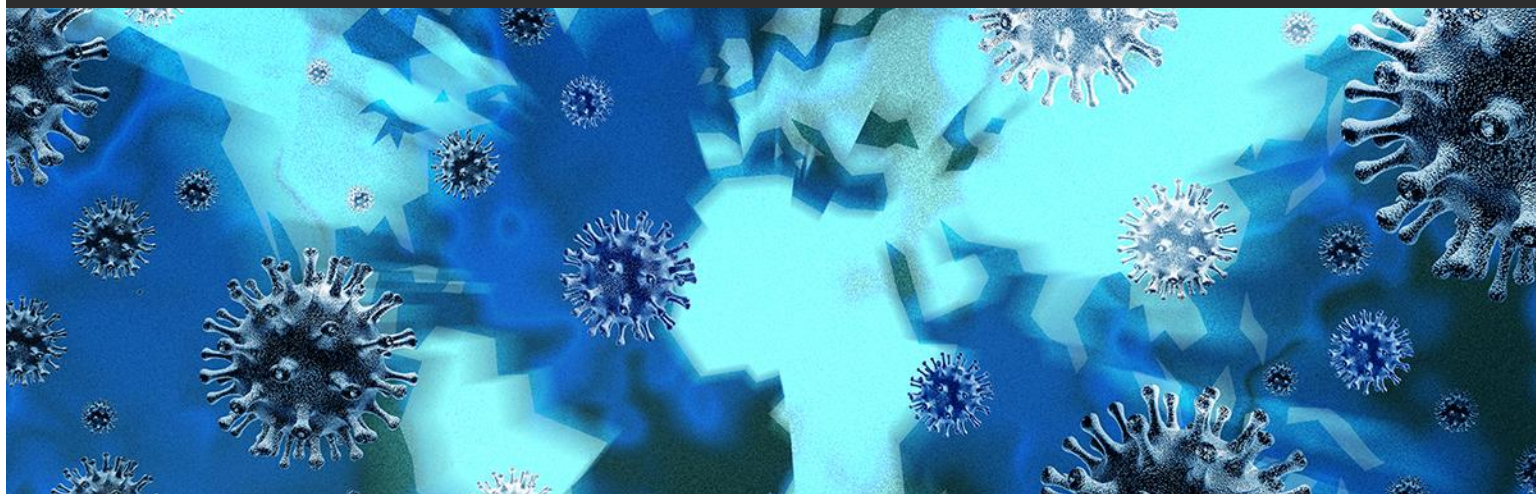


**Alert | Health Emergency Preparedness Task Force:  
Coronavirus Disease 2019**



**March 27, 2020**

## **Rethinking Notice Provisions Due to Coronavirus Disease 2019: Permitting Email-Only Notice**

The global pandemic has forced lawyers and their clients to rethink contracts. The most obvious example is force majeure clauses. We are seeing contracts that either allow for a delay in or entirely excuse performance as a result of Coronavirus Disease 2019 (COVID-19) related interruptions.

Lawyers and their clients may consider an often-overlooked area of contracts: notice provisions. Notice provisions govern the methods by which contract parties communicate with one another regarding the contract (e.g., extension options, default notices, elections to terminate, etc.). Parties are typically free to determine for themselves the methods by which notice may be given from one party to another under the contract, although in some cases an applicable statute or regulation determines the method by which parties must give notice to one another (“regulated notices”).

Notice provisions are generally structured in one of two ways. The first method only permits notice via personal delivery or certified mail/overnight delivery service. This approach is somewhat antiquated but is still prevalent in many commercial contracts. The second method permits notice to be given via personal delivery or certified mail/overnight delivery service and electronic mail. Notice via email is typically only permitted if a concurrent notice is sent via certified mail/overnight delivery service. This second method in some instances also permits notice to be given via facsimile, but this option has suffered the same fate as the fax machine itself (the fax notice option has been almost entirely phased out).

The method permitting notice via email with concurrent notice via some other physical means is more aligned with modern business practice (as opposed to not permitting notice via email at all). But this method is still burdensome, as it pertains to notices which are not regulated notices (“ordinary notices”). In light of COVID-19, the business community is realizing that “paper only” and “email plus paper” notice methods could have serious unintended consequences.

Certified mail and overnight delivery can become problematic when federal, state, or local governments restrict movement or limit business operations. As COVID-19 increasingly disrupts daily life, providing notice by traditional means (e.g., certified or overnight mail) may become more difficult, unsafe, or impossible.

For these reasons, companies may wish to consider amending notice provisions in existing contracts, and negotiating specific provisions into future contracts, to permit ordinary notices to be sent solely via email. Such a change with respect to ordinary notices will permit greater flexibility in uncertain circumstances and avoid pitfalls that could arise if giving notice according to the contract’s strict terms is not practicable or possible.

However, moving to an email-notice only system for ordinary notices carries a risk of the “missed email.” Therefore, use of such notice should be carefully considered and adopted only where one is confident that the email will not be missed. Moreover, most commercial contracts do not permit email-only notice. Companies determining they wish to use an email-only notice should consider adopting the following safeguards to potentially mitigate the “missed email” risk.

1. Have multiple recipients for each party listed as required notice parties;
2. Create a general legal notice email address (e.g., legalnotice@company.com) for your company and establish and administer a policy which requires such account to be checked regularly. This email address should be one of the addresses to which notice is required to be sent;
3. Specify in the contract whether a specific “subject line” (e.g., “LEGAL NOTICE” in all caps) will be required for notice to be deemed proper;
4. Include an affirmative obligation for notice parties to add the email address of all counter notice parties to their “safe senders list” (to avoid emails going to spam);
5. Turn on read receipts when sending important notices;
6. Require all regulated notices to be sent per the traditional physical delivery options.

For more information and updates on the developing COVID-19 situation, visit [GT’s Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

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