



Shifting Sands: Enterprise Risk Management Strategies for Novel Coronavirus (COVID-19)

Presented by:

Krieg DeVault LLP (with Reveal Risk)

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PRESENTER – Part Four (Contracting)



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OBJECTIVES

- **People:** Explore big picture ways to harness the power of your most valuable asset.
- **IT Infrastructure:** Implement strategies to defend against threats and leverage your virtual environment.
- **Insurance Coverage:** Consider how insurance policies may provide a viable cost recovery option in the event of some COVID-19 related losses or liabilities.
- **Third Party Contracts:** Review force majeure clauses and other contractual provisions as a way to manage risk and mitigate harm.

“Hello folks. @ritawilson and I want to thank everyone here Down Under who are taking such good care of us. We have Covid-19 and are in isolation so we do not spread it to anyone else. There are those for whom it could lead to a very serious illness. We are taking it one-day-at-a-time. There are things we can all do to get through this by following the advice of experts and taking care of ourselves and each other, no? Remember, despite all the current events, there is no crying in baseball.”

- Tom Hanks, https://www.instagram.com/p/B9qBEyjJu4B/?utm_source=ig_web_copy_link (last accessed March 17, 2020).

PEOPLE

Principle #1: Define <<**and communicate**>> organizational priorities.

- Leadership should align on (or reaffirm) the specific priorities of the organization in light of a crisis.
- Develop a communication plan to ensure key priorities and updates are communicated to employees in an efficient and consistent manner. Pay particular attention to “voice.”
- Consider the impact of those priorities on different members of your workforce.
- Be vigilant against communicating absolutes, unnecessary contradictions, platitudes, empty promises, political commentary, and other alienating messages that will distract from priority communications.

SCENARIO:

A site manager in Company A determines after receiving many requests that employees in her organizational unit should be able to work remotely if they choose for the next two weeks. This is within her authority, so she sends an email to her site team advising them of the opportunity. Shortly thereafter, the Director of HR sends a company-wide email stating that, due to increased volume needs within the Company and concerns about on-site staffing levels, remote work arrangements must be formally requested and approved through HR using a specific set of criteria.

SAMPLE RESOURCE:

Occupational Safety and Health Administration, *Guidance on Preparing Workplaces for COVID-19*

<https://www.osha.gov/Publications/OSHA3990.pdf>

PEOPLE

Principle #2: Know your legal and organizational landscape and how it is changing.

- Understand the web of local, state, federal, and even international laws which govern your organization.
- Identify reputable and authoritative sources for updates and consult them regularly. Seek additional guidance as necessary.
- Follow established organizational policies and procedures, with consideration for documented, temporary changes. Ensure that such changes are consistent with law and with contractual obligations (e.g. collective bargaining agreements).
- Remain consistent in your treatment of employees in light of applicable law, organizational policy, and available guidance. Understand that existing workplace dynamics do not disappear during a crisis.

SCENARIO:

Company A provides 15 Paid Time Off (PTO) days to non-exempt employees on an annual basis, renewed each January 1. As detailed in the Company handbook, the PTO must be approved at least two business days in advance except in exigent circumstances with documentation showing why prior notice was infeasible. Anna has used 14 of her 15 PTO days as of March 18 and yet notifies HR that morning that she is staying home due to a flu-like illness. She volunteers that her doctor has advised her not to be seen unless symptoms get worse. (Candidly, Anna is a challenge to deal with already.) What happens next?

SAMPLE RESOURCE:

U.S. Department of Labor, *Pandemic Flu and the Family and Medical Leave Act: Questions and Answers*

https://www.dol.gov/whd/healthcare/flu_FMLA.htm

PEOPLE

Principle #3: Show humility and empathy (with appropriate boundaries).

- Critical component of obtaining buy-in at every level. “We are in this together.”
- Get comfortable with being uncomfortable. No one knows exactly what will happen next, even leaders who typically project an aura of confidence and strength.
- Keep in mind that “what happens next” looks dramatically different for individuals based on role at work, financial status, geographic location, and personal circumstances.
- Establish or enhance a process to address employees’ concerns while also stressing professionalism and continued job performance. Set limits as appropriate, and follow established policies and procedures.
- Connect employees with appropriate resources, and proceed carefully and thoughtfully with inquiries relating to employee needs and concerns.

SCENARIO:

Company A provides janitorial services for various sports venues around Sky City. Its workers are non-exempt, and most have been with the Company for many years. CEO of the Company receives word that all of the venues have declared a force majeure event and will not use the Company’s services until at least mid-April. Company has financial resources to provide assistance to some employees, but not all. CEO knows that one employee in particular cares for an ailing mother and relies heavily on the income, and another employee has become a close friend outside of work and also needs the income badly.

SAMPLE RESOURCE:

Centers for Disease Control and Prevention, *COVID-19 - Manage Anxiety & Stress*
<https://www.cdc.gov/coronavirus/2019-ncov/prepare/managing-stress-anxiety.html>

PEOPLE

Principle #4: Earn (or maintain) trust.

- If your organization has guiding principles, they should be considered with each leadership decision to ensure consistency and authenticity, also known as the “gut check”.
- Empower high-functioning stakeholders and teams to make independent decisions within established parameters, and support them in those decisions.
- Proceed with honesty and integrity, even in the face of difficult messaging. Consider a range of options before selecting a course of action.
- Aim for consistency and reliability amidst the daily changes in information and courses of action.
- Obtain and convey guidance and recommendations from reliable, timely, and authoritative sources.

CRITICAL QUESTION:

Is your organization a reliable, timely, and authoritative source for your workforce? Why or why not?

SAMPLE RESOURCE:

Centers for Disease Control and Prevention, *Resources for Businesses and Employers*

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

PEOPLE

Principle #5: Empower your people.

- (All of the above!)
- Activate and communicate **crisis management** plans and protocols. Again, focus on following already-established policies and procedures while also implementing temporary, documented changes as may be appropriate.
- Launch or convene a **core leadership team** that covers needed areas of expertise (e.g. Corporate, HR, Legal, IT/Privacy/Data Security, Finance, Operations, Regulatory, Risk Management, Communications). Supplement with external or specialized expertise as necessary. Empower this team to act.
- **Educate your workforce** on how to protect themselves and the organization, and then provide resources to foster success. Clearly communicate standards and expectations, and implement reasonable retraining or disciplinary measures in accordance with company policy and applicable law.
- **Preserve and reinforce** strong ethical, quality, and compliance standards despite a sometimes chaotic environment.
- Expect that navigating this “new normal” will feel like shifting sands for the entire organization. **Be vigilant** for burnout, fatigue, stress, and other issues that can creep in. Remind employees of available resources, such as Employee Assistance Programs, health and wellness benefits, and flexible work options. Explore ways to increase flexibility temporarily to help alleviate some of the most critical employee needs (document this!).

PEOPLE

Questions?

ADDITIONAL RESOURCES:

<https://www.kriegdevault.com/info/coronavirus-covid--resource-center>

Implement Strategies to defend against threats and leverage your virtual environment

IT INFRASTRUCTURE

Today

- What is at Risk?
- What to do about it?
- IT Infrastructure: Strategies
- What's Next?

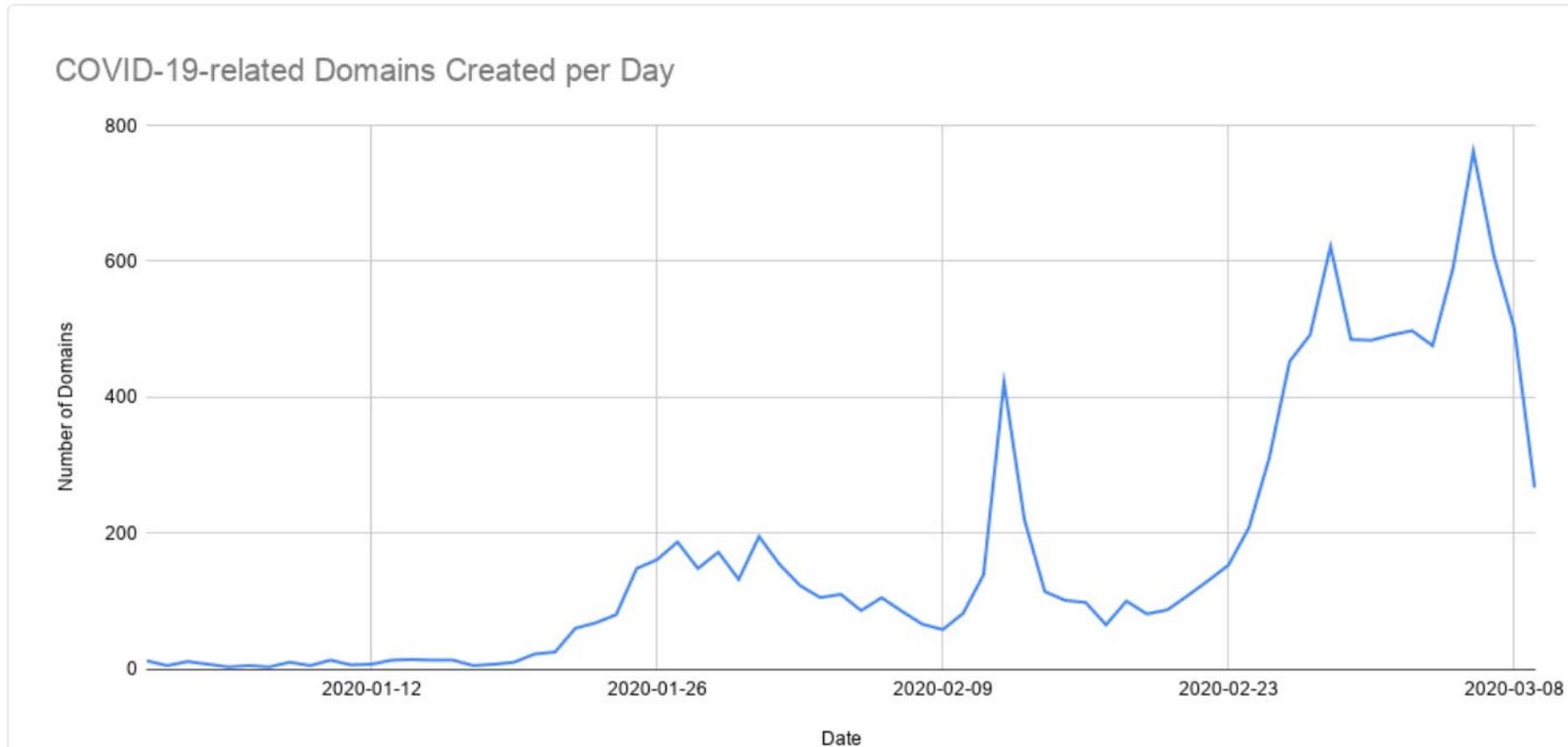


What is at Risk?

- Increase in Phishing & Social Engineering
- Increase in Malware
- Increase in Domain Registrations
- Increase in remote workers
- Increase in Risk and Complexity in protecting your Organizations Systems, Data and Reputation



Increase in Domains (@QWERTY.com)



Source: Capitalizing on Coronavirus Panic, Threat Actors Target Victims Worldwide, March 12, 2020 by the Insikt Group

IT Infrastructure: Strategies

- Plan & Prepare – Have the Talk!
- Are you ready to Handle the Increase in Remote Workers?
- Manage – The Workforce & Technical Support Expectations



Plan & Prepare – Have the Talk!

- Intellectual preparedness alone is not enough!
- Have a plan – how to handle events
 - A (virtual) war room set-up, with a small dedicated team empowered to decide and execute, can cut through organizational complexity.
- Do you have the resources needed?
 - VPN – Virtual Private Network
 - MFA –Multi Factor Authentication
 - Communication Plan
 - Contact Numbers
 - Back-ups (Electronic, Equipment & People)
- Prioritize your Risk with remote working



Increase in Remote Workers

- If remote working is rare the need for additional explanation should be anticipated.
- Be clear on your policies — where they apply, how they will work, and when they will be reviewed.
- Provide secure ways to work:
 - VPN –Virtual Private Network
 - MFA –Multi Factor Authentication
- What are tools are approved for what use?
 - Personal Computer?
 - What's App? Personal Box/Drop Box?
 - Print from their home printer or local Print Store?



Manage – The Workforce & Technical Support

Communicate

- Tell them how you will or won't communicate
 - We will send emails from this address
 - We won't ask for your login or password via links in emails
- Tell them how to obtain tech help
- Tell them how to report events
- Help your Technology & Security Teams Prioritize
- Make sure your communication platforms have capacity!



Quick Tips for Your Home!

- Secure your wireless network at home
 - Change the default admin password
 - Enable WPA2 encryption and
 - Use a strong password for your wireless network.
- Review all the devices connected to your home network
 - Ensure all those devices are protected by a strong password
 - Run the latest version of their operating system
- Protect your personal computer(s) at home
 - Make sure your operating system and your applications are patched and updated. (Enable automatic updating whenever possible)
- Make sure each of your accounts has a separate, unique password.



Questions or Need More:

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COVID-19:
Insurance Coverage Issues

INSURANCE COVERAGE

First-Party v. Third-Party Coverages

Types of Coverages Potentially Implicated

- Business Interruption
- Worker's Compensation
- Property
- Commercial General Liability (CGL)
- Professional Liability
- Employment Practices
- Specialized Coverages
 - Cyber
 - Event Cancellation Coverage
 - Civil Authority Coverage

INSURANCE COVERAGE

Potential Exclusions

- Virus, Disease or Illness Exclusions (Business Interruption/ Property)
- Bacteria / Fungus Exclusion (CGL)

Preliminary Preparation

- Know what coverages you have.
- Get organized. Collect and inventory your policies. Create a coverage chart. (Rely as much as possible on your insurance agent for these items.)
- Identify the impact COVID-19 is having on your business.
- Identify future impacts and future claims that may result from COVID-19.
- Talk with your insurance agent generally about potential coverage for a hypothetical COVID-19 circumstance or claim.
- If the insurance agent tells you there is or would likely be coverage (unlikely), get that in writing.

Claims Handling 101

- General recommendation is to overly-notify.
- Better to give notice sooner rather than later.
- Better to give notice under all/more policies than not enough of your policies.
- But there still needs to be a “trigger” (more on this to follow).
- In external discussions (with insurance agent and insurance company), always assume and act like there is coverage.
- Do not assume there is not coverage.
- Do not accept at face value a statement from insurance agent or insurance carrier there is no coverage. Have coverage counsel review.

When to Give Notice?

- Generally, there needs to be some sort of acute event or circumstance that occurs before an insurance policy is “triggered.”
- But COVID-19 is a special/unique circumstance.
- It has been declared a national and state emergency.
- Broad policies and mitigative measures are being implemented.
- If there is a possibility for coverage for COVID-19 losses, you will need to work with your insurance agent and coverage counsel to determine when it becomes appropriate to notify your insurers.
- Once coverage has been triggered, you must promptly notify. Avoid “late notice” argument by insurers and avoid time bars within ‘claims made’ policies.

Are You Telling Us to Notify Our Insurers Tomorrow About COVID-19?

- Not necessarily – it really depends on the particular facts.
- We recommend collecting and reviewing your policies.
- We recommend identifying the current and potential future impact COVID-19 is having on your business.
- We recommend a preliminary discussion with your insurance agent and your coverage counsel.
- With input from your insurance agent and coverage counsel, you need to monitor for when the COVID-19 impact and circumstances warrant notifying your insurers.
- Unfortunately, no bright line rules. Very fact specific.

Examples

- There is generalized concern throughout your business about COVID-19. You enact general policies to be prepared. You encourage employees to work from home when feasible. None of your employees have been diagnosed. **Give notice?: probably not.**
- One of your employees is diagnosed with COVID-19. They were at work for the week prior and interacted with other employees while symptomatic. You now mandate employees to work from home. **Give notice?: almost certainly.**
- An employee has not been diagnosed with COVID-19, but knows he/she interacted with someone that has COVID-19. The employee alerts you out of an abundance of caution. He/she elects to work from home with your approval. **Give notice?: probably.**

Final Thoughts

- Limited downside to giving notice of a claim.
- Generally, worst that can happen is get a denial (though be aware of potential for declaratory judgment action).
- Likelihood of impact to your premiums is low if it turns out there is not coverage.
- You can always withdraw the claim.
- Difficult to predict how coverage for COVID-19 will unfold.
- Example: NJ is trying to broaden business interruption coverage through the legislature.

Third Party Contracts: Review force majeure clauses and other contractual provisions as a way to manage risk and mitigate harm.

CONCLUSION



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