of reopening is the personal health and safety of employees and stakeholders.

In a stark juxtaposition, one risk of remaining closed is the economic well-being of those same stakeholders. Thus, many companies are moving towards reopening in some capacity. While mitigation measures should be driven by current science, the board must ensure that the company stakeholders understand and are embracing the plan that has been carefully crafted based on the evolving science, and boards must assure that the practices are rigorously followed throughout the organization pursuant to a robust pandemic compliance system.

## Have a Transparent Operating Plan

Ensure the operating plan and its rationale are transparent and well documented. Setting the right culture of going the extra mile for the health and economic welfare of the stakeholders must be clear in the company's documentation.

Boards should consider conducting surveys of employees and stakeholders to determine their views and ensure that their concerns are addressed. Conducting media searches of commentary on the company and its industry can complement the internal assessment and ensure that no issue goes unaddressed.

Gaining access to the plaintiff's lawyers alerts on potential class action areas can also be helpful to determine vulnerabilities. An independent review of the board's minutes and documentation practices should be conducted to assure that the story of its caring and diligence is well documented.

### Test Vulnerability to Litigation

Under the attorney-client privilege, the board should pressure test the company's vulnerability to loss of trust and potential litigation. A critical upfront question is seeking to determine if the company's employees, customers, and communities suffered health and economic damages that one might claim was caused by the company's failures.

It is important to use the lens of what activists, plaintiff's lawyers and other opportunists might claim – optics are as important as facts in this exercise. If the company has not updated its ERM process to list all of the potential legal issues that the company may face due to the crisis, this needs to be done immediately. The independent pressure testing process can then assess each area to see if significant vulnerabilities are identified. If so, a remediation and mitigation strategy should be implemented immediately.

### Follow the Science

To achieve trust that the company did the right thing, the plan for reopening, or continued operations in essential businesses, must be grounded in science. The key to protecting the health of employees and the stakeholders is limiting the spread of the virus. How this is accomplished is the subject of varying scientific studies and opinions. The science is evolving; any plan for company operations should be nimble enough to evolve with it.

Here are three potential scenarios that companies must address in their U.S. risk mitigation strategies:

- The present course of re-opening, aggressive by some and phased by others, continues through the summer and into the fall of 2020. Social distancing, testing and restrictions continue until a vaccine successfully eliminates the virus sometime in 2021 or 2022. Economic recovery will be markedly better than the other options. This scenario likely requires the least change to a company's initial reopening plan, beyond simple adjustments to limit the spread as science develops.
- The current reopening is not successful in suppressing the virus spread, leading to a second wave in the fall, and infection waves continue until a vaccine is developed. To account for this scenario, companies must ensure that their plans include a framework for future closures that mitigates, to the extent possible, the negative impact on its stakeholders. The economic disruption from such reoccurrences would be severe.
- A vaccine is not successfully developed in the foreseeable future and herd immunity is not achieved. In this scenario, it is likely that testing, social distancing, PPE and other restrictions will be put into place for the infected and most vulnerable. The economic recovery will take longer, but if there are no second or third waves, there will be no additional disruption. However, the long-term implications of this scenario on a company's plan should be considered. While many companies appear to be viewing the plans for re-opening as temporary accommodations, there is a very real possibility that these plans become long-term realities.

All boards and their companies will be evaluated sooner or later on how they managed their COVID-19 health and economic risk/reward decisions. Acting now to set the right narrative under the above four steps will set the best course for success. Failing to act now will allow the waiting opportunists to hijack the narrative of many companies to their detriment.

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