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Moss & Barnett Advocate

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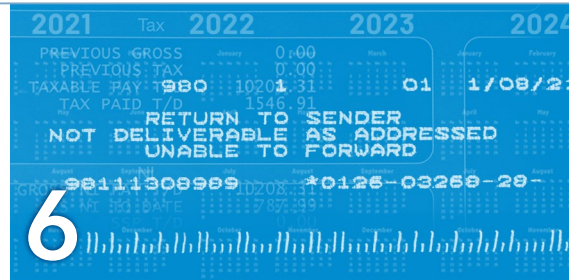
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Post-Pandemic Hybrid Work from Home: Is Comfort Worth the Risk? Cybersecurity and Data Privacy Considerations



As companies begin to seriously consider the post-pandemic office and whether to adopt a permanent hybrid work-from-home environment, serious thought should be given to the data privacy and cybersecurity risk involved. Potential benefits of a hybrid work environment – such as greater employee flexibility and reduced real estate footprint – need to be weighed against the legal and reputational risks to a company should a data breach occur. No network is completely immune from intrusion, but networks that facilitate work from home present unique challenges that companies ignore at their peril.

The arrival of COVID-19 and the ensuing stay-at-home orders in March 2020 meant a sudden and hurried shift to remote work. In the chaos of those early pandemic days, companies focused on rapidly deploying work-from-home technologies. According to one prominent cybersecurity firm, the internet saw a 40% increase in *unsecured* remote desktop traffic as companies scrambled to facilitate remote access. Not surprisingly, cybercriminals took advantage. But companies (especially smaller organizations) that were working quickly to adjust to a rapidly evolving public health emergency and government-imposed restrictions were likely insulated, at least temporarily, from the full legal and reputational risks involved.

Much data breach litigation is based on negligence law that judges a defendant's actions by what a reasonable person or organization would do under similar circumstances. Certain compromises to enable remote work that may have been reasonable as a once-in-a-lifetime pandemic suddenly descended on the nation will likely be seen as unreasonable going forward. While it will likely be some time before data breach lawsuits related to COVID-19 work their way through the courts, leniencies that the law might afford as accommodation to the sudden government imposed shift to remote work will almost certainly not carry over to

the post-pandemic period. Companies that continue to facilitate work from home need to invest in appropriate technologies and apply policies to adequately protect customer data.

Basic security precautions that companies should consider implementing include:

1. Multi-Factor Authentication.

The era of the password is over. When physical presence in the office was a prerequisite to network access, a strong password may have been enough. But with remote access, a second layer of authentication such as an access code texted to employees with each login attempt have likely become a minimum security standard.

2. Encryption.

All remote access to a company's network needs to be encrypted to guard against eavesdropping. A virtual private network (VPN) establishes a secured tunnel for data to travel from the home office to the company network. But even a VPN might not be enough. Vulnerabilities in an employee's personal router can allow hackers to access the company's network by piggy-backing a ride through the VPN connection. Consider providing employees with company managed routers or security appliances to reduce that risk.

3. Virtual Machines.

If a company permits staff to access its network from personal devices, security vulnerabilities present in that personal equipment can put the company network at risk. Consider the benefits of deploying virtual machines that can act as a sandbox insulating the network from malware that may be present on personal devices.

Alerts

1 Court Operations Update

While civil litigators have embraced remote technology, we are beginning to see a return to in-person depositions, mediations, and arbitrations. In our state court system, pandemic-related modifications remain in place, including the following:

- Hearings across all case types will continue to be conducted remotely to the extent possible.
- In-person civil jury trials may be held at the discretion of the chief judge and district court administrator.
- Remote civil jury trials may be held on agreement of the presiding judge and parties.

Operations in federal court in the District of Minnesota remain modified to encourage remote appearances; however, we expect to see a return to in-person civil jury trials, bench trials, and hearings on a case-by-case basis.

Our litigators practice in Minnesota and throughout the country. If you have questions about a civil litigation matter, please contact your attorney at Moss & Barnett.

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4. Do Not Forget the People.

No matter what security technology a company implements, good security training and easy access to IT staff are critical in any data security plan. The most effective defense against phishing attacks, for example, is staff well trained to spot and avoid malicious communications.

It is also important to ensure that a company's insurance policies adequately cover a hybrid work environment. The technologies and processes needed to adequately safeguard a network and stored data in a work-from-home environment vary depending on industry, company size, core technologies, regulatory framework,

and sensitivity of the data involved. While some form of hybrid workplace may well be the ideal fit for a company going forward, there are serious risks that need to be considered.



Aaron P. Minster is a member of our litigation group assisting companies and individuals with commercial litigation. Certified by the International Association of Privacy Professionals (CIPP/US) and a former network engineer, he has extensive experience in the areas of data privacy and cybersecurity.

612-877-5263 | Aaron.Minster@lawmoss.com
LawMoss.com/people-aaron-p-minster

Team News

Kelsey M. Scanlan Has Joined Our Team

Kelsey’s practice focuses on estate planning and probate and trust administration. She represents individuals and families in a variety of matters, from the preparation of estate planning documents to the administration of estate and trust matters. Kelsey counsels clients in the areas of wills, trusts, powers of attorney, health care directives, and other estate planning documents; probate and trust administration; tax reduction planning; and business succession and exit planning. She received her J.D., *magna cum laude*, from William Mitchell College of Law and her B.A. from the University of Minnesota-Twin Cities.

Kelsey M. Scanlan

612-877-5320

Kelsey.Scanlan@lawmoss.com

Wealth Preservation and
Estate Planning



Moss & Barnett Client: Impacks

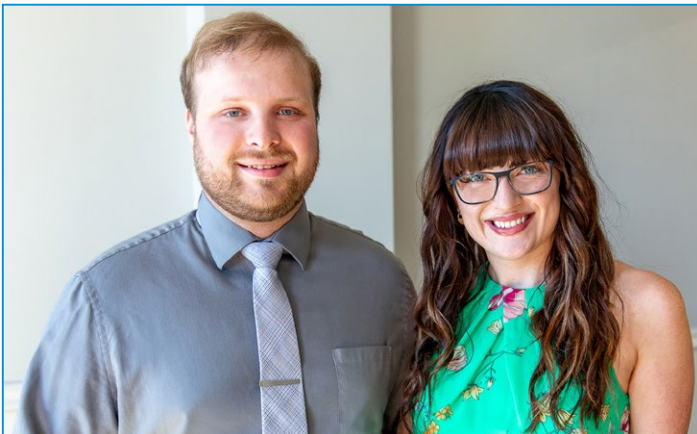
Brandon and Clare Richards

Moss & Barnett is pleased to serve as legal counsel to Brandon and Clare Richards, founders of a rapidly growing Minnesota startup, Impacks. Impacks was founded to address the lack of access many children have to critical school supplies, with a mission to create a world where every student has all of the supplies he or she needs to succeed. The Impacks platform provides a simple, convenient way for families to purchase their school supplies online, while also partnering with schools to help them fundraise. Impacks offers customized, prepackaged school supply kits at less than half



the national average cost, while also giving families a meaningful and convenient way to donate to their school. In addition to donations from families, Impacks also matches a portion of every donation. They have also established a partnership with the Central MN Educational Research & Development Council, and were recently accepted into a nationally ranked and highly competitive accelerator program, gBETA.

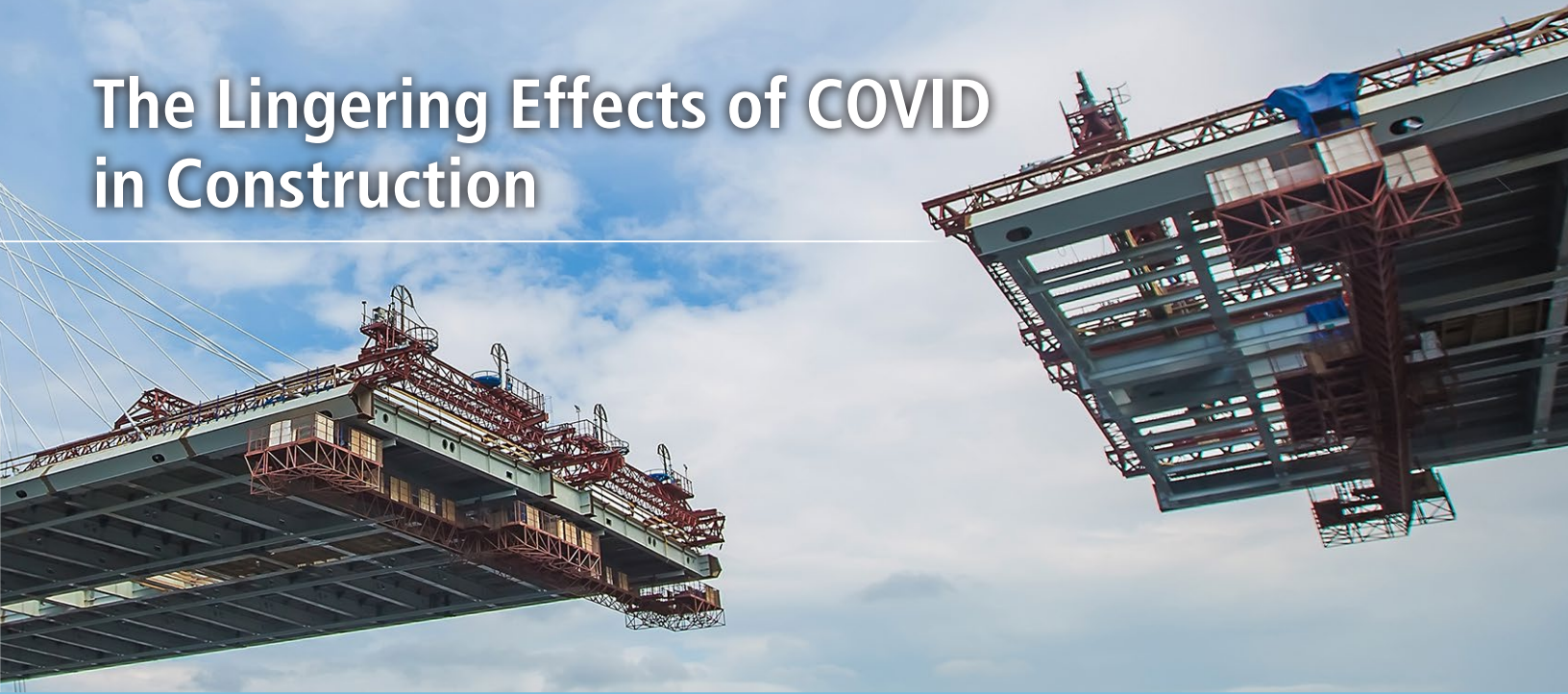
Learn more about Impacks: myimpacks.com.



Brandon and Clare Richards
Founders, Impacks



The Lingering Effects of COVID in Construction



Even though vaccinations against COVID are rising, the construction industry is still feeling the aftershocks of the pandemic. Supply chains continue to be disrupted nationwide. Many manufacturers and suppliers had to curtail or even stop production, but construction activity continued throughout the pandemic. That caused depletion of inventory and instances where demand exceeds supply. Clients are now reporting long lead times for materials that are usually readily available. When materials are available, they are often much more expensive than usual.

This causes problems at all levels of construction and exacerbates the tensions that already exist in the industry. Owners do not make money during construction; they make money from completed projects that they can use, rent, or sell. Owners want their projects completed as quickly and as inexpensively as possible. Contractors and subcontractors do make money during construction, but, like retailers, they make money by maximizing the difference between their cost for labor and materials and the price they charge. Price escalation in materials cuts into margins. And having workers sitting idle on a jobsite waiting for materials is the antithesis of labor productivity.

The contracts between the owner, the contractor, the subcontractors, and the suppliers all determine who will ultimately bear the cost of a problem on a construction contract. Here are a few things to consider if you are negotiating a new contract or are trying to resolve a problem on an existing project that has been impacted by supply chain issues:

- What is the form of your contract? Is it fixed-price or cost-plus?
- Does the contract impose deadlines?
- Under what circumstances can those deadlines be changed?
- What are the penalties if deadlines are missed? Liquidated damages or actual damages?
- Is there a no damages for delay clause?
- Is there a limitation on consequential damages?
- Is there a cost escalation provision?
- Is there a *force majeure* clause and does it apply?

This list is by no means exhaustive, but it shows that several different provisions in a single contract have to play together to achieve the desired allocation of risk between the parties to the contract.

But the problem often is even more complex than that. The contractual risk allocations need to be consistent for all of the contracts affecting a party on a project. For example, a general contractor on a construction project will typically have a contract with the owner and separate contracts with one or more subcontractors and suppliers. If the contract with the owner is fixed price and does not allow for cost escalation adjustments, the

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Be Aware of Unclaimed Property Rules

Unclaimed property laws can be confusing and can create traps for the uninformed. Under Minnesota’s unclaimed property law, a business that fails to timely report and remit unclaimed property may be hit with severe penalties and interest. Consequently, businesses need to understand and comply with unclaimed property laws.

Unclaimed property generally refers to abandoned intangible property. Common examples include dormant bank accounts, unclaimed wages, unpaid accounts payable, un-refunded overcharges, and deposits for the repair or purchase of goods or services. Under Minnesota law, however, unclaimed property does not include gift certificates, gift cards, or layaway accounts issued or maintained by a business selling tangible property or services at retail.

Common businesses that typically have unclaimed property include:

- Retailers
- Manufacturers
- Brokers
- Real estate agents
- Hospitals
- Clinics
- Oil and gas companies
- Financial institutions
- Insurance companies

The party responsible to report and forward unclaimed property to the state is known as the “holder.” Reporting requirements arise when the holder has held certain property for a specified period of time, called the dormancy period. Different dormancy periods exist for different types of property. For example, uncashed wage checks become unclaimed property after a one-year period, and

customer overpayments become unclaimed property after a three-year period.

Determining the “holder”

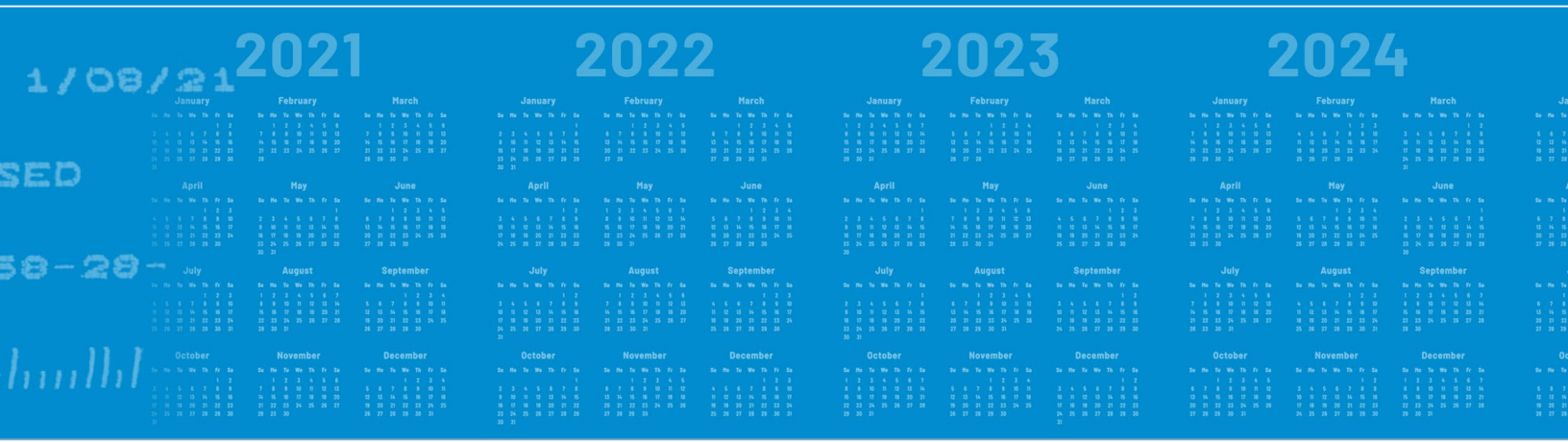
Determining the holder can be confusing. Often, the holder is not the party with custody of the property. For example, many businesses outsource rebate programs to third parties, called fulfillment houses. Typically, these fulfillment houses are responsible for administering the rebate program on behalf of the business. The fulfillment house collects and processes the rebate claim and subsequently remits a rebate check to the consumer. If the consumer fails to cash the rebate check, the unused rebate becomes unclaimed property after the dormancy period expires. Unfortunately, businesses may think they are not the holder in these situations. Despite outsourcing the rebate program, the business may be responsible for remitting the unclaimed rebates to the state. The business will want to understand the applicable law to identify if it has any exposure in these situations.

Due diligence and filing requirements

Holders must conduct due diligence in finding the rightful owner of property. Under Minnesota law, a holder must send written notice to the presumed owner within 120 days before filing a report if:

- The holder’s records contain an address for the presumed owner that the records do not disclose as inaccurate;
- The statute of limitations does not bar the presumed owner from bringing a claim; and
- The property has a value of \$100 or more.

Holders with unclaimed property must report and forward, regardless of amount, unclaimed property to the Minnesota Department of Commerce. For property that becomes unclaimed property on June 30, most holders must report by November 1 of that same year, while life insurance companies must report by October 1.



A failure to report results in a misdemeanor. A willful refusal to pay or deliver unclaimed property results in a gross misdemeanor. Additional penalties and 12% interest may also be imposed.

Here are some tips for “holders”:

- Implement procedures to monitor the dormancy period of property held. Be aware that different dormancy periods exist for different types of property.
- Review record retention policies. Under Minnesota law, the statute of limitations is generally ten years after the filing of a report. Retain applicable documents, including copies of all filed reports and remittances, before the expiration of the statute of limitations. If a holder is unable to produce records, auditors may attempt to estimate past-due liability for years without records. The auditor's use of estimation may create draconian results.
- Consider filing past reports to start running the statute of limitations. A failure to file a report allows the Department of Commerce to audit and impose penalties and interest for an indefinite period. The statute of limitations does not begin until a report is filed.

- If a third-party administers any consumer rebates (e.g., fulfillment houses), review contracts and records to determine which entity is responsible to report and remit unclaimed property to the state.
- If under audit, seek the advice of a professional knowledgeable in the area of unclaimed property. A knowledgeable professional will identify any applicable defenses that may help the holder avoid or reduce liability. The professional may also be able to achieve a favorable result through negotiation.

This article addresses Minnesota's unclaimed property law. The laws of other states may differ. If you have any questions regarding how to handle unclaimed property, please reach out to your Moss & Barnett attorney.



Nathan Thompson is a member of our Business Law group and Wealth Preservation and Estate Planning group. He focuses his practice on tax law and navigates clients through the complexity of the tax rules.

612-877-5302 | Nathan.Thompson@lawmoss.com
LawMoss.com/people-nathan-j-thompson

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general contractor bears the risk of future price spikes in labor and materials. The general contractor can mitigate that risk by having fixed price contracts with its subcontractors and suppliers. That transfers the risk of price escalation further down the contractual chain. But if the general contractor has variable or market-price contracts with its subcontractors and suppliers, then the general contractor is stuck. The general contractor has to pay more than planned to get the materials it needs, but it cannot pass that cost on to the owner.

Coordinating multiple contract provisions across many contracts during contract negotiations is hard. Navigating conflicting

contract provisions after a problem arises on a problem is often even more difficult. Owners, contractors, and subcontractors should consult with a knowledgeable construction attorney early to position themselves as best they can in these turbulent times.



Jeffrey A. Wieland practices in our Construction Law and Litigation groups. He has a B.S. in Engineering Physics and a Master's degree in Mechanical Engineering. He spent 15 years working as an engineer and project manager before becoming a lawyer. He is licensed in the state and federal courts in Minnesota and North Dakota where he typically represents contractors, subcontractors, suppliers, and owners.

612-877-5261 | Jeff.Wieland@lawmoss.com
LawMoss.com/people-jeffrey-a-wieland



Moss & Barnett

www.LawMoss.com

Minneapolis, MN

150 South Fifth Street
Suite 1200
Minneapolis, MN 55402
Telephone: 612-877-5000
Fax: 612-877-5999

St. Cloud, MN

3800 Eighth Street North
Suite 102
St. Cloud, MN 56303
Telephone: 320-654-4100
Fax: 320-654-4101

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