

Insights

FIVE STEPS FOR DRAFTING AN EFFECTIVE “EXTENUATING CIRCUMSTANCES” CANCELLATION POLICY FOR YOUR CONSUMER CONTRACTS IN THE UNITED STATES

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SUMMARY

As local and national regulations seek to “lower the curve” of infections of the COVID-19 illness, they have forestalled a host of consumer transactions, most notably those regarding travel, hospitality, and community events. Even if such regulations do not absolutely prohibit the fulfillment of those transactions, companies must confront the fact that consumers will still want to cancel them for the health and safety reasons. When this happens, companies’ standard cancellation policies or then-effective termination or force majeure clauses in their consumer contracts are likely insufficient to deal with the high consumer demand for contract cancellations. Therefore, companies should consider being prepared to enact “extenuating circumstances” cancellation policies (“ECCPs”) to excuse performance under existing consumer contracts. BCLP has prepared a list of five steps for drafting effective ECCPs to assist your business.

1. Make Your ECCP Easy To Understand. When drafting your ECCP, we recommend avoiding presenting the information in long paragraphs with lots of legalese. Doing so will make the provisions more accessible to consumers, and will decrease the volume of requests to your customer service representatives asking for clarification. We recommend using bullet points to separate the key provisions of your ECCP, including any relevant timelines and refund options. Essentially, these key provisions should form a roadmap for how consumers can formally cancel their contracts and receive refunds or credits in the extenuating circumstances. In case consumers may still have questions, consider including contact information at the end of your ECCP so that consumers can communicate those questions to you. Dedicated hotlines or chat boxes that direct consumers to specific customer service representatives responding to issues arising from the ECCP will streamline those inquiries.

2. Make Your ECCP Easy To Find. You are likely publishing your ECCP in response to a specific event such as a natural disaster or quarantine. We recommend creating a unique page or subpage

on your website for your ECCP in order to associate your ECCP with such event. This way, consumers seeking out your ECCP through search engines are more likely to land on the unique page or subpage without having to separately contact you. Additionally, if the event for which you are publishing your ECCP affects a majority of your customer base, you may consider placing a banner on your website's homepage that links to various pages and subpages with company information and responses regarding such event, one of which contains your ECCP.

3. Be Clear About The Scope Of Your ECCP. Your ECCP should be unambiguous for which consumer contract terms you are excusing performance and which transactions you are permitting to be cancelled. An ambiguously drafted ECCP will lead to consumer confusion and an increase in the volume of requests to your customer service representatives. This could result in inordinate delays in consumers exercising their cancellation rights. To avoid that, we recommend prescribing the following, at a minimum, in your ECCP to be clear about its scope:

- The event affecting consumers that will allow them to cancel.
- Which contracts and contract terms the ECCP excuses to allow for cancellation.
- The date by which a cancellation must be tendered in order to make it effective.
- Any limitations on the right to cancel based on when the contract was entered into.
- Any limitations on the right to cancel based on the location of the consumer or the location of where the contract was to be performed.

Remember that while your ECCP excuses obligations under pre-existing standard cancellation policies or termination or force majeure clauses in your consumer contracts, the other provisions of such contracts will likely remain unchanged. While it is not always necessary to remind consumers of this, we suggest that you take note of it internally, (i) so that your ECCP does not contradict any provisions in your consumer contracts that you do not intend to excuse, and (ii) as the publishing of your ECCP may trigger other pre-existing obligations of yours under those contracts, such as giving consumers proper notice of enacting the ECCP.

4. Be Transparent About The Remedies Under The ECCP. Any consumer making a cancellation under your ECCP will be principally concerned with recuperating their losses and recovering from the extenuating circumstances triggering their cancellation. The more transparent your ECCP is about how consumers may be reimbursed or credited, the fewer inquiries your customer service representatives will have to field and the more peace of mind you will give to your consumers. If your ECCP allows for consumers to be reimbursed upon cancellation, we recommend detailing the method of reimbursement and the timeline for receiving it. If your ECCP grants a credit to consumers upon cancellation, we recommend detailing to which future purchases that credit may be applied and making the process for using that credit as simple as possible by providing consumers with all necessary redemption information via email. We recommend that any credits

which you grant consumers should not expire for a reasonable period of time after the extenuating circumstances have ended.

5. Proactively Communicate With Consumers About Your ECCP. Following the publishing of your ECCP, you should make all reasonable efforts to communicate the offering of the ECCP to your affected consumers, including any efforts required by the notice provisions in your consumer contracts that remain unchanged. Any notices that you give to consumers about the ECCP should not contradict your pre-existing notice obligations. Making these notice efforts will effectively communicate to consumers about their rights and will facilitate amicable cancellations, fostering consumers' trust in your company and their continued purchase of your goods and services following their extenuating circumstances.

RELATED CAPABILITIES

- Commercial Transactions
- Retail & Consumer Products

MEET THE TEAM



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