

ASMP's Business + Legal Guide

for COVID-19:

A Protocol for Visual Creators

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Thomas Maddrey

General Counsel, ASMP

Managing Member, Maddrey PLLC

MADDREY
— PLLC



Disclaimer

The COVID-19 pandemic presents unprecedented challenges for the entire world, including photographers and the creative community. In response, the American Society of Media Photographers and Maddrey PLLC have created this Guide to help photographers and visual creators navigate these uncharted waters in their business practices. This Business + Legal guide is the second phase of ASMP's response to the 2020 COVID-19 Pandemic.

You can view “ASMP’s Health + Safety Guide for COVID-19,” [here](#).

This Guide is informational in nature and is NOT a substitute for specific legal advice for your business. While the authors of this Guide have accumulated and presented information that is accurate to the best of their knowledge at the time this document was published, the reality is that the nature of COVID-19 as well as related information, actions, and laws by local, state, and federal governments are changing by the day. ASMP and Maddrey PLLC neither guarantee nor endorse the accuracy of the information presented.

The information in the following pages and associated links to articles and webinars are being shared as additional resources, though we always recommend caution and vigilance for outdated or incorrect information. As a result, please regularly consult federal guidelines and your state and local authorities for updates. ASMP and Maddrey PLLC accept no responsibility, and will not be liable for, the use of or reliance on the information provided.

You are ultimately responsible for taking this information, and all other information, and crafting your own policies and procedures. Bottom line? Please do your own research. It is imperative.



Table of Contents

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ASMP'S BUSINESS + LEGAL GUIDE FOR COVID-19: A PROTOCOL FOR VISUAL CREATORS

• DISCLAIMER	02
• TABLE OF CONTENTS	03
• CHAPTER ONE: WELCOME	06
• Resources and Templates	07
• The Team Behind This Guide	08
Thomas Maddrey - Lead Author	08
Madeleine Shroyer, Maddrey PLLC - Co-Author	09
Samantha Jorden, Maddrey PLLC - Co-Author	09
Derek McKee, Constangy, Brooks, Smith & Prophete, LLP - Contributing Author	10
• Special Thanks	11
• CHAPTER TWO: CONTRACTS	12
• Three Clauses To Pay Attention To Now	13
Payment – Deposit vs. Retainer	14
<i>Force Majeure</i>	15
Cancellation / Termination	17
• Conclusion	22
• CHAPTER THREE: INSURANCE	23
• Common Types of Insurance	23
Commercial General Liability Insurance	24
Business Interruption Insurance	24
Contingent Business Interruption Insurance	24
Civil Authority Policy	25
• Specialty Types that May be Relevant Now	25
Pandemic Specific Policies	25
Event Cancellation Insurance	25
Others: Travel Insurance, Political Risk Insurance	25
• Bottom Line	26

• CHAPTER FOUR: WORKPLACE CONSIDERATIONS	27
• Policies and Procedures	27
• Social Distancing Policy	28
• Waiver of Liability, Assumption of Risk, and Statement of Health	28
• CHAPTER FIVE: EMPLOYER CONSIDERATIONS	30
• FAMILIES FIRST CORONAVIRUS RESPONSE ACT	32
• Discrimination + Equal Employment Opportunity	34
• Safety + Health	37
• Wages + Hours	40
• Workers' Compensation	41
• CHAPTER SIX: CLIENT COMMUNICATIONS	42
• CHAPTER SEVEN: ADDITIONAL RESOURCES	44

Chapter One : Welcome

Over the last six months during this unprecedented and worldwide pandemic, the **American Society of Media Photographers** (ASMP) has provided countless hours of guidance in the business, legal, and safety fields to benefit both our members specifically, and the visual creator community as a whole. As the next step in this outreach, we are proud to present:

ASMP'S BUSINESS + LEGAL GUIDE FOR COVID-19

This guide, created by ASMP General Counsel Thomas Maddrey and his team at Maddrey PLLC, is meant to identify and clarify some of the ways in which COVID-19 is affecting your business and legal practices. Try as we might, there is no succinct way to identify all of the effects, and this Guide is simply a starting point for how to approach these issues in your business.

On some of the most pressing questions, such as liability exposure for businesses, we are in a “wait and see” mode. While we can and will provide general thoughts in this Guide, it remains to be seen if the courts and legislatures across the country will address these issues. That is why this is a “living” document. Always be sure to check the version number of this Guide as well as the **Main Page of this Guide** for the latest updates.

This document is but one cog in the wheel of responses that ASMP has been offering and will continue to offer our members in these trying times. We hope you are able to find actionable and concrete information in these pages. **Thank you for being an ASMP member!** Your commitment to this organization and entity allow for work like this to be created.

Resources + Templates

One of the most important features of this Guide is the access ASMP members have to an ever evolving set of documents drafted and available for your use in your business. While these are general templates only, and you **MUST** modify them for your particular uses, on the [Main Page of this Guide](#), you will find the following documents you can access and download:

- General Policies + Procedures
- Self-Screening Form (Short)
- Social Distancing Policy (Clients)
- Social Distancing Policy (Employees / Contractors)
- General Release, Assumption of Risk, and Statement of Health Agreements
- Employee Temperature Check / Health Screening Forms
- Announcement to Employees About Positive Test



The Team Behind This Guide



Thomas Maddrey Lead Author

Thomas Maddrey is the founding partner and lead attorney for Maddrey PLLC. Prior to attending law school at the SMU Dedman School of Law, Thomas was a commercial photographer, entrepreneur, and gallery owner. His photography training was at the Brooks Institute in Santa Barbara, California where he obtained his first degree. Subsequently, Thomas obtained a Business degree from The University of Texas at Dallas.

Since becoming General Counsel at ASMP, Thomas has been involved as the primary author on multiple U.S. Supreme Court and U.S. Circuit Court of Appeals briefs, as well as drafting articles and leading courses for both creators and attorneys on Copyright Law, Business Law, Intellectual Property Law, and on the range of other issues facing visual artists and photographers.

Thomas is a member of the Bar of the Supreme Court of the United States, the 2nd, 4th, 5th, and 9th Circuit Courts of Appeals as well as the State of Texas. He is an active member of The Copyright Society of the United States, sits on the board of The Copyright Alliance, the board and Executive Committee of The Dallas Opera, and is the designated representative for ASMP in the Author's Coalition of America and the Coalition of Visual Artists, among other positions.



Madeleine Shroyer

Maddrey PLLC | Co-Author

Madeleine joined the Maddrey PLLC team as an associate in early 2018 and specializes in intellectual property law, business law, and nonprofit formations. Before working at Maddrey PLLC, Madeleine graduated from SMU Dedman School of Law, during which she was a legal intern at a boutique law firm, clerked for a Tarrant County district court judge, participated in a corporate counsel externship program with the Texas Rangers, and served as a student attorney for SMU's Child Advocacy Clinic where she represented children who had been abused and neglected. With a passion for traveling and learning about the art history of different cultures, Madeleine treasures the opportunity to represent clients who desire to share their stories with the world through art.



Samantha Jorden

Maddrey PLLC | Co-Author

Samantha Jorden is an associate attorney at Maddrey PLLC specializing in Trademark Law, Copyright Law, and brand protection. Before joining Maddrey last year, Samantha graduated from Texas A&M School of Law where she spent four semesters working at the school's Trademark and Copyright Clinic working with creators and IP owners in the community each week. As an artist herself working in both digital and physical mediums, Samantha understands the importance of protecting one's creations in an ever-developing society.



Derek McKee

Constangy, Brooks, Smith & Prophete, LLP | Contributing Author

Derek McKee is a workplace lawyer at Constangy, Brooks, Smith & Prophete, LLP who focuses on helping employers prevent lawsuits and, if necessary, prevail in litigation. He routinely advises employers on a wide variety of employment law issues such as hiring, compensation, discrimination, employee handbooks, employment policies, and terminations. He has experience both in single-plaintiff and class-action defense under federal and state employment law statutes. Derek's goal is to enable employers—of all sizes—to thrive in their business ventures.

Special Thanks

This Guide has been created with input from a number of business and legal professionals, as well as working photographers and visual creators who have reached out to ASMP with stories and examples from their own businesses.

The team at Maddrey PLLC was instrumental in the creation of this Guide. In addition to the attorneys listed above, Thomas would like to thank Kristin LaBarr, Victoria Gonzales, and Bronte Story for their assistance.

Finally, Thomas would like to thank National Board and Leadership of ASMP:



James Edmund Datri

ASMP's Chief Executive Officer

The ASMP National Board

Marianne Lee, Michael Shay, Gabriella Marks, Felicia Peretti, Rana Faure, Kevin Brusie, Nicholas Freeman, Michael Hart, Frank Rocco, Thomas Donley, Leah Nash, Amy Tierney, Stretch Ledford (Ex-Officio)

Chapter Two: Contracts

The truth is: **everything is a contract.** COVID-19 has injected significant uncertainty in the way businesses operate. The global pandemic has restricted travel, caused economic turmoil, and limited our ability to communicate with other people in person without taking proper precautions. With state and federal regulations changing by the day, many questions remain unanswered.

In such a time of uncertainty, it has never been more important to have the proper paperwork in place for the projects you take on and clients you work with. Contracts have always been important – they lay out the terms of an agreement in writing so that if a dispute were ever to arise, both parties can go back and look at what the terms of the contract say for how to handle it.

At my firm, we like to say that a good contract is one that, once signed, can be placed in a drawer and not looked at ever again because the parties know exactly what's in it. Also, if you are coming back to a contract after many months, it's almost certain something has gone wrong!

Contracts should be simple. Contrary to popular belief, contracts actually make things easier – they ensure that everyone is on the same page while also anticipating and planning for potential issues. This is especially important now.



The novel coronavirus has changed the way people conduct their business. It has put parameters on the way people interact, restricted operations, caused businesses to adopt certain precautions, and even forced many to pull out of agreements already in place. This chapter presents a few of the critical contract provisions to watch for and include in your agreements with clients to ensure that you are prepared in case circumstances become such that you or your client cannot hold up your end of the contract.

Whether you draft your own contract to present to your client or your client presents you with a contract, ***we encourage you to consult an attorney or your advisors to be sure the proper provisions***, like the ones described in this section, are incorporated so that you are protected in case something unimaginable or unprecedented happens...again.

Three Clauses To Pay Attention To Now



The three contract clauses that are most in focus in light of the pandemic:

- 01 Payment Clauses
- 02 Force Majeure Clauses
- 03 Cancellation / Termination Clauses

These three clauses are *interrelated* and *interdependent*. Below, we explore how each affects the other -- for example, the way you define payment determines whether the client should receive a refund if the contract is cancelled.

We also address questions like: ***if there is a “shelter-in-place” regulation that prevents you from going outside to photograph an assignment, are you expected to still perform your contract?*** Or, if your client cancels the contract because of COVID-19, do they still owe you any payment? These are the practical, critical questions that we hope to offer some perspective on.

I recently recorded a ***webinar*** on this very topic during one of the first ASMP Town Halls that we started back in March. That video is another helpful resource that will provide further detail on these and other issues related to the effect of COVID-19 on your business.

Payment – Deposit vs. Retainer

In your payment clause, you need to specify whether the client's payment will be considered a deposit or a retainer. **The distinction can be critical.** A **deposit** is generally seen in the legal world as a payment that is intended to go towards a future service. Some courts have held that if the service is never performed, the money must be returned, unless there is an agreement to the contrary in writing (and sometimes not even then). On the other hand, a **retainer** is generally interpreted as a payment that is made in advance to secure future availability for services. Unlike deposits, retainers are almost always non-refundable.

Our general guidance is to word your payments in terms of a “retainer” or “fee” if you want to give yourself the best shot at ensuring that you get paid for the job. This way, if the client backs out of the agreement and demands a refund, any money that you have already been paid can't be refunded (barring other terms to the contrary in the agreement and the specifics of your situation).

Regardless of whether you have “deposits” or “retainers” in your agreements, I highly recommend that you have the client initial next to the payment section, in addition to making sure both parties sign at the end of the agreement. The practice of initialing next to the payment section shows that the client has read, understands, and accepts the terms of payment as written, i.e. whether any or all of the payment is refundable, what the payment schedule looks like, and so on. This way, you have a paper trail in case there is ever an issue. **A good rule of thumb when it comes to contracts is: always think about what you would want or need to prove your position in the future.**

FAQ:

When it comes to deposits versus retainers, should you consistently use one over the other in your contracts or does it depend on the assignment? [Check out this video.](#)



Force Majeure

You have likely heard of this term before. It is what lawyers like to call “boilerplate,” or in other words, very common language in most contracts. It is a French term that translates to “superior force,” and it refers to what happens in case an unforeseeable event, or an “act of God,” makes it impossible for someone to perform his or her duties in a contract. Types of force majeure events include: natural disasters, war, labor strikes, global epidemics or pandemics, and military or civil order or regulation -- to name a handful. Here are some basics:

1. The *force majeure* event must be beyond the control of the parties.

In other words, it cannot be something that one of the parties did. For example, let's say I have a rental studio that you have contracted to use for a shoot, and I happen to leave the water on the night before the shoot, which causes the studio to flood. Since I caused the event that made it impossible to perform our contract, the flood would not be considered a *force majeure* event, and the clause would not apply.

2. The *force majeure* event must affect the contract at issue.

For example, let's say you are based in Texas, and a client based in New York has hired you to create a digital illustration for the client's brand. Then, COVID-19 hits. You would not be able to claim that the pandemic was a *force majeure* event that prevented you from doing your job, since you can likely still perform your duties under the contract. Even though a “pandemic” may be listed as a *force majeure* event, it does not affect your contract – you are still able to create the digital content and send over the work product to your client electronically. Thus, the contract could not be cancelled. The event causing the *force majeure* has to somehow prevent the performance of your contract.

3. The *force majeure* event must not have been anticipated or predicted.

It is critical that the *force majeure* events come out of nowhere. Let's look at the Y2K Bug as an example. Everyone predicted that the millennium would bring technology compatibility issues because of the way early software programs were structured. Thus, that would not have qualified as a *force majeure* event because it was anticipated.

A *force majeure* clause allows a contract to be canceled in its entirety based on the above three criteria. Let's look at an example of a *force majeure* clause:

“

A party shall not be held liable for failure of or delay in performing its obligations under this Agreement if such failure or delay is the result of an act of God, such as earthquake, hurricane, tornado, flooding, or other natural disaster, epidemics or pandemics as defined by the Centers for Disease Control and Prevention or by the World Health Organization, wars, action of foreign enemies, terrorist activities, labor dispute or strike, government sanction or regulation, military or civil order, blockage, embargo, failure of electrical service riots, strikes, lock-outs, work stoppages, other labor disputes, or supplier failures (any, a “*Force Majeure* Event”). The non-performing party must make every reasonable attempt to minimize delay of performance. In the event a *force majeure* event continues longer than twelve (12) months, either party may terminate the Agreement, and in such event, if Client elects to terminate the Agreement, Client agrees to repay the full amount of the deposit within ten (10) days of termination notice.”

This *force majeure* clause is pretty thorough. It starts off by saying that you and the other party are not liable if either is unable to perform the contract because of a *force majeure* event. The list of *force majeure* events, though not exhaustive, includes specific examples, including pandemics and epidemics.

Next, this clause states that if a *force majeure* event lasts longer than a certain period of time (here 12 months), either party can get out of the contract. Although the time period in this example is 12 months, you can make it whatever period of time you want, whether 8 weeks, 4 months, or some other length of time. Notice also that this is where your payment clause comes in to play – if you want or expect some sort of payment if the contract is cancelled, be sure to include that and align it with your payment and cancellation provisions.

The beauty of contracts is that you can craft them the way you want, which means you can include whatever terms you want. So, you should write a clause that makes sense for you and your business. Bottom line: be creative and be specific.

FOR ADDITIONAL INFORMATION,

please refer to this additional resource:

<http://bit.ly/force-majeure-maddrey>



Cancellation / Termination

A cancellation or termination clause is exactly as it sounds – it explains how either party may cancel the agreement in place. Cancellation and termination are used interchangeably and in most cases mean the same thing. Now, this clause is different from *force majeure* because it does not require an event out of your control to cancel the contract. Rather, the agreement can be cancelled for any reason or no reason at all. That's why language really matters here. When drafting or examining a cancellation clause, it's important to pay attention to the following:

1. For what reasons can I cancel?

Contracts usually provide both “*for cause*” and “*not for cause*” cancellation. “**For cause**” cancellation means the cancelling party has a reason for cancelling, *i.e.* Party A has breached the contract and didn’t fix it within an allotted time frame, so Party B wants out. “**Not for cause**” cancellation means the cancelling party does not have a reason for cancelling, *i.e.* Party B wants to cancel just because. Both are acceptable forms of cancellation, as long as they are spelled out in the contract.

Typically, each type of cancellation requires some type of notice, meaning the cancelling party has to give the non-cancelling party a heads up in writing that it wants to cancel. This writing can be in the form of a letter or an email – either will suffice unless the agreement says otherwise. Let’s say Party B wants to cancel because Party A breached the agreement (for cause). Party B usually has to first alert Party A that it didn’t follow through on its part of the agreement and thus has 15 days to try to remedy the situation, but if it doesn’t do so, then Party B can send Party A notice of termination.

On the other hand, a party that cancels for whatever reason (not for cause) usually provides the other party at least 30 days’ written notice. Let’s say Party B does not want to be in contract with Party A anymore – Party B has to send Party A an email or a letter 30 days before he wants the contract to end to let Party A know of its intent to cancel. Again, these notice periods (15 days if for cause, 30 days if not for cause in this example) are generally standard but ultimately, can be up to you.

2. How does the cancellation clause interact with my payment clause?

If either party cancels the contract, it is important to be clear about whether any refunds to the client or further payments to you are expected. If your payment clause makes it clear that the amount paid upfront is a retainer and cannot be refunded, then the non-cancelling party is hard-pressed to demand a refund if it decides to cancel the contract. However, if your payment clause notes that the initial payment to you was a deposit, your client would have a better argument for demanding a refund on cancellation.

3. When can someone cancel?

We certainly encourage putting parameters on when a client can cancel. It is obviously not ideal for a client to cancel the day before a shoot. To prevent that, be clear about how far in advance a client can cancel without any consequence and if they choose to cancel within that time frame, what the consequences are in terms of payments or kill fees.

4. Is cancellation all or nothing, or is postponement an option?

This is especially relevant in the midst of COVID-19, as projects may be impossible to do now but could be postponed and then accomplished once state and local regulations lift and businesses are operating more normally. While it may be an inconvenience to postpone, it is sometimes better to postpone than to cancel because you still have work for the future and maintain a relationship with your client. Remember the key is to be flexible, so make sure there is not just cancellation language in your contract but also postponement language if that makes sense in your specific situation.

The first example of a termination clause is below. It is a standard termination clause in a commercial assignment contract. Note that this is not a template to use, but rather an illustrative example of the types of language you may see:

Termination By Default: If either Party is in material breach of any obligations hereunder, which remains uncured for a period of thirty (30) days after receipt of written notice from the non-breaching Party of such breach, the non-breaching Party may terminate this Agreement.

Elective Termination: Client may terminate this Agreement upon thirty (30) days' written notice to Photographer and delivery of an early termination fee, which will be fifty percent (50%) of the Creative Fee and all of the other fees and expenses actually incurred in connection with the Assignment (the "Kill Fee"). Notwithstanding the foregoing, if Client terminates pursuant to this section less than two (2) business days prior to Photographer beginning work on an Assignment, the Kill Fee payable in connection with the Assignment will be one hundred (100%) of the Creative Fee and all of the other fees and expenses actually incurred in connection with the Assignment. Photographer may terminate this Agreement upon written notice to Client if Client becomes insolvent or suffers any act of insolvency.

Effect of Termination: Upon expiration or termination, all licenses granted in this Agreement will be immediately terminated, and within thirty (30) days thereafter, Client will return and/or destroy all copies of the Assignment Content in any and all media in its possession or control. All payment obligations will survive termination of this Agreement for any reason.

You'll notice that this termination clause accounts for both types of termination: ***termination for cause (or by default) and termination not for cause (termed here as elective termination).***

Specifically, the contract would be terminated if either party breached the agreement (“breach” is a fancy word for failing to follow through with a promise made in the agreement or somehow going against the terms in the agreement), and that party did not try to repair the situation within 30 days. Otherwise, either party could cancel the contract for any reason by giving the other party 30 days’ written notice. And, this termination clause describes the expectations of paying a kill fee for any elective termination by client.

The second example is a cancellation clause that is tailored specifically for an event, such as a photoshoot or a wedding. You will see it contains conditions if the event has to be cancelled or postponed under normal circumstances and separate conditions for cancellations or postponements due to COVID-19.

CANCELLATION OR POSTPONEMENT: If Client should cancel the event, the Retainer will not be refunded, and the Client must immediately notify Studio in writing.

a. POSTPONEMENT: To consider a date change, Studio must first receive written release of the current contracted date and time, which will null and void this written contract.

b. CANCELLATION OF MULTIPLE EVENTS: If this Agreement contains multiple services, and a portion of this contract is cancelled up to 30 days prior to the initial service date in this Agreement, then a partial refund of XX% will be remitted to Client .

c. CANCELLATION OR POSTPONEMENT DUE TO COVID-19: If Federal, State, or local regulation makes the performance of the photoshoot impossible, the Studio will take necessary steps to work with Client to postpone the photoshoot within a reasonable timeframe. If Client wishes to cancel due to concerns regarding COVID-19, Client must notify Studio within five (5) days in writing, and the Retainer will be refunded. If Client becomes ill with COVID-19 symptoms and must postpone the photoshoot, Client must notify Studio as soon as practicable, in writing, and may not schedule another date for a photoshoot until symptoms have not been present for at least 14-days.

This cancellation clause is pretty thorough because it covers not just cancellation, but postponement too. It also provides a clear cancellation window and touches on refundability of payment depending on when cancellation occurs.

Conclusion

The above clauses are crucial pieces of your contracts right now because they address the very issues people are facing, from canceled events to unprecedented ones. No one could have predicted a global pandemic and its vast implications. We now have the awareness and the tools to deal with it and prepare for other similar events. Spelling out the ramifications of these kinds of worst-case-scenarios will help you be prepared no matter what else comes your way. ***Remember, you will need to form fit your contract based on the project, assignment, or client as well as your specific needs and expectations.***

Chapter Three:

Insurance

Insurance is a tricky topic. There are several different types of coverage, but most have very specific requirements when it comes to recovering from COVID-19. Additionally, most policies are not currently beneficial as the pandemic is already well underway -- insurers aren't in the business of insuring burning houses!

Use this section as a helpful guide to understanding policies you may already have, as well as policies you may want to consider for the future.

Common Types of Insurance

Commercial General Liability Insurance

Commercial General Liability Insurance covers you when third-party individuals claim that they sustained some sort of injury or personal damage resulting from an interaction with your business. This type of insurance, for example, could potentially cover claims of people who say that they contracted COVID-19 while interacting with you or your employees while you were conducting business. However, always check your policy – oftentimes this type of insurance does not allow coverage for virus-related claims. ***WE SIMPLY DON'T YET KNOW IF THIS WILL COVER COVID-19 CLAIMS!***



Note: This is a great time to remind you that an LLC is incredibly important for reducing your personal liability, especially in COVID-19 circumstances. For example, if your commercial policy did not cover you and you had not formed an LLC, you could be personally liable to an individual who contracted COVID-19 from your business. A properly formed and regulated LLC helps to lessen or remove the liability from you personally and directs it towards your business instead.

Business Interruption Insurance

Business interruption insurance is triggered whenever your business activity is halted by physical damage such as a flood, fire, earthquake, etc. Unfortunately for COVID-19 purposes, government shutdowns, “states of emergency”, or simply closing up shop to prevent disease spread won’t likely rise to the level of “physical damage.” That being said, this type of insurance may cover you if you have to shut down because an infected person has been inside your establishment, and you need to clean, sanitize, and wait for the area to be safe again. Check your policy!

Contingent Business Interruption Insurance

Similar to regular Business Interruption Insurance, Contingent Business Interruption Insurance is triggered whenever there have been physical disruptions with suppliers or buyers. These disruptions are typically events such as an earthquake damaging a factory, an 18-wheeler overturning and losing the product, or a fire burning down a buyer’s premises. For the purposes of COVID-19, this type of policy could be triggered if the partner or customer has to shut down due to an active COVID-19 infection on the premises – as above, the key here is that the shutdown result from physical contamination. Cautionary shutdowns or shutdowns resulting from government mandates likely wouldn’t be sufficient.

Civil Authority Policy

A Civil Authority Policy comes into play when there is a physical loss of property resulting from an order from a civil authority (for example, local, state, or federal government). For COVID-19 purposes, this could mean orders such as a mandatory shelter-in-place or the closing of specific types of businesses (bars, restaurants, etc.). However, if the government merely “recommends” that you stay home to prevent spread, this is likely insufficient to trigger the policy. The order must actually prevent the business from allowing persons inside the establishment.

Specialty Types that May be Relevant Now

Pandemic-Specific Policies

Pandemic-specific policies are fantastic for pandemics. Unfortunately, they may cost more, and you can't get one right now to protect you against COVID-19-related issues. Insurers don't insure burning houses! However, it's definitely something to consider when you're deciding whether or not to expand your business insurance for the future.

Event Cancellation Insurance

This type of policy offers broad coverage for when an event must be cancelled, postponed, or relocated due to disease or quarantine. However, this does not cover voluntary cancellations or events with low (to no) attendance. You are also typically required to mitigate (or attempt to lessen any damages). Nonetheless, this insurance is great to have for future events that are impacted by government shutdowns, high rates of disease spread, or travel restrictions.

Others: Travel Insurance, Political Risk Insurance

Some other miscellaneous policies such as travel insurance and political risk insurance may cover pandemic-related incidents, but it is best to talk to your insurance provider for details and specifics.

Bottom Line?

The bottom line? Document your losses, understand your policy, and talk to your insurance provider. They can help you understand the policies you do have while also recommending policies to consider for the future.

FAQ:

In terms of COVID, what is an example of “physical damage” that could trigger an insurance clause?

What does one do if they don't have insurance, or their insurance doesn't cover COVID-specific issues?

Check the [Guide Page](#) for answers!



Chapter Four:

Workplace Considerations

With the flood of information coming from federal and state authorities about social distancing, PPE, and hygiene, it's important that your business has policies in place that address these concerns and the new normal we find ourselves in. This chapter discusses the paperwork we suggest you have and present to everyone you work with, including employees, contractors, and clients.

Of course, it is important to remember that these forms are provided as examples of the kind of documents you may wish to use as part of your business practice. **Ultimately, you MUST customize them depending on your particular business needs.**

Policies and Procedures

Regardless of the size of your business, policies are a good thing to have in place for big and small businesses alike to ensure that your business operates efficiently, transparently, and productively. It's a way for everyone to get on the same page about your expectations. In the midst of a pandemic that has affected the way photo shoots can be conducted and has impacted interactions with clients and colleagues, a company policy has never been more important.

The **Policies and Procedures** document describes the protocol that your business has adopted to try to prevent the spread of COVID-19 at your workplace. It applies whether you are at your studio or on location, and it affects your employees, contractors, and clients. Based on information and data gathered from federal and state authorities, topics covered in this document include: testing and screening for COVID-19 at your studio or workplace, sick leave arrangements, work from home requests, traveling

and commuting measures, temperature checks, hand washing, respiratory etiquette, proper protective equipment, and cleaning and disinfecting plans. ***This Policy puts everyone on notice that you are taking precautions and doing your due diligence as a business owner. We couldn't recommend it more.***

Social Distancing Policy

A document that is referenced in the above-discussed Policies and Procedures is the **Social Distancing Policy**. The CDC and the WHO have maintained that social distancing is a critical component of slowing the spread of COVID-19. Please refer to **ASMP's Health and Safety Guide** for a closer look at the medical insight on social (or physical) distancing.

The Social Distancing Policy goes hand in hand with the Policies and Procedures and should be presented alongside it to your employees, contractors, assistants, and clients. This policy specifically looks at the definition of social distancing according to federal authorities and outlines the measures that your business should take to comply with their social distancing guidelines. The recommended measures include changing work schedules to decrease the number of people in the studio at one time, limiting the number of large gatherings at a shoot, maintaining a six-foot distance between you and those you work with, and restricting the sharing of equipment as much as possible. Also included at the bottom of the Social Distancing Policy is an acknowledgment that the signer understands his or her responsibility to abide by the policy's terms. It's important that the person not only reads but also signs the Social Distancing Policy.

Waiver of Liability, Assumption of Risk, and Statement of Health

Since March, one of the most frequently asked questions we've received from photographers like you has been: what happens if a client or an assistant gets sick after a shoot? Can I be liable? ***The answer is: well, we don't know yet.***

Part of the reason we aren't sure is because we are just now starting to see lawsuits pop up where employees or employee family members have sued employers after developing a COVID-19 infection and alleging unsafe workplace conditions. Congress is currently in the process of considering the addition of employer liability protections to the next relief bill. What we do know is that there are steps you can take now to protect yourself and your business from liability in the meantime. This is through a release and waiver form.

The **Assumption of Risk, Waiver of Liability, and Statement of Health** is a comprehensive form that addresses three main things: (1) risk, (2), liability, and (3) screening. First, the form states that the signer understands and accepts the risks of shooting with you during the pandemic, including the risk of becoming infected with COVID-19. Second, the form states that the signer agrees not to hold you liable for any illness (that means COVID-19) that may result from participating in the shoot. Lastly, the form sets forth the symptoms of COVID-19 and has the signer attest to not having any of the symptoms, not being around someone who has been diagnosed with COVID-19 within the last 30 days, and not traveling to a COVID-19 hotspot within the last 30 days. Essentially, the person signing the form—whether it be a client, a contractor, talent, or a crew member—is agreeing that whatever happens at the shoot is not your fault. Now, this form does not guarantee that you will never be sued. But, if you are, it does help your case to be able to present this signed document in court. ***It is critical to make sure that you are following your own Policies and Procedures. If not, it doesn't matter how many signed documents you have... you will be often out of luck.***

Chapter Five:

Employer Considerations

Ed. Note - This chapter was authored by Derek McKee, a workplace lawyer with the firm of Constangy, Brooks, Smith & Prophete, LLP. While ASMP understands that many photographers work in a solo situation, or with one or two close employees, others have a regular set of employees, contractors, and crew. To that end, this chapter specifically must be adapted to your needs and your business. We have attempted to include information here that will be of benefit at whatever stage you find yourself. And remember, whether you have W-2 employees or hire independent contractors, you are the employer in both scenarios!

COVID-19 is relentless. We fully understand how difficult this pandemic has been for businesses of all sizes, but especially for small business owners. To further increase employers' collective stresses, state, local, and federal governments have seemingly created the world's most difficult puzzle of legal "do's and don'ts." With the onslaught of new regulation, it became our mission to simplify some of the biggest landmines for employers to avoid in the COVID-19 era. Consider the following information the "weapons" you need to detect and avoid the legal landmines during COVID-19:

Which laws could apply in the event of a COVID-19-related workplace situation?

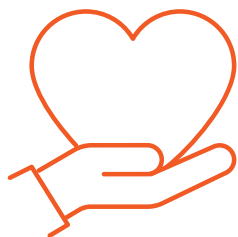
Too many to count. However, the following are the ones we feel may provide the greatest exposure to any kind of liability. The **Occupational Safety and Health Act** applies to keep your workplace safe for your employees. The **Americans with Disabilities Act** might apply to an employee who either has COVID-19 or who has an underlying medical condition that makes him or her particularly vulnerable to COVID-19. The ADA also governs reasonable accommodations of disabilities and "medical inquiries" made in connection with employment and confidentiality of employee medical information.

The new **Families First Coronavirus Response Act** requires paid leave for employees who are unable to work for certain specified COVID-19-related reasons. (The FFCRA applies to private sector employers with fewer than 500 employees and to most public sector employers.) The **Family and Medical Leave Act** might apply with, or instead of, the FFCRA. Furthermore, employers need to be conscious of their obligations under the **Fair Labor Standards Act** for employees that may be teleworking and take appropriate measures to protect their confidential and proprietary information.

In addition to all of the above, employers need to be aware of any applicable state or local laws that might apply to their employees. Make sure to check your state and local governments' websites for any new regulations. We cannot stress this enough--**Check. Your. Local. And. State Regulations.** If they don't make sense to you, call your lawyer. The fifteen minute phone call will be much less expensive than a potential lawsuit.

What should an employer do if it learns that an employee has COVID-19?

- Identify everyone with whom the infected employee had contact during the CDC-identified 14-day period. Notify those identified individuals of possible exposure, and consider sending the exposed employees home for 14 days (depending on the relevant facts and circumstances).
- Do **not** disclose the name or personal information of the employee who has tested positive.
- Inform any other necessary parties.
- Disinfect the workplace as soon as possible. OSHA has offered general guidance on cleaning chemicals in their **Guidance on Preparing Workplaces for COVID-19**.



FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (“FFCRA”) was signed into law on March 19, 2020 and contains two key provisions that require some employers to offer paid leave to employees who can’t work (or telework) for specified reasons. *The FFCRA will expire on December 31, 2020.*

The FFCRA paid leave provisions apply to private sector employers with fewer than 500 employees, and to virtually all public sector employers. Private sector employers who provide leave required by the FFCRA are entitled to payroll tax credits to cover the expense.

The Emergency Family and Medical Leave Expansion Act allows employees to take paid leave to care for a son or daughter who is home because of a school or childcare closing or because the childcare provider is unavailable. Employees can take up to 12 weeks’ leave in a rolling 12-month period, and after the first two weeks, the leave is paid at 2/3 times the employee’s regular rate, up to a maximum of \$200 a day or \$10,000 total. *The Emergency Paid Sick Leave Act provides up to 80 hours of paid leave for six coronavirus-related reasons:*



1. The employee is under a federal, state, or local quarantine or isolation order because of COVID-19,
2. The employee is advised by a health care provider to self-quarantine because of COVID-19,
3. The employee has symptoms of COVID-19 and is seeking a medical diagnosis,
4. The employee is caring for an individual who meets one of the first two conditions above,
5. The employee is caring for a son or daughter whose school or “place of care” is closed because of COVID-19 precautions, or whose care provider is unavailable for the same reason, or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

To be eligible for expanded FMLA leave, the employee must have been employed by the employer for at least 30 days before the date that the leave would begin. Employees are eligible for leave under the Paid Sick Leave Act as soon as they are employed.

What if an employee needs time off for a legitimate coronavirus-related reason that is not covered by the FFCRA?

Even if the FFCRA does not cover the time off, the employee may be entitled to paid leave under the employer's policies or short-term disability, or to job-protected unpaid leave. Make sure you check your policies! Additionally, depending on whether the employer is "covered" and whether the employee is eligible and has a qualifying condition, the time off may be covered under the "unpaid leave" provisions of the Family and Medical Leave Act, or as a reasonable accommodation under the Americans with Disabilities Act. Discrimination + Equal Employment Opportunity.

Discrimination + Equal Employment Opportunity

Is COVID-19 a "disability" within the meaning of the Americans with Disabilities Act?

Not *per se*, but depending on the severity and duration of the condition for a particular individual, it could be. It is also possible that related conditions could be disabilities, even if the COVID-19 itself is not. For example, if an employee has diabetes, asthma, or an immune disorder that COVID-19 affects more severely, then the employee may have a disability based on the asthma or the immune disorder, if not the coronavirus. It is also possible that the effects of a COVID-19 condition could be disabilities.

Further, it's important to note that the ADA provisions relating to employment-related "medical examinations" and confidentiality of employee medical information apply to all applicants, offerees, and employees -- whether they have ADA-protected "disabilities" or not. This is why it is so important to keep medical information confidential -- especially the identity of a suspected or a confirmed case of COVID-19. You wouldn't want to run afoul of the ADA or HIPAA by divulging confidential medical information.

Are employers required under the ADA to make reasonable accommodations for employees with coronavirus?

No. It is not necessarily required, but it would be a really smart idea to be cautious and attempt to accommodate employees as such. If the coronavirus is severe enough or long enough in duration to be a "disability" within the meaning of the ADA, or if the employee has to be extra cautious because of an underlying medical condition, then yes. Even if the coronavirus is short-term or not severe enough to rise to the level of an ADA-protected disability, employers are strongly encouraged to make reasonable accommodations for employees who have the condition, or who have been exposed to the condition. In the case of a mere exposure, that could include allowing the employee to be off work (or to telecommute) for the medically recommended length of time.

It's also important to remember that otherwise-healthy employees who have an exposure or are under quarantine may be entitled to job-protected paid leave under the Families First Coronavirus Response Act.

Are we allowed under the Americans with Disabilities Act to take employee temperatures or test employees for COVID-19?

YES! The EEOC finally said that taking employee temperatures to screen for possible COVID-19 does not violate the ADA. Moreover, "employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19" and "may measure employees' body temperature." BUT, all test results of this nature should be kept confidential and disclosed only in accordance with the ADA or other applicable law. The full text of the EEOC's guidance regarding COVID-19 testing is available [here](#).

If we learn that an employee has coronavirus or has been exposed, how much can we say to other employees without violating the ADA's confidentiality provisions?

Ideally, the only thing you will need to tell employees is that there has been an exposure in the workplace, or in a particular work location. However, it is possible that some people will need to know more than this, including the identity of the individual. Disclosure of the identity (or individually identifiable information about the individual) should be strictly limited to those with a legitimate need to know, and those employees should be instructed -- upon penalty of disciplinary action, up to and including discharge -- to keep the information confidential.

For the safety of our older workers, can we send them home until the pandemic is over, or reaches a safer level?

Absolutely, positively NO. The EEOC holds the position that doing so would be age discrimination. However, a smart way to provide this protection without mandating it would be to give the older workers the option of telecommuting (assuming their jobs would allow for that). If that's a possibility, it would be up to the employees whether to accept that offer.

Of course, if they accept, and if they are doing their jobs remotely, they are working and would have to be paid in accordance with all applicable wage and hour laws. Furthermore, these employees are still responsible for performing their jobs. As such, it is critically important to stay in contact with your employees, ensure they are finishing their work, and discipline as needed to keep them on track.



Would the same principles that apply to older employees also apply to pregnant employees, whom we would not want to put at risk?

Since the U.S. Supreme Court's 2015 decision in *Young v. UPS*, employers are required to make reasonable accommodations for pregnancy and related conditions if they accommodate non-pregnant employees who are similar in their ability or inability to work. In the case of a pregnant employee, an appropriate comparator would be an employee who had another medical condition that put him or her at heightened risk in the event of an exposure to COVID-19 -- for example, an employee with diabetes or an immune disorder. If you would accommodate that employee, then you would be expected to accommodate the pregnant employee, as well.

SAFETY + HEALTH

Is there any guidance available for employers who are reopening their offices?

On July 2, the Occupational Safety and Health Administration published a set of [Frequently Asked Questions related to COVID-19](#). The FAQs do not appear to provide any new guidance but are grouped by topic for easier reference and are more user-friendly as a result. Before publication of the FAQs, employers needing information had to visit multiple pages on the OSHA website and the website for the Centers for Disease Control and Prevention. [More information is available here.](#)

What should employers do in the event of an exposure to COVID-19 in the workplace?

The Centers for Disease Control and Prevention has released guidance and continues to update that guidance as the situation surrounding the COVID-19 pandemic develops. The CDC also recommends the following Do's and Don'ts for essential critical workers who have been exposed to COVID-19:

DO: Take your temperature before work; Wear a face mask at all times; Practice social distancing in the workplace as work duties permit; Take the employee's temperature and assess symptoms before he or she starts work; If an employee becomes sick during the day, send the employee home immediately; Test the use of face masks to ensure they do not interfere with workflow; Increase air exchange in the building; Increase the frequency of cleaning commonly touched surfaces.

DON'T: Stay at work if you become sick; Share headsets or objects used near face; Congregate in the break room or other crowded places.

The CDC also recommends that employers implement the recommendations outlined in their [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019](#). Additionally, state and local governments, agencies, and health departments may have also issued guidance, some of which might be more restrictive than the guidance issued by the CDC.

Is there any circumstance where I would have to report a COVID-19 case to OSHA?

In limited situations, yes. In July, OSHA issued new [Frequently Asked Questions](#) addressing when employers governed by the federal agency must report work-related cases of COVID-19. Under the new FAQ, an employer must report COVID-19-related hospitalizations when the employer has knowledge that (1) the employee has been hospitalized (2) as a result of COVID-19. If an employee is hospitalized with what is apparently work-related COVID-19, but the case is not confirmed until after the hospitalization, the employer would have to report the case to OSHA within 24 hours of when the employer learned that the case of COVID-19 had been confirmed.

To stay out of trouble and avoid a citation for untimely reporting, you should report to OSHA within 24 hours of when you learn of a COVID-19-related admission to a hospital. But if you inadvertently miss this new deadline, we advise against conceding that there has been a violation of your obligation to report to OSHA when there has been a hospitalization. If that hospitalization occurred more than 24 hours after the “work-related incident,” then we believe that as a matter of law the rule in OSHA Rule §1904.39(b)(6) still controls and does not require reporting.

Can an employee who is concerned about coronavirus simply refuse to come to work?

In limited circumstances. An employee’s right to refuse to do a task is protected if ALL of the following conditions are met:

- Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and,
- The employee refused to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists; and,
- A reasonable person would agree that there is a real danger of death or serious injury; and,
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Wages + Hours

Does an employer have to pay employees if it is closed because of COVID-19?

It depends on whether the employees are exempt or non-exempt under the federal Fair Labor Standards Act and any applicable state wage and hour laws. The following applies to the FLSA only, so check your state and local regulations to ensure compliance (or ask your lawyer to help with that):

- **Exempt employees:** Exempt employees must generally be paid for the entire workweek if they perform any work during that week. (Limited exceptions may apply.) They do not have to be paid in workweeks in which they perform no work. One requirement for FLSA-exempt status is that the employee be paid on a “salary basis.” If an exempt employee performs some work during the workweek but the employer makes deductions from the employee’s pay for time not worked -- even if it is due to a facility closure -- the employee will no longer be paid on a “salary basis” and, in most instances, therefore will no longer be exempt.
- **Non-exempt employees:** An employer is not required to pay non-exempt employees for non-work time. Thus, the FLSA does not require an employer whose facility is closed to pay non-exempt employees for the time that they would have worked if the facility had remained open.

Watch out for teleworking: Of course, time spent teleworking is “time worked” and should be treated as such, regardless of whether the employee is FLSA-exempt or not and regardless of whether the employer’s facility is closed.

BEWARE: An employer cannot require an employee to use PTO if the employee is entitled to paid leave under the FFCRA (although the employee can choose to use PTO before using FFCRA leave). But to be eligible for paid leave under the FFCRA, the employee must be unable to work or telework for one of the specified reasons ***even though the employer has work available.***

Workers' Compensation

Employees may file claims if they believe they contracted COVID-19 at work, although that does not mean it is a compensable claim. Generally, it will be difficult to prove work-relatedness because diseases to which the general public is exposed are usually excluded -- aka it would be very difficult to prove that an employee contracted COVID at work. Under current law, the increased "risk" even with these jobs is not generally sufficient to result in a finding of compensability.

However, BEWARE, a number of states have or are considering changes to their workers' compensation laws as a result of COVID-19.

Most of these proposals would provide that a COVID-19 illness is compensable for health care workers and safety professionals (firefighters, first responders, police officers, etc.). Make sure to stay apprised of your state and local laws for Coronavirus related changes.



Chapter Six:

Client Communications

They say communication is the hallmark of a good relationship. Your relationship with your client is no exception, especially right now when circumstances seem to be changing by the day. Open lines of communication with your client eliminate confusion, foster transparency, and create trust for current and future projects.

Perhaps your client is contacting you and asking you whether you want to continue with a shoot. It's important to first communicate to your clients that you cannot make the decision for them. Instead, try explaining what your experience has been with other clients and what you are willing to do. For instance: "Some of my clients have canceled, some haven't. If you decide to continue with shoot, I can make it, but we need to make sure we follow proper protocol." Then, depending on the outcome, you should provide them with your policies and waivers ([see Chapter Four](#)).

Or, perhaps your client has canceled an upcoming shoot and you are wondering what to do. First, we would recommend you communicate in writing. Sure, you can call your client (in fact, some would argue phone calls are a lost art), but it's always a good idea to follow up any phone conversation with an email that outlines what was discussed. This is called a "contemporaneous writing," and it can serve as evidence in a courtroom. If you don't have a written record, the court won't care what was said. It will be as if the conversation never happened.

You also will need to refer to your contract to see what it says about cancellation / postponement and payment. You will need to abide by what the contract says, if anything, about cancellation which is why it is so important to thoroughly craft the clauses discussed in [Chapter Two](#).

Based on what the contract allows you to do, you will have to weigh competing business options – what other projects do you have lined up? Do you want to stop working with this client? For the sake of salvaging the relationship and creating a good rapport with your client, it may be best to try to reschedule or postpone if you can, rather than cancel. That way, you communicate that you are easy to work with, flexible, and willing to work with them. Lastly, it is important to be understanding. These are unprecedented times that have taken everyone by surprise and affected people differently. Some are more hesitant and cautious in their business practices; others are unbothered and operating normally. The truth of the matter is, it's not business as usual. Meet your clients where they are, and it will help you in the long run.

Bottom line: communicate, communicate, communicate. And put it in writing. You (and your lawyer) will be happy you did.



For more information,

you can check out [this video](#) that discusses the implications of COVID-19 on business conduct, including client communications

Chapter Seven:

Additional Resources

As mentioned repeatedly in the foregoing pages, we will update the contents of this document as needed based on new information that comes to light. However, it is imperative that you continue to check federal guidelines as well as your state and local authorities for updates. We provide some of those helpful resources below for your convenience and reference.

- **ASMP's Health and Safety Guide For COVID-19: A Protocol for Visual Creators**
- **Centers for Disease Control and Prevention**
- Cleaning and Disinfecting:
<https://www.cdc.gov/coronavirus/2019-ncov/community/clean-disinfect/index.html>
- Businesses and Workplaces:
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- Small Businesses:
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-small-business.html>
- World Health Organization (WHO)
<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
- Occupational Safety and Health Administration (OSHA)
<https://www.osha.gov/SLTC/covid-19/>
- Constangy Coronavirus Resource Page:
<https://www.constangy.com/coronavirus>