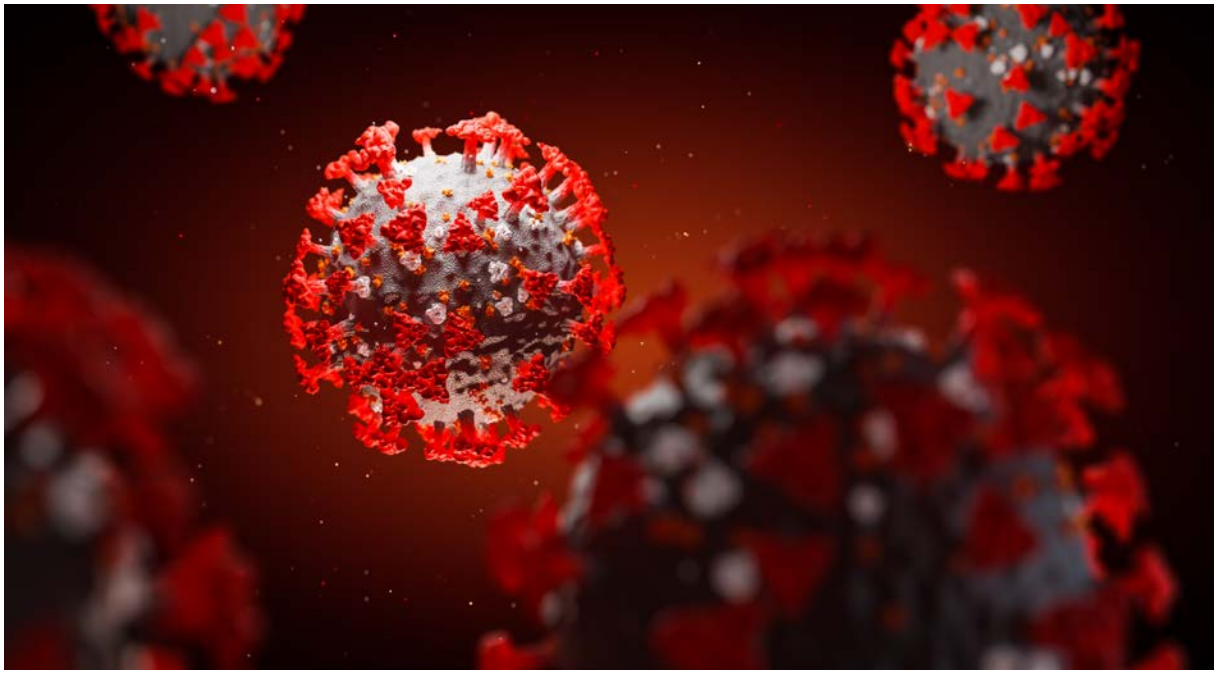
DICKINSON WRIGHT PLLC

COVID-19 Resource Guide
Updated March 2021



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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

To Our Readers

Overview

We thank our knowledgeable authors and contributors, who provided their time and talent to produce these articles. We dedicate this PDF compilation to the thousands of people whose lives have been impacted or lost prematurely to COVID-19.

Highlights – By Topic, Location and Date

We wanted to make this resource be as easy to use as possible, so have included an index that contains the articles by topic, by location-specific information, and by date.

Contents – By Topic or Location

* Indicates date of release; there may be a slight delay from dated article.

Contents – By Date

* Indicates date of release; there may be a slight delay from dated article.

$200 MILLION IN FUNDING AVAILABLE FOR SMALL BUSINESSES THROUGH NEW TENNESSEE BUSINESS RELIEF PROGRAM

by Kevin W. DeHart and Ralph Z. Levy, Jr.

Tennessee Governor Bill Lee has announced the Tennessee Business Relief Program ("TBRP") intended to assist Tennessee businesses affected by the COVID-19 pandemic. The TBRP will oversee the distribution of approximately $200 million in federal Coronavirus Relief Funds through the Tennessee Department of Revenue ("TDOR") directly to small businesses that qualify for relief based upon the type of business conducted. It is unclear how the businesses covered under the TBRP were determined; however, it was designed to reimburse small businesses for costs incurred as a result of mandatory closures. The TBRP focuses on businesses that collect sales tax or pay business tax and were required to suspend or significantly m odify t heir o perations u nder T ennessee Executive Order. Governor Lee has tasked the TDOR with issuing business relief payments through this program to qualifying businesses.

While specific details continue to be posted on the TDOR's website, the amounts awarded will be based upon the annual gross sales of a given business. Gross sales totals for each eligible business will be based upon what the business reported on its applicable sales or business tax returns. This amount will be determined by looking at the greater of the reported gross sales on of an eligible business's calendar year 2019 sales tax returns or the reported gross receipts on its most recent business tax return. Therefore, businesses that are not registered with the TDOR or that do not file either sales tax or business tax returns are not eligible for a business relief payment. Qualifying businesses will receive business relief payments regardless of whether the business has received a benefit under a separate federal or state program and will receive notification and information about their relief payment upon issuance of the same.

While not clear how it was calculated, according to statistics available on the State of Tennessee's website, approximately 28,000 Tennessee businesses are expected to participate in the TBRP, with the vast majority of those businesses generating annual gross sales of $500,000 or less. Information regarding the timing of the payments will be posted to the TDOR's website when available; however, the TDOR has stated that payments will be made by direct deposit if the business has previously provided bank account information and authorized the TDOR to save that information. Otherwise, payments will be made by check. According to the TDOR, there is no need for business owners to request or apply for a business relief payment as the TDOR will determine eligibility and issue payments directly to businesses. In a recent development, the TDOR has clarified that the qualifying payments made under the TBRP are not loans and do not have to be repaid.

As posted on the State of Tennessee's website, the following types of small businesses are eligible under the program:

- Barbershops
- Beauty shops
- Nail salons
- Tattoo parlors, spas, and other personal
- care services
- Gyms and fitness centers
- Restaurants
- Independent artists, writers and performers
- Agents and managers of artists, athletes, and entertainers
- Theaters, auditoriums, performing arts centers, and similar facilities
- Museums, zoos, and other similar attractions
- Amusement parks
- Bowling centers and arcades
- Marinas
- Amusement, sports, and recreational industries
- Promoters of performing arts, sports, and similar events
- Hotels and other travel accommodations

In addition, the following small businesses are eligible if their sales were reduced by at least 25%, as shown on their April sales tax returns which were filed in May:

- Furniture stores
- Home furnishing stores
- Clothing stores
- Shoe stores
- Jewelry, luggage, and leather goods stores
- Sporting goods, hobby, and musical instrument stores
- Book stores
- Department stores
- Office supply, stationery, and gift stores
- Used merchandise stores
- Other miscellaneous stores

Assistance under the TBRP is only available to the types of businesses listed above and notably exclude businesses engaged in manufacturing or providing professional services such as doctors, lawyers, accountants, architects, contractors, electricians, plumbers, real estate agents, and other professionals.

If your business has been negatively impacted by the COVID-19 pandemic and you have questions about the TBRP, Dickinson Wright attorneys are here to help. For more information, call Ralph Z. Levy Jr., Esq., at 615-620-1733, or Kevin W. DeHart, Esq., at 615-780-1115, in the Nashville, TN office.

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$484 BILLION SMALL BUSINESS CORONAVIRUS RELIEF BILL SUMMARY

by Kevin W. DeHart

On April 24, 2020, President Trump signed "Phase 3.5" of the emergency interim coronavirus relief package into law a day after Congress had passed the legislation, known as the Paycheck Protection Program and Health Care Enhancement Act, which expands upon the Coronavirus Aid, Relief, and Economic Security Act signed into law on March 27, 2020. The $484 billion in additional funding will replenish the Paycheck Protection Program and provide additional support of Health and Human Services and Emergency Disaster Loans as summarized below:

AMENDMENTS TO THE PAYCHECK PROTECTION PROGRAM (PPP):

- Expand the authorization level in Section 1102(b)(1) of the CARES Act for the Paycheck Protection Program from $349 billion to $659 billion.
- Increase the direct appropriation level set forth in Section 1107(a)(1) of the CARES Act for the Paycheck Protection Program from $349 billion to $670.335 billion.
- Create a set-aside for Insured Depository Institutions, Credit Unions, and Community Financial Institutions for the PPP. Community Financial Institutions are defined as minority depository institutions, certified development companies, microloan intermediaries, and state or federal credit unions.
- The section provides additional funding for the PPP through:
  - $30 billion for loans made by insured depository institutions and credit unions that have assets between $10 billion and $50 billion.
  - $30 billion for loans made by community financial institutions, small insured depository institutions, and credit unions with assets less than $10 billion.

HEALTH AND HUMAN SERVICES (HHS) FUNDING:

- $75 billion for reimbursement to hospitals and health care providers to support the need for COVID-19 related expenses and lost revenue. Language remains the same as CARES Act. This funding is in addition to the $100 billion provided in the CARES Act.
- $25 billion for necessary expenses to research, develop, validate, manufacture, purchase, administer, and expand capacity for COVID-19 tests. Specific funding is provided for: $11 billion for states, localities, territories, and tribes to develop, purchase, administer, process, and analyze COVID-19 tests, scale-up laboratory capacity, trace contacts, and support employer testing. Funds are also made available to employers for testing. $2 billion provided to states consistent with the Public Health Emergency Preparedness grant formula, ensuring every state receives funding $4.25 billion provided to areas based on the relative number of COVID-19 cases $750 million provided to tribes, tribal organizations and urban Indian health organizations in coordination with Indian Health Service.
- $11 billion for states, localities, territories, and tribes to develop, purchase, administer, process and analyze COVID-19 tests, scale-up laboratory capacity, trace contacts, and support employer testing. Funds are also made available to employers for testing. $2 billion provided to states consistent with the Public Health Emergency Preparedness grant formula, ensuring every state receives funding $4.25 billion provided to areas based on the relative number of COVID-19 cases $750 million provided to tribes, tribal organizations and urban Indian health organizations in coordination with Indian Health Service.
- $2 billion provided to states consistent with the Public Health Emergency Preparedness grant formula, ensuring every state receives funding.
- $4.25 billion provided to areas based on the relative number of COVID-19 cases.
- $750 million provided to tribes, tribal organizations, and urban Indian health organizations in coordination with Indian Health Service.
- $1 billion provided to Centers for Disease Control and Prevention (CDC) for surveillance, epidemiology, laboratory capacity expansion, contact tracing, public health data surveillance, and analytics infrastructure modernization.
- $1.8 billion provided to the National Institutes of Health to develop, validate, improve, and implement testing and associated technologies; to accelerate research, development, and implementation of point-of-care and other rapid testing; and for partnerships with governmental and non-governmental entities to research, develop, and implement the activities.
- $1 billion for the Biomedical Advanced Research and Development Authority for advanced research, development, manufacturing, production, and purchase of diagnostic, serologic, or other COVID-19 tests or related supplies.
- $22 million for the Food and Drug Administration to support activities associated with diagnostic, serological, antigen, and other tests, and related administrative activities.
- $825 million for Community Health Centers and rural health clinics.
- Up to $1 billion may be used to cover costs of testing for the uninsured.
- Includes $6 million for HHS Office of Inspector General for oversight activities.
- Requires plan from states, localities, territories, and tribes on how resources will be used for testing and easing COVID-19 community mitigation policies.
- Requires strategic plan related to providing assistance to states for testing and increasing testing capacity

AMENDMENTS TO DISASTER LOANS:

- Allow agricultural enterprises as defined by section 18(b) of the Small Business Act (15 U.S.C.647(b)) with not more than 500 employees to receive EIDL grants and loans.
- Appropriates an additional $10 billion for Emergency EIDL Grants to remain available until expended.

Dickinson Wright attorneys can assist small businesses and health care providers in applying for and taking advantage of the additional funds provided by this new relief package. Do not hesitate to reach out to your Dickinson Wright attorneys with any questions you may have regarding this legislation. We are here to help you navigate through these changes.

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Family Focus

7 TIPS FOR SHELTERING IN PLACE WITH YOUR SPOUSE DURING A DIVORCE

Posted by Marlene Pontrelli | May 1, 2020

While it may not have been easy, it was at least tolerable for a few weeks sheltering in place with your spouse in the middle of your divorce. However, as the shelter in place orders have extended in many cases into May, it has become more difficult and hard to see the light at the end of the tunnel.

There are a few things you can do to keep yourself from going crazy as you wait for courts to open, houses to be sold, and your divorce finalized.

1. *Keep in touch with your divorce lawyer*. Just because courts are operating on limited schedules it does not mean that your case cannot move forward. Prior to finalizing a divorce, discovery usually takes place, disclosures of financial information exchanged, and in some cases appraisals and business valuations done. This is the perfect time to engage in the activities that need to happen prior to finalizing the divorce and can be done while waiting for courts to become fully operational. Talk to your lawyer about what needs to be done in your case so you are ready to proceed with settlement discussions, mediation, or, if necessary, trial, when shelter in place orders are lifted.
2. *Give consideration for your "wish list."* Take the time to consider your ideal wish list for how property is divided, what spousal support looks like, what the ideal parenting plan will be, and any other matters that are important to you in resolving your divorce. Make the list and set it aside so that you have time to think about how important each item is for you. This will help guide you when you do start talking to your spouse, lawyer, or mediator about a potential resolution.
3. *Take the time to prepare your affidavit of financial information*. An Affidavit of Financial Information (referred to in different states sometimes by different names) is a statement to the court that informs the court about your income and expenses. This is an important document that will help determine whether you can pay your reasonable expenses if you are seeking support, or if you are able to pay your expenses while still paying some support to your spouse if you are being asked to pay support. Oftentimes this document does not get the attention it needs because it takes time to go through financial statements, credit card statements, and check registers to determine how much you spend on things like food, clothing, household supplies, transportation and utilities. Use the time you have at home to go over these expenses. If feasible, talk to your spouse about the expenses so that you both have an agreement on how much it currently costs as a household for these items.
4. *Consider settlement of non-controversial issues*. During a pending divorce, there is a tendency to want to settle everything all at once. However, it is not necessary to do so. Taking small steps to settle some issues, even if not the big issues like custody, support, or whether the marital residence will be sold, will help move the case forward. For example, especially if both parties are sheltering in place in the same location, prepare a list of the division of the marital personal property. Going through the home and dividing, at least on paper, the furnishings and household hold items, will save time later. Making pre-decree distributions of funds in checking, savings, and investment accounts may also be done, provided there is some agreement on how the joint expenses during the divorce continue to be paid. Make a list with your spouse of the things that

can be settled now. If represented by counsel, the list can be prepared into a formal stipulation that is filed with the court.

5. *Take care of yourself*. It is easy to forget the need to take care of yourself during this process. Eating healthy, staying active, eliminating as much stress in your life as possible, are all important aspects of making sure you are in the right place physically and emotionally to proceed with the divorce process when shelter-in-place orders are lifted.

6. *Practice gratitude*. Give yourself the gift of time right now. Take time to see what you really want and how you want to proceed. You may find that rather than rushing through a divorce, the idea of reconnecting with each other, or finding that there is nothing to reconnect over, will bring some certainty to the decision you think you have made. You may also find that a divorce is not what you really want, but rather what was missing was time together, talking with each other, and sharing things with each other that caused you to fall in love in the first place. You may wish to explore with your attorney the idea of a post-nuptial agreement to resolve financial issues while concentrating on trying to remain in a marriage. Or, perhaps rather than a divorce, the two of you would rather have a legal separation. On the other hand, the prolonged time spent together may make your decision to proceed even more certain. Either way, be grateful for the gift of time you have been given, and the luxury of not rushing through a process that forever changes your future.

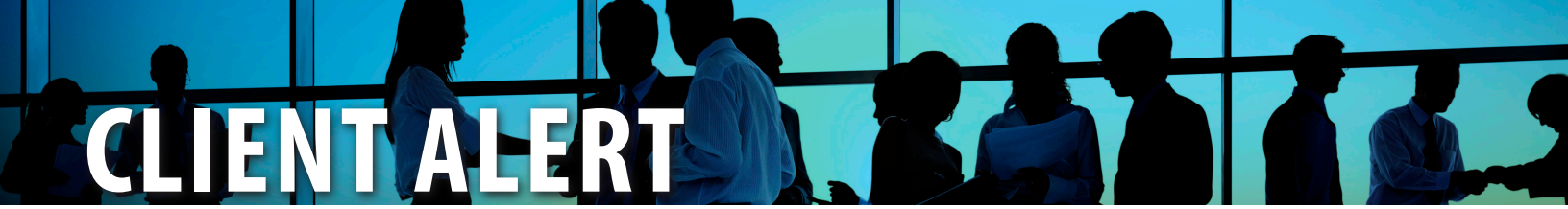
7. *If you are ready mediation is still an option*. Although not ideally the same as participating in person, most mediators have been able to utilize web-based conferencing such as Zoom or GoToMeeting, to still conduct mediations without the need to appear in person. You will still be able to be in a "separate" private room with your counsel while your spouse and counsel are in a separate room and the mediator will go back and forth between the two "rooms." If you are ready to finalized the process talk to your lawyer about this alternative.

Keeping these 7 tips in mind will not only help speed the process along once you are able to resume your matter, but will likely provide for a better, more thoughtful outcome.

About the Author:

Marlene Pontrelli is a Member in our Phoenix office and co-chair of the firm's Family Law Practice. Marlene is a certified specialist in family law. Her practice focuses on all aspects of family law including dissolution, post-dissolution, paternity, child custody and child support matters. She is admitted to practice in California and Arizona. She is a judge pro tem for the Superior Court of Maricopa County in family law. She has extensive trial and appellate experience including appearing before the Arizona Court of Appeals, Arizona Supreme Court and Ninth Circuit Court of Appeals.

Ms. Pontrelli has written several books, including as a co-author of the Divorce in Arizona book. She is a frequent lecturer in the area of family law and has conducted workshops throughout the country. Ms. Pontrelli is also an adjunct professor at The Sandra Day O'Connor School of Law at Arizona State University, where she teaches the family law class. Marlene may be reached in our Phoenix office at 602-285-5081.



BANKRUPTCY

A REALISTIC SURVIVAL OPTION FOR SMALL BUSINESSES – RELIEF UNDER THE SMALL BUSINESS REORGANIZATION ACT

by Carolyn ("CJ") Johnsen

No one can yet predict the overall effect the COVID-19 pandemic will have on the economy in the long run. However, the immediate impact on small businesses seems readily apparent. The dramatic disruption has impeded cash flow and upset daily operations to the point that some business owners question whether recovery is possible. Should a business find themselves in that unfortunate position, there is relief available under Chapter 11 of the Bankruptcy Code, but the Chapter 11 process can be unwieldy and expensive for small or even medium-sized businesses.

Interestingly, and fortuitously, in late 2019 Congress passed the Small Business Reorganization Act ("**SBRA**") designed to streamline the Chapter 11 process for qualifying businesses and eliminate some of the legal hurdles for them to reorganize quickly and cost-efficiently.

Eligibility to File Bankruptcy Under the SBRA

A small business debtor is defined as having no more than $7,500,000 in liquidated, non-contingent secured and unsecured debt. [Note: Under the SBRA as originally passed, the debt ceiling was $2,725,625; however, the newly passed federal stimulus package – the Coronavirus Aid, Relief and Economic Security Act – raises the ceiling to the new level for one year]. The debtor (includes an individual or a company) must be engaged in commercial or business activity with at least 50 percent of the debt arising from such activity. Single asset real estate cases are excluded.

Streamlined Process That Reduces Cost

The Debtor must file a Plan of Reorganization within 90 days of filing the case but the time can be extended "under circumstances for which the Debtor should not justly be held accountable." Only the Debtor can file a plan, thus eliminating the risk of a competing plan by a creditor. Unlike larger Chapter 11 cases: (a) the Debtor does not have to file a Disclosure Statement and can seek approval of the Plan in a single hearing; (b) the Debtor does not have to pay fees to the United States Trustee; and (c) no creditor committee is appointed thereby eliminating both pressure and cost.

The Simplified Plan

The concept of the Plan is quite simple. The Debtor pays secured creditors over time (no different from a larger Chapter 11) and commits all of its "Disposable Income" to pay creditors over a 3 to 5 year period (the "Income Commitment Period"). "Disposable Income" is defined as income that is not reasonably necessary to maintain support of the Debtor, satisfy domestic obligations, or ensure the continued preservation or operation of business.

Certain Legal Hurdles Eliminated

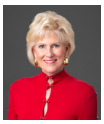
The Debtor remains in possession of its assets although a trustee is appointed with the essential obligation to facilitate a consensual plan. In fact, provisions of the SBRA are designed to incentivize consensus. Before the SBRA, the existing shareholders (or an individual) in a chapter 11 proceeding could not retain ownership without consent of unsecured creditors unless the shareholder(s) infused new capital, or unsecured creditors were paid in full. This requirement was a nearly impossible hurdle to overcome by the financially troubled debtor trying to discharge enough debt to survive. The SBRA eliminates this requirement so long as the Income Commitment is fulfilled as described above. In addition, unlike larger Chapter 11s, acceptance by at least one accepting impaired class is not necessary. These features reduce creditor pressure, promote consensus, and ultimately save considerable time and expense in resolving issues.

Conclusion

The financial distress many small businesses are suffering is a result of the temporary setbacks caused by the COVID-19 situation. A Chapter 11 bankruptcy under the SBRA is a tool designed to allow a business to have the breathing room necessary to recapitalize and restructure a path to future prosperity.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of bankruptcy law. The foregoing content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions relating to any of the topics covered.

FOR MORE INFORMATION CONTACT:



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GAMING & HOSPITALITY LEGAL NEWS

The Gaming and Hospitality Group at Dickinson Wright stands in solidarity with our friends, colleagues, and clients, who are all facing unprecedented challenges in light of the COVID-19 pandemic. We hope that you are all staying healthy and safe during this uncertain time.

ALL QUIET ON THE LAS VEGAS STRIP: COMPLIANCE CONSIDERATIONS FOR THE COVID-19 SHUTDOWN IN NEVADA

by Jeff Silver, Jennifer Gaynor, Greg Gemignani, and Kate Lowenhar-Fisher

On March 13, 2020, Nevada Governor Steve Sisolak declared a State of Emergency in connection with the COVID-19 virus pandemic and declared that the Nevada Health Response Team would be leading the fight against the virus. On that date, the Nevada Gaming Control Board ("the Board") sent a notice to all licensees that it expected them to use their best efforts to comply with the COVID-19 rules as promulgated by the Occupational Safety and Health Administration and to consistently monitor the CDC's website for updates. At that time, the CDC asked businesses and employers to perform routine environmental cleaning, actively encourage sick employees to stay home, and to emphasize respiratory etiquette and hand hygiene. Licensees were instructed to have an Infectious Disease Outbreak Response Plan as one of their "best practices."

On Sunday, March 15, 2020, the Governor issued a directive closing all K-12 schools for three weeks and urged all employees who could work from home to do so. All public gathering spaces, presumably including casinos and their showrooms, were asked to reduce the capacity to 50% of what was allowed by the Fire Marshal. The Governor concluded his statement by making the comment that "as we all know, gaming is the lifeblood of Nevada's economy, and a source of financial support for so many of our citizens and their families. But to protect the public health and safety of Nevadans and visitors, I strongly support any of our properties that make the difficult decision to close to the public." The Governor encouraged these licensees to do their best to protect the pay and benefits of their workforce during this difficult time. Later that evening, the State had its first COVID-19 related death.

Notwithstanding the plea, the Governor stated that properties that elected to stay open had to comply with restrictions requiring no more than three chairs at table games, cleaning of

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all gaming machines at least every two hours and that buffets could only be served by employees touching the utensils. On March 16, 2020, a second bulletin was sent out by the Board that included the Governor's directions from the previous day.
Although several casino companies elected to immediately close their facilities, others implemented the Governor's guidelines and waited for further developments. The wait was a short one. On March 17, 2020, the Board, referencing the Governor's Risk Mitigation initiatives, stated they would be enforcing a temporary suspension of licensee operations:

All gaming devices, machines, tables, games, and any equipment related to gaming activity must be shut down by 11:59 pm on March 17, 2020.

The above restriction remains in effect for thirty days (through April 17, 2020).

A "policy memorandum" accompanied the Board's notice providing for procedures for Casino Closures and Changeovers. A changeover/closure plan should be established and forwarded to the Board's Audit Division. Normally, these plans would be submitted at least 10 days prior to the closure, however, when the temporary closure occurs suddenly, as by an order from the Board, the closure plan should be submitted within 24 hours prior to or as soon as possible, thereafter.

The closure plan should provide the following information:

1. Contact information for the person coordinating the closure.
2. A schedule for certain procedures for the closure of the games, including drop, booth, kiosks and vault closures, and the name of the responsible person performing these functions.
3. Plans for security over pit and other funds during the closure.
4. Chip and token inventories which must be counted and verified.
5. In the event the casino does not intend to reopen, for whatever reason, plans for the disposal of progressive jackpot amounts and the method for handling inter-linked jackpot sums. Normally, progressive jackpot disposal plans require the Board's administrative approval, however, in these emergency circumstances, written requests for extensions would likely be granted.
6. There are specific procedures required for turning in a gaming license under Regulation 9, however, these would be applicable in the case where a new operator would be licensed. Notwithstanding, a communication requesting "temporary closure" based upon the Governor's Order, should be sent to the Board as a matter of notice, and if the closure would be longer than the 30 days, regardless of permission by the Governor to reopen, the additional closure time must be also requested to avoid the loss of the license.
7. Information must be provided regarding the disposition of credit instruments. This would be only applicable to a changeover, rather than a temporary suspension.
8. The licensee would be required to submit plans for a final audit. Again, only applicable to a changeover, not a temporary suspension.
9. If the licensee is making periodic payments pursuant to a structure jackpot, the licensee must provide assurances that the regularly scheduled payments will be made during the temporary closure.
10. The licensee must communicate with the Audit Division regarding its Sports Book reserve requirements and may even request a release of the reserve once the obligations against the reserve have been satisfied.
11. Notwithstanding a temporary closing, the licensee must continue filing monthly tax returns and the expired slot vouchers/payoff receipts reflected in those returns.
12. During a temporary closure, the plan should address how patrons may access their safe deposit boxes, or how the boxes will be secured until the property reopens.
13. For temporary closures, the normal bankroll requirements will be temporarily waived. However, the licensee must maintain sufficient funds that can be used to pay expected chip and token redemptions, payout receipts, and front money deposits.

Finally, although the need for a temporary closure may occur suddenly, licensees are reminded that they are expected to remain in continued compliance with Minimum Internal Control Standards or Procedures, depending on whether the licensee is Group 1 or Group 2, and compliance with standard procedures for safeguarding of assets. Questions should be directed to the Board's Audit or Enforcement Divisions.

Immigration Insights and Issues (III)

AM I AN ESSENTIAL TRAVELER BETWEEN CANADA AND THE U.S. OR MEXICO AND THE U.S.?

Posted by Elise Levasseur | Mar 26, 2020

On March 24, 2020, the U.S. Department of Homeland Security (DHS) provided formal notices in the *Federal Register* of an earlier Trump Administration order, which limited travel between Canada and the U.S. as well as Mexico and the U.S. at land ports-of-entry, and ferries service ***effective March 20, 2020, 11:59 p.m. through April 20, 2020, 11:59 p.m.*** The DHS also defined the meaning of "essential travel" as a guideline to the U.S. Customs and Border Protection Service (CBP). Only travel by land and ferries is limited. The travel restrictions ***do not*** apply to air, freight rail or sea travel. The limitation ***do*** apply to passenger and ferry rail.

Under the President's proclamation, "essential travel" is not to be so restricted that legitimate trade between our neighbors to the north and south is disrupted, neither to be disrupted are critical supply chains bringing food, fuel, medication and other critical materials to both sides of each border.

DHS has defined ***"essential travel"*** to be the following:

- U.S. Citizens and Lawful Permanent Residents returning to the U.S.
- Individuals traveling for medical purposes (*g.* to receive medical treatment in the U.S.).
- Individuals traveling to work in the U.S. (*g.* individuals working in farming or the agricultural industry who must travel between Canada and the U.S. and Mexico and the U.S. in furtherance of such work.).
- Individuals traveling for emergency response and public health purposes (e.g. government officials or emergency responders entering the U.S. to support federal, state, local, tribal or territorial government efforts to respond to COVID-19 or other emergencies.).
- Individuals engaged in official government travel or diplomatic travel.
- Members of the U.S. Armed Forces and the spouses and children of members of the U.S. Armed Forces, returning to the U.S.; and,
- Individuals engaged in military related travel or operations.

DHS also defined what is ***not*** "essential travel:

- Travel for tourism (*g.* sightseeing, recreation)
- Gambling
- Attending cultural events

CBP has been also directed to consider humanitarian or other purposes in the national interest for travel not deemed essential.

Disclaimer

The above guidelines leave much discretion to officers of the CBP to make decisions on what is considered "*traveling to work in the U.S."* as well as other essential travel reasons as defined in the *Federal Register*. The guidelines permit "individuals" to travel to the U.S., which would presumably include nonimmigrants. Reports from the ports-of-entry are mixed. Some report that holders of valid nonimmigrant status/visas with work authorization have been challenged by CBP in all types of professions and business categories, while others indicate that new applications for work authorization and admission to the U.S. are being approved. We do know that **all** travel will be subject to additional screening.

Nonimmigrants holding valid work visas and status and their U.S. employers should be prepared to answer questions from CBP on why the nonimmigrant worker should be deemed an essential traveler. It is recommended that nonimmigrants carry with them "essential traveler" letters from their employers outlining the essential nature of their work in the U.S. Nurses and other health care professionals holding TN-1 status should not experience problems, but in this author's opinion, those who are traveling to work for all types of manufacturing operations and especially those that have already been shut-down under "shelter-in-place" orders from various U.S. governors should be prepared to discuss how their being in the U.S. is critical to the maintenance of the infrastructure of the organization. Each shelter in place order should be reviewed carefully regarding exemptions as to critical infrastructure that would be deemed as essential or otherwise qualifying for travel. Such critical infrastructure might be I.T. support, financial support, vital human resource functions or that the essential traveler has a role in the organization that would permit other employees to continue to work at home. In some cases, it is important to refer to the guidance provided by the U.S. Department of Homeland Security Cyber and Infrastructure Security Agency's (CISA) Essential Critical Workforce Memorandum dated March 19, 2020 (CISA Memo) as to industries able to continue to operate as appropriately modified to account for Center for Disease Control (CDC) workforce and consumer protection guidance.

Dickinson Wright will continue to monitor this situation and report back on its Blog as new information becomes available.

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GAMING & HOSPITALITY LEGAL NEWS

AS FEDERAL AID FOR THE GAMING INDUSTRY LAGS IN THE US, GAMING PROPERTIES PREPARE FOR EVENTUAL RE-OPENING

by Jennifer J. Gaynor, Gregory R. Gemignani, Kate C. Lowenhar-Fisher, and Jeffrey A. Silver

Over the past several weeks, we have seen the gaming industry scramble to gain inclusion in relief under the hastily passed Coronavirus Aid, Relief, and Economic Security Act of 2020 ("CARES"), including the Paycheck Protection Program ("PPP").

CARES was designed to assist businesses and furloughed employees in their efforts to tread water until the pandemic crisis has passed. Much has already been written about this welcome relief in the form of Small Business Administration ("SBA") loans for businesses which qualify as a "small business concern."

THE GAMING INDUSTRY GETS SHUT OUT

As the gaming industry (both private and tribal) quickly learned, most had been shut out from these loan benefits because the law and Interim Rules as written exclude millions of gaming employees from the safety net provided by PPP.

Why was this business-salvaging program not available to the gaming industry? That is a question currently being asked by the American Gaming Association ("AGA"), the Association of Gaming Machine Manufacturers ("AGEM"), the National Congress of American Indians and many other organizations, tribal authorities and individual gaming operators.

On April 8, 2020, Bill Miller, the President and CEO of the AGA, sent a letter to President Trump regarding this "unintentional exclusion" in which he requested assistance to address the Interim Final Rules adopted by the SBA on April 2, 2020 (the "Interim Rules"). He stated, "Specifically, these interim rules rely on antiquated, discriminatory policy that renders small gaming entities ineligible to receive critical loan assistance designed to help small businesses pay their employees."

The rules referenced were found in 13 CFR Section 120.110 which describes the businesses eligible for PPP and specifically excluded those "deriving more than one-third of gross annual revenue from legal gaming activities." This provision is contrary to Section 1102 of the CARES Act which added a new section 7a to the Small Business Act that allows any small business concern to be eligible for PPP loans so long as size or monetary requirements (not more

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than 500 employees or maximum tangible net worth less than $15 million and average annual net income (after federal income taxes), of not more than $5 million, calculated using the two years preceding the application) are met.

TREASURY DEPARTMENT CLARIFICATION OFFERS LITTLE HELP

As of the date of this release, the Treasury Department and SBA have offered a "clarification" for businesses that receive revenue from legal gaming that wish to be considered for a PPP loan:

A business that is otherwise eligible for a PPP loan is not rendered ineligible due to its receipt of legal gaming revenues if the existing standard in 13 CFR 120.110(g) is met or the following two conditions are satisfied: (a) the business's legal gaming revenue (net of payouts but not other expenses) did not exceed $1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business's total revenue in 2019.

This clarification of the Interim Rules did little to assist small casino operators, including most tribal operations, whose revenue is derived primarily from gaming. The political and emotional battle lines are drawn for the inclusion of small casinos in the PPP and while a favorable outcome is still possible, a disappointed Bill Miller stated "Despite promising conversations with the administration over the last two weeks, this updated guidance falls woefully short of fully addressing antiquated, discriminatory policies that have, to date, restricted small gaming companies from accessing critical loan support made available through the CARES Act." His hope would be that gaming can make its case in a subsequent funding.

Although the funds for the initial tranche of SBA funding were quickly exhausted, hope is on the horizon. News sources have reported that an agreement on a new $470 billion federal stimulus package, which would include $310 billion more for the PPP, is imminent.

OTHER INTERIM OPTIONS FOR GAMING COMPANIES

In the interim, The Pandemic Unemployment Assistance ("PUA") law, referenced in Section 2102 of CARES, generally allows states that enter into an agreement with the Secretary of Labor (the "Secretary") to pay up to 39 weeks of benefits to individuals who are not eligible to receive or who have exhausted their regular unemployment compensation benefits and can meet the eligibility requirements described below. The costs of this new federal benefit program are 100% federally funded, but require the State to enter into an agreement with the Secretary in order to receive the funding for this program.

In Section 2102 of CARES (potentially applicable to the gaming industry employees, including part-time workers), an individual who is not eligible for regular unemployment compensation or extended benefits under State or Federal pandemic emergency unemployment compensation under Section 2107 of CARES, including a person who has exhausted all rights to regular unemployment or extended benefits, may be eligible for PUA relief. Section 2107 is emergency funding which expands unemployment compensation benefits to provide an additional 13 weeks of benefits if the individual remains unemployed after 26 weeks at a weekly rate of $600 for that 13-week period).

In order to be eligible for PUA, the employee must provide a certification under oath that he or she is otherwise available to work, but they are unemployed because they have contracted the virus, a family member has contracted the virus and they have voluntarily self-quarantined, they are caring for children who must remain at home because of school closures, or the individual's place of employment is closed as a direct result of the COVID-19 public health emergency. If an employee can demonstrate he or she is a "covered individual" under PUA, the employee would be eligible for assistance for up to 39 weeks due to unemployment, partial unemployment or inability to work caused by COVID-19 beginning on or after January 27, 2020 and ending on or before December 31, 2020.

In general, the weekly benefit shall be the amount authorized under the unemployment compensation laws of the State where the covered individual was employed (except that the amount may not be less than the minimum weekly benefit amount described in section 625.6 of title 20, Code of Federal Regulations https://www.govinfo.gov/content/pkg/CFR-2012-title20-vol3/pdf/CFR-2012-title20-vol3-sec625-6.pdf).

The Secretary shall provide these supplemental funds to the State for distribution to the affected employees. Employers of affected employees should advise the furloughed or terminated employees to first file for regular unemployment benefits and, if such benefits are denied or have been exhausted, the employee should seek coverage under PUA. Under the law, the State is required to provide the employee a prompt determination and

notification of appeal processes in the event PUA coverage is not granted. The PUA can also apply to self-employed persons provided they can meet certain eligibility certification standards.

Individuals who meet the following criteria are not eligible for PUA:

a. Individuals who have the ability to telework with pay. When addressing issues about the availability of paid telework, the State must determine whether the claimant has been offered the option of continuing to work for pay by teleworking. If so, and claimants were offered to continue to work the same number of hours, claimants are not eligible for PUA.

b. Individuals receiving paid sick leave or other paid leave benefits. If claimants receive such leave for their customary work hours, they are not eligible for PUA. The State must treat any paid sick leave or paid leave received by a claimant in accordance with the income restrictions set out in PUA at 20 C.F.R. 625.13.

Finally, there are several additional programs that were a part of CARES which the authors can discuss with your individual business. They include Economic Injury Disaster Loans ("EIDL") which are also available through the SBA through December 31, 2020. These loans can provide paid sick leave to employees unable to work due to the effect of COVID-19 and/or to meet increased costs to obtain materials that would be unavailable through traditional supply chains and pay obligations that cannot be met due to revenue losses. For those requiring immediate relief, an emergency advance of up to $10,000 may be available.

LOOKING TOWARDS THE RE-OPENING OF GAMING PROPERTIES

As the hard-hit gaming industry burns through their reserves and gaming employees continue to face workforce reductions and furloughs, all eyes are looking worriedly towards the future. Reports suggest that the impact of COVID-19 will continue to be felt for many months to come. Given this reality, even after properties are allowed to re-open, the gaming industry as we know it will never be the same.

Indeed, in addition to the Nevada Gaming Control Board and Gaming Commission, Nevada gaming properties are paying increased attention to a regulatory body that will have a large say in what taverns and casinos will look like when they re-open- Nevada OSHA. Members of the Gaming Control Board have provided that the Board will be looking to OSHA for guidance on workplace rules for when casino operations resume in Nevada. It is expected that the Board rules regarding re-opening procedures will be published soon, and it is expected that, much like the closing guidance published by the Board, the published guidance will in large part look similar to prior memos regarding post remodeling closures, with the inclusion of or reference to OSHA-directed requirements for social distancing and sanitization at gaming properties.

A review of the Nevada OSHA protocols that have been issued for essential businesses that are continuing to operate during the pandemic provides some guidance on what those OSHA requirements may look like. For example, the current guidelines include that essential business shall:

- Establish effective social distancing protocols, which ensure that staff maintain a 6 foot personal separation from other staff during meetings, discussions, or other job tasks.
- Prohibit gatherings of 10 or more people.
- Promote frequent and thorough hand washing, including providing workers, customers, and worksite visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol.
- Provide face masks to service runners who deliver ordered materials to curbside pick-up locations, attend to drive through windows, or any other immediately exposing tasks.
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces and equipment with Environmental Protection Agency-approved cleaning chemicals from List N or that have label claims against the coronavirus.
- Provide sanitation and cleaning supplies for addressing common surfaces in multiple user mobile equipment and multiple user tooling. This guideline is recommended based on the specifics of a business's services and procedures.
- Maintain 6 foot separation protocols for labor transportation services, such as buses, vans, etc.
- Conduct daily surveys of changes to staff/labor health conditions. The Nevada OSHA is emphasizing the need for business leadership to be working with and aware of the health and well-being of its staff.

GAMING & HOSPITALITY LEGAL NEWS

- Ensure that any identified first responders in the labor force are provided and use the needed Personal Protective Equipment (PPE) and equipment for protection from communicable or infections disease.
- Provide access to potable and sanitary water

Although these guidelines apply to businesses that are open during the height of the pandemic and will certainly be scaled back for re-opening after the virus has run past its peak, they offer a look into the sorts of practices that will be required when gaming properties come back online. This is especially true when these are paired with the GCB Restrictions on Operations during COVID-19 Outbreak, which were issued on March 16, 2020, just prior to the total closure of the state's gaming properties. These restrictions included that:

- There may be no more than three chairs at each table game.
- Each gaming machine must be cleaned and sanitized at least once every two hours.
- Patrons may not serve themselves from buffets that remain open. Similarly, employees may not serve themselves in employee dining areas.
- The gaming floor and other public areas of a licensee's property must operate under the latest social distancing guidance from Nevada's medical advisory team.

It is safe to say that the world-famous Las Vegas buffets and crowded casino floors will not be the same, at least not anytime soon. In the meantime, gaming properties are working hard to prepare for the new normal and to ensure they can get up and running as quickly as possible.

For further information, attorneys at Dickinson Wright can assist.

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All Things HR

BENEFITS BRIEFS IN THE TIME OF COVID-19, PART 1: FEDERAL AGENCIES RELAX SUMMARY OF BENEFITS AND COVERAGE ("SBC") DISCLOSURE DEADLINES

Posted by Eric Gregory | Apr 28, 2020

Recent guidance from the Department of Labor ("DOL"), Health and Human Services ("HHS") and Treasury (the "Departments") provides limited enforcement relief from the summary of benefits and coverage ("SBC") disclosure rules during the COVID-19 crisis for employers to comply with the CARES Act or to add other benefits to their group health plans.

Dickinson Wright's All Things HR Blog is beginning a multi-part series on frequent issues and questions faced by employers during the COVID-19 crisis. They are intended to be brief, readable, and informative summaries to help bring human resources personnel and employers up to speed.

Basic SBC Rules

As part of the Affordable Care Act's ("ACA") reforms, all group health plans subject to the ACA are required to provide a SBC to employees eligible for coverage prior to enrollment or re-enrollment.

If during a plan year, the plan is materially amended in such a way that changes the information on the SBC, the plan must supply an updated SBC or at least a notice of the change at least 60 days in advance of the change. A "material" change is one that would be considered important by the average plan participant.

Limited SBC Relief for CARES Act Changes

With respect to group health plans, the CARES Act made a number of changes for group health plans that applied retroactively, including:

- Coverage for COVID-19 testing;
- Allowing plans to permit the purchase of over-the-counter medical products using HSAs, FSAs, MSAs, and HRAs; and
- Permitting high-deductible-health-plans to pay for telehealth services pre-deductible.

Given that these changes were made retroactively, it would be impossible for group health plan sponsors to comply with the SBC requirement. Therefore, the Departments have provided that changes made consistent with the CARES Act are not subject to the 60-day advanced notice requirement, so long as notice is provided "as soon as reasonably practicable."

Notice may be provided by distributing an updated SBC reflecting the modification or providing a separate notice describing the modifications.

Additional Relief for Greater Coverage Related to COVID-19

Additionally, sponsors of group health plans may expand coverage related to the diagnosis or treatment of COVID-19 beyond the requirements of the CARES Act without complying with the 60-day advanced notice rules.

Changes Not Covered

The Departments will continue to take enforcement action, however, against any plan that attempts to limit or eliminate other benefits, increase cost-sharing, or reduces other benefits to offset the cost of increasing COVID-19 benefits, without complying with the disclosure requirements.

Time Period for the Relief

The non-enforcement period applies for applicable changes made during the period during which a public health emergency declared under the Public Health Service Act or a national emergency declaration related to COVID-19 declared under the National Emergencies Act is in effect. To the extent that the changes extend beyond the emergency period, plans must comply with all other applicable requirements to update plan documents and terms of coverage.

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BENEFITS BRIEFS IN THE TIME OF COVID-19, PART 2: TEMPORARY EXPANSION OF EDUCATIONAL ASSISTANCE PROGRAMS TO COVER EMPLOYEES' STUDENT LOAN DEBT

Posted by Cyndi Moore | Apr 29, 2020

The CARES Act gives employers a way to pay employees' student loan debt on a pre-tax basis during a portion of 2020 through an educational assistance program under Section 127 of the Internal Revenue Code ("Code").

Overview of an Educational Assistance Program

Under a Section 127 educational assistance program, an employer may pay or reimburse an employee on a pre-tax basis for up to $5,250 annually for tuition, fees, books, supplies and equipment for undergraduate or graduate courses. The courses are not required to be job-related, although many employers require that reimbursable courses must be job-related. The program may not pay for tools or supplies that may be retained by the employee after completion of a course; meals, lodging or transportation; or courses involving sports, games or hobbies (unless such courses involve the employer's business or are required as part of the degree program.) If desired, the employer can require that employees complete the course or attain a particular grade prior to making reimbursement.

An educational assistance program must meet the following additional requirements under Code Section 127:

- The program must be in writing.
- An employer must give eligible employees reasonable notification of the program.
- The program must benefit a classification of employees that does not discriminate in favor of highly compensated employees (as defined in Code Section 414(q)).
- No more than 5% of the amounts paid by the employer under the program may be provided to 5% owners or their spouses or dependents.
- The program must not provide eligible employees with a choice between educational assistance and taxable compensation. Therefore, it cannot be included as an optional benefit in a Section 125 cafeteria plan.

CARES Act Expansion

The CARES Act provides that an employer may include, as a benefit under its educational assistance program, the payment of principal or interest on any qualified education loan incurred by an employee for the employee's education. This special rule applies to payments made after March 27, 2020 and before January 1, 2021.

Any payments for student loan debt would count against the $5,250 annual benefit under the educational assistance program. To implement this feature, an employer should amend its educational assistance program, or adopt a program, and notify employees of the availability of the new benefit. The employer should also create appropriate forms and processes under which employees may submit a request for reimbursement and coordinate with its payroll provider to ensure that any payment are treated as non-taxable payments.

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BENEFITS BRIEFS IN THE TIME OF COVID-19, PART 3: LAYOFFS/FURLOUGHS AND EXCISE TAXES UNDER THE AFFORDABLE CARE ACT

Posted by Eric Gregory | Apr 30, 2020

Employers that are laying off or furloughing employees during the COVID-19 crisis may be creating the possibility for excise taxes under the Affordable Care Act ("ACA"). Knowing the method by which employers determine full-time status is key to understanding the issue.

Excise Taxes under the ACA

The ACA generally provides that employers with 50 or more full-time and full-time equivalent employees ("applicable large employers" or "ALEs") have to provide affordable coverage with minimum value to at least 95% of full-time employees, or pay an excise tax known as the "employer shared responsibility payment" or "ESRP."

Two Types of ESRPs

An employer may be subject to two different types of ESRPs:

1. The "A penalty" under Code Section 4980H(a), imposed if the employer fails to make a coverage offer to at least 95% of its full-time employees and dependents, and at least one full-time employee receives coverage through the ACA marketplace using premium tax credits; or
2. The "B penalty" under Code Section 4980H(b), imposed if the employer fails to make an affordable offer of coverage to a full-time employee, and that employee receives coverage through the ACA marketplace using premium tax credits.

For 2020, the annual penalty amounts are $2,570 per employee for the A penalty and $3,860 per employee for the B penalty. These penalties are pro-rated and imposed on a month-to-month basis.

Determining Full-Time Status: Monthly or Look-Back Method

IRS regulations under the ACA allow for two methods for employers to determine which employees are full-time for purposes of offering coverage. Every ALE must use one of the two methods.

The first method is the monthly measurement method. Under this method, an ALE determines each employee's status as a full-time employee by counting the employee's hours of service for each calendar month. This method is simple for employers that have a clearly full-time or clearly part-time workforce, but is a problem for employees near the margin, or whose hours are variable, because the employer will only know an employee's full-time status and that an offer of coverage was required for the employee after the month ends.

The look-back method is a frequently used alternative, using a prior measurement period to measure the full-time status of the employee, and a subsequent stability period during which the employee retains full-time status, regardless of hours worked during the stability period. Typically, the

measurement period will end in conjunction with open enrollment, and the stability period will run the duration of the group health plan's plan year.

Layoffs and Furloughs

Employers which use the look-back method and lay off or furlough (but do not terminate) employees who are treated as full-time during a stability period must remember that the affordable offer of coverage rules continue to apply to employees for the duration of the stability period.

If an employer does not make an affordable offer of coverage to those employees, a B penalty may be triggered if the employees obtain subsidized insurance on the ACA marketplace, and an A penalty may be triggered to the extent that 95% of full-time employees are not offered coverage and at least one full-time employee obtains subsidized insurance on the ACA marketplace.

To avoid ACA penalties, employers may wish to consider subsidizing or instituting a premium holiday for employees on layoff or furlough to ensure that affordable coverage continues to be offered. Alternatively, if an employee is terminated, no penalties will result from a month in which an employee is not employed. An unsubsidized offer of COBRA coverage will generally not be considered affordable under the ACA.

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BENEFITS BRIEFS IN THE TIME OF COVID-19, PART 4: REIMBURSEMENT OF OVER-THE-COUNTER MEDICATIONS

Posted by Cyndi Moore | May 1, 2020

Congress has reversed course and amended the Internal Revenue Code ("Code") to provide that a health flexible spending account ("health FSA"), health savings account ("HSA") and health reimbursement account ("HRA") may reimburse employees for over-the-counter medications, effective January 1, 2020.

Background

For many years, health FSAs, HSAs and HRAs did not consider a non-prescription drug as a reimbursable expense, as Code Section 213(b) provides that a "medical expense" does not include a non-prescription drug other than insulin for purposes of an individual's deduction for medical expenses. In 2003, the IRS ruled that a health FSA, HSA and HRA could reimburse for over-the-counter medications. Later, the Code was amended by the Affordable Care Act ("ACA") to provide specifically that a reimbursable medical expense meant only a prescription drug or insulin, effective January 1, 2011. Even under the ACA's restrictions, a health FSA, HSA and HRA was still permitted to reimburse employees for over-the-counter supplies and equipment, such as crutches, bandages and blood sugar test kits, as long as the item met the general definition of medical care in Code Section 213(d)(1).

CARES Act

In the CARES Act, Congress repealed the ACA's exclusion for non-prescription drugs. Therefore, health FSAs, HSAs and HRAs can now reimburse employees for expenses incurred for over-the-counter medications, effective January 1, 2020. Code Section 106(f) was further amended to provide that menstrual care products are eligible reimbursable expenses. Under the amended rule, a health FSA, HSA or HRA may reimburse such items as non-prescription antacids, allergy medicines, pain relievers and cold medicines. However, items that are merely beneficial to general health, such as vitamins, are not reimbursable.

Action Items

An employer is not required to allow participants to be reimbursed for over-the-counter medications from its health FSA or HRA. However, due to the popularity of this category of reimbursable expenses prior to the ACA exclusion, particularly in health FSAs, we anticipate that many employers will permit the reimbursement of over-the-counter medications.

Most cafeteria plans/health FSAs were amended in 2010 or 2011 to specifically state that the plan would only reimburse for prescription drugs and medicines, as was required by the ACA exclusion. Thus, a health FSA or HRA will likely need to be amended to allow for the reimbursement of non-prescription drugs, and participants should be given notice of the change in a summary of material modifications. Although a cafeteria plan/health FSA is not generally allowed to be retroactively

amended, we expect that the IRS will give employers a grace period in which the plan can be amended retroactively to January 1, 2020, as the CARES Act amendment was adopted with a retroactive effective date.

An HSA does not need to be amended, as employees are required to self-police their reimbursable medical expenses. However, an employer could provide notice of this change to employees so they are aware of the additional items that can be reimbursed on a pre-tax basis from an HSA.

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BENEFITS BRIEFS IN THE TIME OF COVID-19, PART 5: SUSPENDING OR REDUCING 401(K) SAFE HARBOR CONTRIBUTIONS

Posted by Jordan Schreier | May 4, 2020

As businesses across the country adjust to the financial reality of Coronavirus related shutdowns and restrictions, some employers that sponsor safe harbor formula 401(k) plans are revisiting a money saving strategy last implemented on a wide scale basis over a decade ago during the great recession—the suspension or reduction of safe harbor contributions.

Under a safe harbor 401(k) plan, the plan can automatically satisfy the ADP, ACP, and top heavy nondiscrimination requirements if the employer makes either a minimum matching contribution to employees who make elective deferrals or a non-elective contribution to all eligible employees not tied to elective deferrals. Generally, a safe harbor plan must remain a safe harbor for the entire plan year. However, if certain conditions provided in IRS regulations are met, a safe harbor plan may be amended mid-plan year to suspend or reduce safe harbor contributions mid-year.

Suspension or Reduction Requirements

An employer may suspend or reduce safe harbor contributions mid-year if each of the following conditions are satisfied:

- The employer must either:
  - be operating at an "economic loss" (as described in the pension plan waiver of minimum funding standard rules under Code Section 412(c)(2)(A)) for the plan year, or
  - the annual safe harbor notice provided to eligible employees for the plan year included a statement that the plan could be amended to suspend or reduce safe harbor contributions with 30 days' notice.
- All eligible employees (not just those actively participating) are provided a supplemental notice of the change which explains the consequences of the amendment that suspends/reduces safe harbor contributions, the procedures for eligible employees to change their elective deferral elections, and the effective date of the amendment.
- The suspension or reduction is effective no earlier than the date the suspension or reduction amendment is adopted or 30 days after eligible employees are provided the supplemental notice.
- Eligible employees are given a reasonable opportunity after receipt of the notice to change their elective deferral elections.
- The Plan is amended to provide that the ADP test and ACP test (if applicable) will be satisfied for the entire plan year.
- The Plan satisfies all other safe harbor requirements with respect to amounts deferred through the effective date of the amendment

For employers with an urgent need, the fastest a plan can suspend or reduce safe harbor contributions is 30 days after the date the supplemental notice is provided, as long as the plan amendment is adopted before the 30 days expires. The employer must make safe harbor contributions for periods prior to the suspension/reduction effective date. Once the safe harbor contribution is suspended or reduced, a plan will not be a safe harbor plan for the rest of the plan year, even if safe harbor contributions are resumed later in the year.

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Read Part 4: Reimbursement of Over-the-Counter Medications

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BENEFITS BRIEFS IN THE TIME OF COVID-19, PART 6: SPECIAL CONSIDERATIONS FOR MID-YEAR CHANGES TO CAFETERIA PLAN ELECTIONS

Posted by Cyndi Moore | May 5, 2020

Section 125 cafeteria plan elections are irrevocable for the plan year unless the participant experiences a change in status or other event that allows an election change under the Section 125 regulations.

Common status change events that may be occurring due to the pandemic include the following:

- *A commencement of an unpaid leave of absence*. If an employee is placed on an unpaid furlough or temporary layoff but is not terminated, an employee may have the right to change elections if he/she loses eligibility for coverage under a group-term life insurance or group health plan. Any change must be on account of and correspond to the change in status, typically to drop coverage.
- *Special enrollment right*. An employee may make an election change if he/she experiences a special enrollment right under the HIPAA portability rules, including marriage; birth or adoption; and loss of other group health coverage. Normally, the employee has a 30-day time period to notify the employer of a special enrollment right. However, under the Notice issued jointly by the DOL and IRS on April 29, 2020, the period from March 1, 2020 until 60 days after the announced end of the COVID-19 national emergency is disregarded in determining whether an employee has timely exercised a special enrollment right. For example, if the employee has a baby on April 30, 2020 and the end of the COVID-19 emergency is May 31, 2020, the 60-day period ends on July 30, 2020 and the employee would have until August 29, 2020 to add the baby to his/her health plan coverage. The baby's coverage would be effective as early as April 30, 2020 and the employee would be required to make all required premium payments. Presumably, pre-tax contributions under a cafeteria plan are allowed as, under these facts, the employee has timely exercised his/her special enrollment right.
- *Dependent care flexible spending account ("dependent FSA")*. An employee may change a dependent FSA election due to a cost or coverage change. For example, the employee may be furloughed at home with children who are out of school and no longer need after-school child care. Under these circumstances, the employee may wish to drop or reduce his/her dependent FSA election. Or, the employee may have to seek alternate child care if the normal day care provider closes due to the pandemic. If the new day care provider charges a higher price for care, the employee may wish to increase his/her dependent FSA election.

Participants may be asking if the plan could refund amounts they have already contributed to a health FSA or dependent care FSA. For example, the participant may have been contributing to a health FSA to pay for an elective surgery that will now not take place, or may have been contributing to a dependent FSA to pay for summer day camp that may be cancelled. Once made, FSA contributions may generally not be refunded to participants. If permitted by the cafeteria plan, unused funds up to $500 in a health FSA may rollover to the next plan year. Alternatively, participants may have a 2 ½ month grace period after the end of the plan year in which to incur expenses that may be submitted against the prior year's health FSA or dependent FSA balance.

As always, the starting point for whether an employee is permitted to change an election is to review the terms of the cafeteria plan document. If an employer wishes to change its practices (for example, to give employees 90 days rather than 30 days to make a dependent FSA election change), the employer should amend the plan document as necessary and communicate with participants.

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Read Part 5: Suspending or Reducing 401(k) Safe Harbor Contributions

About the Author:

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BENEFITS BRIEFS IN THE TIME OF COVID-19, PART 7: WHAT DO LAYOFFS, LEAVES, AND FURLOUGHS MEAN FOR RETIREMENT PLANS?

Posted by Deborah Grace | May 7, 2020

The COVID-19 pandemic has employers strategizing on how to retain valuable employees while addressing declines in demand for the company's products or services. Some employers have placed employees on unpaid leave status instead of terminating the employee's service. Employers may call this unpaid leave a layoff or a furlough. This benefits brief describes how the employee's unpaid status may affect retirement plan administration and the employees' benefits.

Contributions

With no compensation being paid to the employee, his or her 401(k) salary deferrals will cease. This decrease in employee deferrals may impact a 401(k) plan's ability to pass the ADP and ACP tests, thereby increasing the possibility that salary deferrals will need to be returned to highly compensated employees. This could be particularly problematic if non-highly compensated employees are placed on unpaid leave while highly compensated employees continue to work and receive compensation.

In addition, for plans that impose an hours of service requirement that must be met during the plan year for the employee to be eligible for the employer's match or profit sharing contribution, a lengthy period of unpaid leave may result in the employee being ineligible for that contribution. Employers that are concerned about this issue could amend their plan to reduce or eliminate the hours of service requirement for this year.

Vesting

Retirement plans use either the elapsed time or the hours of service method to calculate an employee's vesting service. Under the elapsed time method, the period between an employee's date of hire and date of termination determines if the employee has completed the requisite service to be fully vested in his or her account. Since this method does not look at whether the employee was paid during the period of employment, an unpaid layoff or furlough may have little impact on the employee's accrual of vesting service in a plan that uses the elapsed time method.

Under the hours of service method, only hours for which an employee is paid count towards vesting service. Most plans that use this method require an employee to complete 1,000 hours of service during a plan year to earn a year of service. If the period of unpaid leave is extensive, the employee may not have sufficient hours of service to earn a year of vesting service in the current plan year.

Distributions

Employees on layoff or furlough have the same distribution options that would be available to them if they were actively at work. Such distribution options could include an in-service distribution if the employee has attained age 59 ½ or a hardship distribution if the employee has a hardship that meets the plan's requirements. In addition, the employee may be eligible for a "coronavirus related

distribution" if the employer has adopted this provision of the CARES Act, which is explained in detail here.

Loans

Most retirement plans require loan payments to be withheld from an employee's pay, and do not have processes to accept direct payments from an employee. When the employee is on an unpaid leave, loan payments will be missed. Employers will want to monitor the missed payments to ensure that they fall within the repayment exception that applies when an employee is on an unpaid leave of absence, or that they comply with the CARES Act rules, if adopted by the employer. When the employee returns to work, the employee will need to catch up his or her missed payments in accordance with the plan's loan policy.

Whether an employee who is on an unpaid leave is eligible for a plan loan will depend on whether the plan's loan policy restricts loans to participants who are receiving pay from the employer from which loan payments can be withheld.

Unpaid layoffs, leaves and furloughs raise a number of plan administration questions that can be answered only by reviewing the terms of the retirement plan with an experienced benefits attorney.

This post is a part of the All Things HR Blog's multi-part series on frequent issues and questions faced by employers during the COVID-19 crisis.

Read Part 1: Federal Agencies Relax Summary of Benefits and Coverage ("SBC") Disclosure Deadlines

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Read Part 5: Suspending or Reducing 401(k) Safe Harbor Contributions

Read Part 6: Special Considerations for Mid-Year Changes to Cafeteria Plan Elections

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BENEFITS BRIEFS IN THE TIME OF COVID-19, PART 8: COBRA COMPLICATIONS

Posted by Cyndi Moore | May 8, 2020

The DOL and IRS recently issued final regulations (the "Final Rule") that extend notice and premium payment periods for participants and plans under COBRA. Specifically, a group health plan must disregard the period from March 1, 2020 through 60 days after the announced end of the COVID-19 national emergency (the "Outbreak Period") in determining, among other items:

- The 60-day COBRA election period;
- The date for making a COBRA premium payment; and
- The date for individuals to notify the plan of (a) a qualifying event that is a divorce/legal separation or a dependent child who loses eligibility or (b) a Social Security determination of disability.

For a group health plan, the Outbreak Period is disregarded when determining the date for providing a COBRA election notice. The extended period may be useful if the plan fails to send a COBRA election notice during the Outbreak Period, but we encourage plan administrators to continue to send COBRA notices on a timely basis if feasible so that participants are advised of their rights.

For example, assume that the announced end of the national emergency is May 31, 2020, which means the Outbreak Period ends 60 days later, or July 30, 2020.

- An employee receives a COBRA notice dated April 1, 2020. Normally, the employee would be required to make a COBRA election by May 30, 2020, 60 days after the notice. However, the "Outbreak Period" is disregarded and the employee would have 60 days after July 30, 2020 to make a COBRA election. If elected, coverage would be reinstated as of the original loss of coverage and the employee would owe COBRA premiums back to that date.
- A qualified beneficiary has elected COBRA as of April 1, 2020. The qualified beneficiary fails to make premium payments for April, May, June and July. Normally, the grace period for premium payment would end on April 30, 2020 and COBRA coverage would be terminated effective April 1. However, the "Outbreak Period" is disregarded and the qualified beneficiary would have until August 29, 2020 (30 days after the end of the Outbreak Period) to make any missed premium payments.

The extended time periods raise a number of issues for group health plans that are not addressed in the Final Rule, including:

1. Do individuals who experience a qualifying event need to be notified of the extended time periods? If so, does notice need to be given to individuals who are in the midst of an election period?
2. Do existing qualified beneficiaries need to be notified of the extended period for premium payments? Should notice be given to all qualified beneficiaries or only to those who miss a premium payment?

3. If an individual elects COBRA coverage with a retroactive effective date, will a health insurer honor the retroactive election? Must an employer continue to make premium payments during the election period? Or, as permitted by the COBRA regulations during the normal 60-day election period, can claims be held pending an election and premium payment?

In our view, it would be prudent for a plan administrator to update its COBRA notice to reflect the extended time periods and to send a supplemental notice to existing qualified beneficiaries so that they are aware of the extended period for premium payments and other notice requirements.

Interestingly, a few days after the Final Rule was published, the DOL issued an updated model general COBRA notice and an updated model COBRA election form and related FAQs, which can be accessed here. The model notices add new information on the interaction of Medicare and COBRA, but do not include any new provisions on the extended time periods. We recommend that plan administrators use the model COBRA notices, as appropriately completed and supplemented, as the model notices are deemed to comply with COBRA's notice content requirements.

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Read Part 7: What Do Layoffs, Leaves, and Furloughs Mean for Retirement Plans?

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BENEFITS BRIEFS IN THE TIME OF COVID-19, PART 9: ADDITIONAL FLEXIBILITY FOR CAFETERIA PLANS; INCREASE IN HEALTH FSA CARRYOVER AMOUNT

Posted by Cyndi Moore | May 18, 2020

In Notice 2020-29, the IRS gave plan sponsors additional flexibility to allow participants to make certain mid-year cafeteria plan election changes during calendar year 2020 without regard to the restrictions that typically apply, and to adopt an extended claims period for flexible spending accounts ("FSAs"). In Notice 2020-33, the IRS has increased the $500 carryover amount that applies to health FSAs for the 2020 plan year to $550. Following is a summary of each Notice.

Notice 2020-29

A. Mid-Year Election Changes

Health Plan Election Changes

During calendar year 2020, a Section 125 cafeteria plan may be amended to allow a participant to make the following prospective changes with respect to an employer-sponsored group health plan (whether insured or self-funded):

- Make a new election for coverage, if coverage was previously waived;
- Revoke an election and make a new election to enroll in different employer-sponsored coverage (for example, moving from a low option to a high option, or from self-only coverage to family coverage); or
- Revoke an election for coverage, if the employee attests in writing that he/she is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

Normally, under the Section 125 regulations, an election change must be made within a certain time period (for example, within 30 days after a special enrollment right occurs) and any changes must be on account of and correspond with a change in coverage that affects eligibility for the health plan. Under Notice 2020-29, these restrictions would not apply to the health plan election changes outlined above, if the cafeteria plan is amended to permit them. Election changes may be permitted regardless of whether the employee is affected by COVID-19.

Health FSA or Dependent Care FSA Election Changes

During calendar year 2020, a cafeteria plan may be amended to allow an eligible employee to revoke an election, make a new election, or increase or decrease a health FSA or dependent care FSA election on a prospective basis, again without regard to the restrictions that normally apply. For instance, normally a participant may not make an election change to a health FSA as a result of a change in cost or coverage. However, it appears that such changes would be allowed under Notice

2020-29. For example, if a participant switches from a high option health plan to a low option health plan, he/she may be permitted to enroll in or increase his/her contribution to a health FSA.

An employer is permitted to limit mid-year elections to an amount at least equal to amounts already reimbursed. For example, if an employee elected to contribute $1200 to a health FSA on January 1 and has been reimbursed for $900 as of June 30, the employee may not reduce his/her election to less than $900 on July 1.

General Guidelines that Apply to Mid-Year Changes

An employer could allow these changes at any time during calendar year 2020 or could offer a limited open enrollment period during which employees could change their elections, for instance, during a two-week period in June 2020.

As always, an employer is not required to permit these election changes, or could offer some but not all of them. As an example, if an employer was concerned about adverse selection in its health plan, it could allow an employee to revoke coverage but not to enroll in new coverage.

B. Extended Claims Period for Health FSAs and Dependent Care FSAs

An employer may amend its cafeteria plan to permit participants to submit claims incurred through December 31, 2020 to unused balances at the end of a plan year or grace period ending in 2020. This change is intended to give participants additional time to incur claims that may be submitted to FSA balances and is useful for non-calendar year plans.

Example: Employee A has a balance in her health FSA of $2,000 on June 30, 2020. If the cafeteria plan is amended to allow an extended period for incurring claims for the plan year ending June 30, 2020, Employee A may incur claims from July 1, 2020 through December 31, 2020 that may be reimbursed from her June 30, 2020 account balance.

Note that the extended claim period could make the participant ineligible to make HSA contributions, if the health FSA is not a limited purpose FSA.

Notice 2020-33 – Increase in Health FSA Carryover Amount

In Notice 2020-33, the IRS has allowed the $500 carryover amount that is permitted to be adopted in a health FSA to be indexed as is the $2500 salary reduction limitation for health FSAs ($2,750 in 2020). Under this change, the carryover amount will increase to $550 for the plan year beginning in 2020, if the cafeteria or health FSA plan is amended to permit the increase.

Plan Amendments

Plan amendments to incorporate any of the foregoing changes must be adopted by December 31, 2021, and may be effective as of January 1, 2020. The plan must be operated in accordance with the changes and participants must be notified.

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Read Part 7: What Do Layoffs, Leaves, and Furloughs Mean for Retirement Plans?

Read Part 8: COBRA Complications

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BUSINESS INTERRUPTION INSURANCE AND COVID-19 IN ONTARIO

by Mark S. Shapiro, Wendy G. Hulton, Paul E. Bain, Liana C. Di Giorgio, and Jacky Cheung

During the COVID-19 pandemic, most businesses have suffered losses caused by business interruption, whether related to staff falling ill, loss of customers or suppliers, or governments requiring new forms of compliance. Some businesses have made COVID-19 related claims which have been met with resistance by their insurers and are already taking legal action as a result – for example, a nation-wide class action was recently launched in Saskatchewan against several insurance companies in respect of denied claims relating to COVID-19, and a group of Ontario optometrists has started a petition urging their insurers to approve claims resulting from COVID-19. It is important to note that generally speaking, commercial property insurance policies cover losses caused by actual physical damage.

In the past few weeks, the Ontario Superior Court's decision in *MDS Inc. v. Factory Mutual Insurance Company* has made waves throughout the legal and insurance communities. Some interpretations of this decision have suggested that courts may require all-risk and business interruption insurers to cover certain losses caused by COVID-19. However, a closer review of the decision reveals that these interpretations are likely too good to be true for insureds. This decision does not relate directly to COVID-19, nor does it alter the terms of all-risk and business interruption insurance policies as they relate to losses caused by COVID-19.

THE FACTS

MDS Inc. (the "**Plaintiff**") was in the business of buying and selling radioisotopes. A leak occurred at the nuclear reactor facility from which the Plaintiff obtained radioisotopes, causing an unexpected shutdown of the facility. The leak did not cause physical damage to the area of the facility responsible for producing the radioisotopes. The shutdown lasted over a year and prevented the Plaintiff from sourcing these radioisotopes. As a result, the Plaintiff suffered over $120M in losses.

At the time of the incident, the Plaintiff had an all-risk insurance policy (the "**Policy**") in place with Factory Mutual Insurance Company (the "**Insurer**") for losses from all risk of physical loss or damage, except as excluded by the policyThe Plaintiff made a claim for its losses under the Policy but the claim was denied by the Insurer.

THE REASONING

One of the main issues explored in the decision is the meaning of the term "resulting physical damage" found in the Policy. The Insurer claimed there was no resulting physical damage as physical damage would require *actual* damage to the area where the radioisotopes were produced. The Plaintiff argued for a broader interpretation, suggesting the shutdown caused by the leak should constitute resulting physical damage, as it prevented the facility from being used.

Though the Court ultimately agreed with the Plaintiff, this decision involved specific facts, and an important factor was the language contained in the Policy. The term "resulting physical damage" was not defined in the Policy. As such, the Court turned to a Supreme Court decision that held that the interpretation of the scope of a resulting damage exception should be informed by the specific language of the policy and the relevant factual matrix, including the reasonable expectations of the parties.

The Court applied this principle and spoke to the purpose of all-risk insurance being to provide broad coverage for risks not typically covered by other types of policies. The purpose of the Policy included the compensation of the Plaintiff for interruptions to its supply of radioisotopes caused by unforeseen events.

The Court also conveyed that certain other provisions in the Policy supported the broad interpretation of "resulting physical damage." Though the Court did suggest that physical damage could include the loss of use of certain property despite there being no actual physical damage to such property, this decision was based on a unique fact pattern, and it is unlikely that the decision alone would support the broader notion that physical damage includes intangible harm that restricts the use of property.

CONCLUSION

In this case, the Court adopted a broad interpretation of "physical damage" in light of the purpose of the Policy and the distinctive set of facts before it. While the decision may have some application to future claims involving COVID-19, one should not read the decision as suggesting that business interruption or all-risk insurance coverage will unequivocally extend to interruptions caused by COVID-19.

Some policies may expressly cover business interruption caused by contagious diseases or restrictions imposed by governmental authorities, some may expressly exclude these events (as a result of insurers' experiences with the SARS and H1N1 outbreaks), and some may be entirely silent.

It will be very interesting to see how Courts interpret different types of insurance policies in light of COVID-19 – some may sympathize with claimants, while others may not be willing to shift the burden of uninsured losses to insurers. We also expect different insurers to behave differently in the face of uncertainty with some being more generous and others more aggressive in their approach to covering losses before insurance laws catch up to COVID-19.

If your business has experienced losses caused by COVID-19, Dickinson Wright may be able to assist by reviewing your existing insurance policies and advising in respect of how they relate to potential claims for such losses. Dickinson Wright can also help you navigate disputes with your insurers regarding the same. If you have suffered these types of losses you should act as quickly as possible as your insurance policies may require you to make claims within a certain time period.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

CAN A FORCE MAJEURE CLAUSE BE RELIED UPON IN LIGHT OF THE COVID-19 PANDEMIC?

by Philip M. Aubry, Jack B. Tannerya and Carly J. Walter

FORCE MAJEURE CLAUSES AND THE COVID-19 PANDEMIC

Although usually set out at the end of a contract in the general or miscellaneous articles of an agreement (and often not paid much attention by the parties), force majeure clauses are now getting a lot of attention and are being scrutinized by parties and their legal counsel in light of the COVID-19 pandemic, with the main question being "Can I (or can the other side) get out of this contract?"

WHAT IS THE NATURE OF A FORCE MAJEURE CLAUSE?

Force majeure clauses authorize contracting parties to extend or suspend the time of performance, or to be excused from performance, in whole or in part, as a result of specifically negotiated and enumerated conditions or events.

Obligations under the contract may resume once the condition or event has been remedied – a determination of the exact circumstances will depend on the clause, and its place contextually within the contract as a whole.

WHAT IS A FORCE MAJEURE EVENT OR CONDITION?

If a party wants to rely on a force majeure clause, they must first establish that the event or condition falls within the definition of force majeure; this is evaluated in the context of each specific contract.

The Supreme Court of Canada, in the leading decision, *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited*, defined a force majeure clause as "generally [operating] to discharge a contracting party when a supervening, sometimes supernatural event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill. "

It is not sufficient that the event makes performance more expensive or time-consuming than expected. The event must make performance substantially more difficult, substantially more expensive, or imprudent.

WHAT WILL THE FORCE MAJEURE CLAUSE CONTAIN?

Force majeure clauses typically contain the following four parts:

- A contracting party is excused from performance: The clause typically starts with language excusing one or both of the contracting parties from performing the contract if one of the specified force majeure events occur.
- A list of force majeure events or conditions: The contracting parties can negotiate the list of force majeure events or conditions.
- Impacted party's obligations: The parties can negotiate the impacted party's obligation to:
  - notify the contracting party of inability to perform; and
  - mitigate the damages of the force majeure event.
- Remedies: The contracting parties can negotiate appropriate remedies, for example, the contracting party's right to terminate the contract without penalty if the force majeure event remains in effect after the specified number of days or consecutive days.

DOES COVID-19 CONSTITUTE A FORCE MAJEURE EVENT?

Force majeure provisions may alleviate the risk of non-performance or delayed performance. In light of the COVID-19 outbreak, force majeure may or may not be an excuse for non-performance; however, the applicability of the force majeure clause for any particular contract will depend on how it was negotiated and drafted. There is no "one size fits all" answer on this and the specific list of force majeure events needs to be reviewed to determine if the COVID 19 pandemic qualifies as a force majeure with respect to the particular agreement.

Traditional and older force majeure clauses may not adequately capture the risks presented by outbreaks and pandemics. Importantly, however, an emerging trend in contracts is to explicitly include "public health emergencies," "communicable disease outbreaks," or "pandemic" in force majeure clauses.

In the event that there is not specific language to capture COVID-19, it may be the case that the outbreak is covered by more generic language. For example, the government declaring a state of emergency or closing its borders to neighbours and trade partners might fall under the definition of a force majeure that includes "government or administrative action." A clause that includes "shortages" may apply when an obligor cannot fulfil its obligation to deliver goods to its customer if the distributor cannot secure adequate transportation services.

Again, a determination of the applicability of the force majeure clause to the COVID-19 pandemic will vary on a case-by-case basis and, as such, requires a careful review of the contract and the force majeure clause.

CAUSATION AND MITIGATION

If the COVID-19 outbreak is considered to be a force majeure event or condition pursuant to the explicit provision of a contract, the elements of causation and mitigation must be considered when determining use of the clause.

The triggering event or condition must be connected to the non-performance of a contractual obligation. The strength of the connection required will depend on context and the contractual language. If the clause requires a causal tie between the event or condition and non-performance, there must be a substantial relationship between the two. This will vary depending on the contract, but usually requires that the impacted party's performance be either prevented or hindered or delayed. The forced closure of all nonessential businesses in Ontario would make it likely that businesses have met this criteria.

A party who is relying on a force majeure event to justify non-performance is expected to make reasonable efforts to mitigate the effect of the event. It is important to note that, in this context, mitigation refers to mitigating the effects of the force majeure event or condition and does not refer to mitigating contractual

damages. For example, a gas supplier who is faced with a force majeure shortage is expected to make reasonable efforts to acquire replacement gas for its customers. The duty to mitigate is limited to a standard of commercial reasonableness. As long as Ontario businesses are following the Government of Ontario's rules and have also made reasonable attempts to meet their obligations, it is likely that they can meet this criteria.

WHAT IF THE CONTRACT DOES NOT CONTAIN A FORCE MAJEURE CLAUSE?

If a contract is silent on force majeure, a court will render their decision whether to excuse an impacted party's performance during the force majeure event based on the foreseeability of the event which may be either:

- Foreseeable: The court deems that the parties can allocate the risk of foreseeable events by adjusting the monetary terms of the contract. Therefore, the court generally does not excuse the impacted party's performance. In this case, the obligor bears the risk of the specified event.
- Unforeseeable: The court generally excuses the impacted party's performance. In this case, the contracting party bears the risk of the specified event.
- Where a force majeure provision is absent or inapplicable, the courts may apply the more general principles of frustration or impossibility to excuse performance, although they are limited in their application.

SELF-EVALUATION

While various companies have already declared force majeure over the COVID-19 pandemic, this relief does not apply to all parties to contracts with force majeure clauses. A careful review of force majeure clauses is essential prior to the declaration that force majeure applies.

The evaluation for contracting parties is twofold: i) How has the COVID-19 pandemic affected my business? ii) Is this impact sufficient to trigger the force majeure clause? A careful consideration of the steps required to mitigate any related damages should immediately follow.

COMPARISON: FRUSTRATION

In the absence of an applicable force majeure clause and in limited circumstances, a party may be relieved from its obligations by claiming frustration of contract. When an unforeseen event renders performance of the contract radically different than what was bargained for, this may be the result. Contrary to force majeure, which offers flexibility, frustration automatically results in both parties being discharged from the contract. The doctrine of frustration is an equitable remedy for extreme events that break down the very basis for contracting.

Contracting parties are free to agree to the legal effect of a force majeure event and the contract is not necessarily at an end as a result; there are ongoing obligations although the parties may be excused from penalties or damages due to delayed performance. In contrast, if a contract is frustrated, the result is that both parties are discharged from their obligations; the contract is at an end.

Due to the likely temporary nature of the COVID-19 outbreak, the temporary effects of force majeure rather than the permanent termination of the contract under frustration may be preferable.

HOW WE CAN HELP

Paying attention to detail and rapidly adapting to changing circumstances is what we do at Dickinson Wright, both in Canada and the United States. While this should not be construed as legal advice, should you require any assistance, please do not hesitate to contact us.

Our colleague in the Colombus office has offered insights on force majeure provisions and the coronavirus: https://www.dickinson-wright.com/news-alerts/force-majeure-and-covid19

Our colleagues in Las Vegas and Reno have provided insights into how COVID-19 has impacted contractual relationships under Nevada law: https://www.dickinson-wright.com/insight/2020/04/covid19-impact-on-contractual-relationships

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Family Focus

CAN I STILL GET A DIVORCE DURING A PANDEMIC?

Posted by Marlene Pontrelli | Apr 3, 2020

You were finally just about ready to make that appointment with a lawyer to discuss the possibility of a divorce from your spouse and then the world seemed to change overnight as COVID-19 (the coronavirus) took center stage on world news. Now what? With law offices working remotely, courts reducing schedules, custody evaluators conducting teleconferences rather than in-home visits, is it still possible to even file for divorce? The answer is yes, but there are some steps you may wish to consider first.

1. Consider when you ideally would like your divorce finalized. Keep in mind that most states have a "cooling off" period between the time a petition for dissolution is filed and served on the other party, and before the parties may even file the final decree of dissolution. In Arizona, that time period is 60 days. Accordingly, if you were expecting to have a divorce finalized before the end of the summer (if uncontested) or the end of the year (if contested), you may wish to at least start the process. In fact, this may be the perfect time to begin since a final decree, in Arizona, cannot occur during the first 60 days.
2. Use this time to mediate a resolution with your spouse. If you have been forced into self-quarantine with your spouse, or working remotely out of the same household, this may be an opportunity to try and sit down and talk about a settlement agreement. One of the difficult things in a divorce is often finding the time to sit down and attempt to amicably resolve issues with each other. Having the time now to talk about a potential resolution either between the two of you, or with the help of legal counsel and a mediator, may save time and money in finalizing a consent decree for dissolution of a marriage.
3. Determine other alternatives. If you are not quite ready to file for a divorce, consider discussing the possibility of a post-nuptial agreement that allows you and your spouse to stay married but otherwise addresses financial issues, division of assets, and spousal support in the event of a divorce. A post-nuptial agreement is a contract entered into by the parties in consideration of staying married, but also includes terms for the financial arrangements in the event one party ultimately files for a divorce or legal separation.
4. Talk with an experienced family law attorney. Do not let the fact that there is a pandemic stop you from obtaining competent legal advice about your situation. Most lawyers will still schedule consultations over the telephone to answer questions and give you recommendations for your particular situation.

Life may have changed overnight, but how you want to live the rest of your life is still something to consider.

About the Author:

Marlene Pontrelli is a Member in our Phoenix office and co-chair of the firm's Family Law Practice. Marlene is a certified specialist in family law. Her practice focuses on all aspects of family law including dissolution, post-dissolution, paternity, child custody and child support matters. She is

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Ms. Pontrelli has written several books, including as a co-author of the Divorce in Arizona book. She is a frequent lecturer in the area of family law and has conducted workshops throughout the country. Ms. Pontrelli is also an adjunct professor at The Sandra Day O'Connor School of Law at Arizona State University, where she teaches the family law class. Marlene may be reached in our Phoenix office at 602-285-5081.

GAMING & HOSPITALITY LEGAL NEWS

CANADA LIFTS RESTRICTIONS AGAINST GAMING COMPANIES' ABILITY TO UTILIZE CO-LENDING PROGRAM

by Chantal A. Cipriano and Kevin J. Weber

In light of COVID-19, the Canadian government is offering financial relief by way of various forms. Relief includes, but is not limited to the following:

Wage Subsidy Program. The federal government is offering a 75% wage subsidy to all eligible employers of up to $847 per week from March 15 – June 6. Employers must show a drop of at least 30% of their revenue during this time from last year. More information can be found: https://www.canada.ca/en/department-finance/economic-response-plan/wage-subsidy.html

Deferral of the Payment of Income Tax. All businesses will be able to defer until September 1, 2020, payments of the amount owing/instalments owing under Part I of the Income Tax Act due on or after March 18 and before September 1, 2020: https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/covid-19-filing-payment-dates.html

Deferral of HST/GST Remittances. All businesses will be able to defer, until the end of June 2020, any GST/HST payments or remittances that become owing on or after March 27, 2020 and before June, 2020. During this time, businesses are still required to file their returns before their normal deadline. The deferral also applies to quarterly GST/HST instalment payments for annual filers: https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/frequently-asked-questions-gst-hst.html#toc0

Deferral of Import and Custom Duties. Businesses will be allowed to defer payments due to the Canada Border Services Agency (custom duties and GST on regular imports, re-assessments, penalties, etc.) to June 30, 2020. However, this does not change the accounting timeframes that are prescribed. Importers are required to submit accounting declarations for imported goods released on minimum documentation within the required timeframes: https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-11-eng.html

Co-Lending Program. The Business Development Bank of Canada ("BDC") is offering a Canada Emergency Business Account and a Small and Medium Enterprise Loan and Guarantee Co-Lending Program with Export Development Canada: https://www.bdc.ca/en/pages/special-support.aspx?special-initiative=covid19.

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GAMING & HOSPITALITY LEGAL NEWS

Initially, the gaming industry was excluded from this important relief under the Co-Lending Program. Restrictions that predated the COVID-19 pandemic excluded the BDC from offering loans to casinos, and possibly other gaming-related enterprises such as slot manufacturers and distributors, on the basis that these businesses are not "consistent with generally accepted community standards of conduct and propriety." Shortly after the COVID-19 relief programs were announced, these restrictions were revised. The revised restrictions now exclude only businesses owned by persons who own directly or indirectly entities that:

a. are engaged in or associated with illegal activities;
b. trade in countries that are proscribed by the Federal Government;
c. violate standards with respect to human rights, labour, the environment, and anti-corruption;
d. promote violence, incite hatred, or discriminate on the basis of race, national or ethnic origin, colour, religion, gender, age or mental or physical disability;
e. fail to respect health, safety, labour, industry, and environmental standards and best practices established by all levels of government or applicable industry associations/governing bodies;
f. outside Canada, fail to respect the UN Global Compact's Ten Principles and the General Policies of the OECD Guidelines for Multinational Enterprises in the areas of human rights, labour, the environment, and anti-corruption; or
g. manufacture or sell weapons, ammunition, vehicles/equipment, or related products or services to the military or police forces of foreign countries subject to sanctions under the United Nations Act or that fails to respect the UN Universal Declaration of Human Rights.

A business that has been sanctioned by gaming authorities in any Canadian jurisdiction, or that is controlled by a person who controls other entities that have been sanctioned in such a manner, may be ineligible for BDC loans based on (e), above. However, the concern that all gaming-related businesses might be ineligible for BDC loans has been alleviated.

The BDC has also launched a Capital Bridge Financing Program intended to support Canadian-based, venture-backed companies that have been specifically impacted by COVID-19. Pursuant to this program, the investment arm of the BDC may match, via a convertible note, current financing rounds being raised through "qualified existing and/or new investors made in an eligible company."

As well, the Alcohol and Gaming Commission of Ontario is extending the term of granted licenses without financial penalty or regulatory repercussions. All licensees will have their licenses extended for six months, without the need for renewal, if applicable, during that time.

We will continue monitoring and being at the forefront of all gaming industry updates.

Please Note: These materials do not constitute legal advice. Government initiatives, announcements and regulations in response to the COVID-19 situation continue to evolve and change frequently. As such, it is important to ensure you are aware of current information and that you consult with a lawyer before making your business decisions.

If you have any immediate questions or require further information, please reach out to your Dickinson Wright LLP lawyer or contact the dedicated Dickinson Wright COVID-19 email at COVID19info@dickinsonwright.com.

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CANADA PROVIDES EXPANDED RELIEF TO ALL BUSINESSES RESPONDING TO COVID-19 PANDEMIC

by Daniel D. Ujczo

The Government of Canada has expanded the scope and criteria for companies seeking relief pursuant to the $82 billion federal *COVID-19 Economic Response Plan*. Additional details will be provided during a press briefing to be held on Wednesday, April 1, 2020. Current parameters of the programs are as follows (all $ in CAD):

EMERGENCY WAGE SUBSIDY

Prime Minister Justin Trudeau has announced enhanced eligibility and coverage for the *Emergency Wage Subsidy*. The program includes:

- A 75% wage subsidy provided by the Government of Canada to companies for the first $58,700 of an employee's earned wages. The subsidy is estimated to provide approximately $847 a week per employee. Companies are encouraged to provide the remaining 25% in wages to the employee.
- The subsidy will be backdated to March 15, 2020, and extend for three months.
- Companies eligible for the subsidy will be required to demonstrate a 30% decrease in corporate revenues since the start of the pandemic. The assessment of the 30% revenue drop will be performed after the disbursement. In the event the decrease later is demonstrated to not have reached the 30% threshold, the company will have to repay the subsidy.
- The number of employees a company has will not determine eligibility (i.e., all companies are eligible regardless of size).
- The subsidy also will apply to nonprofits and charities.
- The company needs to be a Canadian-controlled private corporation (CCPC). CCPCs generally are privately-held/not publically traded, incorporated in Canada and/or a province of Canada, and not controlled by any combination of non-residents of Canada and/or public corporations.
- The subsidy will be a direct payment to the company to pay the employee.

CANADA EMERGENCY BUSINESS ACCOUNT

The Prime Minister also announced the new Canada Emergency Business Account program for small and medium-sized enterprises (SMEs) where banks will offer $40,000 guaranteed, interest-free loans for one year. To qualify, SMEs and not-for-profits will need to demonstrate a total 2019 payroll between $50,000 to $1 million in total payroll. Repaying the balance of the loan on or before December 31, 2022 will result in loan forgiveness of 25% (up to $10,000). The account will be implemented by eligible financial institutions in cooperation with Export Development Canada (EDC). Applications for the $25 billion program will be issued by private financial institutions.

CANADA ACCOUNT

EDC also will guarantee new operating credit and cash flow term loans that financial institutions extend to SMEs, up to $6.25 million. The program cap for this new loan program will be a total of $20 billion for export sector and domestic companies.

BUSINESS CREDIT AVAILABILITY PROGRAM (BCAP)

BCAP will allow the Business Development Bank of Canada (BDC) and EDC to provide more than $12.5 billion of additional support, largely targeted to SMEs. BDC and EDC will cooperate with private sector lenders to coordinate on credit solutions for individual businesses including in sectors such as oil and gas, air transportation, and tourism. The near term credit available to farmers and the agri-food sector will also increase by $5 billion through Farm Credit Canada. BCAP generally requires companies to have been in operation for at least 2 years.

GST, HST & CUSTOMS DUTIES RELIEF

Canada will defer Goods and Services Tax (GST), Harmonized Sales Tax (HST), and customs duties until June 2020. This is projected to be equivalent to $30 billion in interest-free loans.

Regarding GST/HST, the Minister of National Revenue will extend until June 30, 2020, the period that:

- Monthly filers have to remit amounts collected for the February, March, and April 2020 reporting periods;
- Quarterly filers have to remit amounts collected for the January 1, 2020 through March 31, 2020 reporting period; and
- Annual filers, whose GST/HST return or instalment are due in March, April, or May 2020, have to remit amounts collected and owing for their previous fiscal year and instalments of GST/HST in respect of the filer's current fiscal year.

The Canada Border Services Agency will be issuing specific guidance regarding customs duties.

CORPORATE TAX EXTENSIONS

The Canada Revenue Agency (CRA) will allow all businesses to defer, until after August 31, 2020, the payment of any income tax amounts that become owing on or after March 18, 2020, and before September 2020. This relief would apply to tax balances due, as well as instalments, under Part I of the Income Tax Act. No interest or penalties will accumulate on these amounts during this period.

CRA also will not contact any small or medium businesses to initiate any post-assessment GST/HST or Income Tax audits for the next month. For the vast majority of businesses, the CRA will temporarily suspend audit interaction with taxpayers and representatives.

The various Government of Canada Ministries and Departments will be issuing guidance on these programs over the coming days and posting information to the relevant website: https://www.canada.ca/en/department-finance/economic-response-plan.html.

Dickinson Wright's team is available to assist all companies seeking relief.

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PROTECTING SMALL BUSINESS ACT, 2020

by Paul A. Muchnik and Justin Quach

As of June 18th, Bill 192, *Protecting Small Business Act, 2020* (the "Act") received royal assent and came into force. The Act is an amendment to the *Commercial Tenancies Act of Ontario* (the "CTA") and introduces prohibitions on certain actions by landlords who are eligible, or would be eligible, to receive assistance from the Canada Emergency Commercial Rent Assistance ("CECRA") for small businesses program.

The Act is intended to prevent the eviction of commercial tenants during the COVID-19 pandemic if the basis for eviction is non-payment of rent for the months of April, May, and June 2020. It also serves to protect commercial tenants from being locked out or having assets seized due to non-payment of rent for the months of April, May, and June 2020.

Highlights of the Act are as follows:

- The Act only applies to a landlord that is either (1) eligible to receive assistance under CECRA and has elected not to participate; or (2) eligible to receive assistance under CECRA and is participating by having entered into a rent reduction agreement containing a moratorium on eviction.
- The time period in which a landlord is prohibited from taking action against tenants (the "Non-Enforcement Period") begins June 18, 2020 and ends on the day the Act is repealed. The Act is anticipated to be repealed September 1, 2020, or on an earlier day to be named by the proclamation of the Lieutenant Governor.
- The Act prohibits judges from ordering a writ of possession that is effective during the Non-Enforcement Period if the basis for doing so are rental arrears for the months of April, May, and June of 2020. This prohibition applies irrespective of whether the action or application was commenced before, on, or after the beginning of the Non-Enforcement Period.
- During the Non-Enforcement Period, a landlord caught under this Act is prohibited from exercising a right of re-entry.
- If a landlord exercised the right of re-entry between May 1, 2020 and June 18, 2020, the Act mandates that the landlord shall as soon as reasonably possible,
  i. Restore possession of the premises to the tenant unless the tenant declines to accept possession; or
  ii. If the landlord is unable to restore possession of the premises to the tenant for any reason other than the tenant declining to accept possession, compensate the tenant for all damages sustained.

Unless otherwise agreed, the tenancy is deemed to be reinstated on the same terms and conditions.

- During the Non-Enforcement Period, a landlord caught under this Act is prohibited from seizing any goods or chattels as a distress for non-payment of rent for the months of April, May, and June of 2020.
- If a landlord seized any goods or chattels as distress for arrears between May 1, 2020 and June 18, 2020, the Act mandates that the landlord shall, as soon as reasonably possible, return to the tenant all of the seized goods and chattels that are unsold as of June 18, 2020.
- If a landlord of an eligible tenant applies for CECRA and is approved to receive assistance under CECRA, the landlord will no longer be prohibited from, and the tenant will no longer be protected from evictions, lockouts, or asset seizures for non-payment of rent for the months of April, May, and June 2020.
- A landlord who fails to comply with the above-mentioned is liable to the "person aggrieved" for any damages sustained by the person aggrieved as a result of the contravention or non-compliance.

The Act was introduced in Ontario to halt and reverse evictions in light of the COVID-19 pandemic, but also to address the lack of participation in the CECRA program. Although CECRA is primarily intended to provide relief for commercial tenants, participation in the program is at the landlord's discretion. Prior to the Act, tenants who would otherwise be eligible for relief under CECRA could be denied such relief and be subject to eviction, lock,outs, or asset seizures for arrears in rent if the landlord did not wish to enroll in the program. The Act serves to persuade landlords to participate in CECRA if their tenants are eligible for assistance.

The Act is intended to protect commercial tenants during the COVID-19 pandemic, provide relief to tenants, provide landlords with income stability, and it also aids in preserving the relationship between landlords and tenants.

However, the Act leaves the following questions unanswered:

- The Act mandates that landlords who fail to comply are liable to "persons aggrieved" for damages. Who is considered a person "aggrieved"? Was it the legislature's intention to expand a landlord's liability beyond the tenant?
- The Act is set to be repealed on September 1, 2020 and CECRA only provides relief for the months of April, May, and June. Are businesses that have experienced significant declines in revenue expected to resume and meet their pre-pandemic rental obligations or be faced with evictions and asset seizures as of September 1, 2020? Is the Act simply a rent deferral mechanism, prolonging the inevitable demise of commercial tenancies of troubled businesses?
- After a tenant is eligible and approved for assistance under CECRA, landlords are no longer prohibited under the Act from commencing evictions, lockouts, and asset seizures for non-payment of rent for the months of April, May, and June, 2020. However, the Act does not specify whether a tenant that would be eligible, but refuses to participate in the CECRA program is entitled to protection under the Act.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

Tax Blog

CANADA'S EMERGENCY COMMERCIAL RENT ASSISTANCE PROGRAM (CERCA)

Posted by Jennifer Leve | May 11, 2020

On April 24, 2020, The Canadian Federal Government provided some details about the new Canada Emergency Commercial Rent Assistance program (CECRA) for small businesses and commercial landlords. The CECRA was announced on April 16, 2020 to provide relief for small business tenants and, in some respect, landlords.

Under the CECRA, the Federal Government will offer forgivable loans to the landlord equal to 50% of three monthly rent payments that are payable by eligible small business tenants who are experiencing financing hardship in April, May, and June. The loans will be forgiven if the mortgaged property owner agrees to reduce the small business tenants' rent by at least 75%, with the remaining 25% or less covered by the tenant.

The forgivable loans would be disbursed directly to the landlord's mortgage lender. If a landlord does not have a mortgage secured by a commercial rental property, different program options may be available, which may include applying funds against other forms of debt facilities or fixed cost payment obligations (e.g. utilities). More details are to come.

For landlords applying to the program, they are required to forgo their profits derived from rental income. The government will reimburse landlords for only their "before profit" rent. As well, landlords must enter into a formal "rent forgiveness agreement" with their tenant. This agreement must specify that the landlord is not allowed to evict the tenant for the three months of April, May, and June.

A small business tenant is a business paying less than $50,000 per month in rent and who has temporarily ceased operations or has experienced at least a 70% drop in pre-COVID revenues, comparing revenues of April, May, and June of 2020 to the same month in 2019, or alternatively compared to average revenues for January and February 2020.

For more information, please contact Jennifer Leve in the firm's Toronto office at (416) 777-4043.

Disclaimer

DICKINSON WRIGHT LLP

COVID-19 GUIDANCE AND RESOURCES

1. OVERVIEW

We are all in this together and, while we are all currently working remotely, please know that we are here for you in these unprecedented times. The impact of COVID-19 is changing at a rapid pace. One thing that will not change is our commitment to help our friends, clients and colleagues.

The outbreak of the 2019 Novel Coronavirus disease ("**COVID-19**") which originated in Wuhan, China, has rapidly spread throughout the world, including Canada and the United States.

Coronaviruses are a series of infections that are mostly spread amongst individuals through close contact. The likelihood that a person will become severely ill is higher where the person has a weakened immune system. COVID-19 causes a respiratory infection with symptoms ranging from common to severe respiratory illnesses, including difficulty breathing, fever, and cough. In the most severe cases, it may lead to pneumonia, kidney failure and death.

As a result, Canadian individuals and businesses are being directly or indirectly affected by the pandemic.

Dickinson Wright has set up industry specific Canadian and cross-border groups with lawyers that are ready to assist you in navigating the many challenges, both personal and professional resulting from COVID-19.

2. CROSS BORDER CONSIDERATIONS

In assessing obligations related to cross border agreements, it is imperative that businesses consider and/or review the following:

a) Review Outstanding Purchase Orders

As China is a large hub for the manufacturing sector, there has been a large reduction in operations and productivity due to COVID-19.

As a result, sourcing and procurement contracts should be reviewed to determine any guarantees related to timelines that suppliers may have provided. Also, there may be notice provisions contained within the agreements that require the supplier to provide notice in the event it cannot meet product demand. It may be the case that procurement groups may need to vary or suspend supply contracts in order to be able to obtain the product from a different source.

b) Supply Chain and Transporting Goods

As a result of the outbreak, international shipments may be delayed. It is important for Canadian importers to remain in contact with their suppliers to ascertain whether the logistics chain is still flowing as usual. It may be worthwhile to consider alternate shipping methods, particularly where products are being shipped by sea. For example, consider air shipment, which may lessen the pressure on the supply chain.

c) Inventory Review

During this time, it is worth diversifying your suppliers in various jurisdictions to help with stocking and inventory in the event where one supplier experiences hardship due to the outbreak. If inventory insurance applies, it is worth reviewing the policy to determine what steps need to be taken to protect rights to an inventory claim.

3. COMMERCIAL & CONTRACT LAW IMPLICATIONS

a) Contracts

COVID-19 may result in disruption of the performance obligations of various companies, and will continue to negatively affect businesses in several ways. As a result, there may be contractual and commercial issues resulting from the pandemic. Businesses should not rely on using the outbreak as a way to excuse non-performance.

Extreme events in business transactions, also known as *force majeure* events, are events which are beyond the control of a party, and may prevent a party from performing its obligations under the contract. If the contract is silent on *force majeure*, a court may excuse an affected party's performance based on impossibility or frustration of the contract. An example of impossibility may include a situation where the promisor dies or is incapacitated, which could include quarantine of an individual or illness due to the outbreak.

Where a contract does not include a *force majeure* clause, barring a claim for frustration of contract, a party will still remain liable to the other party for performing and will not be released of its obligations to the other party, regardless of an intervening event beyond

its control, even if the intervening event makes performance impossible for the party to perform its obligations.

In reviewing contracts, identify whether a pandemic or epidemic is a specified *force majeure* event. If the *force majeure* clause, objectively interpreted, covers COVID-19, the parties should consider the following issues: notice, causation, mitigation and consequences on contractual performance, including the following:

- Is there a notice period? If so, is there a length of time the *force majeure* event must continue to rely on the provision, and in the event where the outbreak results in an inability to perform, is there is an opportunity to mitigate?
- Are there any consent or approval requirements?
- As a result of COVID-19, are there any untrue or misleading representations or warranties?
- Are there any disaster recovery measures in place, and if so, are such procedures being followed?
- Are there any termination provisions triggered?
- Are there any events of default that have been triggered, despite the existence / application of the *force majeure* clause?
- Will any guarantees be affected?
- Are there any other damages that could be incurred?
- Are there any time of the essence provisions?
- Are there any negative future implications – for example, will COVID-19 affect any contracts that are being negotiated or are soon due for renewal?

Keep in mind, however, that there may be other ways to terminate the contract – we are happy to review any contracts and confirm what other flexibility is available.

b) *Force Majeure* Clauses

The impact of the Covid-19 situation and *force majeure* clauses depends, in large part, on the exact wording of the clause itself. Traditionally, *force majeure* clauses have been interpreted narrowly, with close attention paid to the specific language of the impugned clause. In the words of the Supreme Court of Canada:

> An act of God clause or force majeure clause […] generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.

If a *force majeure* clause exists and is applicable in the circumstances, we recommend that you:

- Provide timely notice of the *force majeure* event
- Document everything
- Prepare for eventual litigation
- Call us

c) Mergers and Acquisitions

In mergers and acquisitions ("**M&A**") and certain contracts, the term "material adverse effect" ("**MAE**") is used as the threshold to measure the negative impact of certain occurrences.

MAE is typically defined as "any event, occurrence, fact, condition or change that is materially adverse to the business, results of operations, conditions of assets of the corporation, or the ability of the corporation to consummate the transaction". The outbreak of COVID-19 should fit the first part of this definition as an "event", a "condition" or a "change". However, whether it is materially adverse to the business, results of operations, condition or assets of the target corporation or business, is a question of fact.

Canadian case law in this regard is limited and has not dealt with issues similar to the pandemic that we are experiencing. However, U.S. case law is much more comprehensive in this regard, and will likely be influential in the event of litigation related to MAE transactions. While it is too early to know whether COVID-19 will be significant in the interpretation of MAE, this remains fact specific to each M&A transaction.

Regarding Representations and Warranties Insurance ("**RWI**"), the underwriting and scope of coverage continues to develop in real time. There are several practical considerations for dealmakers to consider when utilizing RWI as an effective risk allocation tool. RWI insurers are paying close attention to the current and potential effects of COVID-19 on the operations of the target with some insurers proposing exclusions related to COVID-19 that can vary in scope. As part of the RWI underwriting process, organizations should expect increased diligence around virus impact, particularly with respect to workforce and supply chain disruption.

d) Commercial Leases

A commercial landlord's right to impose rules as it sees fit (provided it is consistent with the law) surrounding the operation of its property and its right to control common areas will likely suffice to permit the landlord to limit or control access to the property if advised to do so by authorities.

A commercial landlord should act reasonably and in good faith and never with an ulterior motive. It is imperative that the landlord keep tenants fully informed about the actions it intends to take in relation to the property, and explaining the necessity for them, particularly amidst the outbreak.

If applicable, consider discussing a rent abatement with your landlord.

4. KEY ISSUES FOR EMPLOYERS

It is an employer's duty to ensure that the workplace is safe for all of its employees. Employers should consider the following health and safety related issues during this outbreak:

- How to conduct workplace hazard risk assessments for the virus.
- How to reduce virus-related risks in the workplace.
- How an employer can temporarily require a high-risk employee to stay home and the risks relating to dismissal that may arise.
- The employee's right to know about virus-related hazards.
- The employee's right to refuse work that they view as carrying a risk of infection.
- Remote work arrangements.
- Reporting obligations to health and safety and workers' compensation authorities following instances of infections.
- The employer's duty to protect employees who are experiencing violence and/or harassment connected to the virus.

There are also circumstances that will trigger an employer's duty to notify the Ministry of Labour, Training and Skills Development within four days, such as if the employer is advised that a worker is ill from COVID-19 due to a work-related exposure, or if a claim has been filed with the Workplace Safety and Insurance Board ("**WSIB**"), as well as the workplace joint health and safety committee/health and safety representative and trade union (if applicable).

There may be several instances in which an employee will be unable to attend to work during the epidemic, such as contracting the virus, being around someone who has contracted the virus, family obligations related to caring for a loved one or child, or travel disruptions. In this regard, employers should be mindful of the following:

- The statutory leaves offered to employees who contract the virus, require medical treatment, or who must care for ill members of their family.
- Deciphering between culpable and non-culpable work absence and coming up with an appropriate response.
- Disability accommodations resulting from COVID-19.
- Deciphering between brief illnesses that may not require accommodation versus more serious illnesses that require accommodation.
- Workers' compensation rights where the virus is contracted in the workplace.
- The type of medical information that the employer can request and the procedures for requesting same.
- Requirements for conducting proper layoffs without triggering constructive dismissals.
- Taking the appropriate steps to ensure privacy of medical and health information.
- Awareness of processing and administrative delays related to international travel and mobility, and making alternate arrangements for operations if necessary.
- The significant impact on international travel and mobility of employees that are required to travel as part of work, and considering alternate work arrangements.
- Assisting employees who are returning to work after an infection.
- Canceling or postponing non-essential work related travel to high risk jurisdictions.
- Monitor travel and health advisories.
- Require employees returning from a high-risk area to immediately report such travel, as well as any symptoms. Require such employees to work remotely for 14 days and only return once cleared by a medical professional.
- Consider the effect of scheduling vacations/leave of absences due to staff shortages.
- Advise employees to stay home and seek medical treatment if they are experiencing symptoms of a respiratory illness of any kind.
- Advise employees to wash hands often with soap for at least 20 seconds and to avoid touching their eyes, nose and mouth with unwashed hands, as well as advising them to cover a cough or sneeze with a tissue or to cough/sneeze into their sleeve.
- Consider that employees with a legitimate health and safety work refusal cannot be disciplined or dismissed.
- Employees must not be subject to discrimination or harassment based on a high-risk jurisdiction that they visited or based on birthplace or origin which may be a high-risk jurisdiction.

<u>Changes to Employment Insurance Sickness Benefits and Work-Sharing</u>

Employment Insurance ("**EI**") sickness benefits provide financial support for eligible workers who:

- Cannot work for a medical reason, which includes being subject to a quarantine.
- Experience reduced regular weekly earnings of more than 40% per week.
- Have accumulated 600 insured hours of work in the 52 weeks preceding a claim.

Benefits pay 55% of an employee's insurable earnings, up to a maximum of $573 per week, for a maximum of 15 weeks.

Normally, there is a one-week waiting period for EI sickness benefits. Note this does not refer to when an employee will receive the benefit (which is usually 28 days after the application for EI benefits). This waiting period is treated like a deductible for other types of insurance, where workers will not receive payment for one week of their work absence.

The federal government has waived the one-week waiting period, meaning that individuals subject to quarantine or in self-isolation, or who are ill due to COVID-19, will receive benefits throughout their absence, up to a maximum of 15 weeks.

See more information on EI sickness benefits here: EI sickness benefits: What these benefits offer.

Work-sharing is designed to help employers and employees avoid layoffs or termination during an economic downturn. As part of the program, EI benefits are provided as income support for the employees who experience reduced working hours due to the business downturn. The affected employees must agree to a reduced work schedule and share available work over a certain period of time. The maximum duration of a work-sharing period is normally 38 weeks. This period will be doubled to 76 weeks for businesses experiencing a downturn in business due to COVID-19.

See more information on work-sharing here: https://www.canada.ca/en/employment-social-development/services/work-sharing.html

In the event an employee or a family member does contract COVID-19, they may be able to utilize their unpaid leave entitlements pursuant to the *Employment Standards Act, 2000,* including the following:

- Family caregiver leave – up to eight weeks to care for or support a family member suffering from a serious illness.
- Critical illness leave – up to 37 weeks to provide care or support to a critically ill minor child or 17 weeks to provide care or support to a critically ill adult family member.
- Sick leave – up to three days in each calendar year due to employee illness, injury or medical emergency.
- Family medical leave – up to 28 weeks in a 52-week period where the employee is providing support to a family member suffering from a serious medical condition, who is at significant risk of death within 26 weeks.
- Declared emergency leave – where an employee will not be performing his or her duties as a result of an emergency declared under the Emergency Management and Civil Protection Act or other similar legislation.

5. IMMIGRATION AND TRAVEL ISSUES

Impact of Coronavirus Travel Bans in Canada

On March 18, 2020, the Government of Canada issued an Order-in-Council defining the terms of the travel ban first announced on March 16 to limit the spread of COVID-19. This ban came into effect of March 18 at 12 pm EDT, and will remain in effect until June 30, 2020.

Initially, officials said the ban applied to all foreign nationals, but excluded Canadian citizens and permanent residents, immediate family members of Canadian citizens, as well as aircrews, diplomats and U.S. citizens. The exception for U.S. citizens has since been the subject of an amendment.

Pursuant to an Order-in-Council issued on March 18 under the *Quarantine Act*, there are 16 scenarios under which a person would be permitted to enter Canada, including the following exemptions which pertain to permanent and temporary residents:

- immediate family members of Canadian citizens or permanent residents (immediate family members include spouses, common-law partners, dependent children of either the resident or their partner, and grandchildren of citizens and permanent residents);
- people who have been authorized, in writing, by a consular officer of the Government of Canada to enter the country for the purpose of reuniting immediate family members;
- people who have only been in Canada or the U.S. during the 14 day period before arriving in Canada;
- people who are considered "protected persons" where their refugee protection has been conferred and they have not had their claims or applications subsequently deemed to be rejected;
- people who will provide an "essential service" while in Canada; and
- people whose presence in Canada is in the national interest according to the opinion of the Minister of Foreign Affairs, the Minister of Citizenship and Immigration or the Minister of Public Safety and Emergency Preparedness.

In regards to valid study and work permit holders who are currently outside of Canada and the U.S., on March 19, a statement was released by the Government of Canada indicating that air carriers operating flights to Canada are required to deny boarding to any passenger who is not a Canadian citizen or permanent resident (or an immediate family member). This means that international students and workers who are outside of Canada and the United States will not be permitted to board an aircraft to return to Canada, unless they are the spouse, common-law partner or dependent child of a Canadian citizen or permanent resident.

This statement suggests that study or work permit holders outside of Canada and the U.S. who are not the immediate family member of a Canadian citizen or permanent resident are forbidden from returning to Canada for the time being, unless they are able to seek entry to Canada by land or water.

However, study and work permit holders currently in the U.S., who have not travelled to any other country may be eligible to return to Canada as long as the travel is deemed to be "essential". As noted, the original travel ban provided an exception for U.S. citizens. This exception has since been amended, pursuant to the terms of a statement released by the government of Canada on March 20, 2020 which provides that commencing on March 21,

all "non-essential travel" from the U.S. to Canada will be restricted. This applies to all travel, regardless of whether it involves air travel or crossing into Canada by land or water. The statement provides that "'non-essential' travel includes travel that is considered tourism or recreational in nature." The statement goes on to provide that "Americans and Canadians also cross the land border every day to do essential work or for other urgent or essential reasons, and that travel will not be impacted." Later on March 20, the Government of Canada issued a clarifying statement which provided that holders of valid work permits and study permits are exempt from the border restrictions. They can fly into Canada and are considered "essential travel" for the purposes of land border restriction exemptions. All persons entering Canada from abroad pursuant to any of these exemptions are expected to self-isolate for 14 days upon arrival in Canada, with exemptions from this self-isolation requirement applicable to certain occupations such as long-haul truckers and certain health care related occupations.

The Government of Canada has also officially discouraged "flagpoling." "Flagpoling" is a term given to the practice of individuals in Canada travelling to the U.S. border in order to have Canadian border officials update their immigration status. It is a common method used by individuals to renew their study or work permits or to activate their permanent residence status.

The Canadian Border Services Agency (CBSA) has advised that travelling to the U.S. border for immigration services is currently defined as non-essential travel and CBSA requests that such individuals do not travel to the border until further notice. Rather, temporary residents who are looking to extend their stay in Canada as students, workers, or visitors should apply to do so on the website of Immigration, Refugees and Citizenship Canada.

6. MINIMIZING LITIGATION RISK DURING COVID-19

During COVID-19, it is imperative that you inform yourself regarding the duties you maintain under various contracts or any reporting obligations that you owe to regulators, employees and independent contractors, customers, investors, and creditors.
It is prudent to review contracts and terms sheets, consider cross border obligations, engage in without prejudice settlement discussions, consider guidance for public issuers and review media strategy to avoid risks related to public relations and to avoid litigious matters.

7. COURT OPERATION SUSPENSIONS AND HEARING CANCELLATIONS

Ontario Superior Court of Justice

On March 15, 2020, Chief Justice Morawetz announced that court operations in the Ontario Superior Court of Justice are suspended as of March 17, 2020, until further notice.

All civil, criminal, and family matters on or after March 17 are adjourned. This includes all telephone and video conference appearances, unless directed otherwise by the court.

However, during this period, courthouses will be open for filings in non-urgent matters. The court has advised that if the courthouse becomes unsafe or it becomes impossible to file at the courthouse, the court intends to grant extensions of time once regular court operations recommence. However, parties must still comply with rules and orders requiring the service or delivery of documents as between the parties.

On March 20, 2020, the Ontario government made an order under section 7.1 of the *Emergency Management and Civil Protection Act* suspending limitations periods and procedural time limits, retroactive to March 16, 2020. This includes any statute, regulation, rule, by-law or order of the Ontario government that establishes any time period within which any step must be taken in any proceeding in Ontario, subject to the discretion of the court.

The following civil matters will be heard during this time period, although the court has the discretion to deny scheduling an immediate hearing:

- Applications, appeals, and requests relating to COVID-19 and public health.
- Urgent and time-sensitive motions and applications in civil and Commercial List matters, only in the instances where the result would have significant financial consequences if no judicial hearing were to take place.
- Outstanding warrants issued in regards to a Small Claims Court of Superior Court civil proceeding.
- Any other matter the court deems essential to be heard on an urgent basis.

It is expected that a Return to Operations Scheduling Court will be established for the purpose of rescheduling matters that have fallen within this period. Based on our recent experience with the courts, it appears that cases are being rescheduled to a scheduling court in June, 2020.

Ontario Court of Appeal

On March 17, 2020, the Ontario Court of Appeal suspended all scheduled appeals until April 3, 2020. Urgent appeals will still be heard during this timeframe, but only remotely or based on written materials.

Parties on non-urgent matters can also request that their appeal be heard during this time period, based on written materials previously filed.

The court has advised that the parties to appeals scheduled between April 3 and April 30, 2020 should adjourn their appeals on consent. Parties are encouraged to file by mail.

Tribunals Ontario

On March 13, 2020, Tribunals Ontario closed all front line counter services until further notice. The tribunals include:

- Environmental Review Tribunal
- Local Planning Appeal Tribunal
- Mining and Lands Tribunal
- Human Rights Tribunals of Ontario
- Landlord and Tenant Board

Tribunals Ontario is implementing a new policy to postpone in-person hearings and reschedule to a later date. Where feasible, alternative hearing options such as written and telephone hearings will be considered.

Labour Relations Board

On March 15, 2020, the Ontario Labour Relations Board ("**OLRB**") announced that all in-person hearings scheduled up to and including March 27, 2020 are cancelled.

OLRB is accepting submissions from parties regarding rescheduling of hearings or scheduling hearings to be heard by telephone or in writing.

The OLRB will continue receiving applications and other submissions, but anticipates processing may be delayed. Front line reception areas will also be closed for walk-in inquiries.

Workplace Safety and Insurance Board

The Workplace Safety and Insurance Board closed its offices to the public on March 17, 2020 and postponed in-person hearings.

The Workplace Safety and Insurance Appeals Tribunal gave notice on March 18, 2020 that it was postponing all in-person hearings scheduled March 16, 2020-April 3, 2020 and closed its offices to the public.

8. ESTATE PLANNING

At this point, we would promote the following actions to ensure that your estate planning affairs are in order:

a) Review your existing documents. Make sure that you have copies (either paper or electronic) of your existing estate planning documents, and review them to confirm that they still reflect your wishes. If you cannot locate your documents, consider calling or emailing your estate planning lawyer to obtain copies.

b) Pinpoint any items that require attention sooner rather than later. As you review, take note of any major changes that may have occurred in your family since you last updated your estate plan. These might include child births, deaths, marriages, divorces, etc. Also consider whether the individuals that you previously appointed to serve as your agents are still appropriate.

c) Follow up with your loved ones and advisors.

- Make sure that your loved ones know if you have appointed them to any role in your estate plan. This includes your executor (i.e. personal representative under your will, or trustee of your trust), guardian for your minor children, attorney-in-fact under your durable power of attorney for property, and patient advocate under your health care power of attorney.
- Consider reaching out to your financial advisor, insurance advisor, etc. to ensure that your beneficiary designations are up to date and discuss any new planning opportunities relative to your current financial status.
- If you require any medical attention in the near future, confirm that your medical provider has a copy of your patient advocate designation and is informed as to who you wish to have access to your confidential health information.

NOTE – If you do not already have an estate plan, now is as good of a time as any to consider the opportunity before you. Having a will/trust, a power of attorney, and a healthcare power of attorney can certainly contribute to a healthy state of mind.

9. HEALTH

On March 11, 2020, the World Health Organization ("**WHO**") assessed COVID-19 as a pandemic. Canada's public health system, through the federal government's Public Health Agency of Canada, along with public health authorities across the country, responded to the outbreak by working to educate the public and prevent the spread of COVID-19. Specifically, the federal government has identified an increased risk or more severe outcomes for Canadians aged 65 and over, people with compromised immune systems, and with underlying conditions.

In addition, there is an increased health risk for Canadians who have travelled abroad. The Canadian government has advised all Canadians to avoid non-essential travel outside of Canada until further notice, including cruise ships. For travelers who have returned to Canada, the federal government has recommended self-isolating for 14 days, and to continually monitor their health for symptoms including fever, cough, or difficulty breathing. In Ontario, the Ministry of Health has recommended individuals who believe they are experiencing symptoms to contact Telehealth Ontario (the province's public health contact centre) or to contact their local public health unit before visiting an assessment centre.

10. GOVERNMENT OF CANADA

a) Economic Assistance for Canadian Businesses

The government has committed up to $82 billion in support of businesses and Canadians who are affected by the COVID-19 outbreak. A Business Credit Availability Program providing more than $10 billion in support for Canadian businesses will be available through the Business Development Bank of Canada, and Export Development Canada. Augment credit will be available to farmers and the agri-food sector through Farm Credit Canada. To ensure financial market liquidity, the government will purchase up to $50 billion of insured mortgage pools through the Canada Mortgage and Housing Corporation. Businesses will also be allowed to defer payment of their income taxes until August 31, 2020. Finally, the federal government is offering wage subsidies of 10% of employment wages, up to $1375 per employee and $25,000 per employer to mitigate the possibility of layoffs.

b) Economic Assistance for Canadians

Part of the economic response plan includes the creation of different programs for Canadians, including an Emergency Care Fund, which will provide financial assistance to self-isolated workers, those caring for others with COVID-19 and parents who are unable to work because of school and daycare closures. An Emergency Support Fund will help workers not eligible for employment insurance but facing unemployment.
In addition to these new measures, existing support programs will be enhanced. Families with young children will see an increase in their Canada Child Benefit for the 2019-2020 year. Low-income individuals will also see their Goods and Services Tax Credit double. The federal government has extended the deadline for filing taxes until June 1, 2020. Canadians with outstanding student loans will receive a six-month interest free moratorium on making payments. The mandatory withdrawals for retirees with retirement accounts have also been reduced by 25% for 2020.

11. GOVERNMENT OF ONTARIO

As of Tuesday, March 24th at 11:59PM, all non-essential businesses will be ordered to close for an immediate period of 14 days. The Ontario government is expected to release a list of what is deemed to be an "essential" business. All businesses should carefully monitor the news and the Ontario government website for further updates and instructions on how to conduct their business operations accordingly.

As an immediate response, the Ontario government also announced immediate funding of $304 million to enhance the province's response to COVID-19, with the following:

- $100 million for increased capacity in hospitals.
- $50 million for more testing and screening of COVID-19, including funding for contact tracing, laboratory testing, and home testing.
- $50 million to protect frontline workers, first responders and patients by increasing personal protective equipment and critical protection equipment.
- $25 million to support frontline workers in COVID-19 assessment centres, including childcare services.
- $50 million for long-term care support, for additional screening and staffing.
- $20 million for residential facilities in developmental services, and to support additional staffing for caregivers impacted by school closures, and increasing personal protective equipment and supplies and fund additional cleaning supplies.
- $5 million for increased infection control in retirement homes.
- $4 million for Indigenous communities for transportation costs for health care professionals.

The Ontario government has also passed the *Employment Standards Amendment Act (Infectious Disease Emergencies),* to provide job-protected leave to employees in quarantine or isolation due to COVID-19 who need to be away from work due to illness or to care for children due to the closure of schools and day cares. The legislation provides job protection for those who are under medical investigation, are under isolation or quarantine, are following public health orders or directions, or for those who are caring for a person for a related COVID-19 reason such as a school or day care closure. The legislation provides that employees will not be required to provide a medical note if they must take the leave, and is retroactive to January 25, 2020.

Under the *Emergency Management and Civil Protection Act*, all gatherings of 50 or more people are prohibited. Individuals who fail to comply with the prohibitions can be fined up to $1,000, while businesses can be fined up to $500,000.

Certain businesses have been ordered to shut, including:

- Day cares
- Concert venues
- Theatres
- Indoor recreational programs
- Private schools
- Movie theatres
- Bars and restaurants, except those that provide drive-thru, delivery or take-out options

12. INDUSTRY SPECIFIC UPDATES

Securities: The Canada Securities Administrators ("**CSA**") has offered a 45 day filing extension for periodic filings normally required by issuers, investment funds, registrants, certain regulated entities and designated rating organizations which were previously due on or before June 1, 2020. In addition, all CSA proposals will have their comment periods extended by 45 days. For more information, see: https://www.securities-administrators.ca/aboutcsa.aspx?id=1877

The CSA has also provided guidance on conducting annual general meetings during the outbreak. For more information, see: https://www.securities-administrators.ca/aboutcsa.aspx?id=1879

OSFI: The Office of the Superintendent of Financial Institutions ("**OSFI**") has enacted several measures to support the resilience of financial institutions. Measures include lowering the Domestic Stability Buffer by 1.25%, suspending consultation on the minimum qualifying rate for uninsured mortgages, and further reviewing and introducing new measures in light of changing circumstances as necessary. For more information, see: https://www.osfi-bsif.gc.ca/Eng/osfi-bsif/med/Pages/nr_20200313.aspx

The Bank of Canada has taken a series of proactive measures, including to cut the interest rate to 0.75% in light of the negative shocks to Canada's economy arising from the COVID-19 pandemic and the recent sharp drop in oil prices. For more information, see: https://www.bankofcanada.ca/2020/03/opening-statement-180320/

Health Canada: Health Canada has temporarily allowed access to hand sanitizers, disinfectants, PPEs, and swabs which may not fully meet regulatory requirements. These include products which would not have otherwise complied with labelling and packaging requirements, as well as products that were not authorized for sale in Canada but authorized in other jurisdictions with similar regulatory frameworks and quality assurances. For more information, see: https://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2020/72623a-eng.php

Alcohol, Gaming and Cannabis: The Alcohol and Gaming Commission of Ontario has extended the term of all alcohol, gaming, and cannabis licenses, authorizations, and registrations for three months. For more information, see: https://www.agco.ca/agco-will-extend-term-your-active-licence-authorization-andor-registration

Canadian Intellectual Property Office: The Canadian Intellectual Property Office ("**CIPO**") has announced that any days in the period March 16, 2020 to March 31, 2020 inclusive will be considered "designated days". If a CIPO deadline falls on any of these "designated days", the time period to respond will be extended until the next business day. This applies to any deadline as set under the *Patent Act, Trademark Act,* and *Industrial Design Act*. This time can be extended, but any impacted party should contact our team immediately for advice before any deadline. For more information, see the CIPO webpage for updated information for service and website interruptions: https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr00050.html

13. HELPFUL LINKS

We are continuously keeping this list updated as materials are being produced.

- Link to Dickinson Wright COVID-19 Resources: https://www.dickinson-wright.com/news-alerts/coronavirus-related-article-and-blogs
- Health Canada's COVID-19 Information: https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks.html#p
- Information about the federal government's economic response plan: https://www.canada.ca/en/department-finance/economic-response-plan.html
- Information from the Ontario government's dedicated COVID-19 webpage, updated twice daily: https://www.ontario.ca/page/2019-novel-coronavirus

14. TIPS FOR STAYING SAFE

Coronaviruses are a series of infections that are mostly spread amongst individuals through close contact. The likelihood that a person will become severely ill is higher where the person has a weakened immune system. COVID-19 causes a respiratory infection with symptoms ranging from common to severe respiratory illnesses, including difficulty breathing, fever, and cough. In the most severe cases, it may lead to pneumonia, kidney failure, and death.

Canada's public health authorities have recommended that all Canadians avoid and reduce contact with others by:

- Staying at home and self-isolating, or if leaving the home, wearing a mask or covering the mouth and nose with tissues, and maintaining a 2-metre distance with others.
- Avoiding individuals in hospitals and long-term care centres.
- Avoiding having visitors at your home.
- Covering your mouth and nose when coughing or sneezing.
- Having supplies dropped off at your home instead of running errands.
- Practicing social distancing by avoiding any greetings (such as handshakes), avoiding non-essential gatherings, avoiding crowded places, and limiting interactions with older adults and those in poor health.
- Practicing good hygiene, including washing hands with soap and water for at least 20 seconds, or using alcohol-based hand sanitizer if soap and water are not available.
- Clean high-traffic surfaces with household cleaners.

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CANADIAN SECURITIES LAW UPDATE

TEMPORARY EXEMPTIVE RELIEF FROM CERTAIN SECURITIES REGULATORY FILING REQUIREMENTS DURING THE COVID-19 PANDEMIC

by Donald A. Sheldon, Andre G. Poles, and Carly J. Walter

To accommodate difficulties that reporting issuers and other issuers or persons may have in meeting filing requirements due to the COVID-19 pandemic, the regulators that make up the Canadian Securities Administrators have each issued multiple orders granting 45-day extensions in respect of certain filing and other requirements under applicable securities laws, regulations and National Instruments. While consistent in intention, the orders introduce nuances that vary based on the legislation or instrument that created the reporting obligation.

The 'extension period' applies to certain filings required to be made and certain documents required to be sent during the period from March 23, 2020 to June 1, 2020 and extends the filing deadline to a date which is 45 days from the date on which the filing was required to be made.

Continuous Disclosure Reporting Obligations – Corporate Finance

The blanket relief granted applies to reporting issuers and other issuers for making certain filings and for sending or delivering certain documents under continuous disclosure requirements and under prospectus exemption requirements.

Reporting issuers or other persons are provided a 45-day extension to the filing obligation, provided that they issue and file on SEDAR a news release in advance of the filing deadline disclosing:

i. the applicable requirement,
ii. that insiders and management are subject to a trading black-out,
iii. the estimated date on which the filing or delivery of the disclosure material is expected to be made, and
iv. an update on any material business developments since the last filing or confirmation that there have been none.

Thereafter, the reporting issuer or other person must issue and file on SEDAR news releases, within 30 days after the first day of the extension period and subsequently within 30 days after the previous news release, an update on material business developments or confirmation that there have been none.

This relief applies to certain annual, interim and other financial statements, certain annual and interim management discussion and analysis reports, annual information forms, certain technical reports and reserve data listed in the orders issued by the commissions.

Similar relief was granted for certain filings in respect of changes of auditors, changes of year-end, business acquisition reports and changes of corporate structure provided that the person or company issues and files on SEDAR a news release in advance of the filing deadline disclosing each applicable requirement for which it is relying on this relief.

Continuous Disclosure Reporting Obligations – Investment Funds

Similar to the relief granted to Corporate Finance issuers, relief has been granted to Investment Fund issuers from certain financial and other reporting filing, sending or delivery requirements that are required to be made during the period March 23, 2020 and June 1, 2020.

Investment Funds are provided an additional 45 days from the deadline otherwise applicable provided that in advance of the filing deadline they:

i. notify the regulator by e-mail; and
ii. post a statement on the Investment Fund's website or on the website of the investment fund manager

stating that the Investment Fund is relying on the blanket order and each applicable requirement for which it is relying on the blanket order.

Exempt Distribution Filings – OM Exemption, Crowdfunding Portals and Designated Rating Organizations

Relief was also granted in respect of certain filings due during the period from March 23, 2020 to June 1, 2020.

Filing deadlines for certain forms and documents are being extended by an additional 45 days from the deadline otherwise applicable provided that (i) the issuer issues a news release prior to the filing deadline, and files it on SEDAR, disclosing each requirement for which the person is relying on the relief, and (ii) if the person is a rating agency, the news release must provide reference to information previously issued that has become materially inaccurate or confirmation that there is no such materially inaccurate information.

This relief is limited to annual financial statements, initial and annual notices of use of proceeds and certain annual filings (and amendments thereto) of designated rating organizations.

Reports of Exempt Distributions Not Extended

For capital raising activities in the exempt market that have continued to occur during the COVID-19 pandemic it is important to note that the blanket relief orders do not extend the timeframe for filings required in connection with issuance of securities by way of an exempt distributions.

Shelf Prospectus Lapse Dates – Corporate Finance

Certain shelf prospectuses that would otherwise lapse during the period from March 23, 2020 to June 1, 2020 may add an additional 45 days to that lapse date provided that they issue and file on SEDAR a news release prior to the lapse date, disclosing the requirement that the person is relying on for relief and further provided that the person is not relying on the *Continuous Disclosure Reporting Obligations – Corporate Finance* relief described above.

Prospectus Lapse Dates – Investment Funds

An Investment Fund distributing securities under a prospectus that would otherwise lapse during the period from March 23, 2020 to June 1, 2020 may continue to distribute under its existing prospectus and add an additional 45 days to that lapse date when meeting the prospectus renewal requirements, provided that in advance of the filing deadline they:

i. notify the regulator by e-mail; and
ii. post a statement on the Investment Fund's website or on the website of the investment fund manager

stating that the Investment Fund is relying on the blanket order in respect of its lapse date.

Financial Reporting Obligations – Registrants and unregistered capital markets participants

Registrants and unregistered capital markets participants that would otherwise have financial reporting obligations under National Instrument 31-103 or the *Commodity Futures Act* (Ontario) during the period from March 23, 2020 to June 1, 2020 are exempt from the filing requirement provided they deliver the required information no later than 45 days after the original delivery deadline.

Reporting Obligations – Marketplaces, Clearing Agencies, Designated Trade Repositories, Designated Information Processors and Commodity Futures Exchanges ("Regulated Entities")

Regulated Entities that would otherwise be required to make certain specified filings between March 23, 2020 and June 1, 2020 are able to provide the filing on a date that is no later than 45 days after the original due date, provided that when it provides the document or other information it discloses that it is relying on the order and states the reasons why it could not submit the document or other information by the original due date.

For complete details of the relief and lists of applicable filings, please refer to:

https://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20200323_25-502_general-order-temporary-exemption-reporting-requirements-regulated-entities.htm;

https://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20200323_31-510_general-order-temporary-exemption-certain-financial-statement.htm;

https://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20200323_51-502_general-order-temporary-exemption-certain-corporate-finance-requirements.htm; or

https://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20200323_81-503_general-order-extension-investment-funds.htm

Or contact your securities counsel at Dickinson Wright LLP.

Stock Exchanges

Certain stock exchanges have also announced relief from some of their regulatory requirements.

The TSX has granted temporary blanket relief from certain provisions of the TSX Company Manual ("Manual"). The TSX has granted, without an application, an extension of the time for filing or mailing an issuer's annual financial statements in 2020, consistent with the extended deadlines announced by Canadian Securities Administrators. In respect of normal course issuer bid limitations, the TSX increased the limit on the number of shares that can be acquired on any trading day, from 25% to a temporary maximum of 50% of the issuer's average daily trading volume for the six calendar months preceding the date of acceptance by the TSX of the notice of the normal course issuer bid. In addition, for the balance of 2020, the TSX will not apply two of the usual delisting criteria, namely (i) if the market value of the issuer's listed securities is less than $3 million over 30 trading days, or (ii) if the market value of the issuer's freely-tradeable, publicly-held securities is less than $2 million over 30 trading days. Due to the recent market volatility, on a case-by-case basis, the TSX will depart from the definition of "market price" as it is used in the Manual. The Manual defines "market price" as the volume weighted average trading price (or VWAP) on the TSX for the five trading days immediately preceding the relevant date. During this temporary period, the TSX may use a shorter time period for determining "market price". For example, three trading days will be used when the first two days of the usual five-day period are no longer representative of market price.

The TSX Venture Exchange has announced relief from some shareholder meeting requirements and shareholder approval of incentive stock options without applying to the Exchange for such relief. Issuers that must hold an annual shareholder meeting in 2020 may, subject to compliance with applicable corporate and securities laws, hold the meeting at any time on or before December 31, 2020. Similarly, annual shareholder approvals required for rolling stock option plans in 2020 may be obtained at annual shareholder meetings held at any time on or before December 31, 2020. In addition, the TSX Venture Exchange has extended the deadline by which listed companies must pay their 2020 annual sustaining fees from March 31, 2020 to May 31, 2020. As well, for listed companies requiring additional relief, the Exchange will permit them to pay their 2020 annual sustaining fees in two instalments – 50% by May 31, 2020 and the remaining 50% by July 31, 2020.

RECONCILING SHAREHOLDER MEETING REQUIREMENTS WITH SOCIAL DISTANCING MEASURES

Canadian public companies are reassessing their plans for annual meetings of shareholders ("AGMs") in an effort to implement measures designed to limit the spread of COVID-19. Delaying previously called meetings in order to permit electronic participation may be necessary for some issuers. Some of the necessary, urgent decisions that issuers have had to make at this time with respect to their shareholder meetings may be facilitated by temporary relief measures announced by the Toronto Stock Exchange and TSX Venture Exchange as well as flexibility on the part of Canadian regulators. In addition to the commentary below regarding holding shareholder meetings in whole or in part through electronic means, please refer to the commentary above regarding certain relief in respect of the timing for holding AGMs.

Alternatives to In-Person Meetings

A virtual-only meeting is held entirely through electronic means, without the option of in-person participation. Virtual-only meetings can be successfully conducted with the use of remote-meeting technology. In contrast, hybrid meetings offer the option of in-person attendance as well as the opportunity to participate electronically.

Given the limited accessibility of air travel as well as public health calls for physical distancing, a virtual-only meeting or a hybrid meeting are alternatives that issuers may choose use to facilitate shareholder and proxyholder participation in annual meetings this year.

Enbridge Inc. was one of the first Canadian issuers to adopt a virtual-only AGM when it announced that it will be holding its 2020 AGM online. Many other issuers are following suit.

Considerations for Issuers

Issuers contemplating holding a virtual-only or hybrid meeting should review their by-laws or other applicable constating documents to determine quorum requirements, including whether shareholders and proxyholders who attend the meeting electronically are considered to be present at the meeting for the purpose of establishing quorum.

On aggregate, companies incorporated under the *Canada Business Corporations Act* ("CBCA") must be authorized by their articles or bylaws to hold virtual meetings. In contrast, companies incorporated under the *Ontario Business Corporations Act* ("OBCA") can hold virtual meetings, unless their articles or by-laws expressly provide otherwise.

Provided that a company's articles and by-laws permit virtual meetings (in the case of CBCA companies) or do not prohibit them (in the case of OBCA companies), it is likely that virtual meetings will not be able to be successfully challenged in a subsequent legal proceeding.

Regulators and the Exchange

The Canadian Securities Administrators have provided ongoing guidance for issuers navigating changes to their AGM procedures in response to the pandemic. Details are provided here: Canadian securities regulators provide guidance on conducting Annual General Meetings during COVID-19 outbreak. Regulators' actions thus far indicate a concerted effort to proceed with "business as usual" by taking a flexible approach for the time being.

This announcement may be a relief to issuers contemplating a delay of annual general meetings; however, it is important to note that the obligation to adhere to relevant corporate law deadlines remains intact.

PRACTICAL STEPS

Technology. It is essential that issuers hoping to hold virtual meetings without delay or deferral are prepared with adequate virtual meeting tools. Issuers should consider postponement upon an assessment of any practical deficiencies in this respect.

Disclosure. If issuers make the decision to hold a virtual-only or hybrid meeting, they should notify shareholders and other market participants of their plans in a timely manner. The issuer's proxy materials should clearly explain the shift in meeting format has been made due to COVID-19 and provide detailed information about any other changes to its meeting format or procedures. Clear instructions to shareholders on how to access and participate electronically in the meeting are essential.

Encourage Participation. Issuers should ensure that their shareholders have the ability to attend, participate in and vote at the meeting to the same extent that they otherwise would if it were held in person. Technology solutions should be used to allow for shareholder communication of questions and concerns so as to meet the standards in place for in-person meetings.

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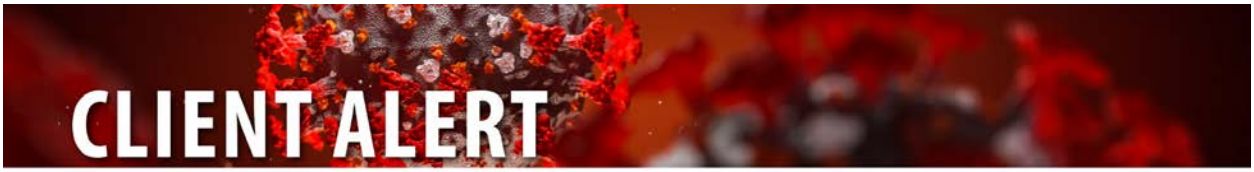

News Update – Canadian Tax Measures

The Government of Canada has announced measures to support Canadians and Canadian businesses from the economic impacts of COVID-19. Measures include tax filing/tax dispute deadline extensions, as well as economic support through emergency benefit credits for workers and credit and financing options for Canadian businesses.

Extensions – Returns/Filing

Individuals (not self-employed)	Deadline extended to June 1, 2020 from April 30, 2020.	Balance owing deadline extended from April 30, 2020 to September 1, 2020. This includes the instalment payment ordinarily due June 15, 2020 for those who pay by instalments. Penalties and interest will not be assessed if the amount due is paid by September 1, 2020.
Individuals (self-employed and their spouse/common-law partner)	Deadline remains June 15, 2020.	Balance owing deadline extended from April 30, 2020 to September 1, 2020. This includes the instalment payment ordinarily due June 15, 2020 for those who pay by instalments. Penalties and interest will not be assessed if the amount due is paid by September 1, 2020.
Corporations	Deadline extended to June 1, 2020 for corporations that would otherwise have a filing due date after March 18 and before June 1, 2020.	Balance owing deadline extended to September 1, 2020 for corporate balances and instalments due on or after March, 18

		and before September 1, 2020. Penalties will not be assessed if the amount due is paid by September 1, 2020.
Trust and Estate Returns	Deadline extended to Mary 1, 2020 from March 30, 2020 for trusts and estates with December 31, 2019 year ends. Deadline extended to June 1, 2020 for those trusts and that would otherwise have a filing due date in April or May 2020.	Balance owing deadline extended to September 1, 2020 for income tax balances and instalments due on or after March 18 and before September 1, 2020.
Partnership Returns	Deadline extended to May 1, 2020 for partnerships with an original March 31, 2020 deadline.	N/A
Non-resident Information Returns for Amounts Credited or Paid to Non-residents	Deadline extended to May 1, 2020 from March 31, 2020.	Balance owed still remains as 15th day of the month following the month an amount was credited or paid to a non-resident.
GST/HST Returns	Filing deadlines have not changed; however, the CRA has confirmed it will not impose penalties where a return is filed late provided that it is filed by June 30, 2020, and the XRA will not be processing paper returns until operations return. CRA is	Monthly filers: amounts collected for February, March, and April 2020 reporting periods is extended until June 30, 2020. Quarterly filers: amounts collected for the January 1, 2020 through March 31, 2020 reporting periods is

	"encouraging" registrants to file online.	extended until June 30, 2020. Annual filers, whose GST/HST return or instalment are due March, April, or May 2020, have to remit amounts collected and owing for the previous fiscal year (and instalments of GST/HST in respect of the filer's current fiscal year) by June 30, 2020.

Extensions – Tax Disputes/Audits

Audits	CRA will not initiate contact with taxpayers for audits. Some exceptions may include limited risk and exception cases or cases of high-risk GST/HST refund claims which require some contact before being paid out. The CRA will generally not contact small or medium (SME) businesses to initiate any post-assessment GST/HST or income tax audits until the end of April, at minimum. No requests for information related to existing audits will be made, and no audits will be finalized.
Objections	No reassessments should be issued until the end of April, at minimum. Any objections related to Canadians' entitlement to benefits and credits have been identified as a critical service and will continue to be processed. All other objections related to other tax matters filed by individuals and businesses will be held in abeyance. No collection actions will be taken. Any deadline to file an objection or a related request due March 18 or later is effectively extended until June 30, 2020.

Collections	Collection actions on new debts will be suspended until further notice. Financial institutions and employers do not need to comply or remit on existing Requirements to Pay (RTPs) during at least until the end of April, and possibly until May.
Tax Court	The Tax Court has cancelled its judicial sittings and conference calls until May 1, 2020. Time has stopped running for the purposes of calculating deadlines with The Tax Court. The Tax Court has further ordered that the Tax Court is closed until further notice.

Measures for Corporations

Canada Emergency Wage Subsidy	The Canadian government announced a 75% wage subsidy for qualifying businesses for up to three months, retroactive to March 15, 2020. The Canada Emergency Wage Subsidy would apply at a rate of 75% of the first $58,700 normally earned by employees, equivalent to a benefit of up to $847/week. There is no overall limit to the subsidy amount that an eligible employer may claim. However, any amount received by an eligible employer will be considered taxable income. The Canada Emergency Wage Subsidy will not be tied to employer payroll source deductions; these amounts will continue to be required to be withheld from the employee's pay and remitted to the CRA. Eligible employers who suffer a drop in gross revenues of at least 15% in March and/or 30% in April, or May, when compared to the same month in 2019, or the average of January and February of 2020, would be able to access the subsidy. Each month should be examined independently to determine if the employer qualifies. If so, the employer will need to reapply for the subsidy every month. Revenue for this purpose is from business carried on in Canada and earned from arm's length sources. "Eligible Employers" include all employers other than public sector entities, i.e. municipalities, local government, etc. This includes corporations, partnerships, and sole proprietors, without a requirement that the entity be a Canadian controlled private corporation eligible for the small business deduction. Nonprofits and

	charities who suffer losses of revenue will be assessed on a case-by-case basis for eligibility. An eligible employer's entitlement to the wage subsidy will be based entirely on the salary/wages actually paid to employees, and all employers would be expected to at least make best efforts to top up salaries to 100% of the maximum wages covered. The subsidy would be accessed by applying through an online CRA portal. Employers who do not qualify for the subsidy may continue to qualify for the 10% temporary wage subsidy program, if applicable, paid from March 18 to June 20, up to a maximum subsidy of $1,375/employee and $25,000/employer. An employer would not be eligible to claim the subsidy for remuneration paid to an employee that has not been without remuneration for more than 14 consecutive days in an eligibility period (a 4-week period). Penalties may apply in cases of fraudulent claims. Anti-abuse rules will be proposed to ensure that the subsidy is not inappropriately obtained and to ensure that employees are paid the amounts they are owed.
Temporary Wage Subsidy for Employers	Prior to the release of the Canada Emergency Wage Subsidy, the Canadian government released a temporary measure for employers referred to as the Temporary Wage Subsidy for Employers. Legislation concerning this temporary wage subsidy was recently passed in Parliament. The temporary subsidy is a three-month measure to allow eligible employers to reduce the amount of payroll deductions required to be remitted to the CRA. Employers include individuals (not trusts), partnerships who pay salaries, wages, or bonuses to employees, nonprofits, registered charities, and Canadian controlled private corporations eligible for the small business deduction. The temporary wage subsidy is limited to 10% of the remuneration paid by an eligible employer between March 18, 2020 and June 20, 2020. There is a per employee cap of $1,375 and a maximum total

	subsidy of $25,000 per employer. CCPCs that are associated with each other have their own $25,000 limit which is not required to be shared. Eligible employers can reduce the income tax portion of their payroll remittances when they make their first remittance for remuneration paid after March 17, 2020, or they may choose not to reduce their payroll remittances at this time and instead calculate the total temporary wage subsidy for which they are eligible and request it paid to them at the end of the taxation year or transferred to their payroll remittance account in 2021.
Working Capital Loan – COVID-19	New relief measures for qualified businesses include: - working capital loans from the Business Development Bank of Canada ("BDC") of up to $2M with flexible terms and payment postponements for up to six months for qualifying businesses - deferred payments are for existing BDC clients with total BDC loan commitment of $1M or less - loans require a GSA and personal guarantee by ownership
Business Credit Availability Program ("BCAP") Canada Emergency Business Account Program	The Government of Canada has announced the launch of the new Canada Emergency Business Account, which will be implemented by eligible financial institutions in cooperation with Export Development Canada ("EDC"). The $25 billion program will provide interest-free loans of up to $40,000 to small businesses and not-for-profits, to help cover operating costs while their revenues have been reduced during the COVID-19 crisis. Small businesses may apply for an interest-free loan of up to $40,000, made through the small business's financial institution. To qualify, each applicant must demonstrate that they paid between $50,000 and $1M in total payroll in 2019. Repaying the loan in full prior to December 31, 2022 will result in loan forgiveness of 25% of the loan being repaid, subject to a cap of $10,000.
Business Credit Availability Program ("BCAP") Small and Medium	EDC to guarantee up to $20 billion in new operating credit and cash flow term loans issued by financial institutions to Small and Medium Enterprises. Each loan is capped at $6.25 million with EDC guaranteeing 80% of each loan. Loans are to be repaid within one year.

Enterprise Loan and Guarantee Program	BDC to issue incremental credit to eligible Small and Medium Enterprises of up to $6.25M per eligible Small and Medium Enterprise, jointly with financial institutions. BDC will finance 80% of the loan with the remaining 20% coming from financial institutions. This co-lending arrangement will make up an additional $20 billion in financing available to Small and Medium Enterprises. Eligible Small and Medium Enterprises could avail themselves of up to $12.5M through these two lending streams. Applications are to be made through the Small or Medium Enterprises' existing financial institution or other authorized financial institution.

Measures for Individuals

Improved Employment Income ("EI") Sickness Benefits	EI Sickness Benefits provide up to 15 weeks of income replacement and is available to eligible claimants who are unable to work because of illness, injury, or quarantine, to allow them time to restore their health and return to work. Canadians who are quarantined can apply for EI Sickness Benefits. The one week waiting period for EI Sickness Benefits will be waived for new claimants who are quarantined so they can be paid for the first week of their claim. Individuals claiming EI Sickness Benefits due to quarantine will not have to provide a medical certificate. Those who are unable to complete their claim for EI sickness benefits due to quarantine may apply later and have their EI claim backdated to cover the period of delay.
Canada Emergency Response Benefit ("CERB")	The CERB is a taxable benefit that will provide Canadians impacted by COVID-19 with $2,000 per month for the next four months. The CERB would be paid every four weeks. The program is set to expire on October 3, 2020. The benefit applies to any Canadian over the age of 15 years, who was resident in Canada in 2019 and who had a total income of at least $5,000 from employment or self-employment in either 2019 or in the 12 months immediately preceding their application. A person will be eligible if out of work due to reasons related to COVID-19 for at least 14 consecutive days within the four-week application period.

	The reasons for ceasing work or being out of work include sickness, quarantine, caregiving, staying home to take care of children out of school or daycares or sick family members or loss of jobs. Furloughed workers, those who are still technically employed but not receiving income, would also qualify for the benefit. The benefit would cover wage-earners, contract workers and self-employed individuals who would not otherwise be eligible for EI. In addition, people who are still employed but are not receiving income due to disruption of their work situation due to COVID-19 would also qualify. A person cannot receive EI benefits (or other income) and the CERB for the same period. Those who are already receiving EI regular and sickness benefits should not apply for the CERB. Where a person has applied for EI benefits but their application has not been processed, an application for the CERB should be made. If eligible for EI benefits, these would be received after the four months of CERB benefits. Canadians who have yet to apply for federal income support will be able to decide whether to apply for CERB or EI based on which may offer more financial support. Unlike EI, the CERB is not tied to the recipient's previous employment income. All recipients are to be paid $2,000 per month. As an individual's income rises, the CERB becomes less attractive. The maximum payment under the CERB, at $500 a week, is less than the top EI weekly payment of $572. Once a worker's annual income exceeds $47,272, they would be better off collecting EI Sickness Benefits than the CERB. An individual must make an application to collect the CERB for every four-week period. CERB payments will be made within ten days of the application. Applications must be made no later than December 2, 2020. The portal for online applications will open on the CRA's website Monday, April 6, 2020. Applications may also be made by phone (1-800-959-2019 or 1-800-959-2041).

Please Note: These materials do not constitute legal advice. Government initiatives, announcements and regulations in response to the COVID-19 situation continue to evolve and change frequently. As such, it is important to ensure you are aware of current information and that you consult with a lawyer before making your business decisions. For further information, please contact Jennifer Leve.

CARES ACT EXPANDS FUNDING AND MEDICARE COVERAGE FOR TELEHEALTH SERVICES

Posted by Kimberly Ruppel | Apr 1, 2020

The Coronavirus Aid, Relief, and Economic Security ("CARES") Act, recently passed by Congress and signed into law by President Trump, provides a number of important expansions of telehealth coverage during the public health emergency affecting those in rural areas and home health care patients and establishes significant funding for enhancement of telehealth services by updating and upgrading technology and infrastructure. Although Medicare coverage changes are currently intended to remain in effect, only during the public health emergency, increased reliance on telehealth is likely to result in longer-lasting changes.

- ***Provider Flexibility.*** Telehealth visits will be covered by Medicare regardless of whether a provider has treated a beneficiary within the prior three years, allowing access to a broader range of providers.
- ***Rural Locations***. Federally qualified health centers or rural health clinics will temporarily serve as appropriate "distant sites" for providing telehealth services to beneficiaries, allowing individuals to receive care at home.
- ***Home Health Care.*** Medicare will reimburse for telehealth visits between a physician and a home dialysis patient, and concerning hospice care recertification, temporarily eliminating certain requirements for a face to face visit. Also, guidance will be forthcoming on the encouraged use of remote patient monitoring and other telehealth services in connection with home health care.
- ***HDHP Plans***. A new safe harbor allows high deductible health plans with a health savings account to cover telehealth services without cost sharing before meeting a deductible.
- ***Funding for Access and Infrastructure***. Significant funds are earmarked to prevent, prepare and respond to COVID-19 by upgrading access and expanding the telehealth infrastructure overall and for rural health services and the Indian Health Services in particular. These improvements will carry over after the current public health emergency and are likely to increase reliance on this method of delivering healthcare.

About the Author:

Kimberly Ruppel is a co-chair of Dickinson Wright PLLC's Telehealth Task Force of the firm's Health Care Law Group. She has over 20 years' experience as a commercial litigator who represents healthcare providers, insurers and benefit plans in matters related to healthcare litigation, licensing and regulatory disputes, governmental fraud and abuse investigations, HIPAA compliance, ERISA and insurance claims, and coverage and fiduciary disputes in state and Federal courts.

Disclaimer

CARES ACT INCREASED FUNDING FOR THE PUBLIC HEALTH AND SOCIAL SERVICES EMERGENCY FUND

by Jeremy L. Belanger and Mark E. Wilson

The Coronavirus Aid, Relief, and Economics Security Act (the "CARES Act") provided additional funding for the U.S. Department of Health and Human Services' ("Department") Public Health and Social Services Emergency Fund (the "Fund") to assist health care providers.

The Department's guidance indicates that the following "providers" that would qualify for funds are large organizations and health systems that bill Medicare, organizations that employ physicians and bill Medicare, group practices that bill Medicare, and solo practitioner that bill Medicare. Physicians in organizations and group practices should not expect to receive any funds directly, as the payments will go to the organization that bills Medicare.[1]

This Fund is different than many other Medicare programs. Under the Accelerated Payment program, which was also expanded by the CARES Act, accelerated payments provided to certain hospitals are loans that must be repaid. The Fund has been created to provide payments, not loans, to health care providers that bill Medicare, and will not need to be repaid so long as the provider qualifies and complies with the requirements of the Fund.

The funds are being provided to support health care-related expenses or cover lost revenue attributable to COVID-19. The Department has determined that every patient is a possible case of COVID-19 and that care not specifically related to COVID-19 can cause health care related expenses attributed to COVID-19. Thus, funds are available, even if qualified provider performs services that are not to treat COVID-19. However, the CARES Act does not define "lost revenues that are attributed to coronavirus." Providers should be prepared to estimate lost revenues and lost operating margins including lost revenue from replacing procedures with higher reimbursements to those with a lower reimbursement, lost volume due to lower capacity, cancelled procedures, and a lower number of providers.

In order to qualify, a health care provider must certify the following:

1. The provider billed Medicare fee for service (not Medicare Advantage) in Calendar Year ("CY") 2019;
2. The provider currently provides diagnoses, testing, or care for possible or actual COVID-19 patients;
3. The provider has not been terminated by Medicare, is not currently excluded from participation in Federal health care programs, and has not had its Medicare billing privileges revoked;
4. The payment will only be used to prevent, prepare for, and respond to COVID-19;
5. The provider will only be reimbursed for healthcare-related expenses or lost revenue attributed to COVID-19 and the funds will not be used to reimburse expenses or losses reimbursed by other sources.

Providers with unpaid federal tax liability or federal criminal felony convictions within the past 24 months do not qualify for the payments. Additionally, entities that capture or procure chimpanzees from the wild, including for research purposes, do not qualify for funds.

The Fund requirements include restrictions on confidentiality and nondisclosure provisions in agreements with employees and contractors. Providers will need to review agreements with their employees and independent contractors prior to certifying compliance with the Fund's requirements. Providers with strict confidentiality provisions and nondisclosure provisions may not qualify for payments and, if received, would need to remit the payment to the Department. Providers may need to amend their agreements to ensure compliance, as the Department requires certain terms to be included in these provisions.

Recipients of the funds will be required to submit reports required by the Department to ensure compliance. Entities that receive more than $150,000 in funds under a CARES Act or any other COVID-19 response act must submit a report within 10 days after the end of each Calendar Year quarter. The report must contain the total amounts received from the Department, a detailed list and description of projects or activities the funds were used for, and detailed information for any subcontracts or subgrants awarded by the recipient.

The Department is making the initial infusion of $30 billion automatically via direct deposit to qualified providers beginning on April 10, 2020. Providers can estimate their payments by calculating their CY 2019 Medicare fee for service payments, excluding Medicare advantage payments, and dividing that amount by $484 billion and then multiplying that ratio by $30 billion.

Providers will be required to sign the Terms and Conditions (the "Terms") within 30 days of receipt of the initial payments, but failure to do so does not require remittance of the funds. Failure to return signed Terms is treated as an acceptance of the Terms and providers will be required to comply with the

[1] https://www.hhs.gov/provider-relief/index.html

Terms. Providers who do not want to comply with those terms must inform the Department and remit the full payment.

There are numerous restrictions on use of the payments received, which may impact whether providers want to accept the Terms. These limitations include:

a. Payments cannot be used to pay the salary in excess of Executive Level II, which is $197,300 for CY 2020.
b. Providers must not collect out-of-pocket expenses from a COVID-19 patient greater than the in-network cost required.
c. The payments cannot be used to advocate or promote gun control.
d. The provider cannot use any part of the payments to influence, support, or defeat any federal or state legislation, regulation, administrative action, or order.
e. The provider cannot use the funds for any abortion unless the pregnancy is the result of rape or incest or the pregnancy places the woman in danger of death.
f. The provider cannot use the funds for embryo creation or research or other embryo research in which embryos are destroyed, discarded, or knowingly subjected to risk of injury or death.
g. The provider cannot promote the legalization of any drug or other substance located on Schedule I of the list of controlled substances (e.g., marijuana) unless there is significant medical evidence of a therapeutic advantage.
h. Funds cannot be used to set up a computer network unless it is designed to prevent the viewing, downloading, or exchange of pornography.
i. The funds cannot be used to purchase sterile needles or syringes for illegal drug use unless there is a state or local health department determination that there is or is a risk for a significant increase in hepatitis or HIV.
j. The funds cannot be used for publicity or propaganda purposes.

An additional $70 billion in funding is available, and there will be targeted distributions to areas particularly impacted by COVID-19, such as rural providers, providers with lower Medicare reimbursements, providers who predominantly serve Medicaid patients, and providers treating uninsured Americans.

There are many elements of the Terms and the Fund which can carry risks for health care providers receiving funds. Dickinson Wright's health care attorneys can assist providers in navigating this process to ensure compliance with the Fund's requirements.

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CECRA UPDATE | May 22, 2020

By Andrew Skinner and Jacky Cheung

On May 19, 2020, Canada Mortgage and Housing Corporation ("**CMHC**") published further information on the previously announced Canada Emergency Commercial Rent Assistance Program ("**CECRA**"). Dickinson Wright's previous Client Alerts on the CECRA can be found here and here.

In accordance with an announcement made on May 20, 2020 the application portal for the CECRA will open on May 25, 2020. Registration will be staggered. Landlords with 10 Tenants or less will be able to apply before Landlords with more than 10 Tenants. Registration will be available to all Landlords five days after the application portal is opened.

Gross Rent

CMHC has clarified their meaning of gross rent for the purposes of the CECRA. The following are included in the calculation of gross rent:

1. Net rent / minimum rent / base rent (in a net lease)
2. Regular monthly installments of operating costs (in a net lease)
3. Regular monthly installments of property taxes payable to the Landlord by the Tenant
4. Regular monthly installments of other additional rent amounts payable to the Landlord such as maintenance costs, repairs, utilities, and management fees.
5. "Gross rent" as described as such in a gross lease
6. Percentage of sales rent paid by the Tenant (if included in the lease arrangement)

The following are excluded from the calculation of gross rent:

1. Damages
2. Indemnity payments

3. Payments/costs arising due to Tenant default / Landlord enforcement
4. Payments/costs arising due to Landlord exercise of self-help remedies
5. Interest and penalties on unpaid amounts
6. Fees payable for special services such as fees to Landlord for reviewing plans, supervising work, considering requests for consent and performing exceptional tasks at Tenant's request
7. Reconciliation adjustment payments
8. Amounts required under the lease agreement to be paid separately by the Tenant to 3rd parties (for example: property taxes, utilities, insurers)
9. Costs of non-monetary obligations such as repairs and maintenance charges
10. Insurance proceeds or proceeds from other rent subsidy programs

Other Non-Eligible Tenants

Small businesses that have opened on or after March 1, 2020 are not eligible for this program.

Forms Required for CECRA

CMHC has provided the form of Attestation Statement that will be required from Landlords and Tenants, as well as the form of Rent Forgiveness Agreement and the Forgivable Loan Agreement. Below are some new aspects about the program that are reflected in these documents.

Tenant/Sub-Tenant Attestation

- Tenants/Sub-Tenants are expected to have investigated and applied for other available government rent relief programs and any applicable insurance claims relating to rental payment obligations prior to applying for the CECRA. Tenants are required to disclose any amounts they have received or expect to receive from these sources.

- Tenants/Sub-Tenants must not be subject to any insolvency proceedings nor have made any filings for creditor relief or bankruptcy proceedings.
- The subject lease must expire later than August 31, 2020, and the Tenants/Sub-Tenants must be committed to the lease for the balance of the lease term.
- Non-arm's length Tenants and Sub-Tenants are also eligible, provided that they attest that the sub-lease is on fair market terms, the total gross rent payable under the sub-lease is not higher than fair market rent and that the sub-lease has not been created or amended after April 1, 2020.
- Tenants/Sub-Tenants will be required to sign an Integrity Declaration, to the effect that the Tenant and its affiliates have not, among other things, been convicted of a crime or regulatory offence with respect to financial related matters.

Landlords must obtain an attestation for each applicable Tenant/Sub-Tenant.

Property Owner's Attestation

- The Landlord must continue to carry on business in accordance with good business practices and prudent cash flow measures.
- Landlords are expected to have investigated and applied for other available government rent relief programs and any applicable insurance claims relating to rental revenue prior to applying for the CECRA. Landlords are required to disclose any amounts they have received or expect to receive from these sources.
- The Landlord must enter into a binding Rent Forgiveness Agreement with its Tenant substantially in the form provided.
- The property cannot be owned, in whole or in part, by a government or an agent of the Crown, subject to certain exceptions, including airports, hospitals, pension funds, and post-secondary institutions.
- Landlords must also sign an Integrity Declaration.

- Landlords must not be subject to any insolvency proceedings nor have made any filings for creditor relief or bankruptcy proceedings.
- Landlords must provide CMHC with a current rent roll.

Forgivable Loan Agreement

- The loan amount a Landlord would receive under the CECRA is equal to 50% of the rent minus a *pro-rata* portion of any insurance proceeds available to it for impairment of rental revenue or any other non-repayable proceeds of any other Federal or Provincial government program.
- The Landlord must agree to use commercially reasonable efforts to recover any rent amounts previously forgiven under the Rent Reduction Agreement if the Landlord discovers the Tenant's attestation is false. Any such amounts shall be applied against the Landlord's forgivable loan.
- The loan to the Landlord would be forgiven on December 31, 2020, subject to full compliance by the Landlord with the terms of the program.
- The loan to the Landlord would be interest-free unless the Landlord "defaults," in which case, interest will accrue monthly at the rate of 5% per annum.

Rent Reduction Agreement

- The Rent Reduction Agreement confirms any prior rent reduction agreement entered into by the Landlord and Tenant, but subject to any overriding terms of the CECRA Rent Reduction Agreement.
- The Landlord must acknowledge that any rent that is forgiven and reduced will never be recoverable and that the Landlord shall not attempt to use any means, directly or indirectly, to do so. For example, if the Tenant pays additional rent and a subsequent reconciliation for the 2020 year results in a credit in favour of the Landlord, such credit for

the months that the Rent Reduction Agreement is in place shall be reduced in proportion to the reduction of rent (i.e. 75% or more) provided for in the Rent Reduction Agreement.

- Landlords are prohibited from serving a default notice or taking any steps to evict the Tenant for any default of obligations under the lease due to COVID-19 during the period from the date of the application until the later of (1) three months thereafter; or (2) the date the Tenant is no longer receiving rent reduction under the Rent Reduction Agreement.

Our Comments

It does not appear that these details of the CECRA released by CMHC will make the program materially more attractive to Landlords. This is regrettable for commercial Tenants and Landlords who have been hopeful and perhaps, in serious need to receive rent-related COVID-19 relief.

It would make sense for commercial Landlords to participate in the program with regard to exceptional situations where a Tenant is insolvent or on the verge of bankruptcy. On the other hand, Landlords may be more inclined to directly negotiate with Tenants to reach rent relief agreements where, in the Landlord's judgment, the Tenant will survive the COVID-19 crisis.

The fact that the program is based on the fully encompassing amount of "gross rent" (i.e. net rent + operating costs) makes the program comparatively unattractive for Landlords in that the higher the amount of "gross rent," the more "costly" the program is to the Landlord. The deduction of insurance proceeds from the calculation of loan forgiveness and the inability of Landlords to fully recover additional costs through subsequent reconciliations, as noted above, were not previously announced by CMHC and may be further factors that make the program less attractive to Landlords.

At this point, further clarification and details concerning the program and how it will operate in practice are required. As the program proceeds and more details become available, the program inevitably becomes more complex. For example, it is not clear how the bankruptcy regime will impact a Landlord who elects to participate in the program. It is not clear, for example, the nature and scope of a Landlord's obligations to demonstrate "commercially reasonable efforts" to recover any forgiven rent amounts in the event that any part of the Tenant's attestation is untrue.

Clearly in varying degrees, both Tenants and commercial Landlords have suffered considerably in light of COVID-19. It remains to be seen as we move forward how and to what degree Landlords and Tenants in Ontario will participate in the CECRA. Hopefully the Province and the Federal Government can be responsive to feedback they have been receiving and consider any necessary modifications to the program so that there will be greater participation by Landlords and Tenants.

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CEWS AND CERB EXTENSION OF GOVERNMENT AID: UPDATE TO APRIL 11, 2020 PUBLICATION

by Chantal A. Cipriano and Alana P. Walter

The Government of Canada has now updated its Canada Emergency Wage Subsidy (CEWS) page and its Canada Emergency Response Benefit (CERB) page to inform the public of benefit extensions in response to COVID-19.

CANADA EMERGENCY WAGE SUBSIDY

CEWS provides a 75% wage subsidy to employers based on each employee's pre-COVID-19 salary, with a limit of $847 per week per employee, for 12 weeks, retroactive to March 15, 2020.

We reported in a previous alert that under CEWS, there are three qualifying periods (i) March 15, 2020 to April 11, 2020; (ii) April 12, 2020 to May 9, 2020; and (iii) May 10, 2020 to June 6, 2020 for which employers can claim CEWS.

CEWS has now been extended by an additional 12 weeks, to August 29, 2020. The same rules applicable to the previous three periods will apply to the current, fourth period (June 7, 2020 to July 4, 2020). Thereafter, the extension will commence as period five (July 5, 2020 to August 1, 2020) and/or period six (August 2, 2020 to August 29, 2020). The Government of Canada will soon be announcing potential changes to the program's framework for the fifth and/or sixth periods. The public consultation in relation to such focused the discussion on adjustments to the program to benefit those most affected, eliminating barriers to rehiring workers and expanding access to better target those who need the program.

CANADA EMERGENCY RESPONSE BENEFIT

CERB gives financial support to qualifying Canadians who are directly affected by COVID-19. If an individual is eligible for CERB, they may receive $2,000 over a 4-week period.

CERB has now been extended from 16 weeks to 24 weeks to October 3, 2020. This extension applies to workers who: (1) stopped working due to COVID-19; (2) are eligible for Employment Insurance regular or sickness benefits; or (3) have exhausted their Employment Insurance regular benefits or Employment Insurance benefits between December 29, 2019 and October 3, 2020.

For official Government of Canada updates and information about Canada's response to COVID-19, visit http://canada.ca/coronavirus/.

This is an update to a previous alert on this topic dated April 11, 2020, found here: Covid-19 Wage Subsidy Bill Received Royal Assent on April 11, 2020

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Please Note: These materials do not constitute legal advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently. As such, it is important to ensure you are aware of current information and that you consult with a lawyer before making your business decisions. For further information, please contact one of the key contacts listed herein.

CLIENT ALERT

CANADIAN IP

CIPO PANDEMIC RESPONSE AND CANADA'S NEW COMPULSORY PATENT LICENSING PROVISIONS

by Matthew Powell

The Canadian Government and its operating agencies have provided a number of responses to the COVID-19 Emergency. The purpose of this alert is to provide information about the responses pertaining to intellectual property in particular.

HEALTH EMERGENCY COMPULSORY PATENT LICENSING

Canada's Parliament, as part of the COVID-19 Emergency Response Act, has now added health emergency compulsory licensing legislation to Canada's Patent Act. The new legislation requires the Commissioner of Patents, upon application by the Minister of Health, to authorize the Government of Canada and any person to make, construct, use and sell a patented invention to the extent necessary to respond to a public health emergency that is a matter of national concern. Royal Assent for this legislation was received on March 25, 2020.

An authorization under this provision is temporary. In particular, such an authorization ceases to affect the earlier of: the day the Minister of Health notifies the Commissioner that the authorization is no longer necessary, and one year after the day the authorization was granted. In addition, the Commissioner shall not make such anauthorization after September 30, 2020.

Pursuant to the new legislation, the use or sale of a patented invention that is made or constructed in accordance with the authorization is not an infringement of the patent. However, the Government of Canada and any person authorized by the Commissioner of Patents must pay the patentee any amount the Commissioner considers adequate remuneration in the circumstances.

The COVID-19 Emergency Response Act did not enact similar compulsory licensing provisions in The Industrial Designs Act.

CANADIAN INTELLECTUAL PROPERTY OFFICE OPERATIONS

Regarding operations of the Canadian Intellectual Property Office (CIPO):

- **For utility patents and applications, deadlines that would have fallen between March 16, 2020 and April 30, 2020 are automatically extended to May 1, 2020**. CAUTION: this extension does not apply to any statutory deadlines that the Commissioner of Patents is not authorized to extend, such as statutory deadlines for filing applications after a public disclosure, and certain deadlines for restoration of right of priority;
- **For industrial design registrations and applications, deadlines that would have fallen between March 16, 2020 and April 30, 2020 are automatically extended to May 1, 2020**. CAUTION: this extension does not apply to any statutory deadlines that the Minister is not authorized to extend.
- **For trademark registrations and applications, deadlines that would have fallen between March 16, 2020 and April 30, 2020 are automatically extended to May 1, 2020**. In addition, for deadlines falling after May 1, 2020, the Registrar of Trademarks is currently considering the COVID-19 disruption to be sufficient circumstance to justify obtaining an applied-for extension under Sections 47(1) and 47(2) of the Trademarks Act. CAUTION: this extension does not apply to deadlines the Registrar of Trademarks is not authorized to extend.
- **For Trademarks Opposition Board (TMOB)** proceedings, including oppositions, Section 45 proceedings, and objection proceedings, deadlines that would have fallen between March 16, 2020 and April 30, 2020 are automatically extended to **May 1, 2020**.
- Document Orders: While CIPO continues to receive orders for IP documents, under the circumstances of COVID-19, these orders will be fulfilled only once services at CIPO resume.

We strongly recommend that originally set deadlines should, wherever possible, continue to be met. However, please contact us promptly if there has been a missed deadline, or if there is a concern about missing a future deadline, so that we can assist you with risk mitigation and planning.

MORE INFORMATION

The Canadian Intellectual Property Office has published notices about Service and Website Interruptions here:

- http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr00050.html

The Department of Justice's website outlining the Government of Canada's response to COVID-19 can be found here:

- https://www.justice.gc.ca/eng/csj-sjc/covid.html

We also encourage readers to consult our Toronto Office's COVID-19: The Essential Need-to-Know Guide for Employers and Employees.

Dickinson Wright will continue to provide client alerts as Canada's response to the COVID-19 Emergency progresses.

KEY CONTACTS

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CIPO PANDEMIC RESPONSE: UPDATE APRIL 28, 2020*

by Matthew D. Powell

The Canadian Intellectual Property Office (CIPO) has now updated its Service and Website Interruptions page to inform the public of new deadline extensions and that its document dissemination service has now resumed operation.

DEADLINE EXTENSIONS

We had reported in a previous alert that CIPO had extended certain deadlines falling between March 16, 2020 and April 30, 2020 to May 1, 2020.

CIPO has now announced that these deadlines, as well as any such deadlines falling between May 1 and May 15, are extended to May 19, 2020.

To achieve the deadline extensions, the Commissioner of Patents, The Registrar of Trademarks, and the Minister of Industry have each exercised their legislated authority to deem all days in the period beginning on March 16, 2020 and ending on May 15, 2020 as Designated Days. It is provided for in legislation that time periods fixed in legislation, but ending on a Designated Day or a Prescribed Day, are extended to the next day that is not a Designated Day or a Prescribed Day. Due to Canada's annual Victoria Day long weekend falling on May 16-18, 2020, each of these weekend days is a Prescribed Day.

We recommend that, where possible, clients should aim to meet the original deadlines. However, please contact us promptly if there has been a missed deadline, or if there is a concern about missing a future deadline so that we can assist you with risk mitigation and planning.

DOCUMENT DISSEMINATION

CIPO has now announced that its document dissemination service, which had previously been receiving orders but not fulfilling them, has resumed full service as of April 27, 2020. Clients are advised to expect delays in processing as CIPO works through the backlog of orders.

** This is an update to a previous alert on this topic, which may be found here:*

- *CIPO Pandemic Response and Canada's New Compulsory Patent Licensing Provisions*

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CLIENT ALERT

CANADIAN IP

CIPO PANDEMIC RESPONSE: UPDATE JULY 3, 2020*

by Matthew D. Powell

The Canadian Intellectual Property Office (CIPO) has now updated its Service and Website Interruptions page to inform the public of new deadline extensions in response to the ongoing health crisis.

DEADLINE EXTENSIONS

We reported in previous alerts that CIPO had extended certain deadlines falling between March 16, 2020 and July 3, 2020 to July 6, 2020.

CIPO has now announced that these deadlines, as well as any deadlines falling between July 6 and July 17, are extended to July 20, 2020.

We recommend that, where possible, clients should aim to meet the original deadlines. However, please contact us promptly if there has been a missed deadline, or if you have any questions or concerns at all about deadlines and how these changes might affect your applications, so that we can assist.

*This is an update to three previous alerts on this topic, which are found here:

- CIPO Pandemic Response: Update June 15, 2020
- CIPO Pandemic Response: Update June 1, 2020
- CIPO Pandemic Response: Update May 15, 2020
- CIPO Pandemic Response: Update April 28, 2020
- CIPO Pandemic Response and Canada's New Compulsory Patent Licensing Provisions

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CLIENT ALERT

CANADIAN IP

CIPO PANDEMIC RESPONSE: UPDATE JUNE 15, 2020*

by Matthew D. Powell

The Canadian Intellectual Property Office (CIPO) has now updated its Service and Website Interruptions page to inform the public of new deadline extensions in response to the ongoing health crisis.

DEADLINE EXTENSIONS

We reported in previous alerts that CIPO had extended certain deadlines falling between March 16, 2020 and June 14, 2020 to June 15, 2020.

CIPO has now announced that these deadlines, as well as any deadlines falling between June 15 and July 3, are extended to July 6, 2020.

We recommend that, where possible, clients should aim to meet the original deadlines. However, please contact us promptly if there has been a missed deadline, or if you have any questions or concerns at all about deadlines and how these changes might affect your applications, so that we can assist.

*This is an update to our previous alerts on this topic, which are found here:

- CIPO Pandemic Response: Update June 1, 2020
- CIPO Pandemic Response: Update May 15, 2020
- CIPO Pandemic Response: Update April 28, 2020
- CIPO Pandemic Response and Canada's New Compulsory Patent Licensing Provisions

KEY CONTACTS

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CIPO PANDEMIC RESPONSE: UPDATE MAY 15, 2020*

by Matthew D. Powell

The Canadian Intellectual Property Office (CIPO) has now updated its Service and Website Interruptions page to inform the public of new deadline extensions in response to the ongoing health crisis.

DEADLINE EXTENSIONS

We reported in previous alerts that CIPO had extended certain deadlines falling between March 16, 2020 and May 15, 2020 to May 19, 2020.

CIPO has now announced that these deadlines, as well as any deadlines falling between May 19 and May 29, are extended to June 1, 2020.

We recommend that, when possible, clients should aim to meet the original deadlines. However, please contact us promptly if there has been a missed deadline, or if you have any questions or concerns about deadlines and how these changes might affect your applications, so that we can assist.

* This is an update to two previous alerts on this topic, which are found here:

- CIPO Pandemic Response: Update April 28, 2020
- CIPO Pandemic Response and Canada's New Compulsory Patent Licensing Provisions

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CLIENT ALERT

CMHC COMMENTS ON THE CANADA EMERGENCY COMMERCIAL RENT ASSISTANCE PROGRAM

by Andrew J. Skinner and Jacky Cheung

The Canada Mortgage and Housing Corporation published a notice today with further information on the previously announced Canada Emergency Commercial Rent Assistance Program ("CECRA"). Dickinson Wright's initial Client Alert on the CECRA can be found here:

HIGHLIGHTS:

- In addition to the requirements for landlords previously announced by the Federal and Ontario Governments, landlords must have declared rental income on their tax returns for 2018 and/or 2019 to qualify.
- The Government loans are only forgivable to the landlord if the landlord complies with all applicable program terms and conditions, including the requirement not to seek to recover rent abatement amounts after the Program is over.
- The Government loans to the landlord will cover 50% of the gross rent owed by a qualifying small business tenant during April, May, and June 2020.
- Landlords can apply retroactively for this Program provided that the landlord can prove eligibility during April, May, and June 2020. However, landlords must refund any amounts paid by the small business tenant for that period. The refund can be a credit for future rent if agreeable by the tenant and the landlord.
- The deadline to apply is August 31, 2020. The Ontario Government previously announced the deadline was September 30, 2020.
- CMHC has introduced additional requirements for small business tenants to qualify:
    - The $50,000 maximum in monthly gross rent is per location and defined in a valid and enforceable lease agreement; and
    - The small business cannot generate more than $20 million in gross annual revenues calculated on a consolidated basis (at the ultimate parent level).

There are still many unanswered questions concerning this Program. It will be interesting to see whether landlords will be inclined to participate in the CECRA, given that their contribution is 25% of gross rent which could likely include mortgage payments, utility costs, realty taxes, etc. and the fact that landlords appear to be prohibited from recouping the 25% of gross rent "loss" after COVID-19 and once the economy for small businesses stabilizes.

To the disappointment of many commercial businesses who are hurting and looking for some relief from a Government program, they may be disappointed by the fact that the Program as formulated to this point does not help commercial landlords, who may also be hurting in this environment. It may be that the Program makes sense in extreme distress situations. However, one questions the equitable balance of a program where a small business could choose to close in the current COVID-19 environment and may qualify according to the financial parameters with a reasonable expectation that, for example, with pent up demand and an improving economy see their revenues spike and essentially keep them whole once the outbreak ends. This is an extreme example. However, it appears that in most circumstances, the Government has dangled an enticing carrot to both landlord and tenant which neither will be able to take advantage of.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

CONSTRUCTION

CONTRACTORS: ARE YOU PROTECTED FROM THE CORONAVIRUS INFECTING THE PROJECT SCHEDULE?

by Chris Cornwall and Stephen Richman

An ounce of prevention is better than a pound of cure, so the old adage goes. Although contraction of the Coronavirus ("COVID-19") fortunately remains a relatively low risk in the United States, COVID-19 still has the ability to "infect" a project schedule simply by reducing the supply of labor and materials needed to complete the work. To prevent such delays and others like them, contractors should take precautionary measures and factor in possible labor and material delays to schedules, and any corresponding price impact, resulting from the spread of COVID-19. Contractors need to consider impacts not only in the United States, but for imported construction materials as well – especially long lead items or materials from highly infected areas (i.e., Italian marble or Chinese steel). If faced with projects requiring materials from highly affected areas, alternate or substitute materials may be an appropriate approach to stay on schedule.

Contractors should discuss potential delays and cost impacts due to COVID-19 during negotiation of the construction documents. Although it is reasonable to argue delay impacts from COVID-19 is a "force majeure" event that should entitle a contractor to an extension of time, the AIA or ConsensusDocs form agreements do not specifically address pandemic events. To avoid this potential issue, revisions to the standard construction documents are required.

§8.3.1 of the AIA A201 General Conditions identifies circumstances that may be commonly described or accepted as force majeure events, but the term "force majeure" is not used or mentioned in the document. Thus, to avoid future disputes (or worse, litigation) over delays and cost impacts due to COVID-19, we recommend our clients add the following language to the AIA A201 agreement:

> ***§ 8.3.1 The Contract Time shall be extended and Contractor shall be entitled to an increase in the Contract Sum for its additional General Conditions and increased costs of labor and materials that are attributable to one or more of the following Impacts:*** (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor shortages and/or disputes, fire, unusual delay in deliveries, unavoidable casualties; ***(4) disruptions in labor or materials resulting from a health crisis regardless of whether an infectious disease, epidemic, pandemic or isolated to areas from which such labor and materials are supplied***; (5) by delay authorized by the Owner pending mediation and binding dispute resolution; (6) by abnormal weather conditions; (7) by other causes beyond the Contractor's control that justify delay; (8) by adverse government actions, including but not limited to tariffs and embargoes; and/or (9) by any Act of God rendering performance of the Contract impossible or impractical. Any time gained by the Contractor on the Project Schedule shall not be offset against any delays as described herein.

§6.3.1(j) of the ConsensusDocs 200 agreement references "epidemics" as a cause beyond the control of a Constructor, but it is wise to expand the definition in a similar manner noted above; to avoid any ambiguity, pandemic events are included as well. Potential price impacts may be addressed in the same section, or separately in the ConsensusDocs 200.1 Amendment No. 1 pertaining to Potentially Time and Price-Impacted Materials.

Paying attention to detail and rapidly adapting to changing circumstances is what we do at Dickinson Wright PLLC. For additional information, please contact any of our offices throughout the United States and in Canada.

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COPYRIGHT OFFICE RESPONSE TO THE COVID-19 PANDEMIC

by Caleb L. Green and John C. Nishi

KEY TAKEAWAYS

The CARES Act provides the Copyright Office with temporary authority to extend certain filing deadlines and procedural requirements in light of the COVID-19 pandemic. In conjunction with Section 710 of the Copyright Act, added by the CARES Act, the Copyright Office is authorized to "toll, waive, adjust, or modify any timing provision . . . or procedural provision" concerning the Copyright Act if the Register of Copyrights determines that a national emergency declared by the President under the National Emergencies Act "generally disrupts or suspends the ordinary functioning of the copyright system."

As a general matter, an applicant's ability to obtain statutory damages and attorney fees is enhanced if it files for registration within three months of a work's first publication. Under Section 710 of the Copyright Act, the Acting Register has extended this deadline in the limited circumstances detailed below.

The Acting Register also made changes for serving and recording notices of termination, to the extent the parties are negatively impacted and are unable to comply due to the COVID-19 emergency.

The Copyright Office expanded its capabilities to receive electronic submissions for certain services. Namely, for applicants who are unable to send physical mail during the national emergency, the Copyright Office will accept submissions by email for the following services: filing notices of termination for recordation, requests for reconsideration of refusals to register, and requests for removal of personally identifiable information from the public record.

If necessary, the Copyright Office will also consider additional appropriate modifications as it becomes aware of sufficient disruption to the copyright system caused by the COVID-19 pandemic.

SUMMARY

In summary, the U.S. Copyright Office has provided the following accommodations:

- Extended the three-month window following first publication of a work for applicants to apply to register their work for statutory damages and attorney's fees purposes, as follows:
    - If an applicant files an application electronically but is unable to submit a required physical deposit, the period to submit the physical deposit will be extended until thirty days after the date the Acting Register issues a public announcement that the disruption has ended.
    - If an applicant is unable to submit an application in either electronic or physical form, the normally applicable three-month application window will be tolled between March 13, 2020, and the date that the Acting Register announces that the disruption has ended. (For example, if a work was first published on February 13, 2020, one month before the March 13 tolling period began, the applicant would have two months following the end of the disruption to submit the application.)
    - To qualify for either deadline adjustment, an applicant must submit a statement certifying under penalty of perjury that they would have met the deadline but for the national emergency and specifying the reasons for their inability to file (e.g., to justify absence of a physical deposit, being subject to a stay-at-home order or being unable to access physical materials due to closure of a workplace; or to justify inability to file electronically or physically, having no access to a computer and/or internet or to physical materials necessary to the application).
    - These timing adjustments do not apply to applications that can be submitted entirely online (e.g., no physical deposit required and applicant has access to a computer and/or the internet)
- Provided timing and electronic submission accommodations for persons who are prevented from serving or recording notices of termination within statutorily required periods.
- The Register of Copyrights has the authority to make changes and provide extensions through December 31, 2021.

Dickinson Wright's attorneys have considerable experience in assisting companies and individuals in navigating the Copyright Office procedures and protecting their intellectual property. The firm remains committed to helping our clients navigate this unprecedented time and remains fully available to provide any assistance that may be required. Copyright owners who have been negatively affected and have experienced barriers in their ability to fully participate in the copyright system are encouraged to consult with one of Dickinson Wright's attorneys experienced in copyright matters.

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DICKINSON WRIGHT

CORONAVIRUS (COVID-19) PRECAUTIONS FOR EMPLOYERS | 新型冠状病毒疫情雇主需注意事项

Heusel, Mark Yan, Lianne (Lingyan).
March 2020
Industry Alerts

It is now impossible to avoid the reality that the coronavirus disease 2019 (COVID-19, the "coronavirus"), is a "public health emergency of international concern," according to the Centers for Disease Control and Prevention ("CDC").[i]
据美国疾病控制与预防中心 (CDC) 称，现在已经无法避免 2019年新型冠状病毒病 ("新冠病毒") 成为 "国际关注的突发公共卫生事件" 这一事实。

The widespread transmission of the coronavirus in the U.S. "would translate into large numbers of people needing medical care at the same time."[ii] This could result in significant adverse consequences, including disruption of the American workforce.
新冠病毒在美国的扩散 "将使大量的民众有同时就医的需求。" 这可能会导致严重的不利后果，包括美国劳动力的中断。

The CDC has developed interim guidance specifically for businesses and employers to reduce transmission and prepare for potential consequences related to the spread of the coronavirus. **Employers are encouraged study the CDC's guidance for businesses and employers available on the CDC's webpage**.
CDC已专门为企业和雇主制定了临时指南，以减少新冠病毒的传播并为与病毒传播相关的潜在后果做准备。**CDC鼓励雇主学习在其网页上为企业和雇主提供的指南，请点击此处。**

Recommended corporate actions include the following:
建议企业采取的预防举措如下：

- Actively encourage sick employees or employees with sick family members to stay home. Encourage telecommuting when possible;
  鼓励患病的员工或有家庭成员患病的员工留在家中。尽可能鼓励远程办公；
- Isolate and/or send home employees who are sick or who become sick during the workday;
  将患病员工或在工作中感到身体不适的员工进行隔离或送回家中；
- Educate employees on coronavirus risk assessments[iii] and encourage sick employees to seek medical care;
  对员工进行新冠病毒风险评估教育，并鼓励患病的员工寻求医疗服务；
- Ensure sick leave policies are flexible, consistent with federal, state and local laws and consistent with public health guidance and understand that you may have to make exceptions for unique situations;
  确保企业病假政策灵活，符合联邦，州和地方法律以及公共卫生指南，并了解企业可能必须针对特殊情况做出例外规定；
- Provide awareness of sick leave policies to employees immediately and often;
  及时并经常向员工提供病假政策信息；
- Educate employees on respiratory etiquette (cough and sneeze cover) and hand hygiene;
  向员工普及呼吸礼仪 (咳嗽和打喷嚏) 以及手部卫生的教育知识；
- Perform routine environmental cleaning and provide disposable wipes for employee cleaning use during the day;
  进行例行环境清洁，并在白天为员工提供一次性抹布以供清洁；
- Discourage travel to China, Hong Kong, Iran, Italy, Japan, Singapore, South Korea, Taiwan, Thailand, and cruise ship travel in Asia. Stay up to date on travel restrictions from the CDC.[1]
  不鼓励去中国，香港，伊朗，意大利，日本，新加坡，韩国，台湾，泰国以及亚洲的游轮旅行。并且随时了解CDC的旅行限制。
- If an outbreak occurs in the U.S., be prepared to cancel all non-essential business travel and all non-essential large work-related meetings or events;
  如果疫情在美国扩散，准备取消所有不必要的商务旅行以及所有与工作无关的大型会议或活动；
- Identify essential business functions, jobs or roles, and elements within your supply chains required to maintain business operations. Plan for how your business will operate if there is increasing absenteeism or supply chains are interrupted; and
  确定维护业务运营所需的基本业务功能，职位或角色以及供应链中的组成部分。计划如果缺勤率增加或供应链中断，公司业务将如何运作；以及

- Create (or refresh) an infectious disease outbreak response plan in writing now, recognizing that the plan's scope and procedures may vary depending on unique business operations and needs.
  以书面形式创建（或更新）疫情扩散应对计划，并意识到该计划的范围和程序可能会因各类业务运营和需求而有所不同。

Under OSHA, employers have a duty to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[iv] The Occupational Safety and Health Administration ("OSHA") has also set up a site to help employers prepare for a potential coronavirus outbreak. Developing a plan to address a potential coronavirus outbreak in the U.S. now may help to keep employees healthy, alleviate public concern, and reduce corporate liability.
根据美国职业安全与健康管理局 ("OSHA") 的规定，雇主有义务提供一个 "不会造成或可能导致死亡或严重身体伤害的公认危险" 的工作场所。OSHA还建立了一个网站，以帮助雇主为潜在的新冠病毒疫情扩散做好准备。现在制定一个解决潜在的新冠病毒疫情扩散的计划可能有助于保持员工健康，减轻公众关注并减少企业责任。

The coronavirus situation is developing quickly. For the most up to date information concerning the coronavirus, refer to the CDC's coronavirus webpage. In addition, we are providing the rolling update on the number of confirmed cases of COVID-19 both in US and of China.
新冠病毒疫情的情况正在迅速发展。有关新冠病毒疫情的最新信息，请参阅CDC新冠病毒疫情网页。此外，我们还附上美国和中国新增确诊病例的滚动更新数字。

Dickinson Wright PLLC is ready to assist employers in addressing a coronavirus outbreak. Please contact us for assistance.
迪克森律所准备协助雇主应对新冠病毒疫情的扩散。请与我们联系以获得帮助。

[1] https://wwwnc.cdc.gov/travel (accessed Feb. 28, 2020).

[i] https://www.cdc.gov/coronavirus/2019-ncov/summary.html (accessed Feb. 28, 2020).
[ii] *Id.*
[iii] https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html (last accessed Feb. 28, 2020).
[iv] 29 U.S.C. 654(a)(1).

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CLIENT ALERT

LABOR & EMPLOYMENT

CORONAVIRUS (COVID-19) PRECAUTIONS FOR EMPLOYERS

Christina McDonald & David Deromedi

It is now impossible to avoid the reality that the coronavirus disease 2019 (COVID-19, the "coronavirus"), is a "public health emergency of international concern," according to the Centers for Disease Control and Prevention ("CDC").[i] As of publication, the coronavirus is not spreading in the community in the United States.[ii] The CDC reports that the immediate health risk is low for the American public.[iii]

Nevertheless, the widespread transmission of the coronavirus in the U.S. "would translate into large numbers of people needing medical care at the same time."[iv] This could result in significant adverse consequences, including disruption of the American workforce.

The CDC has developed interim guidance specifically for businesses and employers to reduce transmission and prepare for potential consequences related to the spread of the coronavirus. Employers are encouraged to study the CDC's guidance for businesses and employers available on the CDC's webpage.

Recommended corporate actions include the following:

- Actively encourage sick employees or employees with sick family members to stay home. Encourage telecommuting when possible;
- Isolate and/or send home employees who are sick or who become sick during the workday;
- Educate employees on coronavirus risk assessments and encourage sick employees to seek medical care;
- Ensure sick leave policies are flexible, consistent with federal, state and local laws and consistent with public health guidance and understand that you may have to make exceptions for unique situations;
- Provide awareness of sick leave policies to employees immediately and often;
- Educate employees on respiratory etiquette (cough and sneeze cover) and hand hygiene;
- Perform routine environmental cleaning and provide disposable wipes for employee cleaning use during the day;
- Discourage travel to China, Hong Kong, Iran, Italy, Japan, Singapore, South Korea, Taiwan, Thailand, and cruise ship travel in Asia. Stay up to date on travel restrictions from the CDC.[1]
- If an outbreak occurs in the U.S., be prepared to cancel all non-essential business travel and all non-essential large work-related meetings or events;
- Identify essential business functions, jobs or roles, and elements within your supply chains required to maintain business operations. Plan for how your business will operate if there is increasing absenteeism or supply chains are interrupted; and
- Create (or refresh) an infectious disease outbreak response plan in writing now, recognizing that the plan's scope and procedures may vary depending on unique business operations and needs.

Under OSHA, employers have a duty to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[vi] The Occupational Safety and Health Administration ("OSHA") has also set up a site to help employers prepare for a potential coronavirus outbreak. Developing a plan to address a potential coronavirus outbreak in the U.S. now may help to keep employees healthy, alleviate public concern, and reduce corporate liability.

The coronavirus situation is developing quickly. For the most up to date information concerning the coronavirus, refer to the CDC's coronavirus webpage.

[i] https://www.cdc.gov/coronavirus/2019-ncov/summary.html (accessed Feb. 28, 2020).

[ii] *Id.*

[iii] *Id.*

[iv] *Id.*

[v] https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html (last accessed Feb. 28, 2020).

[vi] 29 U.S.C. 654(a)(1).

[1] https://wwwnc.cdc.gov/travel (accessed Feb. 28, 2020).

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of Labor & Employment law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in here.

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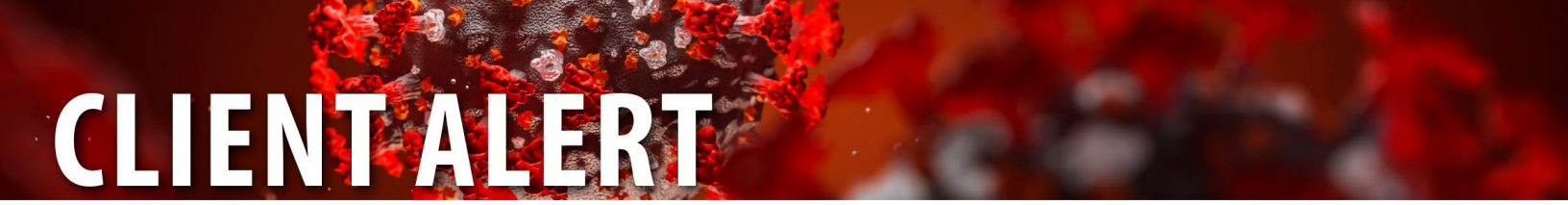

COVID-19 AND ITS IMPACT ON PERFORMANCE OF COMMERCIAL LEASES: A REVIEW OF FORCE MAJEURE, IMPOSSIBILITY OF PERFORMANCE, AND FRUSTRATION OF PURPOSE

by Michael J. Lusardi, N. Courtney Hollins, and Connor E. Phalon

As COVID-19 spreads throughout the United States and governors issue "shelter-in-place" orders and mandate the closure of non-essential businesses, landlords and tenants have encountered new and evolving challenges in meeting their leasehold obligations. Tenants have been unable to generate income to pay their rents, and landlords have been unable to pay their creditors as a direct result. This has caused landlords and tenants to scramble to review their leases to best determine their next course of action (or inaction) and what opportunities may be available to reach a compromise that will facilitate both the landlord's and tenant's ability to work with their respective creditors, owners, customers, and the like in a rational way under these unprecedented circumstances. To assist in that review, this article will explore three legal doctrines that commercial parties commonly invoke to be excused from their obligation to perform under a lease (including the obligation to pay rent) and examine how these doctrines may be applied today.

1. Force Majeure

An analysis seeking to excuse nonperformance by a party to a lease will generally begin with reviewing the express terms of the agreement to determine whether it contains a "force majeure" clause. Force majeure translates to "superior force" and is a contractual provision that allocates the risk of certain unanticipated and unforeseeable events that may result in the delayed performance or nonperformance of a leasehold party. Some common examples of qualifying events include "acts of God", government action, strikes, wars, terrorism, riots, labor disputes, and natural disasters. Typically, in commercial and retail leases, these clauses will contain carve-out language clarifying that a force majeure event will not excuse a party's obligation to pay rent, and will often set a "cap" on the period of time in which a party can claim that force majeure applies.

As the COVID-19 pandemic magnifies, there is an increased likelihood that tenants will look to this specific clause when asking to be excused from their obligation to pay rent or otherwise perform under their lease. To properly invoke a force majeure clause, the affected party must demonstrate that: (1) the unanticipated event was beyond its reasonable control; (2) it was prevented from performing its obligations as a direct result of the event; (3) it has taken all reasonable steps to mitigate damages and avoid nonperformance under the lease; and (4) it has provided notice in full compliance with the lease terms.

Historically, courts have interpreted force majeure clauses narrowly, and have been reluctant to allow a party to rely upon such a clause to excuse its nonperformance unless the unanticipated qualifying event was specifically listed or referenced in the clause itself. Courts have gone so far as to refuse to excuse a party's nonperformance even when performance would have been economically disadvantageous or resulted in financial hardship for the affected party. While courts may opt to more liberally construe these clauses in light of the ongoing pandemic, leasehold parties should closely review their force majeure clauses for specific references to a "pandemic," "epidemic," "disease," "public health emergency," "government restriction or action," or similar language, prior to assuming that COVID-19 or a resultant government action qualifies as a force majeure event excusing nonperformance under the lease.

2. Impossibility of Performance

In the event a lease is silent as to force majeure, a party should begin to assess the applicability of common law doctrines to excuse its nonperformance. One common law doctrine often put forth by parties to excuse nonperformance is the doctrine of "impossibility of performance." To have a viable claim under this doctrine, the affected party must show that the performance of the lease is rendered objectively impossible as a result of an unforeseeable event, and that such event was not the fault of the affected party.[1] Further, the non-occurrence of the event must have been a basic assumption of the lease agreement.

This doctrine has historically been applied on a limited basis by the courts. Only in extreme circumstances, such as the destruction of the subject matter of a contract by an "act of God" or where government laws made performance under an agreement objectively impossible, have courts found the doctrine to apply. That being said, as the pandemic continues and more tenants and landlords fail to meet their leasehold obligations as a result, we anticipate that courts may allow affected parties to more freely avail themselves to the protections afforded under the doctrine of impossibility, which could include being excused from the obligation to pay rent.

3. Frustration of Purpose

If a force majeure provision is not present in a lease, and the specific facts at hand do not support the applicability of the doctrine of impossibility of performance, then a party may consider the common law doctrine of "frustration of purpose" when seeking to excuse its nonperformance. Unlike force majeure and the doctrine of impossibility, this doctrine analyzes whether a qualifying event obviated the principal purpose of an agreement, rather than whether the partieswere able to perform their obligations as a result of the event. To properly invoke this doctrine, a party must show that the qualifying event was reasonably unforeseen at the time the contract was formed and that the event substantially frustrated the principal purpose for which the agreement was entered into for.

Similar to the doctrine of impossibility, courts have applied this doctrine narrowly over the years. This is due to the high bar needed to demonstrate that the frustrated purpose of the agreement was, in fact, the principal purpose behind its creation and execution. That being said, this standard of review may be relaxed by the courts in light of the COVID-19 pandemic and the mandatory closure of businesses across the United States.

Market Trends and Looking Ahead

Much like the public health landscape, the commercial real estate landscape continues to change almost daily. Some jurisdictions have elected to place a temporary moratorium on eviction proceedings against commercial and residential tenants, and landlords throughout the country are considering entering into forbearance or similar rent relief agreements with their tenants for the coming months. How a landlord and tenant navigate these unchartered waters will largely depend on the relationship between the two, the express terms of their lease, and how each court system elects to apply the legal doctrines discussed in this article.

In these uncertain times, we will continue to monitor the impacts of COVID-19 on the real estate sector and provide further updates with guidance on any new legal or business developments.

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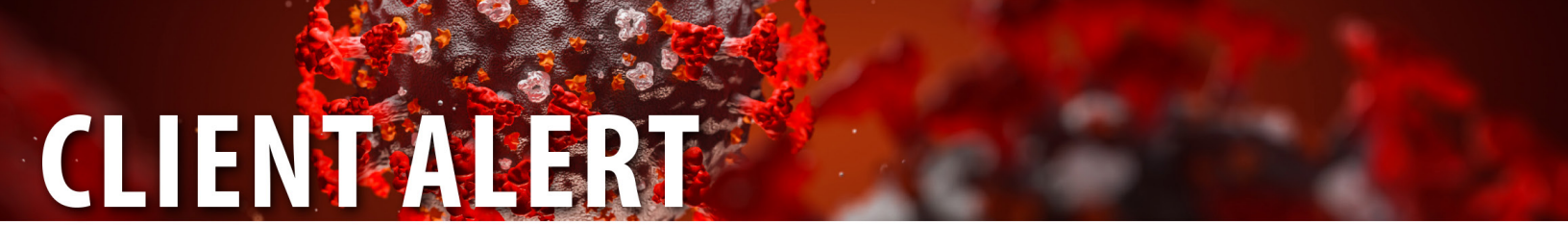

LITIGATION

COVID-19 AND THE WORLD OF COMMERCIAL LEASES: FORCE MAJEURE AND RELATED COMMON LAW DOCTRINES

by Jared Christensen and Matthew Keane

Given the ongoing COVID-19 crisis and the many stay-at-home orders, it is likely that many businesses have temporarily closed their physical doors because they do not operate an "essential business." These businesses – whether they are a landlord or tenant – will face legal issues surrounding the enforcement of their leases. For example, do today's circumstances implicate the implied covenant of quiet enjoyment? And how will a *force majeure* clause impact parties' rights, if at all? Though each case is factually-driven and jurisdictionally dependent, below is a first step in examining how courts may actually view today's circumstances if called upon to decide them.

Quiet Enjoyment

Many states have adopted the implied covenant of quiet enjoyment, a common law doctrine that is often deemed to supplement the terms of any commercial lease.[1] At first blush, it may appear that the covenant of quiet enjoyment has been breached where, for example, a tenant is unable to operate their business and "enjoy" the premises due to an applicable stay-at-home order. This is not the case, however, where the shutdown is the result of government action and not actions of the property owner.[2]

As a result, stay-at-home orders are not likely to trigger a breach of "quiet enjoyment" covenants, however, an argument could be made if a landlord in some way contributed to a business's closure. Parties to a contract should carefully consider how any actions (whether theirs or another party's) go beyond what may be required by their state government, in which case the covenant of quiet enjoyment could be implicated.

Force Majeure Provisions

A "*force majeure*" clause is a rarely invoked lease provision that relieves parties from performing their obligations if certain specified circumstances beyond the parties' control occur, rendering performance substantially difficult or impossible. Depending on the nature of the lease and the terms of the *force majeure* provision itself, the COVID-19 crisis may qualify as a *force majeure* event and provide relief from contractual obligations.

The interpretation of *force majeure* provisions is a question of state law and a party must look to the proper state to analyze the veracity a *force majeure* defense. While many states do not have substantial case law on the issue, there are general principles recognized near-universally. For instance, *force majeure* clauses are "narrowly construed." [3] In other words, they will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically (expressly) identified.[4]

To illustrate, a government's classification of COVID-19 as a "pandemic" could trigger a force majeure clause that expressly contemplates pandemics. Less clear, however, is how courts will apply a force majeure clause that is silent on "pandemics" but covers mandatory governmental shutdowns and forced closures. The outcome is likely to hinge on the governmental order and its precise wording, contrasted with the force majeure clause. No matter the case, parties must review their lease's terms to determine whether their force majeure clause expressly contemplates the circumstances.

Common Law Alternatives

Because of their rare use, many leases do not actually contain *force majeure* provisions. And courts throughout the country have routinely held that a *force majeure* defense cannot be asserted when the lease does not contain such a provision.[5] However, parties may still turn to the traditional common law defenses of impossibility, impracticability, and frustration of purpose. In fact, even if the lease does contain a force majeure clause, these defenses remain viable. A *force majeure* provision does not supplant these common law defenses, and they can be pled in the alternative.[6]

However, these common law defenses come with a high burden of proof that should be considered when weighing your options. The defenses of impossibility or impracticability have become synonymous in modern law.[7] Invoking these doctrines requires a showing that (1) a supervening event made performance impossible or commercially impracticable; (2) the non-occurrence of the event was a basic assumption upon which the contract was based; (3) the occurrence of the event was not the fault of the party seeking to invoke the defense; and (4) neither party assumed the risk of occurrence.[8]

The frustration of purpose doctrine is similar to the doctrines of impossibility and impracticability, but has slightly different elements. It requires a party to demonstrate that (1) a supervening event occurred that should excuse performance, (2) the party did not bear the risk of the event, and (3) the event rendered the value of the party's performance worthless.[9] In contrast, a party with a *force majeure* provision in its lease need only show that an enumerated *force majeure* event in fact occurred and impacted contractual performance.

[1] Under Michigan law, for example, every lease (residential or commercial) incorporates a covenant that: (1) the tenant will not be dispossessed by the landlord or any party claiming through the landlord; and (2) the landlord will not interfere with the tenant's declared use for the premises. Royal Oak Wholesale Co v Ford, 1 Mich App 463; 136 NW2d 765 (1965).
[2] Tucker v Gvoic, 344 Mich 319, 323-324; 74 NW2d 29 (1955); Milton R. Friedman, Friedman on Leases §29.202 (4th ed 1997) ("Interference with the tenant's use by the police power is not breach of covenant of quiet enjoyment").
[3] See, e.g., Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 900, 902-903, 519 N.E.2d 295, 296 (1987); Rohm & Haas Co. v. Crompton Corp., 2002 WL 1023435, at *3 (Pa. Com. Pl. 2002).
[4] Kyocera Corp. v. Hemlock Semiconductor, LLC, 313 Mich. App. 437, 446, 886 N.W.2d 445, 451 (2015).
[5] Flathead-Michigan I, LLC v. Penninsula Dev., LLC, 2011 WL 940048, at *5 n. 1 (E.D. Mich. 2011); Vill. of Monticello v. 56-60 Broadway, Inc., 61 Misc. 3d 1217(A), 110 N.Y.S.3d 899 (N.Y. Co. Ct. 2018); Ner Tamid Congregation of N. Town v. Krivoruchko, 638 F. Supp. 2d 913, 931 (N.D. Ill. 2009); Hubbard v. Talbott Tavern, Inc., 2006 WL 2089308, at *4 (Ky. Ct. App. 2006).
[6] See, e.g., Seaboard Lumber Co. v. United States, 308 F.3d 1283 (Fed. Cir. 2002).
[7] Opera Co. of Boston, Inc. v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1099

(4th Cir. 1987); Island Dev. Corp v. District of Columbia, 933 A.2d 340, 349 (D.C. App. 2007).
[8] United States v. Winstar Corp., 518 U.S. 839, 904, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).
[9] Everett Plywood Corp. v. United States, 227 Ct.Cl. 415, 651 F.2d 723, 729 (1981).

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COVID-19 GUIDE FOR SENIORS

The impact of COVID-19 is changing at a rapid pace. One thing that will not change is our commitment to help our friends, our clients and our colleagues. We have collected a number of resources which may be helpful for seniors attempting to navigate the Covid-19 pandemic.

What are the symptoms of COVID-19?

Those who are infected with COVID-19 may have little to no symptoms. You may not know you have symptoms of COVID-19 because they are similar to a cold or flu.

Symptoms have included:

- Cough
- Fever
- Difficulty breathing
- Pneumonia in both lungs

What should you do if you develop a symptom?

Do not visit an assessment centre unless you have been referred by a health care professional.
Do not call 911 unless it is an emergency.

Instead, you should:

- Complete the COVID-19 Self-Assessment at https://covid-19.ontario.ca/
- Call Telehealth: 1-866-797-0000
  Please note, there are significant wait times to speak to a representative

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How do you protect yourself and others from COVID-19?

- Practice social distancing
- Stay home - Ontario's Chief Medical Officer of Health is strongly urging those over the age of 70 or those with compromised immune systems or underlying medical conditions to stay at home
- Wash hands often with soap and water for at least 20 seconds

- Cover coughs and sneezes with a tissue or your elbow
- Avoid touching your face
- Self-isolate for 14 days if you:
    - recently returned from travel outside of Canada
    - have a cough, fever, fatigue, and/or difficulty breathing
    - are a close contact of someone who has tested positive for COVID-19
    - have been asked by a health care professional for another reason

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How do you practice Social Distancing?

- Keep at least six feet (the length of a bicycle) from others when going out for groceries, medical trips, and other essential needs
- Limit the number of times you leave your home for errands
- Try to shop at less busy times
- Order online to have groceries or other items delivered if possible
- Go for a walk in your neighbourhood or park while maintaining distance from others
- Avoid overcrowding in elevators or other enclosed spaces
- Wash or sanitize your hands after touching communal surfaces

*Many stores are offering senior shopping hours:

- Longo's - 8:00 a.m. – 9:00 a.m.
- Loblaws - 7:00 a.m. – 8:00 a.m.
- Walmart - 7:00 a.m. – 8:00 a.m.
- Costco - Tuesdays, Wednesdays and Thursdays, 8:00 a.m. – 9:00 a.m.

Tips to protect your personal health and wellbeing

During this difficult time, seniors can protect their mental health and feel more connected by taking the following steps:

- Call a friend or family member
- Exercise in your home
- Go for a walk, while remembering to practice social distancing

- Get fresh air by opening a window or going outside for a few minutes each day

Seniors also have access to resources for that can be useful in maintaining mental and physical health:

- ConnexOntario (1-866-531-2600), Ontario's mental health, addictions and problem gambling helpline, which can provide contact information for local mental health and addictions services and supports, including crisis lines
- 211 Ontario: Dial 2-1-1 on your cell phone or home phone or visit www.211ontario.ca
  211 is a telephone helpline and online database of Ontario's community and social services. The service is free and confidential and is available during COVID-19 and beyond
- Ontario Seniors' INFOline: 1-888-910-1999; Email: infoseniors@ontario.ca

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Delivery of Items

The Government of Canada is contributing $9 million through United Way Canada for local organizations to support practical services to Canadian seniors. These services could include the delivery of groceries, medications, or other needed items, or personal outreach to assess individuals' needs and connect them to community supports.

Your local United Way organization: http://www.unitedway.ca/how-we-help/find-your-uwc/

There are several charitable operations that offer delivery to senior citizens who will have difficulty accessing food and essential items during the COVID-19 pandemic. For example, Operation Ramzieh assembles and distributes free food boxes to senior citizens in Toronto and Ottawa.

Information about Operation Ramzieh can be found here: https://operationramzieh.org/about-3

The Canada Emergency Response Benefit (CERB)

The Canada Emergency Response Benefit (CERB) gives up to $2,000 a month to workers who have stopped working because of COVID-19. This includes employees, the self-employed, and contract workers.

You can apply through both the Canada Revenue Agency (CRA) and Service Canada starting April 6, 2020.

To apply for the CERB you need: i) a Social Insurance Number and ii) an online account with the CRA or Service Canada. If you're not able to create an online account to claim your CERB, you can call 1-800-959-2019.

If you're eligible for the CERB, you will get up to $2,000 for four weeks. You will get one payment that covers the four-week period. Payments can be made by direct deposit or cheque.

Rent Payments

Tenants who can pay their rent must do so, to the best of their abilities. Landlords are entitled to collect compensation from a tenant for each day that an eviction order is not enforced.

The government of Ontario has made efforts to encourage landlords and tenants to work together during this difficult time to establish fair arrangements to keep tenants safe and in their homes.

Mortgage Relief

Canadian banks have committed to work with their customers on a case-by-case basis to find solutions to help them manage hardships caused by COVID-19. This includes permitting lenders to defer up to six monthly mortgage payments (interest and principal) for impacted borrowers. Canadians who are impacted by COVID-19 and experiencing financial hardship as a result should contact their financial institution regarding flexibility for a mortgage deferral. This gives flexibility to those who need it the most. You are encouraged to visit your bank's website for the latest information, rather than calling or visiting a branch.

Reduced minimum withdrawals for Registered Retirement Income Funds

The government of Canada has reduced the required minimum withdrawals from Registered Retirement Income Funds (RRIFs) by 25 percent for 2020.

Increase to the GST/HST credit amount

The goods and services tax/harmonized sales tax (GST/HST) credit is a tax-free quarterly payment that helps individuals and families with low and modest incomes offset all or part of the GST or HST that they pay.

You will get the extra payment amount automatically if you normally receive the GST/HST credit and have filed a 2018 tax return. Payments will be issued on April 9, 2020.

The one-time payment will be calculated based on information from your 2018 tax return.

The maximum amounts for the 2019-2020 benefit year will increase from:

- $443 to $886 if you're single
- $580 to $1,160 if you're married or living common-law
- $153 to $306 for each child under the age of 19 (excluding the first eligible child of a single parent)
- $290 to $580 for the first eligible child of a single parent

You don't have to file your 2019 taxes to receive this increased credit amount, the payment will be based on your 2018 taxes. You do have to file your 2019 income tax and benefit return to ensure you continue to get your benefits and credits for the July 2020 to June 2021 benefit year.

The federal government provides detailed information about the rebate and how to apply here: https://www.canada.ca/en/revenue-agency/services/child-family-benefits/covid-19-gsthstc-increase.html

Public Pensions

You can apply online through your My Service Canada Account for the following:

- Canada Pension Plan Retirement Pension
- Canada Pension Plan Disability Benefit, or
- Old Age Security/Guaranteed Income Supplement

Due to the COVID-19 pandemic, Service Canada is strongly encouraging you to apply for these benefits online from the comfort of your home. You will not be required to submit documentation to support your application at this time. Service Canada may be requesting these documents at a later date, but in the meantime, we can begin working on your application.

For more information on Public Pensions such as how to apply and eligibility requirements, go to https://www.canada.ca/en/services/benefits/publicpensions.html or call 1-800-277-9914.

Low-income Energy Assistance Program (LEAP)

The government is providing $9 million in direct support to families for their energy bills by expanding eligibility for the Low-income Energy Assistance Program and by ensuring that their electricity and natural gas services are not disconnected for nonpayment during the COVID-19 outbreak.

Further information can be found here: https://www.oeb.ca/rates-and-your-bill/help-low-income-consumers/low-income-energy-assistance-program

Find the list of contact information for the social agencies used for the delivery of LEAP Emergency Financial Assistance here: https://www.oeb.ca/sites/default/files/LEAP_Utility-Agency_Partners.pdf

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Guaranteed Annual Income System (GAINS)

The Ontario government has proposed to double the Guaranteed Annual Income System (GAINS) maximum payment to $166 per month for individuals and $332 per month for couples, for six months starting in April 2020.

For further information on GAINS and other financial help offered by the Federal and Provincial governments for seniors, visit the CARP (formerly Canadian Association of Retired Persons) website: https://www.carp.ca/2020/03/26/covid-19-financial-supports-announced/

COVID-19 and the Ontario Disability Support Program (ODSP)

If you're already getting income support from the Ontario Disability Support Program (ODSP), you do not qualify for Ontario's COVID-19 Emergency Assistance Program.

Instead, there are new resources that ODSP workers can use to give extra "discretionary benefits" to people getting ODSP and Ontario Works. Individuals on ODSP may be able to get a one-time benefit of up to $100, and those with families may be able to get a one-time benefit of up to $200.

If you qualify, these benefits can be used for needs related to COVID-19, such as:

- personal protective equipment, like masks and gloves, for hospital or clinic visits
- food and groceries if you can't get to a food bank, for example, because you've been ordered to self-isolate, or you're caring for a family member who is sick or has been ordered to self-isolate
- cleaning supplies if you've been ordered to self-isolate, or you're caring for a family member who is sick or has been ordered to self-isolate

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Wills and estate planning during COVID-19

At this point, we would promote the following actions to ensure that your estate planning affairs are in order:

a) Review your existing documents. Make sure that you have copies (either paper or electronic) of your existing estate planning documents, and review them to confirm that they still reflect your wishes. If you cannot locate your documents, consider calling or emailing your estate planning lawyer to obtain copies.

b) Pinpoint any items that require attention sooner rather than later. As you review, take note of any major changes that may have occurred in your family since you last updated your estate plan. These might include childbirths, deaths, marriages, divorces, etc. Also, consider whether the individuals that you previously appointed to serve as your agents are still appropriate.

c) Follow up with your loved ones and advisors.

- Make sure that your loved ones know if you have appointed them to any role in your estate plan. This includes your executor (i.e. personal representative under your will, or trustee), guardian for your minor children, attorney-in-fact under your durable power of attorney for property, and patient advocate under your health care power of attorney.

- Consider reaching out to your financial advisor, insurance advisor, etc. to ensure that your beneficiary designations are up to date and discuss any new planning opportunities relative to your current financial status.
- If you require any medical attention in the near future, confirm that your medical provider has a copy of your patient advocate designation and is informed as to who you wish to have access to your confidential health information.

If you do not already have an estate plan, now is as good of a time as any to consider the opportunity before you. Having a will/trust, a power of attorney, and a health care power of attorney can certainly contribute to a healthy state of mind.

Seniors and Fraud

In emergencies like this, vulnerable individuals, especially seniors, are often targeted by dishonest con artists trying to take advantage of fear and uncertainty. They can pose as door-to-door salespeople, telemarketers, collection agents and sometimes even distant relatives asking for help.

Be on the lookout for any of the following behaviours:

- Scammers may impersonate health organizations and businesses to gather personal and financial information or sell fake test kits, supplies, vaccines or cures for COVID-19
- Fraudsters may seek donations for illegitimate or non-existent organizations
- Scammers may impersonate doctors and hospital staff, claim to have treated a relative or friend of the intended victim for COVID-19 and demand payment for treatment.

How to spot an email scam:

- Be skeptical - fraudulent emails can look like they come from a real organization
- Be vigilant - never send personal and/or financial information by email
- Check the “From” address – Be cautious when an email domain doesn’t match the organization that the sender says they are from
- Never click on suspicious links or attachments - phishing emails often include embedded links that look valid, but if you hover over them, you can usually see the real hyperlink
- Protect your devices - make sure that your electronics are password protected

The RCMP has produced Seniors Guidebook to Safety and Security which provides useful information to answer some common concerns when it comes to seniors' safety and security about scams and other security matters. The guide can be accessed here: https://www.rcmp-grc.gc.ca/en/seniors-guidebook-safety-and-security?wbdisable=true

Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

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COVID-19 POSES INCREASED CYBERSECURITY RISKS TO EMPLOYERS AND BUSINESSES

by Caleb Green and Sara Jodka

Evolving developments and news surrounding COVID-19 (the "coronavirus") has prompted immediate action from employers and businesses worldwide. While many businesses have been forced to temporarily shut down, the ones that remain operational have been forced to adjust to working remotely and adopt other protocols to ensure the health and safety of their employees and customers. As employers face the challenge of balancing business with growing health concerns related to the coronavirus, they face additional challenges as their cybersecurity protocols will be tested like never before.

Cybercriminals love a good crisis and uncertainty to manipulate and exploit individuals through cyber-threats, and they also use newly-implemented technologies to try to penetrate a business's systems. As businesses implement safety strategies in response to the coronavirus pandemic, they must prioritize data protection and cybersecurity concerns to limit their exposure and legal liability.

Specifically, employees working remotely can create risks to businesses in the following ways: (1) increased risks from remote access, including physical security risks associated with use of company-owned and personal devices; (2) increased phishing and other scams; and (3) violation of industry- and state-specific laws.

INCREASED RISKS FROM REMOTE ACCESS

In response to the widespread transmission of the coronavirus, many employers are providing employees with remote access options, enabling them to work outside of the corporate infrastructure. While providing a work-from-home option for employees may be a prudent measure to prevent the spread of diseases throughout the workplace, corporate leaders should be wary that remote systems can expose businesses to cybersecurity risks. Remote access relies on the exchange and transmission of information and data, typically over the Internet. While teleworking, employees may be handling, accessing, discussing, or transmitting sensitive information, including company trade secrets, customer personal information, or confidential financial data.

Since this pandemic started, there has been a palpable uptick in business email and other interruptions, including where Office 365 or Gmail accounts were hacked through phishing scams. One particularly effective scam has been when the hacker sends a fraudulent invoice purporting to be from a legitimate worker with changed wiring instructions where the money transferred goes to the hacker's account. By the time a company reconciles its accounts receivables and realizes what has happened, the money is gone and there is usually no way to recover it. Further, the businesses have paid for goods/services they did not receive, and the account is still due because the money was paid to a criminal element. For this reason, it is good cybersecurity hygiene to enable multi-factor authentication on accounts the business controls, train employees on these types of schemes, and require they speak directly to a person before they change any ACH/direct deposit or other information.

Another issue in a work-from-home environment is where employees use employer-issued or personal devices to access corporate data. Namely, employers risk physical loss or theft of sensitive information stored on corporate devices when they permit employees to access the systems remotely. Furthermore, an employee's remote access in a public setting, such as a coffee shop or their private home network, can expose sensitive information through eavesdropping, networking hacking, and other forms of unauthorized access. For this type of scheme, hackers try to manipulate the network by mimicking the name of the secure network so employees trying to connect think they are connecting to a legitimate network when they are not. For example, when working in a hotel, a common public designation is "Ballroom," "Conference Room," and similar. To get to the top of a user's WiFi choices, hackers will use "Ballroom 1," "Conference Room 1," etc. To ensure safety, businesses should require employees to only work on secure, password-protected internet connection and when using public WiFi, if that is the only option, users should check with the facility to ensure they know what WiFi networks are legitimate so they can easily determine which ones are not.

Another budding issue with the increased workforce is the use of teleconference apps. Zoom and other video-conferencing functions and applications have gained significant popularity among the remote workforce, but there are a number of concerning privacy issues included in Zoom's Privacy Policy, which was modified on March 29, 2020, and some of the more concerning privacy features were deleted. For example, Zoom can:

- Share data with third-party advertisers, including videos, messages, documents, contact information, etc.;
- Use video content for targeted advertising campaigns;
- Zoom hosts may record and share the session with others, but this puts the onus on the host to obtain consent for those in all-party consent states, though consent would not be necessary in one-party consent states; and
- Zoom hosts can also activate "Attention Tracking" to see whether individuals click away from the Zoom meeting for more than 30 seconds.

Zoom is not alone in their privacy practices as all video-conferencing platforms have similar policies. That being said, it is important to fully understand the scope of these policies, especially when using these platforms to conduct medical/healthcare appointments or to conference with minors. Many of these platforms are not HIPAA-compliant, nor are they pretending to be, so ensure that when transmitting HIPAA-protected information that all transmissions are done through a HIPAA-compliant telehealth platform. In fact, the Office of Civil Rights and the Department of Health and Human Services, which is the government agency that enforces HIPAA, has issued guidance on telehealth remote communications and issue issued 11 FAQs on Telehealth and HIPAA during the COVID-19 nationwide public health emergency.

Another issue for remote workers, and their employers, is that even from the comfort and convenience of their own homes, employees can expose sensitive corporate information via voice assistance systems, smart speakers, and home surveillance systems such as Siri, Google Assistant, Amazon Alexa, Echo, and Ring. All of which have grown in popularity within households in recent years, but remain vulnerable to many forms of hacking. In fact, these systems have a history of security vulnerabilities that have led to eavesdropping and spying. Namely, hackers have targeted Ring—a home security company owned by Amazon—by hacking user accounts and gaining access to cameras and microphone hardware embedded within the home security system. In recent events, hackers were able to access Ring cameras within the home, spy on the homeowners and their family members, and even communicate with them using the microphone feature.

Smart speakers, virtual assistants, and smartphones also pose a significant risk to the unaware teleworker. Researchers and white hackers have exposed vulnerabilities in smart devices such as Alexa Echo, Siri, and Google Assistant. Cybercriminals can use nearly silent ultrasound waves to trigger these smart devices to prompt users for their user credentials and passwords as well as force the devices to executive malicious commands. Given the increased number of employees working from home amid the COVID-19 outbreak, hackers will likely continue their attempt to thwart these technologies and systems founds within and throughout the home.

PHISHING ATTACKS

The leading cause of cyber-attacks worldwide is phishing attacks. Phishing is the use of electronic communications, including phone calls, text messages, and even social media tools, to disguise fraudulent communications as legitimate messages from trusted sources. Through these attacks, hackers seek to acquire sensitive information and often will contain malware-infected attachments or a link that, if opened, will install malicious software on the device and surrender sensitive information. Cyber-attackers couple social engineering schemes with phishing ploys to manipulate employees and customers to carry out specific tasks, such as opening the malware-infected attachment, clicking the compromised link, or otherwise divulging confidential information. In light of the widespread transmission of the coronavirus, these cyber risks are compounded as cybercriminals are using the fear and uncertainty surrounding this international emergency to further manipulate employees through phishing schemes. For example, the U.S. Department of Homeland Security reports that to gain access to valuable corporate information, cybercriminals are sending phishing emails posing to be trusted health organizations including malware-infected attachments purporting to contain important information regarding the coronavirus.

The Internet is inundated with phishing schemes that are piggybacking off the COVID-19 pandemic. In February 2020, cybercriminals released a website purporting to be a distribution map of the coronavirus outbreak. The malicious online map, which was located at www.coroa-virus-map[.]com, hosted a convincing impersonation of the legitimate map operated by the John Hopkins Center for Systems, Science and Engineering and offered what appeared to be a tally of the confirmed cases and deaths related to the virus outbreak. However, unbeknownst to users that navigated to this site, malicious password-stealing software was being installed on their computers and mobile devices.

Another COVID-19 related phishing attack mimicked an official email correspondence from the World Health Organization (WHO). The email, which carried the WHO logo, contained a link to a document purporting to contain information regarding preventing the spread of the virus. Instead, the link redirected victims to a malicious website, which attempted to harvest sensitive credentials, including passwords and usernames.

Through these deceiving mechanisms, cybercriminals are actively taking advantage of employees and customers as they attempt to navigate the confusion and barriers resulting from the coronavirus pandemic. As a result, businesses are at increased risk of losing valuable intellectual property, sensitive data, and financial information.

INDUSTRY AND STATE-SPECIFIC LAW COMPLIANCE – STATE DATA BREACH NOTIFICATION REQUIREMENTS, GDPR, CCPA, GLBA, AND HIPAA

While touched on briefly above in regards to HIPAA, remote work can also trigger industry- and state-specific law compliance issues. While remote working is somewhat novel, these state- and industry-specific laws are not. The same standard rules and requirements apply. Further, with so many events being canceled or pushed back, many assumed the effective enforcement date of the California Consumer Privacy Act (CCPA) of July 1, 2020 would be postponed. It will not, and July 1, 2020 remains the anticipated date by which the California Attorney General will begin to enforce the CCPA.

CYBERSECURITY TAKEAWAYS

As employers and businesses implement safety and health measures to combat the spread of coronavirus, corporate leadership should consider the following additional corporation actions and best practices:

1. Consult with an information security professional or service provider to ensure your organization is properly equipped with the proper technology (e.g. firewalls) and safeguards to reduce the risk of cybersecurity breaches.
2. Establish a Telework Security Policy that defines which permissible forms of remote access, which types of telework devices are permitted to use each form of remote access, and the type and amount of access each type of teleworker is granted, and identify and specify particular information and documents that require the utmost care in its handling.
3. Specify in writing what employees can and cannot do in the handling of sensitive/protected information.
4. Require any PI and PHI be encrypted before being transmitted.
5. Ask employees to specify which devices they will use for work and provide encryption services with a company certified security software.
6. Equip employee devices with remote access capability, security software, and the latest manufacturer software updates.
7. Ask employees to password-protect their personal networks with WPA2 encryption.
8. Equip employee issued remote access devices with access controls that limit employee access to minimum services and functions, including disabling employee's use of administrative privileges use of external thumb drives, hard drives, and third-party cloud services (e.g. Google Drive, DropBox).
9. Require employees to return sensitive files and paper documents to the office or corporate infrastructure, especially financial and healthcare-related documents
10. Require multifactor, two-step authentication for employee remote access.
11. Require employees to periodically change their username and password credentials.
12. Require employees to use an encrypted virtual private network (VPN) for remote access.
13. Include warning labels on incoming messages and emails that originate from outside of the corporate infrastructure.
14. Advise teleworkers to refrain from using a speakerphone or conducting work-related conversations in the presence of smart speakers or home surveillance (e.g. Alexa Echo, Google Home, Siri, Ring).
15. Opt-out of cookies each time when using video-conference apps/functions.

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COVID-19 RETURN-TO-WORK CHECKLIST FROM A CANADIAN EMPLOYMENT LAW PERSPECTIVE

by Eric Kay, Wendy G. Hulton, Tracy Bergeron Lucha, and Mark S. Shapiro

As workplaces across Canada begin to reopen in the midst of the COVID-19 pandemic, there are a number of considerations for employers and employees. Regard must be had to compliance with federal and provincial occupational safety and health legislation ("**OSHA**") and return to work guidelines.

Generally, employers have a duty to take every precaution reasonable in the circumstances for the protection of workers. Specifically, during the COVID-19 pandemic, that will mean employers need to consider providing additional personal protective equipment ("**PPE**") and training in how to use PPE and to take other steps to prevent the spread of COVID-19 in the workplace.

The federal government and each province have issued or will be issuing return-to-work guidance that is both of general application and applicable to specific industries or sectors of the economy. Ontario's guidelines can be found here.

Beyond the legislation and guidelines, here is a checklist of issues that employers should be considering as they develop a return to work plan specific to their business.

1. Stay Informed

- ❑ Continue to monitor Health Canada, Provincial Chief Medical Officer of Health, Centers for Disease Control and Prevention as well as OSHA websites for insight relating to COVID-19 issues in the workplace.
- ❑ Keep up-to-date with federal and provincial government requirements for reopening.
- ❑ Continue to monitor COVID-19 plans in the community in which your workplace is located. Local plans may have a significant impact on workplace operations.
- ❑ Continue to stay informed about school and public transportation disruptions, which may impact the workforce.

2. Create and Implement a Response and Communication Plan

- ❑ Identify a team of individuals and a point of contact for the response plan. Be sure to involve key decision-makers, managers, and health and safety members where necessary.
- ❑ Ensure flexibility—be ready to modify or amend workplace practices as needed.
- ❑ Where necessary, prioritize customers, identify alternative suppliers, and determine whether it may be appropriate to reduce operations.
- ❑ Prepare a plan of communication to employees that addresses:
  - Teleworking policies and staggered schedules, which can contribute to physical distancing and reduce the likelihood of your whole workforce being exposed.
  - Availability of statutory leaves under employment standards legislation and employer vacation, sick leave and other leaves.
  - Employee anxiety and misinformation.
  - Who employees should contact for further information.

3. Create and Implement a Safety Plan

- ❑ Consider where, when, and how employees may be exposed (such as from the public or other co-workers).
- ❑ Consider employees' individual risk factors.
- ❑ Follow governmental legislation, regulations, and any specific health and safety guidelines for specific activities, services, and industries.
- ❑ Consider limitations on nonessential travel.
- ❑ Communicate basic prevention measures, consistent with governmental guidelines:
  - Promote hand hygiene—frequent handwashing for all employees, visitors, and customers.
  - Provide soap and water (or hand sanitizer authorized for sale in Canada by Health Canada) where possible.
  - Encourage respiratory etiquette, including covering coughs and sneezes.
  - Provide tissues and trash bins.
  - Social distancing in the workplace.
- ❑ Consider employee screening, including temperature checks and symptom questionnaires. See below relative to confidentiality.
- ❑ Develop policies for identification and isolation of sick or exposed employees as well as return to work policies.
- ❑ Encourage employees to self-monitor for signs and symptoms of COVID-19.
- ❑ Ask employees who have been exposed to COVID-19 or have traveled to a high-risk location to work from home for an incubation period of 14 days.
- ❑ Develop clear policies for reporting to human resources or management when an employee becomes sick or begins experiencing symptoms and for reporting policy violations.
- ❑ Implement engineering controls such as high-efficiency air filters or sneeze guards where appropriate.
- ❑ Increase the frequency of workplace cleaning and sanitation, especially high touch surfaces and shared equipment.
- ❑ Impose clear limits on the size of meetings and events and the number of people permitted in cafeterias, kitchens, lounges, and boardrooms.
- ❑ Consider staggering arrival and break times.
- ❑ Continue to limit non-essential business travel.
- ❑ Ensure the proper use of personal protective equipment where appropriate, including face masks, respiratory protection, gowns, gloves, and face shields.
- ❑ Considering ensuring that the plan has general applicability to cover other infectious diseases including a plan for management of future pandemics.
- ❑ Consider issues and measures for responding in shared building, office, or workplace environments.
- ❑ Follow existing OSHA standards, public health, privacy, and human rights requirements.

4. Consider Leave Options

- ❑ Review existing policies to ensure consistency with federal, provincial, and local law, as applicable to your workplace.
- ❑ Track employees' use of leave, reason for leave, and duration.
- ❑ Ensure that individuals on leave return to their prior positions.
- ❑ To avoid layoffs, consider applying under the various federal wage assistance programs or adopting shared work programs.
- ❑ Prepare for potential work refusals.

5. Consider Confidentiality

- ❑ Be mindful of the privacy and confidentiality obligations regarding employee health information.
- ❑ Require employees infected with COVID-19 to identify all individuals who have worked in close proximity.
  - Inform other employees of any possible exposure, *but keep the identity of infected employees confidential.*
- ❑ Consider noninvasive screenings for employees, including body temperature checks and symptom questionnaires when entering the workplace and keep up to date with other options for testing/screening and applicable law. Remain cognizant of statutory guidelines relative to confidentiality:
  - (1) Results must be kept separate from personnel files.
  - (2) Maintain confidentiality of temperature results.
  - (3) You may disclose the name of an employee that has tested positive for COVID-19 to a public health agency.

6. Consider Workers' Compensation Issues

- ❑ Remain abreast of developments applicable to the jurisdiction of the business.
- ❑ Consider the nature of employment relative to a confirmed case of COVID-19 for e.g.:
  - Evidence of source for contracting the disease during the course of employment.
  - Work that presented the employee with an increased risk of contracting COVID-19.
  - Factors that suggest employment activities sufficiently establish a significant opportunity for contact.
- ❑ Consider how the statutory time limit for filing a claim or objecting to a decision has been impacted by emergency declarations.
- ❑ Monitor applicable statute and board publications for possible inclusion of COVID-19 as an occupational disease for industry-specific workers.

7. Remain Cognizant of Human Rights Issues and Anti-Discrimination/Anti-Harassment Policies

- ❑ Remind employees that discrimination or harassment on the basis of any protected class under applicable federal and provincial human rights legislation is prohibited.
- ❑ Consider redistributing anti-discrimination and anti-harassment policies.
- ❑ Consider training for management and supervisory staff relative to responding to comments about COVID-19 and employees who may have been affected.

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COVID-19 RETURN-TO-WORK CHECKLIST FROM AN EMPLOYMENT LAW PERSPECTIVE

by Aaron V. Burrell

As employers attempt to return to workplaces in the midst of the COVID-19 pandemic, there are a number of considerations they must be mindful of. Indeed, among other things, employers must be sure to establish a COVID-19 response plan, refine their communications and policies, examine travel policies, and ensure compliance with state and federal leave laws. Employers must also remain cognizant of their obligations under the General Duty Clause of the Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 654(a)(1), which requires employers to provide "employment, and a place of employment, which are free from recognized hazards that are causing or likely to cause death or serious physical harm." Below is a checklist of issues employers should be mindful of.

1. STAY INFORMED

- ❑ Continue to monitor the Centers for Disease Control, World Health Organization, and OSHA websites for insight relative to navigating COVID-19 issues for employers.
- ❑ Learn of COVID-19 plans in the community where your business operates. Local conditions may have a significant impact on your business operations.
- ❑ Continue to stay informed relative to school and public transportation disruptions, which may affect business operations.

2. CREATE AND IMPLEMENT A RESPONSE AND COMMUNICATION PLAN

- ❑ Identify a team of individuals and a point of contact for the response plan. Be sure to involve key decision-makers and managers.
- ❑ Ensure flexibility—be ready to modify or amend business practices as needed.
- ❑ Where possible, prioritize customers, identify alternative suppliers, and determine where it may be appropriate to reduce operations.
- ❑ Prepare a plan of communication to employees that addresses:
  - Teleworking policies and staggered schedules, which may be effective at increasing the physical distance among employees.
  - Availability of company vacation and standard paid-sick leave under company policy.
  - Employee anxiety and misinformation.
  - Who employees should contact for further information.

3. CREATE AND IMPLEMENT A SAFETY PLAN

- ❑ Consider where, when, and how employees may be exposed (such as from the public or other co-workers).
- ❑ Consider employees' individual risk factors.
- ❑ Follow governmental regulations.
- ❑ Consider limitations on nonessential travel.
- ❑ Communicate basic prevention measures, consistent with governmental guidelines:
  - Promote hand hygiene—frequent handwashing for all employees, visitors, and customers.
  - Provide soap and water (or hand sanitizer with at least 60% alcohol) where possible.
  - Encourage respiratory etiquette, including covering coughs and sneezes.
  - Provide tissues and trash bins.
- ❑ Consider employee screening, including temperature checks and symptom questionnaires. See below relative to confidentiality.
- ❑ Develop policies for identification and isolation of sick or exposed employees.
- ❑ Encourage employees to self-monitor for signs and symptoms of COVID-19.
- ❑ Ask employees who have been exposed to COVID-19 or traveled to a high-risk location to work from home for an incubation period of 14 days.
- ❑ Develop clear policies for reporting to human resources or management when an employee becomes sick or begins experiencing symptoms.
- ❑ Implement engineering controls such as high-efficiency air filters or sneeze guards where appropriate.
- ❑ Ensure the use of personal protective equipment where appropriate, including face masks, respiratory protection, goggles, gloves, and face shields.
- ❑ Considering ensuring that the plan has general applicability to cover other infectious diseases.
- ❑ Follow existing OSHA standards.

4. CONSIDER LEAVE OPTIONS

- ❑ Review existing policies to ensure consistency with state and federal law, including the Families First Coronavirus Response Act.
- ❑ Track employees' use of leave, reason for leave, and duration.
- ❑ Ensure that individuals on leave return to their prior positions.
- ❑ To avoid layoffs, consider adopting part-time programs, which may allow employees to be eligible for partial unemployment insurance benefits.
- ❑ Consider potential applicability of WARN Act requirements.

5. CONSIDER CONFIDENTIALITY

- ❑ Require employees infected with COVID-19 to identify all individuals who have worked in close proximity.
  - Inform other employees of any possible exposure, *but keep the identity of infected employees confidential.*
- ❑ Consider non-invasive screenings for employees, including body temperature checks and symptom questionnaires when entering the workplace. Remain cognizant of EEOC guidelines relative to confidentiality:

- (1) Results must be kept separate from personnel file.
- (2) Maintain confidentiality of temperature results.
- (3) You may disclose the name of an employee that has tested positive for COVID-19 to a public health agency.

6. CONSIDER WORKERS' COMPENSATION ISSUES

- ❑ The law remains unsettled relative to workers' compensation and COVID-19. It is advisable to remain abreast of developments.
  - There are questions as to whether COVID-19 will be considered an "ordinary disease of life," which generally will not be covered.
- ❑ Consider the workers' compensation factors relative to COVID-19:
  - Will the employee be able to demonstrate that he or she contracted the virus during the "course of their employment."
  - Will the employee be able to demonstrate whether the contraction "arose out of" their employment.
  - Did the position present the employee with an "increased risk" of contracting COVID-19?
- ❑ First responders and certain healthcare workers have a conclusive presumption of coverage in Michigan. EO 2020-10.

7. REMAIN COGNIZANT OF ANTI-DISCRIMINATION/ANTI-HARASSMENT POLICIES

- ❑ Remind employees that discrimination on the basis of any protected class (state or federal) is prohibited.
- ❑ Consider redistributing anti-discrimination and anti-harassment policies.
- ❑ Consider training for supervisory staff relative to responding to comments about COVID-19 and employees who may have been affected.

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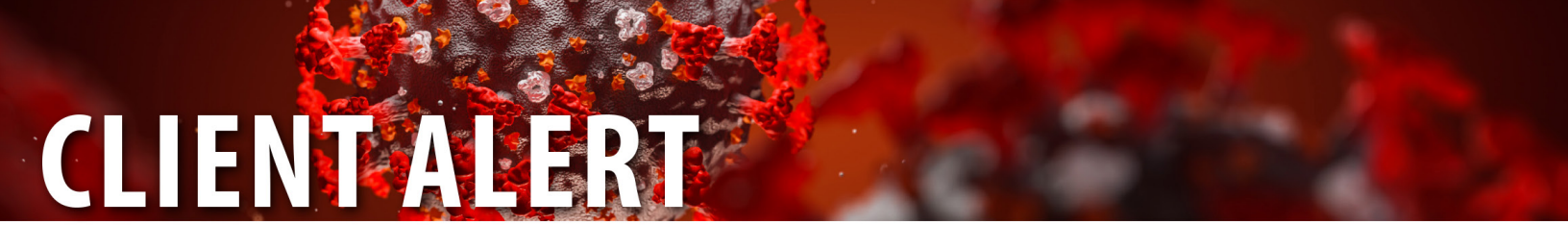

CLIENT ALERT

COVID-19/CANADA

COVID-19 WAGE SUBSIDY BILL RECEIVED ROYAL ASSENT ON APRIL 11, 2020

by Daniel D. Ujczo, Wendy G. Hulton, Lucie D. Kroumova and Jacky Cheung

Bill C-14: *A second Act respecting certain measures in response to COVID-19* (the "**COVID-19 Wage Subsidy Bill**") – the second piece of emergency legislation of the COVID-19 pandemic – received royal assent on Saturday, April 11, 2020. The COVID-19 Wage Subsidy Bill allows the federal government to proceed with the previously announced $73 billion wage subsidy program for employers seeking relief for wage obligations in a declining economic climate.

The following are highlights of the COVID-19 Wage Subsidy Bill which provide additional details and confirm the announcements from last week:

- The Canada Emergency Wage Subsidy ("**CEWS**") provides a 75% wage subsidy to employers, up to $847 per week per employee, for 12 weeks, retroactive to March 15, 2020;
- The list of entities eligible for the CEWS includes corporations, individuals, registered charities (other than public institutions), agricultural organizations, boards of trade and chambers of commerce, nonprofit corporations for scientific research and experimental development, labour organizations, certain not-for-profit organizations such as clubs, societies or associations, partnerships, and other prescribed organizations. The COVID-19 Wage Subsidy Bill leaves open the possibility of other entities being included on this list;
- For the CEWS, the wages eligible for the subsidy are based on the average amount of weekly eligible remuneration paid to the employee between January 1, 2020 and March 15, 2020. Certain amounts are excluded. The precise calculation is extremely technical;
- Under the CEWS, there are three qualifying periods: (i) March 15, 2020 to April 11, 2020; (ii) April 12, 2020 to May 9, 2020; and (iii) May 10, 2020 to June 6, 2020;
- The COVID-19 Wage Subsidy Bill allows the government to extend the CEWS for additional periods up to September 30, 2020. Any further extension would require regulation or an amendment to the bill;
- As previously announced, employers must demonstrate a revenue loss of 15% in the first period to be eligible for the CEWS and a 30% decrease in revenue for subsequent periods ("**Revenue Loss Threshold**");
- For the Revenue Loss Threshold calculation, employers have the option of comparing their revenue in March, April, and May 2020 to that of the same month in 2019 or against the average of their revenue earned in January and February 2020. This option provides flexibility to employers in sectors that faced difficulties in 2019, high-growth firms, nonprofits and charities, and businesses established after February 2019. Employers that choose to compare their revenue against their average revenue in January and February 2020 must do so for all qualifying periods;
- CEWS applications must be submitted and received by the government before October 2020. Employers should avoid leaving applications to the last minute as it is not clear whether applications submitted will be received on the same date;
- The CEWS application will require individuals who are principally responsible for the financial activities of the employer to attest that the application is complete and accurate in all material respects. Chief Executive Officers, Chief Financial Officers, and Treasurers should take note of this obligation;
- The rules for calculating revenue varies depending on the type of entity. Calculations should be based on the inflow of cash, receivables, or other consideration arising in the course of the ordinary activities of the entity – generally from the sale of goods, the rendering of services, and the use by others of resources of the eligible entity;
- Revenue should be calculated using normal accounting practices. Employers may elect to use a cash accounting or accrual method. However, the election to use a cash accounting method will apply to all qualifying periods;
- Satisfying the Revenue Loss Threshold in one period allows the employer to automatically qualify for the CEWS in the subsequent period;
- The overpayment wage subsidy formula in the COVID-19 Wage Subsidy Bill, confirms the federal government's previous announcement that employers will be fully refunded for certain contributions to Employment Insurance, the Canada Pension Plan, the Quebec Pension Plan, and the Quebec Parental Insurance Plan. This refund would apply to employer-paid contributions for eligible employees for each week the employee is on leave with pay. Further details of this refund may be provided in the CEWS application or in future regulations.
- Employers who engage in artificial transactions to reduce their revenue must repay the amount of the subsidy that was improperly claimed and pay a penalty equal to 25% of the value of the subsidy claimed; and
- The government has the ability to publicly share the name of employers who have applied for the CEWS.

Employers can apply for the CEWS through the Canada Revenue Agency's

My Business Account portal. More details about the application process are expected to be announced shortly. For official Government of Canada updates and information about Canada's response to COVID-19, visit: http://canada.ca/coronavirus/.

Dickinson Wright's teams in Canada and the U.S. are available to assist with navigating these programs. Please Note: These materials do not constitute legal advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently. As such, it is important to ensure you are aware of current information and that you consult with a lawyer before making your business decisions. For further information, please contact the authors.

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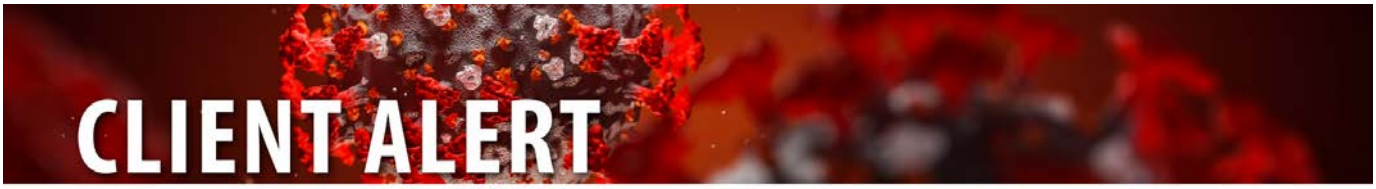
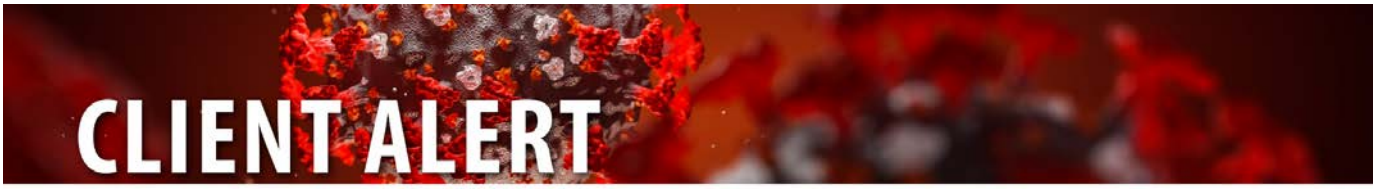


COVID-19: The Essential Need-to-Know Guide for Employers and Employees

by Toronto Office Employment Lawyers

The immediate impact of the 2019 novel coronavirus ("**COVID-19**") has caused major disruptions to Ontario's workplaces. In recent weeks, new questions have emerged for employers, including whether their workplace is considered an essential or nonessential business, whether lay-off is appropriate, whether their business qualifies for any government relief, and what new measures exist to help provide funding for payroll. This guide provides an overview of all of these questions and more as of March 31, 2020. As the situation evolves, the Dickinson Wright LLP team will continue to provide updates in order to help employers and employees navigate the COVID-19 pandemic.

If you have any immediate questions or require further information, please reach out to your Dickinson Wright LLP lawyer or contact the dedicated Dickinson Wright LLP COVID-19 email at COVID19info@dickinsonwright.com.



1. Closure of Nonessential Businesses

The Government of Ontario ordered the mandatory closure of all non-essential workplaces effective as of Tuesday, March 24th, 2020 at 11:59 p.m. This closure is in place for 14 days, with the possibility of an extension. The mandatory closure includes all for-profit and nonprofit businesses that provide goods or services. The mandatory closure does not include businesses that operate online, by telephone, or by mail/ delivery. Businesses may telework and engage in online commerce.

Nineteen categories of businesses were deemed essential, each with their own subcategories and descriptions. At this time, the province requires business owners to review the list of essential businesses that are authorized to stay open, to determine whether they fit into any of the categories and, if they do, to make a business decision as to whether to stay open and/or adapt their operations.

Where a business believes that it should be classified as "essential," but is otherwise directed or advised by the government to temporarily close, the business will need to make a risk assessment as to whether it should remain open. Failure to comply with the mandatory closures can result in fines of up to $10 million for noncomplying corporations, and $500,000 for directors and officers of a noncomplying corporation. At the moment, the government has not introduced a dispute process for businesses who disagree with any decision made by the government to order the closure of a business.

For any questions relating to the closures, the province can contact the Stop the Spread Business Information Line at 1-888-444-3659. The information line is available from Monday to Sunday, from 8:30a.m. to 5:00p.m. Please note, there are significant wait times to speak to a representative.

2. Workplace Exposure to Suspected or Confirmed COVID-19 Cases

Generally, Canadian privacy statutes provide exceptions to consent for the disclosure of personal information in emergency situations involving threats to life, security or health of an individual, or the public at large. We believe that disclosure of certain information in response to the COVID-19 pandemic may qualify for this exception.

a. Requesting Information

Employers may ask employees whether they have tested positive for COVID-19, or whether they have been exposed to certain risk factors, such as recent travel or coming into contact with others who have tested positive for the COVID-19 virus.

b. Disclosing Information

It may be important for employers to advise their employees that there has been a confirmed case of COVID-19 in the workplace. However, **this disclosure must be limited** to the greatest extent possible. During a pandemic, the question of what is reasonable and appropriate to disclose will be informed by various factors, including guidance from health authorities, advice from

healthcare professionals, and fact-specific considerations such as the type, breadth, and volume of personal information required to be collected or disclosed in the circumstances. Employers are typically advising co-workers who may have worked in close proximity to someone who has tested positive for COVID-19.

If an employee requires leave due to COVID-19 related matters (e.g. for self-isolation, to care for a family member, etc.), employers should not disclose the reasons for an employee's leave or remote working arrangements, except on a limited basis to those employees who require that information to carry out their employment duties or to maintain a safe workplace.

What is necessary for the purposes of disclosure may depend on the employer's health and safety obligations to employees under the *Occupational Health and Safety Act* or on what is required by public health authorities. The ultimate objective is to provide sufficient but limited disclosure to potentially exposed employees to enable them to protect themselves and those they interact with and prevent further exposure in the workplace.

Employers should never provide the following identifiable information:

- The name, date of birth, or other identifiers of the individual who is the subject of suspected or confirmed COVID-19.
- If known, the date of the individual's exposure and the extent and circumstances of their potential exposure.

An exception to these restrictions, as permitted by Canadian privacy laws, is the disclosure of personal information without knowledge or consent of the individual in an emergency that threatens the life, health, or security of another individual. Consultation with a qualified medical professional and legal counsel should occur when determining whether the situation constitutes an emergency.

c. Screening in the Workplace

Given the highly infectious nature of the COVID-19 virus and staggering infection rates across Canada, screening measures, such as taking the temperature of employees, may be reasonable in certain workplaces. Before implementing temperature screening policies, employers must consider the following:

- An employee should only be tested if they first consent. If an employee refuses to be tested recourse should be made available through the employer's COVID-19 policy.
- Screening must be conducted in the least intrusive manner available (i.e. non-contact methods are preferred to contact thermometers).
- Advance notice of the temperature screening should be provided, with details regarding the methods and purposes of the test.
- The tests should be administered by qualified individuals, in a safe manner that does not expose employees to health risks.
- If employees test within an ordinary temperature range, their medical information should not be retained by the employer.

- Individuals who test above a normal level which would cause concern to medical professionals must be asked to leave the workplace in a safe and discrete manner and to seek appropriate medical attention

In conjunction with the employer's COVID-19 policy in the workplace, employees can be made responsible for self-screening or self-monitoring for symptoms they experience while they are away from the workplace and for contacting their employer if they suspect they are unfit for work due to a virus-related illness.

3. Reporting

Most employers do not have a legal obligation to report a suspected COVID-19 case to public health authorities. However, some employers/employees in a management role have an obligation to report suspected or confirmed cases to Ontario's Chief Medical Officer including (but not limited to):

- Health professionals.
- School principals.
- Superintendents of stipulated institutions.
- Laboratory operators.

The obligation to report occupational illness to the Ministry of Labour is limited to situations where employees were exposed to the illness in the workplace, or if the employee files a claim for occupational illness with the Workplace Safety and Insurance Board ("**WSIB**"). See the section below on WSIB for further details.

4. Refusal to Work

Under section 43 of the *Occupational Health and Safety Act*, most workers are entitled to refuse to work if they have a reasonable belief that working would put their personal health and safety at risk. Personal health and safety risks can include where "the physical condition of the workplace" is likely to put them in danger. In light of the COVID-19 pandemic, workers may refuse to work if their employer cannot, fails, or refuses to take appropriate measures to ensure the physical condition of the workplace will not spread COVID-19.

While most employees may be able to refuse work, those in certain professions, such as first-responders or those who work in hospitals are not entitled to refuse work in light of conditions that may put their personal health and safety at risk.

An employee refusing to work must report the circumstances of his/her refusal to their employer or supervisor. The employer/supervisor must then investigate the report. If the employer decides there is no hazard, but the employee continues to refuse to work, the employer must report the refusal to the Minister of Labour. An inspector appointed by the Ministry of Labour will visit the workplace to investigate. During this time, the employer cannot assign another employee to work in that job or area

of the work refusal in that workplace until that other employee has been advised of the other worker's refusal and the reason for that refusal.

Most importantly, employers should not dismiss, discipline, or intimidate employees if the refusal was properly exercised and in good faith. Employers considering discipline for a worker who refuses to work should consult a lawyer prior to taking any course of action.

5. <u>Protected Leave</u>

In the last couple of weeks, both the federal and Ontario governments have passed legislation granting employees affected by COVID-19 protected unpaid leave. The *Canada Labour Code* ("**CLC**") applies to federally regulated businesses and industries, such as banks, air transportation, telephone and broadcasting, and most Crown corporations, among others. Most other businesses or industries in Ontario that are not federally regulated are subject to the *Employment Standards Act* ("**ESA**"). It is important to identify which legislation is applicable to understand the changes that impact your business or industry.

a. Federal Amendments to the *Canada Labour Code*

On March 25, 2020, the federal government passed Bill C-13, *COVID-19 Emergency Response Act*. This legislation introduces amendments to the *Canada Labour Code* and other related acts and provides for unpaid leave of up to 16 weeks for employees who are unable or unavailable to work for reasons related to COVID-19. An employee does not have to provide a certificate or medical note issued by a healthcare provider, but an employee is required to give written notice to their employer setting out the reasons for the leave and its length as soon as possible.

If an employee provides written notice to their employer, the employer must make note of the following:

- Reprisals: Employers cannot discipline, demote, lay-off, or dismiss an employee or threaten an employee with any of the foregoing because the employee is taking COVID-19 leave.
- Benefits: Employers must still continue to provide pension, health, and disability benefits, and seniority or service accumulation for the duration of the leave. If applicable, employees are responsible for benefit contributions during the leave, unless they declare they wish to discontinue their benefits during the leave. Employers must continue to pay their proportionate contributions during the leave, if any.
- Opportunities: Where an employee provides a written request, the employer must continue to provide information to the employee on leave of employment, promotion, or training opportunities relating to the employee's qualifications that arise while the employee is on leave.
- Vacation: Vacations may be interrupted to take COVID-19 related leave.
- Parental Leave: The 78-week period for parental leave may be extended, and the 68 weeks available for parental leave may be interrupted in circumstances of a COVID-19 related leave.

b. Ontario's Amendments to the *Employment Standards Act*

On March 19, 2020, the Ontario government passed the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* which adds s.50.1 to the *Employment Standards Act, 2000* ("**ESA**"). This legislation entitles employees to unpaid, job-protected leave during a declared or designated infectious disease emergency, which is deemed to include COVID-19. The job-protected leave is retroactive to January 25, 2020, and remains in effect until the COVID-19 emergency is declared lifted. Employees that are protected under the leave include full-time workers, part-time workers, students, temporary help agency assignment employees, and casual workers.

Employees are not required to provide a medical certificate or note in order to take this new infectious disease leave. However, employers may ask the employee to provide reasonable evidence to show that leave is required. This can include evidence that an airline cancelled their flight or that a daycare is closed.

The amendments to the ESA provide job protection for employees unable to work for the following COVID-19 related reasons:

- Employee is under medical investigation, supervision or treatment.
- Employee is acting in accordance with an order under the *Health Protection and Promotion Act*.
- Employee is in isolation or quarantine in accordance with public health information or directive.
- Employer directs the employee not to work due to concern that COVID-19 could spread in the workplace.
- Employee needs to provide care to a prescribed individual for COVID-19 related reasons.
- Employee is prevented from returning to Ontario due to COVID-19 travel restrictions.

Employers are not required to pay employees who are quarantined or otherwise unable to work because of a qualifying COVID-19 related leave of absence (unless the business's employment or workplace policy says otherwise). While employees employed for two or more consecutive weeks are entitled to sick leave of three days per calendar year under the ESA, this leave is unpaid unless the employee's contract of employment specifically allows for paid sick leave.

The general provisions in the ESA concerning other types of statutory leaves also apply to a COVID-19 leave. These include the right to be free from reprisal, the right to continue to participate in benefit plans (provided employee contributions are made, as applicable), and the right to continue to accumulate credit, as applicable, for length of employment, length of service, and seniority. Finally, as a job-protected leave, a qualifying COVID-19 leave also entitles the employee with the right to reinstatement after the leave ends; subject to instances where an employer dismisses an employee for legitimate reasons completely unrelated to COVID-19. Such instances should be discussed with an employment lawyer.

6. Lay-off and Termination

a. Lay-off

In Ontario, the framework for lay-off is set out in the ESA; however, where temporary lay-off is not expressly permitted in a contract of employment, collective agreement, or in some instances, sufficiently covered by a workplace policy, lay-off runs the risk of prompting a constructive dismissal claim.

Generally in Ontario there is no requirement to provide advance notice of a lay-off. Subject to an employment policy that states otherwise or a registered plan for supplemental employment benefits, employers are not required by legislation to pay an employee (or provide them with benefits) during a period of temporary lay-off. In Ontario there are no mass or group termination considerations for temporary lay-offs; however, should the lay-off extend beyond the allotted time periods prescribed under the ESA mass termination entitlements may apply.

The ESA specifies the time periods for lay-off, following which the employee will be deemed to be terminated and subsequently entitled to termination pay, and if applicable, severance pay. The employee is deemed to have been terminated on the first day of the lay-off.

If the employer does not have a lay-off provision in its employment agreements or the ability to argue that it is implied by the nature of the workplace or industry, laying somebody off (even temporarily) could be a constructive dismissal and may expose the employer to a lawsuit (see discussion below on constructive dismissal).

In these circumstances, many employers are asking their employees to voluntarily agree in writing to temporary lay-offs.

In Ontario, to qualify a period of employee absence as a lay-off rather than an immediate termination of employment, the following ESA criteria apply:

- The term of the lay-off is less than 13 weeks in a period of 20 consecutive weeks; or
- The term of the lay-off is more than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks in any period of 52 weeks, and where:
    - the employee continues to be paid substantial payments from the employer;
    - the employer continues to make payments to the employee's pension plan or insurance plan;
    - the employee receives supplementary unemployment benefits;
    - the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if they were not employed elsewhere;
    - the employer recalls the employee within a time limit approved by the Director of Employment Standards; or in the non-unionized context, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or

- in a unionized workplace, the employer recalls the employee within the time set out in an agreement between the employer and the employee.

A substantial reduction in an employee's working hours may constitute a lay-off. An employee is considered to be on lay-off if they earn less than 50% of the amount they would earn at their normal pay rate in a regular workweek.

Employers should review their employment agreements and policies in order to determine whether a temporary lay-off is an option that they would like to pursue. Employers who seek to impose a temporary lay-off should ensure that they comply with applicable provincial legislation (i.e. the ESA for employees in Ontario).

At the federal level, a lay-off is considered a termination when the employer has no intention of recalling the employee to work.

The *Canada Labour Code* provides for temporary lay-offs as follows:

- the lay-off is for a duration of 3 months or less;
- the lay-off is for a duration of 3 to 6 months with a fixed date of recall; or
- the lay-off is for a period of more than 3 months where:
  - The employee continues to receive payments during the term of the lay-off from their employer in an amount agreed upon by the employee and the employer;
  - The employer continues to make payments for the benefit of the employee to a pension plan that is registered under the Pension Benefits Standards Act, 1985, or under a group or employee insurance plan;
  - The employee receives supplementary unemployment benefits; or
  - The employee would be entitled to supplementary unemployment benefits but is disqualified from receiving them pursuant to the *Employment Insurance Act*.

In addition, in circumstances where there are periods of re-employment that last less than two weeks, these are not included in determining the term of lay-off. Lay-offs may also be directed by the provisions of a collective agreement, and where employees retain a right of recall, such lay-offs are permissible. If you are contemplating lay-offs, it is recommended that you seek advice from legal counsel.

b. Constructive Dismissal

Notwithstanding the provisions of the ESA, Ontario courts have held that unless an employment contract or other agreement includes a right, either express or implied, to lay-off an employee, the lay-off is a negative fundamental change to the employment relationship. Accordingly, laying-off an employee in the absence of an implied or expressed right (or agreement of the employee) may amount to a fundamental breach of the employment contract. In these cases, an employee will be deemed to have been constructively dismissed and the employee may commence a wrongful dismissal lawsuit.

A reduction in an employee's hours of work could also be considered a form of constructive dismissal. This may be the case even if the reduction in hours does not meet the threshold for lay-off as specified under the ESA.

A constructive dismissal arises in circumstances where there has been a unilateral change by the employer to the terms and conditions of employment. There is no constructive dismissal if the employee has agreed to the change.

An employer may be able to assert that they have an implied right to lay-off employees in light of the COVID-19 outbreak and government mandated closure of businesses. As it remains unclear how courts will interpret lay-offs in the current environment, we recommend that employers continue to be cautious and take the following steps, if possible:

- Maintain records that provide evidence of the necessity of the decision to temporarily lay-off the employees.
- Ensure that a temporary lay-off proceeds in accordance with the ESA.
- Request an employee's consent to the temporary lay-off.
- Consider whether continuation of benefits or payment towards insurance plans is possible.

In any event, if the employee claims their lay-off actually amounts to constructive dismissal, the employee will have an obligation to mitigate their damages. For example, if an employee is on lay-off, but is later recalled to work and declines to return, this may significantly lower the value of their claim against their employer.

c. Termination

An employee cannot be terminated for taking protected leave due to COVID-19. However, an employer can terminate an employee at a workplace impacted by COVID-19 without cause. Employers generally have a right to terminate their employees without cause at any time, subject to the terms of their employment agreement or provision of reasonable notice of termination (or pay in lieu of notice).

The ESA sets out the statutory minimums an employee is entitled to on termination. The amount of notice is based on years of service and can be up to a maximum of eight weeks or pay in lieu of the same. In addition, an employee with five or more years of service with the employer may be entitled to severance pay equal to approximately one week's pay per year of service to a maximum of 26 weeks. Severance pay is required if an employer has an annual payroll in Ontario of $2.5 million or more, and the employee has five or more years of service with the employer or if 50 or more employees are terminated from a workplace in a six-month period. There are complex legal issues in the event an employer will be making a "mass termination" and which could be triggered by a mass lay-off involving 50 or more employees that extends beyond the time limits in the ESA. Such instances should be conducted with the advice of a lawyer.

During this time, employers must ensure the terminations cannot be perceived to be based on any prohibited ground of discrimination under the *Human Rights Code* or related to any employee's decision to take a leave in connection with COVID-19.

7. Employment Insurance

Employees on lay-off as a result of business slowdowns or mandatory closures may be eligible to receive regular Employment Insurance ("EI") benefits. To qualify for EI benefits when an employee is experiencing a lay-off due to economic reasons, an employee must meet the minimum number of "insurable hours" calculated over the previous 52 weeks.

The federal government has recently adopted measures to respond to novel challenges posed by COVID-19 including:

- Waiving the one-week waiting period to allow new EI claimants who are in quarantine to be paid for the first week of their claim.
- Facilitating a dedicated toll-free number at 1-833-381-2725, to support enquiries related to waiving the EI sickness benefits waiting period.
- Removing the obligation for people in quarantine to provide a medical certificate in support of their claim.
- Introducing the opportunity for certain quarantined employees to apply for EI benefits at a later date and to have their claim backdated to cover the period of the delay.
- Allowing employees who are required to self-isolate by an employer for reasons consistent with a directive of public health authorities to have access to EI benefits.

When employees experience an interruption in their earnings, an employer must quickly issue a Record of Employment ("**ROE**"), typically within five days of the last day of work, as an ROE is required for employees to access EI benefits. In order to complete the ROE, employers should be aware of and use the following codes when indicating the reason for the interruption in employee earnings:

- When the employee is sick or quarantined, use code D (illness or injury) as the reason for separation (block 16). Do not add comments.
- When the employee is no longer working due to a shortage of work because the business has closed or decreased operations due to coronavirus (COVID-19), use code A (Shortage of work). Consult with a lawyer for the use of additional comments.

Employers who have no choice but to lay-off their employees may elect to enroll in a Supplementary Unemployment Benefit Plan (SUB Plan) which allows qualifying employers to "top up" an employee's EI benefits during a period of unemployment due to a lay-off, whether temporary or permanent. The amount of the top-up can be up to 95% of the employee's weekly wages/salary, less the amount of the employee's corresponding EI benefits, and will not decrease the employee's entitlement to EI benefits.

8. Canada Emergency Relief Benefit (CERB)

On March 25, 2020, the federal government announced that it created a streamlined benefit, the "Canada Emergency Response Benefit" ("**CERB**"). The CERB is a taxable benefit that will provide $2,000 a month for up to four months to qualifying workers who lose their income as a result of the COVID-19 pandemic. The Government of Canada introduced the CERB to replace the previously announced Emergency Care Benefit and Emergency Support Benefit, with the intention that the CERB would be a more simplified and accessible option.

Presently, the CERB is intended to support Canadians who have lost their jobs, are sick, quarantined, or are taking care of a prescribed family member who has contracted COVID-19. Working parents who must stay home without pay to care for children who are sick or at home because of school and daycare closures may also be supported by the CERB.

The CERB is available to employees and self-employed workers who:

- Are at least 15 years of age and a resident in Canada.
- Have earned a total income of at least $5,000.00 or more in 2019 or the 12 months prior to their application for the CERB from any of the following sources:
    - employment;
    - self-employment;
    - from pregnancy or parental EI benefits; or,
    - from pregnancy or parental benefits under a provincial plan;
- Cease working for reasons related to COVID-19 for at least 14 consecutive days within the four-week period in which they apply for the CERB payment; and,
- **Do not** receive, in respect of those 14 consecutive days:
    - income from employment or self-employment;
    - EI benefits;
    - pregnancy or parental benefits under a provincial plan; or,
    - any other income that is prescribed by regulation. (At this time, there are no regulations specifying any other disqualifying income sources).

Employers should be sure to inform any employees on an unpaid leave of their ability to apply for the CERB (subject to any prior application for EI) and direct them to resources with more information.

According to the Government of Canada, Canadians would begin to receive their CERB payments within 10 days of application. The CERB would be paid every four weeks and be available, backdated, from March 15, 2020 until October 3, 2020. The application form will be available through a Government of Canada portal on April 6, 2020.

9. Employees and Workplace Safety and Insurance Benefits

A worker is entitled to WSIB benefits for COVID-19 infections caused by the worker's employment. In order to obtain WSIB benefits, a worker must be diagnosed with COVID-19, and the exposure to COVID-

19 must have occurred at the workplace or was a significant contributing factor in the development of the illness.

If an employee is found to be entitled to WSIB benefits, the employee may be eligible for wage loss benefits that include:

- Any period in quarantine pre-diagnosis.
- Healthcare benefits.
- Permanent impairment benefits arising from the disease.
- In cases of fatality, the employee's survivors could receive WSIB benefits.

a. Employer's Reporting Obligations

Employers must report all claims to WSIB by filing an Employer's Report of Injury/ Illness Form 7 within three days of the worker's report of an injury/illness. If the status of the worker changes, the employer must submit a report of material change within 10 days of becoming aware of that change. Examples of a COVID-19 material change could include the employee confirming their COVID-19 diagnosis, a need for more, or different treatment for the employee related to the COVID-19 diagnosis.

b. WSIB's Adjudicative Guideline for COVID-19 Claims

To handle potential COVID-19 related claims, the WSIB has established an adjudicative guideline. Claims for the benefit are adjudicated on a case-by-case basis, based on the merits and justice of the case, taking into consideration the facts and the circumstances surrounding the employee's exposure to COVID-19. When determining entitlement, the WSIB decision-maker will consider whether:

- The nature of the worker's employment created a risk of contracting the disease to which the public at large is not normally exposed; and
- The WSIB is satisfied that the worker's COVID-19 condition has been confirmed.

If these elements are established, these two factors will generally be considered persuasive evidence that the worker's employment made a significant contribution to the worker's illness. When determining entitlement, the decision-maker will consider other relevant questions to inform their decision, including:

- The nature of the worker's employment created an elevated risk of contracting COVID-19:
    - Has a contact source to COVID-19 within the workplace been identified?
    - Does the nature and location of employment activities place the worker at risk for exposure to infected persons or infectious substances?
    - Was there an opportunity for transmission of COVID-19 in the workplace via a compatible route of transmission for the infectious substance?

- The worker's COVID-19 condition has been confirmed:
    - Are the incubation period, the time from the date of exposure and the onset of illness, clinically compatible with COVID-19 exposure that has been established to exist in the workplace?
    - Has a medical diagnosis been confirmed? If not, are the worker's symptoms clinically compatible with the symptoms produced by COVID-19? Is this supported by an assessment from a registered health professional?

The WSIB decision-maker will consider the above factors, but also any other information that may impact the decision-making. This could include information such as the work environment itself, any work processes involved, job tasks, the use of personal protective equipment, the employer's COVID-19 policy, social distancing in the workplace, among other evidence. All of these factors can indicate and inform the decision-maker whether the working environment created a higher risk of contracting COVID-19 that the public is not normally exposed.

Where a claim does not meet these two factors or answer the related questions in the affirmative, that claim will be reviewed on its own merit, based on the circumstances of the individual case.

10. Support for Business

Both the federal and Ontario governments have introduced programs to mitigate the economic effects of COVID-19 for businesses.

The federal government has announced the following programs:

- A Canada Emergency Wage Subsidy: a three-month wage subsidy for eligible employers. The government will cover up to 75% of an employee's salary on the first $58,700 for businesses who have experienced a decrease in revenue of at least 30%. The wage subsidy is retroactive to March 15, 2020. Businesses of all sizes will be eligible for this subsidy. However, the Prime Minister has warned of serious consequences for employers who misuse the subsidy. What this subsidy will mean for employers will depend on the details of the program which have not yet been released.
- Guaranteed bank loans of up to $40,000 for small businesses which will be interest free for the first year. Organizations who are able to repay the balance of the loan on or before December 31, 2022 will result in loan forgiveness of 25% (up to a maximum of $10,000). The federal government has allocated $25B to this program.
- A Business Credit Availability Program through the Business Development Bank of Canada and Export Development Canada and Economic Development Canada for small businesses.
- A deferral of GST and HST payments, duties and taxes owed on imports until June 2020.
- A deferral, until August 31, 2020, of the payment of any income tax owing between March 18, 2020 and September 1, 2020. This applies to tax balance dues and installments under Part I of the *Income Tax Act*. No interest or penalties will accumulate on these amounts during this time.

The Ontario government has announced the following programs:

- A temporary increase in the Employer Health Tax exemption to $1,000,000.
- A five-month relief period between April 1, 2020 and August 31, 2020 for Ontario businesses unable to file or remit their provincial taxes (including employer health tax, gas tax, etc.) on time due to COVID-19.
- A suspension of auditing interactions with most Ontario businesses and representatives for the month of April 2020.
- The deferral of WSIB premiums until August 31, 2020 for all businesses.

11. Work-Sharing

The work-sharing program is designed to help employers and employees avoid lay-offs due to a temporary reduction in business that is beyond the employer's control. As part of the program, employees experiencing reduced working hours will have their income supplemented with EI benefits.

As work-sharing is a three-party agreement between the employee, employers, and Service Canada, employees must agree to a reduced work schedule and be willing to share the available work temporarily. The employee's work reduction cannot exceed 60%. Under normal circumstances, work-sharing programs are capped at 38 weeks. However, in light of the COVID-19 outbreak, work-sharing agreements for businesses who have experienced a downturn in business due to COVID-19 can enter into a work-sharing arrangement for up to 76 weeks.

Employers interested in entering into work-sharing programs with their employees can find more information here: https://www.canada.ca/en/employment-social-development/services/work-sharing.html

12. How to Create Effective COVID-19 Workplace Policies

During this unprecedented time, employers must take extraordinary steps to limit the spread of COVID-19 in order to protect their employees and the public at large. Implementing clear policies and procedures to accomplish this aim is crucial. Employers should consider the following questions in order to adequately prepare and implement effective workplace policies:

a. Risk Evaluation

- In order to tailor your policies and procedures to adequately protect employees and customers, make decisions based on the following:
  - What is the demographic of your workforce and clientele? Are they considered high-risk?
  - What is the demographic in the local community?
  - What type of service do you provide?
  - Do your employees have access to occupational health and safety services including personal protective equipment on site?
  - Does your workplace require travel?

b. Communication

- What do your staff and customers know about COVID-19? Are they aware of the measures you have taken for prevention?
- Do you have the information and technology required for efficient workplace communication with your workforce (e.g. mass email or text capabilities)?

c. Hygiene

- Evaluate the workplace for areas where people have frequent contact with each other and share spaces and objects, and increase the frequency of cleaning in these areas.
- Have you provided the necessary facilities and cleaning products to maintain a clean and safe workplace (e.g. handwashing facilities, hand sanitizing dispensers, personal protective equipment, etc.)?

d. Reduce Social Contact

- Have you considered the feasibility of teleworking arrangements, flexible hours, staggering start times, use of email and teleconferencing?
- Is working from home viable given the nature of work, resources required, legal concerns, etc.?
- Can you minimize the interactions between customers and your employees, such as limiting the number of customers permitted in your establishment at one time or serving your customers virtually or by phone when possible?
- Can you institute measures to ensure your employees are social-distancing in the workplace?
- Have you placed restrictions on allowing visitors to your workplace?

e. Travel

- Can you cancel or postpone all nonessential meetings or travel?
- Can you include measures that restrict business travel in concert with recommendations by the Public Health Agency of Canada?
- Is there a reporting requirement for employees who have travelled either for work or pleasure?
- Have you considered including a requirement for employees travelling for non-business reasons to follow recommendations and advisories on travel and to destinations set out by the Public Health Agency of Canada and the World Health Organization?

f. Reporting

- When and to whom should an employee report their symptoms or exposure to COVID-19?
- How should the employee report their symptoms and exposure?

g. Self-Isolation

- For how long are employees required to self-isolate?

- Who should the employee report to if they have chosen or been asked to self-isolate?
- When and how should an employee return to work following self-isolation? Will you require a medical certificate before they return?

13. Conclusion

The COVID-19 outbreak has had an unprecedented impact on employers and employees that is changing in real-time. Consequently, the contents of this article may become outdated quickly. We recommend that employers seek current, up-to-date legal advice on these issues, and the decisions they may take to address employment matters arising out of the COVID-19 pandemic to be prepared to adapt to any changes. The Dickinson Wright LLP team remains committed to helping our clients navigate this unprecedented time and remains fully available to provide any assistance that may be required.

Special thanks to articling students Carly Walter, Jacky Cheung and Richard Schuett for their contributions to this piece.

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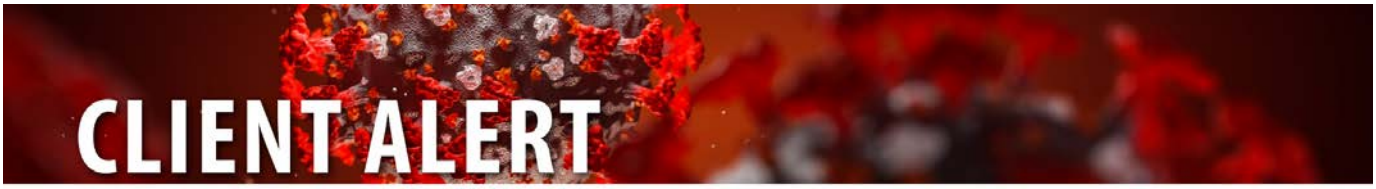
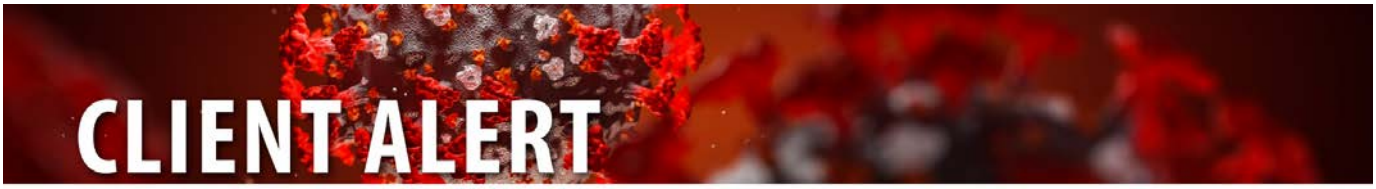


COVID-19: The Essential Need-to-Know Guide for Employers and Employees

by Toronto Office Employment Lawyers

The immediate impact of the 2019 novel coronavirus ("**COVID-19**") has caused major disruptions to Ontario's workplaces. In recent weeks, new questions have emerged for employers, including whether their workplace is considered an essential or nonessential business, whether lay-off is appropriate, whether their business qualifies for any government relief, and what new measures exist to help provide funding for payroll. This guide provides an overview of all of these questions and more as of March 31, 2020. As the situation evolves, the Dickinson Wright LLP team will continue to provide updates in order to help employers and employees navigate the COVID-19 pandemic.

If you have any immediate questions or require further information, please reach out to your Dickinson Wright LLP lawyer or contact the dedicated Dickinson Wright LLP COVID-19 email at COVID19info@dickinsonwright.com.



1. Closure of Nonessential Businesses

The Government of Ontario ordered the mandatory closure of all non-essential workplaces effective as of Tuesday, March 24th, 2020 at 11:59 p.m. This closure is in place for 14 days, with the possibility of an extension. The mandatory closure includes all for-profit and nonprofit businesses that provide goods or services. The mandatory closure does not include businesses that operate online, by telephone, or by mail/ delivery. Businesses may telework and engage in online commerce.

Nineteen categories of businesses were deemed essential, each with their own subcategories and descriptions. At this time, the province requires business owners to review the list of essential businesses that are authorized to stay open, to determine whether they fit into any of the categories and, if they do, to make a business decision as to whether to stay open and/or adapt their operations.

Where a business believes that it should be classified as "essential," but is otherwise directed or advised by the government to temporarily close, the business will need to make a risk assessment as to whether it should remain open. Failure to comply with the mandatory closures can result in fines of up to $10 million for noncomplying corporations, and $500,000 for directors and officers of a noncomplying corporation. At the moment, the government has not introduced a dispute process for businesses who disagree with any decision made by the government to order the closure of a business.

For any questions relating to the closures, the province can contact the Stop the Spread Business Information Line at 1-888-444-3659. The information line is available from Monday to Sunday, from 8:30a.m. to 5:00p.m. Please note, there are significant wait times to speak to a representative.

2. Workplace Exposure to Suspected or Confirmed COVID-19 Cases

Generally, Canadian privacy statutes provide exceptions to consent for the disclosure of personal information in emergency situations involving threats to life, security or health of an individual, or the public at large. We believe that disclosure of certain information in response to the COVID-19 pandemic may qualify for this exception.

a. Requesting Information

Employers may ask employees whether they have tested positive for COVID-19, or whether they have been exposed to certain risk factors, such as recent travel or coming into contact with others who have tested positive for the COVID-19 virus.

b. Disclosing Information

It may be important for employers to advise their employees that there has been a confirmed case of COVID-19 in the workplace. However, **this disclosure must be limited** to the greatest extent possible. During a pandemic, the question of what is reasonable and appropriate to disclose will be informed by various factors, including guidance from health authorities, advice from

healthcare professionals, and fact-specific considerations such as the type, breadth, and volume of personal information required to be collected or disclosed in the circumstances. Employers are typically advising co-workers who may have worked in close proximity to someone who has tested positive for COVID-19.

If an employee requires leave due to COVID-19 related matters (e.g. for self-isolation, to care for a family member, etc.), employers should not disclose the reasons for an employee's leave or remote working arrangements, except on a limited basis to those employees who require that information to carry out their employment duties or to maintain a safe workplace.

What is necessary for the purposes of disclosure may depend on the employer's health and safety obligations to employees under the *Occupational Health and Safety Act* or on what is required by public health authorities. The ultimate objective is to provide sufficient but limited disclosure to potentially exposed employees to enable them to protect themselves and those they interact with and prevent further exposure in the workplace.

Employers should never provide the following identifiable information:

- The name, date of birth, or other identifiers of the individual who is the subject of suspected or confirmed COVID-19.
- If known, the date of the individual's exposure and the extent and circumstances of their potential exposure.

An exception to these restrictions, as permitted by Canadian privacy laws, is the disclosure of personal information without knowledge or consent of the individual in an emergency that threatens the life, health, or security of another individual. Consultation with a qualified medical professional and legal counsel should occur when determining whether the situation constitutes an emergency.

c. Screening in the Workplace

Given the highly infectious nature of the COVID-19 virus and staggering infection rates across Canada, screening measures, such as taking the temperature of employees, may be reasonable in certain workplaces. Before implementing temperature screening policies, employers must consider the following:

- An employee should only be tested if they first consent. If an employee refuses to be tested recourse should be made available through the employer's COVID-19 policy.
- Screening must be conducted in the least intrusive manner available (i.e. non-contact methods are preferred to contact thermometers).
- Advance notice of the temperature screening should be provided, with details regarding the methods and purposes of the test.
- The tests should be administered by qualified individuals, in a safe manner that does not expose employees to health risks.
- If employees test within an ordinary temperature range, their medical information should not be retained by the employer.

- Individuals who test above a normal level which would cause concern to medical professionals must be asked to leave the workplace in a safe and discrete manner and to seek appropriate medical attention

In conjunction with the employer's COVID-19 policy in the workplace, employees can be made responsible for self-screening or self-monitoring for symptoms they experience while they are away from the workplace and for contacting their employer if they suspect they are unfit for work due to a virus-related illness.

3. Reporting

Most employers do not have a legal obligation to report a suspected COVID-19 case to public health authorities. However, some employers/employees in a management role have an obligation to report suspected or confirmed cases to Ontario's Chief Medical Officer including (but not limited to):

- Health professionals.
- School principals.
- Superintendents of stipulated institutions.
- Laboratory operators.

The obligation to report occupational illness to the Ministry of Labour is limited to situations where employees were exposed to the illness in the workplace, or if the employee files a claim for occupational illness with the Workplace Safety and Insurance Board ("**WSIB**"). See the section below on WSIB for further details.

4. Refusal to Work

Under section 43 of the *Occupational Health and Safety Act*, most workers are entitled to refuse to work if they have a reasonable belief that working would put their personal health and safety at risk. Personal health and safety risks can include where "the physical condition of the workplace" is likely to put them in danger. In light of the COVID-19 pandemic, workers may refuse to work if their employer cannot, fails, or refuses to take appropriate measures to ensure the physical condition of the workplace will not spread COVID-19.

While most employees may be able to refuse work, those in certain professions, such as first-responders or those who work in hospitals are not entitled to refuse work in light of conditions that may put their personal health and safety at risk.

An employee refusing to work must report the circumstances of his/her refusal to their employer or supervisor. The employer/supervisor must then investigate the report. If the employer decides there is no hazard, but the employee continues to refuse to work, the employer must report the refusal to the Minister of Labour. An inspector appointed by the Ministry of Labour will visit the workplace to investigate. During this time, the employer cannot assign another employee to work in that job or area

of the work refusal in that workplace until that other employee has been advised of the other worker's refusal and the reason for that refusal.

Most importantly, employers should not dismiss, discipline, or intimidate employees if the refusal was properly exercised and in good faith. Employers considering discipline for a worker who refuses to work should consult a lawyer prior to taking any course of action.

5. <u>Protected Leave</u>

In the last couple of weeks, both the federal and Ontario governments have passed legislation granting employees affected by COVID-19 protected unpaid leave. The *Canada Labour Code* ("**CLC**") applies to federally regulated businesses and industries, such as banks, air transportation, telephone and broadcasting, and most Crown corporations, among others. Most other businesses or industries in Ontario that are not federally regulated are subject to the *Employment Standards Act* ("**ESA**"). It is important to identify which legislation is applicable to understand the changes that impact your business or industry.

a. Federal Amendments to the *Canada Labour Code*

On March 25, 2020, the federal government passed Bill C-13, *COVID-19 Emergency Response Act*. This legislation introduces amendments to the *Canada Labour Code* and other related acts and provides for unpaid leave of up to 16 weeks for employees who are unable or unavailable to work for reasons related to COVID-19. An employee does not have to provide a certificate or medical note issued by a healthcare provider, but an employee is required to give written notice to their employer setting out the reasons for the leave and its length as soon as possible.

If an employee provides written notice to their employer, the employer must make note of the following:

- Reprisals: Employers cannot discipline, demote, lay-off, or dismiss an employee or threaten an employee with any of the foregoing because the employee is taking COVID-19 leave.
- Benefits: Employers must still continue to provide pension, health, and disability benefits, and seniority or service accumulation for the duration of the leave. If applicable, employees are responsible for benefit contributions during the leave, unless they declare they wish to discontinue their benefits during the leave. Employers must continue to pay their proportionate contributions during the leave, if any.
- Opportunities: Where an employee provides a written request, the employer must continue to provide information to the employee on leave of employment, promotion, or training opportunities relating to the employee's qualifications that arise while the employee is on leave.
- Vacation: Vacations may be interrupted to take COVID-19 related leave.
- Parental Leave: The 78-week period for parental leave may be extended, and the 68 weeks available for parental leave may be interrupted in circumstances of a COVID-19 related leave.

b. Ontario's Amendments to the *Employment Standards Act*

On March 19, 2020, the Ontario government passed the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* which adds s.50.1 to the *Employment Standards Act, 2000* ("**ESA**"). This legislation entitles employees to unpaid, job-protected leave during a declared or designated infectious disease emergency, which is deemed to include COVID-19. The job-protected leave is retroactive to January 25, 2020, and remains in effect until the COVID-19 emergency is declared lifted. Employees that are protected under the leave include full-time workers, part-time workers, students, temporary help agency assignment employees, and casual workers.

Employees are not required to provide a medical certificate or note in order to take this new infectious disease leave. However, employers may ask the employee to provide reasonable evidence to show that leave is required. This can include evidence that an airline cancelled their flight or that a daycare is closed.

The amendments to the ESA provide job protection for employees unable to work for the following COVID-19 related reasons:

- Employee is under medical investigation, supervision or treatment.
- Employee is acting in accordance with an order under the *Health Protection and Promotion Act*.
- Employee is in isolation or quarantine in accordance with public health information or directive.
- Employer directs the employee not to work due to concern that COVID-19 could spread in the workplace.
- Employee needs to provide care to a prescribed individual for COVID-19 related reasons.
- Employee is prevented from returning to Ontario due to COVID-19 travel restrictions.

Employers are not required to pay employees who are quarantined or otherwise unable to work because of a qualifying COVID-19 related leave of absence (unless the business's employment or workplace policy says otherwise). While employees employed for two or more consecutive weeks are entitled to sick leave of three days per calendar year under the ESA, this leave is unpaid unless the employee's contract of employment specifically allows for paid sick leave.

The general provisions in the ESA concerning other types of statutory leaves also apply to a COVID-19 leave. These include the right to be free from reprisal, the right to continue to participate in benefit plans (provided employee contributions are made, as applicable), and the right to continue to accumulate credit, as applicable, for length of employment, length of service, and seniority. Finally, as a job-protected leave, a qualifying COVID-19 leave also entitles the employee with the right to reinstatement after the leave ends; subject to instances where an employer dismisses an employee for legitimate reasons completely unrelated to COVID-19. Such instances should be discussed with an employment lawyer.

6. Lay-off and Termination

a. Lay-off

In Ontario, the framework for lay-off is set out in the ESA; however, where temporary lay-off is not expressly permitted in a contract of employment, collective agreement, or in some instances, sufficiently covered by a workplace policy, lay-off runs the risk of prompting a constructive dismissal claim.

Generally in Ontario there is no requirement to provide advance notice of a lay-off. Subject to an employment policy that states otherwise or a registered plan for supplemental employment benefits, employers are not required by legislation to pay an employee (or provide them with benefits) during a period of temporary lay-off. In Ontario there are no mass or group termination considerations for temporary lay-offs; however, should the lay-off extend beyond the allotted time periods prescribed under the ESA mass termination entitlements may apply.

The ESA specifies the time periods for lay-off, following which the employee will be deemed to be terminated and subsequently entitled to termination pay, and if applicable, severance pay. The employee is deemed to have been terminated on the first day of the lay-off.

If the employer does not have a lay-off provision in its employment agreements or the ability to argue that it is implied by the nature of the workplace or industry, laying somebody off (even temporarily) could be a constructive dismissal and may expose the employer to a lawsuit (see discussion below on constructive dismissal).

In these circumstances, many employers are asking their employees to voluntarily agree in writing to temporary lay-offs.

In Ontario, to qualify a period of employee absence as a lay-off rather than an immediate termination of employment, the following ESA criteria apply:

- The term of the lay-off is less than 13 weeks in a period of 20 consecutive weeks; or
- The term of the lay-off is more than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks in any period of 52 weeks, and where:
    - the employee continues to be paid substantial payments from the employer;
    - the employer continues to make payments to the employee's pension plan or insurance plan;
    - the employee receives supplementary unemployment benefits;
    - the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if they were not employed elsewhere;
    - the employer recalls the employee within a time limit approved by the Director of Employment Standards; or in the non-unionized context, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or

- in a unionized workplace, the employer recalls the employee within the time set out in an agreement between the employer and the employee.

A substantial reduction in an employee's working hours may constitute a lay-off. An employee is considered to be on lay-off if they earn less than 50% of the amount they would earn at their normal pay rate in a regular workweek.

Employers should review their employment agreements and policies in order to determine whether a temporary lay-off is an option that they would like to pursue. Employers who seek to impose a temporary lay-off should ensure that they comply with applicable provincial legislation (i.e. the ESA for employees in Ontario).

At the federal level, a lay-off is considered a termination when the employer has no intention of recalling the employee to work.

The *Canada Labour Code* provides for temporary lay-offs as follows:

- the lay-off is for a duration of 3 months or less;
- the lay-off is for a duration of 3 to 6 months with a fixed date of recall; or
- the lay-off is for a period of more than 3 months where:
  - The employee continues to receive payments during the term of the lay-off from their employer in an amount agreed upon by the employee and the employer;
  - The employer continues to make payments for the benefit of the employee to a pension plan that is registered under the Pension Benefits Standards Act, 1985, or under a group or employee insurance plan;
  - The employee receives supplementary unemployment benefits; or
  - The employee would be entitled to supplementary unemployment benefits but is disqualified from receiving them pursuant to the *Employment Insurance Act*.

In addition, in circumstances where there are periods of re-employment that last less than two weeks, these are not included in determining the term of lay-off. Lay-offs may also be directed by the provisions of a collective agreement, and where employees retain a right of recall, such lay-offs are permissible. If you are contemplating lay-offs, it is recommended that you seek advice from legal counsel.

b. Constructive Dismissal

Notwithstanding the provisions of the ESA, Ontario courts have held that unless an employment contract or other agreement includes a right, either express or implied, to lay-off an employee, the lay-off is a negative fundamental change to the employment relationship. Accordingly, laying-off an employee in the absence of an implied or expressed right (or agreement of the employee) may amount to a fundamental breach of the employment contract. In these cases, an employee will be deemed to have been constructively dismissed and the employee may commence a wrongful dismissal lawsuit.

A reduction in an employee's hours of work could also be considered a form of constructive dismissal. This may be the case even if the reduction in hours does not meet the threshold for lay-off as specified under the ESA.

A constructive dismissal arises in circumstances where there has been a unilateral change by the employer to the terms and conditions of employment. There is no constructive dismissal if the employee has agreed to the change.

An employer may be able to assert that they have an implied right to lay-off employees in light of the COVID-19 outbreak and government mandated closure of businesses. As it remains unclear how courts will interpret lay-offs in the current environment, we recommend that employers continue to be cautious and take the following steps, if possible:

- Maintain records that provide evidence of the necessity of the decision to temporarily lay-off the employees.
- Ensure that a temporary lay-off proceeds in accordance with the ESA.
- Request an employee's consent to the temporary lay-off.
- Consider whether continuation of benefits or payment towards insurance plans is possible.

In any event, if the employee claims their lay-off actually amounts to constructive dismissal, the employee will have an obligation to mitigate their damages. For example, if an employee is on lay-off, but is later recalled to work and declines to return, this may significantly lower the value of their claim against their employer.

c. Termination

An employee cannot be terminated for taking protected leave due to COVID-19. However, an employer can terminate an employee at a workplace impacted by COVID-19 without cause. Employers generally have a right to terminate their employees without cause at any time, subject to the terms of their employment agreement or provision of reasonable notice of termination (or pay in lieu of notice).

The ESA sets out the statutory minimums an employee is entitled to on termination. The amount of notice is based on years of service and can be up to a maximum of eight weeks or pay in lieu of the same. In addition, an employee with five or more years of service with the employer may be entitled to severance pay equal to approximately one week's pay per year of service to a maximum of 26 weeks. Severance pay is required if an employer has an annual payroll in Ontario of $2.5 million or more, and the employee has five or more years of service with the employer or if 50 or more employees are terminated from a workplace in a six-month period. There are complex legal issues in the event an employer will be making a "mass termination" and which could be triggered by a mass lay-off involving 50 or more employees that extends beyond the time limits in the ESA. Such instances should be conducted with the advice of a lawyer.

During this time, employers must ensure the terminations cannot be perceived to be based on any prohibited ground of discrimination under the *Human Rights Code* or related to any employee's decision to take a leave in connection with COVID-19.

7. Employment Insurance

Employees on lay-off as a result of business slowdowns or mandatory closures may be eligible to receive regular Employment Insurance ("EI") benefits. To qualify for EI benefits when an employee is experiencing a lay-off due to economic reasons, an employee must meet the minimum number of "insurable hours" calculated over the previous 52 weeks.

The federal government has recently adopted measures to respond to novel challenges posed by COVID-19 including:

- Waiving the one-week waiting period to allow new EI claimants who are in quarantine to be paid for the first week of their claim.
- Facilitating a dedicated toll-free number at 1-833-381-2725, to support enquiries related to waiving the EI sickness benefits waiting period.
- Removing the obligation for people in quarantine to provide a medical certificate in support of their claim.
- Introducing the opportunity for certain quarantined employees to apply for EI benefits at a later date and to have their claim backdated to cover the period of the delay.
- Allowing employees who are required to self-isolate by an employer for reasons consistent with a directive of public health authorities to have access to EI benefits.

When employees experience an interruption in their earnings, an employer must quickly issue a Record of Employment ("**ROE**"), typically within five days of the last day of work, as an ROE is required for employees to access EI benefits. In order to complete the ROE, employers should be aware of and use the following codes when indicating the reason for the interruption in employee earnings:

- When the employee is sick or quarantined, use code D (illness or injury) as the reason for separation (block 16). Do not add comments.
- When the employee is no longer working due to a shortage of work because the business has closed or decreased operations due to coronavirus (COVID-19), use code A (Shortage of work). Consult with a lawyer for the use of additional comments.

Employers who have no choice but to lay-off their employees may elect to enroll in a Supplementary Unemployment Benefit Plan (SUB Plan) which allows qualifying employers to "top up" an employee's EI benefits during a period of unemployment due to a lay-off, whether temporary or permanent. The amount of the top-up can be up to 95% of the employee's weekly wages/salary, less the amount of the employee's corresponding EI benefits, and will not decrease the employee's entitlement to EI benefits.

8. Canada Emergency Relief Benefit (CERB)

On March 25, 2020, the federal government announced that it created a streamlined benefit, the "Canada Emergency Response Benefit" ("**CERB**"). The CERB is a taxable benefit that will provide $2,000 a month for up to four months to qualifying workers who lose their income as a result of the COVID-19 pandemic. The Government of Canada introduced the CERB to replace the previously announced Emergency Care Benefit and Emergency Support Benefit, with the intention that the CERB would be a more simplified and accessible option.

Presently, the CERB is intended to support Canadians who have lost their jobs, are sick, quarantined, or are taking care of a prescribed family member who has contracted COVID-19. Working parents who must stay home without pay to care for children who are sick or at home because of school and daycare closures may also be supported by the CERB.

The CERB is available to employees and self-employed workers who:

- Are at least 15 years of age and a resident in Canada.
- Have earned a total income of at least $5,000.00 or more in 2019 or the 12 months prior to their application for the CERB from any of the following sources:
    - employment;
    - self-employment;
    - from pregnancy or parental EI benefits; or,
    - from pregnancy or parental benefits under a provincial plan;
- Cease working for reasons related to COVID-19 for at least 14 consecutive days within the four-week period in which they apply for the CERB payment; and,
- **Do not** receive, in respect of those 14 consecutive days:
    - income from employment or self-employment;
    - EI benefits;
    - pregnancy or parental benefits under a provincial plan; or,
    - any other income that is prescribed by regulation. (At this time, there are no regulations specifying any other disqualifying income sources).

Employers should be sure to inform any employees on an unpaid leave of their ability to apply for the CERB (subject to any prior application for EI) and direct them to resources with more information.

According to the Government of Canada, Canadians would begin to receive their CERB payments within 10 days of application. The CERB would be paid every four weeks and be available, backdated, from March 15, 2020 until October 3, 2020. The application form will be available through a Government of Canada portal on April 6, 2020.

9. Employees and Workplace Safety and Insurance Benefits

A worker is entitled to WSIB benefits for COVID-19 infections caused by the worker's employment. In order to obtain WSIB benefits, a worker must be diagnosed with COVID-19, and the exposure to COVID-

19 must have occurred at the workplace or was a significant contributing factor in the development of the illness.

If an employee is found to be entitled to WSIB benefits, the employee may be eligible for wage loss benefits that include:

- Any period in quarantine pre-diagnosis.
- Healthcare benefits.
- Permanent impairment benefits arising from the disease.
- In cases of fatality, the employee's survivors could receive WSIB benefits.

a. Employer's Reporting Obligations

Employers must report all claims to WSIB by filing an Employer's Report of Injury/ Illness Form 7 within three days of the worker's report of an injury/illness. If the status of the worker changes, the employer must submit a report of material change within 10 days of becoming aware of that change. Examples of a COVID-19 material change could include the employee confirming their COVID-19 diagnosis, a need for more, or different treatment for the employee related to the COVID-19 diagnosis.

b. WSIB's Adjudicative Guideline for COVID-19 Claims

To handle potential COVID-19 related claims, the WSIB has established an adjudicative guideline. Claims for the benefit are adjudicated on a case-by-case basis, based on the merits and justice of the case, taking into consideration the facts and the circumstances surrounding the employee's exposure to COVID-19. When determining entitlement, the WSIB decision-maker will consider whether:

- The nature of the worker's employment created a risk of contracting the disease to which the public at large is not normally exposed; and
- The WSIB is satisfied that the worker's COVID-19 condition has been confirmed.

If these elements are established, these two factors will generally be considered persuasive evidence that the worker's employment made a significant contribution to the worker's illness. When determining entitlement, the decision-maker will consider other relevant questions to inform their decision, including:

- The nature of the worker's employment created an elevated risk of contracting COVID-19:
    - Has a contact source to COVID-19 within the workplace been identified?
    - Does the nature and location of employment activities place the worker at risk for exposure to infected persons or infectious substances?
    - Was there an opportunity for transmission of COVID-19 in the workplace via a compatible route of transmission for the infectious substance?

- The worker's COVID-19 condition has been confirmed:
    - Are the incubation period, the time from the date of exposure and the onset of illness, clinically compatible with COVID-19 exposure that has been established to exist in the workplace?
    - Has a medical diagnosis been confirmed? If not, are the worker's symptoms clinically compatible with the symptoms produced by COVID-19? Is this supported by an assessment from a registered health professional?

The WSIB decision-maker will consider the above factors, but also any other information that may impact the decision-making. This could include information such as the work environment itself, any work processes involved, job tasks, the use of personal protective equipment, the employer's COVID-19 policy, social distancing in the workplace, among other evidence. All of these factors can indicate and inform the decision-maker whether the working environment created a higher risk of contracting COVID-19 that the public is not normally exposed.

Where a claim does not meet these two factors or answer the related questions in the affirmative, that claim will be reviewed on its own merit, based on the circumstances of the individual case.

10. Support for Business

Both the federal and Ontario governments have introduced programs to mitigate the economic effects of COVID-19 for businesses.

The federal government has announced the following programs:

- A Canada Emergency Wage Subsidy: a three-month wage subsidy for eligible employers. The government will cover up to 75% of an employee's salary on the first $58,700 for businesses who have experienced a decrease in revenue of at least 30%. The wage subsidy is retroactive to March 15, 2020. Businesses of all sizes will be eligible for this subsidy. However, the Prime Minister has warned of serious consequences for employers who misuse the subsidy. What this subsidy will mean for employers will depend on the details of the program which have not yet been released.
- Guaranteed bank loans of up to $40,000 for small businesses which will be interest free for the first year. Organizations who are able to repay the balance of the loan on or before December 31, 2022 will result in loan forgiveness of 25% (up to a maximum of $10,000). The federal government has allocated $25B to this program.
- A Business Credit Availability Program through the Business Development Bank of Canada and Export Development Canada and Economic Development Canada for small businesses.
- A deferral of GST and HST payments, duties and taxes owed on imports until June 2020.
- A deferral, until August 31, 2020, of the payment of any income tax owing between March 18, 2020 and September 1, 2020. This applies to tax balance dues and installments under Part I of the *Income Tax Act*. No interest or penalties will accumulate on these amounts during this time.

The Ontario government has announced the following programs:

- A temporary increase in the Employer Health Tax exemption to $1,000,000.
- A five-month relief period between April 1, 2020 and August 31, 2020 for Ontario businesses unable to file or remit their provincial taxes (including employer health tax, gas tax, etc.) on time due to COVID-19.
- A suspension of auditing interactions with most Ontario businesses and representatives for the month of April 2020.
- The deferral of WSIB premiums until August 31, 2020 for all businesses.

11. Work-Sharing

The work-sharing program is designed to help employers and employees avoid lay-offs due to a temporary reduction in business that is beyond the employer's control. As part of the program, employees experiencing reduced working hours will have their income supplemented with EI benefits.

As work-sharing is a three-party agreement between the employee, employers, and Service Canada, employees must agree to a reduced work schedule and be willing to share the available work temporarily. The employee's work reduction cannot exceed 60%. Under normal circumstances, work-sharing programs are capped at 38 weeks. However, in light of the COVID-19 outbreak, work-sharing agreements for businesses who have experienced a downturn in business due to COVID-19 can enter into a work-sharing arrangement for up to 76 weeks.

Employers interested in entering into work-sharing programs with their employees can find more information here: https://www.canada.ca/en/employment-social-development/services/work-sharing.html

12. How to Create Effective COVID-19 Workplace Policies

During this unprecedented time, employers must take extraordinary steps to limit the spread of COVID-19 in order to protect their employees and the public at large. Implementing clear policies and procedures to accomplish this aim is crucial. Employers should consider the following questions in order to adequately prepare and implement effective workplace policies:

a. Risk Evaluation

- In order to tailor your policies and procedures to adequately protect employees and customers, make decisions based on the following:
  - What is the demographic of your workforce and clientele? Are they considered high-risk?
  - What is the demographic in the local community?
  - What type of service do you provide?
  - Do your employees have access to occupational health and safety services including personal protective equipment on site?
  - Does your workplace require travel?

b. Communication

- What do your staff and customers know about COVID-19? Are they aware of the measures you have taken for prevention?
- Do you have the information and technology required for efficient workplace communication with your workforce (e.g. mass email or text capabilities)?

c. Hygiene

- Evaluate the workplace for areas where people have frequent contact with each other and share spaces and objects, and increase the frequency of cleaning in these areas.
- Have you provided the necessary facilities and cleaning products to maintain a clean and safe workplace (e.g. handwashing facilities, hand sanitizing dispensers, personal protective equipment, etc.)?

d. Reduce Social Contact

- Have you considered the feasibility of teleworking arrangements, flexible hours, staggering start times, use of email and teleconferencing?
- Is working from home viable given the nature of work, resources required, legal concerns, etc.?
- Can you minimize the interactions between customers and your employees, such as limiting the number of customers permitted in your establishment at one time or serving your customers virtually or by phone when possible?
- Can you institute measures to ensure your employees are social-distancing in the workplace?
- Have you placed restrictions on allowing visitors to your workplace?

e. Travel

- Can you cancel or postpone all nonessential meetings or travel?
- Can you include measures that restrict business travel in concert with recommendations by the Public Health Agency of Canada?
- Is there a reporting requirement for employees who have travelled either for work or pleasure?
- Have you considered including a requirement for employees travelling for non-business reasons to follow recommendations and advisories on travel and to destinations set out by the Public Health Agency of Canada and the World Health Organization?

f. Reporting

- When and to whom should an employee report their symptoms or exposure to COVID-19?
- How should the employee report their symptoms and exposure?

g. Self-Isolation

- For how long are employees required to self-isolate?

- Who should the employee report to if they have chosen or been asked to self-isolate?
- When and how should an employee return to work following self-isolation? Will you require a medical certificate before they return?

13. Conclusion

The COVID-19 outbreak has had an unprecedented impact on employers and employees that is changing in real-time. Consequently, the contents of this article may become outdated quickly. We recommend that employers seek current, up-to-date legal advice on these issues, and the decisions they may take to address employment matters arising out of the COVID-19 pandemic to be prepared to adapt to any changes. The Dickinson Wright LLP team remains committed to helping our clients navigate this unprecedented time and remains fully available to provide any assistance that may be required.

Special thanks to articling students Carly Walter, Jacky Cheung and Richard Schuett for their contributions to this piece.

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COVID-19: UNEMPLOYMENT BENEFITS FOR TEMPORARY FOREIGN WORKERS

Posted by All Things HR Team | May 1, 2020

Employers confronting business interruptions and shut-downs in the wake of the first COVID-19 wave face challenging workforce decisions about whether they need to lay-off or terminate workers. Employers having a workforce partially comprised of temporary foreign workers (i.e., workers holding work visas such as H-1B, L-1, E-1/2, E-3, TN, O-1, etc.) confront additional layers of complexity as their decisions may impact the employee's work status in the United States (U.S.), ability to collect unemployment insurance, and eligibility to benefit from new stimulus measures. While there is no "one size fits all" approach, below are a set of key considerations for employers to utilize in making these difficult human resources decisions in consultation with their legal advisors.

COVID-19 Stimulus Measures' Impact On Unemployment Benefits

As a result of COVID-19, the Families First Coronavirus Response Act (FFCRA) and Coronavirus Aid, Relief, and Economic Security (CARES) Act provide relief to both employers and employees via direct stimulus payments and an enhancement of unemployment benefits. Not only has the federal government increased the amount of benefits to employees, but the states also are making certain exceptions.

While the eligibility criteria for unemployment benefits may be different for each state, the following requirements generally apply to all workers:

1. Being "available" to work
2. Unemployed through no fault of their own
3. Earned enough wages or hours in a "base period" (typically a 12 or 18 month period) prior to filing a claim, where the employer is paying into the unemployment system.

Most unemployment benefits systems also have a "work search" requirement, where claimants must actively seek employment and report on their job search activities to the state; however, most states are suspending this requirement due to the current pandemic.[1]

Availability for Temporary Foreign Workers

"Availability" to work presents challenges for foreign workers as the loss of employment may also result in the workers' inability to remain in the U.S. lawfully. Specifically, federal law only allows states to credit wages earned by foreign workers "lawfully present for purposes of performing services." It follows that in order to receive unemployment benefits a foreign worker must maintain lawful status in the U.S. Most states require foreign workers to have valid work authorization at the time that they apply for benefits and throughout the period during which they are receiving benefits.[2] However, until recently, terminated foreign workers immediately lost their nonimmigrant status and were required to leave the country. As such, foreign workers were not eligible to file a claim for unemployment benefits because they were no longer "available" to work in the U.S.

In January 2017, though, a rule change by the U.S. Citizenship and Immigration Services (USCIS) stopped most foreign workers from falling immediately out of lawful status when terminated, and because of this change, it now minimizes the challenges presented by the availability requirement. The new rule established a 60-day grace period for nonimmigrant workers when their employment ends before the close of their authorized validity period (e.g. I-94 admission record). This change provided foreign workers with an opportunity to pursue new employment opportunities for an extension or change of their current nonimmigrant status while being considered in lawful status post termination of employment. For unemployment benefits purposes, these foreign workers are arguably now "available" to work during their grace period.

Termination Impact On Eligibility for Unemployment Benefits

Terminated temporary foreign workers now may be eligible to apply for unemployment benefits during their 60-day grace period. However, if the foreign worker has not secured an employer/sponsor who has timely filed a new petition on their behalf, the foreign worker will lose their status once the grace period has ended. Simply, the foreign worker will no longer be available to work in the U.S., unless an employer has timely filed an H-1B petition on their behalf during that 60-day grace period.

Issues arise from the employment of a foreign worker's spouse. A foreign spouse's employment status is dependent upon the principal foreign worker maintaining legal immigration status. Spouses of foreign workers who are maintaining status (e.g., H-4, L-2, E-1/2/3) with a valid Employment Authorization Document (EAD) may be eligible to apply for unemployment benefits so long as the principal foreign worker is still employed. However, if the principal foreign worker is terminated, the spouse is also granted a 60-day grace period and their EAD is still valid during this period. Thereafter, they will be out of status and likely deemed unavailable to work for unemployment benefit purposes. Other workers with a valid EAD (e.g., pending Adjustment of Status applicants, TPS recipients, DACA recipients, etc.), still have a valid EAD after termination, but may also be eligible for unemployment benefits subject to similar limitations. The specific scenario will control.

Students presents another layer of complexity. F-1 foreign students with Optional Practical Training (OPT) or Curricular Practical Training (CPT) work authorization may not be eligible for unemployment benefits because, by definition, those services are performed by F-1 students as an integral part of their academic program. Specifically, F-1 CPT work authorized students are granted academic credit for their work experience and often the sponsoring U.S. entity does not withhold taxes and benefits payments (i.e., their employers do not pay into the system). Relatedly, some states may not consider student "work" as "employment" for benefits purposes. For example, the State of Michigan provides an exception to the definition of employment for F-1 student visa holders that may make them ineligible for unemployment benefits.[3] For students who may collect unemployment benefits, such as F-1 OPT students, immigration rules provide that the students may not accrue more than 90 days of unemployment during their initial period of post-completion OPT. Similarly, students granted an additional 24 months of 'STEM' OPT may not accrue more than an aggregate of 150 days of unemployment, which includes any days of unemployment during the initial 12 months of Post-Completion OPT. If they do, USCIS will deem those students to be out of status and subject to removal from the U.S.

H-2A Temporary Agricultural Workers may not be eligible for unemployment benefits as federal law expressly excludes agricultural services from the definition of "employment."[4] The H-2A program allows a foreign worker to enter the U.S. for temporary or seasonal agricultural work typically valid for a period of less than one year. Given the short duration, the U.S. does not authorize unemployment benefit protection. However, the FFCRA requires employers to provide employees paid sick leave or expanded family and medical leave due to certain COVID-19 related reason. Similarly, H-2B Temporary Non-Agricultural Workers, H-3 Trainees, and P (athletes, artists and entertainers) visa holders have only a 10-day grace period to remain in the U.S. following termination under existing regulations. As such, these nonimmigrants may not be eligible to receive unemployment benefits, as their "availability" is limited in duration.

Temporary Lay-Offs/Furloughs

Employers may confront a more challenging scenario when temporarily laying-off or furloughing a foreign worker. A lay-off is a result of an employer not having enough work for the employee to perform and involves a temporary separation from payroll, but often allows employees to maintain benefits coverage. Here the intention is for the employee to return to work. A furlough occurs when an employer requires its employees to work fewer hours or take a certain amount of unpaid time-off.

A valid employer-employee relationship may continue to exist (i.e. continuity of benefits, active payroll, etc.) and it may be expected that the foreign worker, who is separated for lack of work will soon return to work. This is certainly true in the context of a “furlough” but arguably also true in the context of a temporary lay-off, where employees are expected to return to work when the state’s stay home order lifts. In the context of a foreign worker who is laid-off or furloughed, since there is not a permanent separation from work, it is not clear whether they will be eligible for unemployment benefits. These foreign workers will need to review the eligibility criteria in the state where they are working to determine if they are eligible to file a claim for full or partial unemployment benefits.

One problematic area for lay-offs and furloughs is in the highly skilled worker area. H-1B and E-3 workers must be paid at least the full salary offered in the I-129 petition and underlying Labor Condition Application (LCA). An H-1B or E-3 worker cannot be “benched” for lack of work. If wage continuity is not possible, an employer may explore options such as filing an amended H-1B petition to adjust for reductions in total pay and hours, while still paying the required wage rate, which is the higher of the actual or prevailing wage rate.

These wage level requirements do not exist for other foreign workers in L-1, E-1/2 or TN status, for example. As long as a valid employer-employee relationship continues to exist and the wages paid are otherwise in compliance with applicable federal and state laws, these workers will generally be considered to be maintaining their lawful status in the U.S. Please note that they must still consider how they can document compliance with their status in a subsequent consular visa application or extension/change of status application with USCIS. However, a key feature of state unemployment insurance programs is that the employer actually pays into the system. It is not uncommon for L-1 or E-1/2 workers to receive their full or partial salary from a related foreign entity abroad. As a result, this practice may impact a foreign worker’s eligibility to receive unemployment benefits, since the U.S. employer may not have contributed to the unemployment insurance and possibly U.S. tax withholdings have not been made. In addition, any earned wages paid after a worker is laid-off would need to be reported and could offset any benefits that a worker may otherwise be entitled to receive. CARES has loosened the requirements for paying into the system (e.g., self-employed and 1099 workers may receive benefits), but it did not directly address the foreign worker issue, and has left some discretion to the states in awarding such benefits.

Cross-Border Commuters

A foreign worker who regularly commutes and crosses the border from their home in Canada or Mexico to work for an employer in the U.S. may be eligible to file a claim for unemployment, if they are employed by and receiving their wages from, the U.S. employer and maintaining lawful status in the U.S. Again, it is unlikely that a cross-border commuter will qualify for unemployment benefits, if the commuter was not receiving wages from a U.S. employer. Similar to the example above, where an L-1 or E-1/2 foreign worker receives payment from a foreign employer abroad, the lack of payment into the unemployment benefit system in the U.S. may impact eligibility. A cross-border commuter with valid work authorization in the U.S. must review the eligibility criteria for unemployment in the state where they are working.

Border states such as Michigan expressly provide for these scenarios, albeit with often conflicting results. Michigan has established procedures for non-U.S. citizens to claim unemployment benefits. The employee may register using his/her Permanent Residence card or I-94 Arrival/Departure Record and the expiration date of their work authorization (if applicable) as opposed to the standard U.S. social security number. Michigan Employment Security Act administrative rules then address the payment of benefits to interstate claimants.[5] This rule specifically states this provision shall apply to accepting claims for unemployment pursuant to an agreement regarding unemployment insurance between the U.S. and Canada.[6] However, the rule leaves silent the question of how the foreign worker may otherwise be eligible. Consequently, the above-referenced considerations come into force.

Public Charge Rule

It is important to point out that foreign workers, who seek unemployment benefits will likely not be impacted by the new public charge rule that went into effect on February 24, 2020. The rule clearly states that unemployment benefits are not considered a public benefit, since they are earned by the employee and a result of an employer’s contributions to unemployment insurance. As such, obtaining unemployment benefits should not negatively impact a foreign worker applying for permanent residence or make them inadmissible. Of course, immigration policy and law is subject to ongoing change.

Ultimately, it is a personal decision to file a claim for unemployment benefits. Foreign workers should seek advice from their own personal lawyer.

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[1] Eligible individuals may qualify for an additional $600 a week of Federal Pandemic Unemployment Compensation (FPUC) set aside in the federal stimulus package included in the CARES Act under a program called Pandemic Unemployment Assistance that went into effect on March 29, 2020. As of now, the $600 weekly additional payments will expire at the end of July 2020. States must offer flexibility in meeting Pandemic Emergency Unemployment Compensation (PEUC) eligibility requirements related to "actively seeking work" if an applicant's ability to do so is impacted by COVID-19.

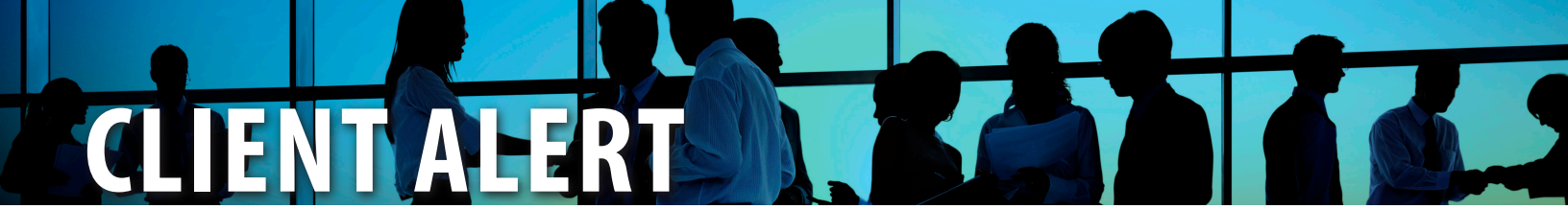
[2] Section 421.27 of the Michigan Employment Security (MES) Act, Section 27(k)(1)("Benefits are not payable on the basis of services performed by an alien unless the alien is an individual who was lawfully admitted for permanent residence at the time the services were performed, was lawfully present for the purpose of performing the services, or was permanently residing in the United States under color of law at the time the services were performed, including an alien who was lawfully present in the United States under section 212(d)(5) of the immigration and nationality act, 8 USC 1182").

[3] Section 421.43 of the MES Act, Section 43(m). Service performed by an individual less than 22 years of age who is enrolled, at a nonprofit or public educational institution that normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program, taken for credit at the institution, which program combines academic instruction with work experience, if the service is an integral part of the program and the institution has certified that fact to the employer. This subdivision does not apply to service performed in a program established for or on behalf of an employer or group of employers.

[4] Sections 214(c) and 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, as amended.

[5] R 421.243 of the MES Act. Rule 243. (1) This rule shall govern the Michigan employment security commission in its administrative cooperation with other states and the Dominion of Canada for the payment of benefits to interstate claimants. "Interstate claimant" means an individual who claims benefits under the unemployment insurance law of 1 or more liable states through the facilities of an agent state. The term "interstate claimant" shall not include any individual who customarily commutes from a residence in an agent state to work in a liable state, unless the Michigan employment security commission finds that this exclusion would create undue hardship on such claimants in specified areas.

[6] The Executive Agreement – Series 244, permits Canada to participate in the Interstate Benefit Payment Plan only on a reciprocal basis. Since the states cannot enter into agreements with a foreign government under the provisions of the United States Constitution, it is necessary for any state which wishes to include Canada in its interstate claims operation to notify the Employment and Training Administration, which in turn will notify the Canadian Unemployment Insurance Commission and advise the state. All states are signatory to the Interstate Benefit Payment Plan, which specifically includes an extension to include claims taken in and for Canada.



IMMIGRATION

CRITICAL COVID-19 GUIDANCE FOR CERTAIN FOREIGN WORKERS

by Christian S. Allen

The ever-changing impact of the evolving COVID-19 pandemic is making it extremely difficult for employers to plan what to do with their foreign worker populations right now. DW Immigration stands ready to help! Here below we summarize some critical pieces of immigration information from the various government agencies and our related guidance, as it stands today.

US Department of State:

- Immigrant and Nonimmigrant Visa Processing

With very limited, "emergency" exceptions, all immigrant (greencard) and nonimmigrant visa interview appointments at US embassies and consulates around the world are cancelled temporarily. Applicants should log into the consulate's visa appointment services website and monitor the interview appointment calendar regularly, as it is unclear when new appointments will be available, and that is varying from location-to-location. Note that applicant's "MRV" filing fee payment will remain valid and can be used for a visa application in the country where it was purchased for one year from the date of payment.

US Customs & Border Protection:

- Canadian and Mexican Border Closures

  The US borders with Canada and Mexico are now closed for all general visitor and tourism purposes. However, temporary workers with otherwise valid visas/status should still be allowed to cross the border, if necessary, under the theory that their work is "essential". Employers may want to provide such workers with a letter clearly explaining their critical need for travel, as it relates to "essential industries and supply chains".

- TN and L-1 Border Processing

  While not specifically prohibited, even in states with "stay at home" orders, many US ports-of-entry are either declining on health and security grounds to allow people to appear for TN and L-1 processing/renewals, or are implementing rules about when that can be attempted and by how many people. If travel and border appearance cannot be postponed, the particular port-of-entry should be contacted directly for guidance, if possible.

US Citizenship & Immigration Services:

- Local Office Closures

  All local ("field") offices of the USCIS are now closed temporarily, and all interview and biometrics capture appointments have been cancelled (or will be cancelled shortly). Those appointments will be rescheduled automatically for later dates, after the USCIS offices reopen. Note that we do not anticipate USCIS Regional Service Center closures at this time, since these offices do not interface with the public.

- Premium Processing Suspension

  Premium Processing service for all I-129 and I-140 petitions has been suspended at the USCIS Regional Service Centers, both for H-1B cap lottery petitions starting next month, as well as for other types of filings using these two forms. It is unclear when Premium Processing service will be made available again. Regular requests for emergency expedites are still possible, but will obviously only be granted by the USCIS in extremely rare circumstances.

- Electronic Signatures

  On a more positive note, the USCIS is temporarily allowing for the submission of applications and petitions with scanned/emailed or faxed signatures. Although, final applications and petition must still be filed in hard copy, allowing for non-original signatures on forms will make package preparation significantly easier for employers working remotely.

US Department of Labor:

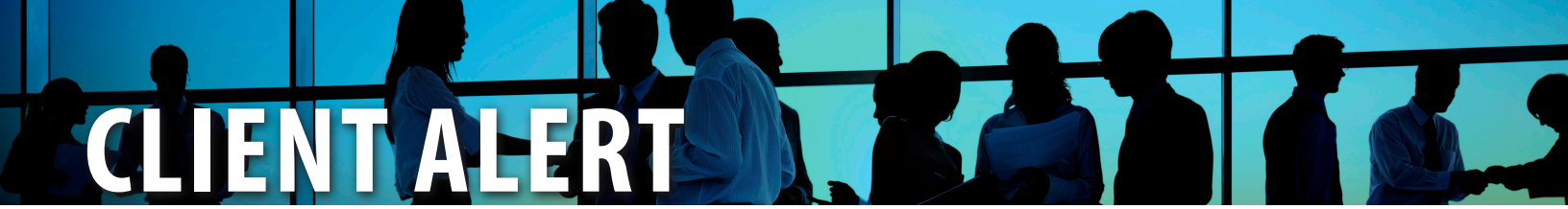
- PERM Labor Certifications
  - *Electronic approvals*

    The DOL announced just today that they will temporarily be providing employers and agents/attorneys with electronic copies of PERM Labor Certification approvals, to avoid the delays and complications of dealing with the usual, blue-paper approvals. Presumably, the USCIS will shortly follow suit and announce that such electronic PERM approvals will be accepted with I-140 Immigrant Petition filings (the next normal step in greencard sponsorship for employees, after PERM approval).

  - *Notice of Filing postings*

    In an attempt to guide employers with remote operations during the pandemic, the DOL issued a new series of answers to Frequently Asked Questions (FAQs) late last week. Included in those FAQs were some suggestions for how employers should notify US workers of job openings and their intention to file PERM Labor Certifications, when the majority of the company's workforce might be working remotely. Unfortunately, their specific accommodation is only to allow employers to post their Notice of Filings up to 60 days later than normal, but it may be possible to follow the DOL's most specific suggestions for H-1B LCA postings (see below), without having to adjust the critical 180-day PERM pre-filing recruitment cadence. This will have to be decided on a case-by-case basis.

    The DOL is also granting employers a short extension of time to respond to PERM Notices of Audit and Requests for Information, as well as a similar 60 extra days to complete all PERM pre-filing recruitment activities, in certain situations.



- Labor Condition Applications
  - *Notice of Filing postings*

    Within its recent round of FAQs, the DOL provided a bit more guidance for how to comply with Labor Condition Application (LCA) posting requirements, in connection with H-1B, H-1B1, and E-3 worker sponsorship. Specifically, the DOL is reminding employers that the requirement to post an LCA for 10 business days in a "conspicuous" location can be met by any means of electronic notification which the employer might ordinarily use to alert employees to job vacancies or other important news. That is, a copy of the LCA could be emailed to all potentially affected workers at the worksite; alternatively, a copy of the LCA could be provided to all affected workers via intranet, its public-facing website, or electronic newsletter. Note that, if done by direct email, only a single email is required, as opposed to the usual 10-day posting elsewhere.

US Immigration & Customs Enforcement:

- I-9 and E-Verify Flexibility

  For approximately 60 days, for companies who have shut down and have new hires who are working remotely, the Department of Homeland Security (DHS) is allowing employers to complete Section 2 of their I-9s using copies of the new employee's documents, instead of the usual in-person inspection. Section 2 must still be completed within the normal three business days, and the original documents must still be inspected in-person, once normal operations resume. See here for details on how to annotate Section 2 of your I-9s, if done temporarily remotely.

  The DHS is allowing a bit less flexibility for users of the E-Verify system. Employees must still be immediately notified of Tentative Nonconfirmations (TNCs), but employers are to give them extra time to attempt to resolve the TNC, if their local Social Security Administration or DHS office is currently closed. Employers must still adhere to the usual, three-day timeframe for entering new hires into E-Verify, although they can note "COVID-19" in the "Other" field, if case creation is delayed due to operational challenges.

For H-1B Workers Specifically:

- LCA Re-Posting for Remote Workers

  If an H-1B worker is temporarily forced to work from home, and their home address is very near to the normal worksite location on your underlying LCA, the DOL is allowing an extra 30-day flexibility for re-posting the LCA at the new "worksite" (i.e. home address). Whenever an LCA is reposted pursuant to these rules, a memo should be placed in the associated Public Access File.

  If an H-1B worker is forced to work remotely from a location which is a significant distance from the LCA worksite, then a full H-1B Amendment petition may be required. Those situations will need to be carefully analyzed on a case-by-case basis.

- Wage Continuity During Furloughs and Lay-Offs

  Generally speaking, H-1B workers must be paid at least the full salary offered on the underlying I-129 sponsorship petition (not the DOL's Prevailing Wage, but the company's offered wage), at all times. Unpaid "benching" for lack of work, even during the COVID-19 pandemic is still strictly illegal. Similarly, forcing H-1B workers to use unpaid vacation or unpaid leave of absence days during a furlough or layoff is also not allowed. However, if an H-1B worker happens to be currently paid significantly more than the wage offered on the I-129 petition, then it may be possible to temporarily reduce their salary back down to the I-129 offered wage.

- Termination and Rehire/Re-Sponsorship?

  If wage continuity is not possible for an H-1B worker, employers should remember that immediate notification to the USCIS of formal termination is critical. That notification is the one and only thing which will halt your full salary obligation to that worker, in the event of an audit. As usual, DW Immigration can submit notification of termination to the USCIS for you, once you alert us. Also remember that terminated H-1B workers should be offered a one-way plane ticket back to their home country (although most such workers will likely not elect to fly home at this time).

  If an H-1B worker is formally terminated, also keep in mind that they now have an automatic up to 60-day grace period in which to remain in the US legally and seek alternate employment and sponsorship. During those 60 days, if you are able to rehire the employee, you can simply file another H-1B petition to bring the employee back onboard. And, the H-1B Portability rules would normally allow that person to begin/resume working for you immediately after your petition is filed with the USCIS, during the subsequent few months until it is processed and hopefully approved. It may even be possible to do this for H-1B workers who accept employment with another company, successful change to another immigration status in the US, and/or return home (although without the option for Premium Processing, the timing of those may be unworkable?).

For TN, E-1/2, and L-1 Workers Specifically:

- Wage Continuity for Furloughs and Lay-Offs

  TN, E-1/2, and L-1 workers in the US are not subject to the same, strict payroll rules as H-1B workers. Instead, they have a bit more wage continuity flexibility. As long as there are other clear indicia of an ongoing, uninterrupted, employer-employee relationship, these workers will generally be considered to have maintained their lawful status in the US. Examples of an ongoing employer-employee relationship could be a clear, written, description of the temporariness of the furlough; continuity of benefits and seniority; a reduced but still active regular payroll, etc.

- Termination and Rehire/Re-Sponsorship

  On the other hand, just like H-1B workers, TN, E-1/2, and L-1

workers in the US do benefit from the same, automatic, 60-day grace period between jobs. But, it can be logistically more tricky to bring them back onboard quickly after rehire, than with an H-1B worker. Hence, those situations will need to be analyzed on a case-by-case basis.

We hope that the above will help you to begin to navigate the current and upcoming challenges for your foreign worker populations, triggered by the COVID-19 pandemic. We urge you to please stay in close contact with your DW Immigration attorney/paralegal teams, and alert us as early as possible to unusual situations. Although we are also struggling to remain fully functional while working remotely, we stand ready to help, in any way that we can!

DW Immigration
Global Mobility With a Personal Touch

FOR MORE INFORMATION CONTACT:

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CROSS-BORDER TRAVEL BETWEEN THE U.S. AND MEXICO/ CANADA – NON-ESSENTIAL TRAVEL RESTRICTIONS EXTENDED TO JUNE 22, 2020

by Kathleen Campbell Walker[1]

On March 24, 2020, two notices (Notices) were published in the Federal Register by United States (U.S.) Customs and Border Protection (CBP) related to limitations on cross-border travel along the northern[2] and southern[3] borders of the U.S. Both of these restrictions went into effect as 11:59 p.m. (EDT) on March 20, 2020, and remained in effect until 11:59 p.m. (EDT) on April 20, 2020. The Notices announced restrictions to "non-essential" travel between the countries (U.S. and Mexico - U.S. and Canada) and outlined what constitutes essential travel for admission to the U.S. These restrictions have now been extended twice and currently expire at 11:59 p.m. (EDT) on June 22, 2020, unless amended or rescinded. The restrictions are not meant to interrupt legitimate trade between the affected nations or disrupt critical supply chains that ensure delivery of food, fuel, medicine, and other critical materials.

Below are references to the notices issued to date:

- U.S.-Canada Border Federal Register Notice (Initial 85 Fed. Reg. 16548) | 30-Day Extension Notice 1 at 85 FR 22352 (April 22, 2020) | 30-Day Extension Notice 2 at 85 Fed. Reg. 31059 (May 22, 2020)
- U.S.-Mexico Border Federal Register Notice (Initial 85 Fed. Reg, 16547) | 30-Day Extension Notice 1 at 85 FR 22353 (April 22, 2020) | 30-Day Extension Notice 2 at 85 Fed. Reg. 31057 (May 22, 2020)

WHAT MODES OF TRAVEL ARE NOT AFFECTED BY THESE NOTICES?

Canada – Air, Freight, Rail, or Sea Travel between the U.S. and Canada.
Mexico – Air, Freight, Rail, or Sea Travel between the U.S. and Mexico.

WHAT MODES OF TRAVEL ARE AFFECTED BY THESE NOTICES?

Canada and Mexico – Land, passenger rail, passenger ferry travel, and pleasure boat travel.

WHAT TRAVEL IS RESTRICTED BY THESE NOTICES (E.G., NON-ESSENTIAL)?

Individuals traveling for tourism (e.g. sightseeing, recreation, gambling, and attending cultural events), which is typically referred to as B-2 admissions to the U.S. Please note that B-1 business visits are not included in the non-essential category. In addition, the CBP Commissioner may on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the U.S., who are not engaged in essential travel.

WHAT TRAVEL IS ALLOWED AS "ESSENTIAL"?

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. §1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the U.S.-Mexico or U.S.-Canadian border shall be limited to "essential travel," *which includes, but is not limited to —*

- U.S. citizens and lawful permanent residents returning to the U.S.;
- Individuals traveling for medical purposes (e.g., to receive medical treatment in the U.S.);
- Individuals traveling to attend educational institutions (It is unclear if this provision applies to students studying online due to COVID-19 related practices applied by their educational institutions.);
- Individuals traveling to work in the U.S. (e.g., individuals working in the farming or agriculture industry who must travel between the U.S. and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (e.g., government officials or emergency responders entering the U.S. to support Federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (e.g., truck drivers supporting the movement of cargo between the U.S. and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the U.S.; and
- Individuals engaged in military-related travel or operations.

Please also review the earlier blog on this issue by Elise Levasseur of Dickinson Wright for more background.

On March 20, 2020, the U.S. and Mexico as well as the U.S. and Canada issued joint statements regarding their joint efforts to prevent the spread of COVID-19. Canada and Mexican travel restrictions regarding non-essential travel were also extended to June 22, 2020. U.S. citizens and dual nationals living abroad are not subject to these restrictions to return to the U.S.

WHAT ABOUT NONIMMIGRANT VISA HOLDERS [E.G., L-1, TRADE NAFTA (TN), H-1B, E, ETC.) TRAVELING TO THE U.S. TO WORK?

The Canadian government was the first to clarify the application of the essential worker term to work authorized nonimmigrants. On March 20, a clarification was posted that, "Exemptions to the air travel restrictions will apply to foreign nationals who have already committed to working, studying or making Canada their home, and travel by these individuals will be considered essential travel for land border restrictions." So far, U.S. CBP officials continue to process the admission of nonimmigrant visa holders for TN status at the northern and southern borders for Canadian citizens and for Canadian L-1 initial visa applicants at the northern border.

Processing of Mexican TN visas has basically been placed on hold due to the ongoing suspension of visa services at U.S. consular posts in Mexico, except in urgent humanitarian circumstances. In some cases, medical professionals have been able to schedule emergency appointments for immigrant and nonimmigrant visas. The U.S. Department of State

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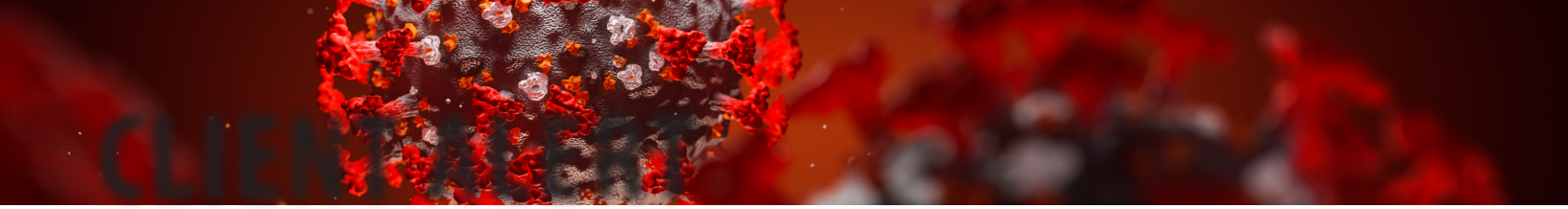
[2] 85 Fed. Reg. 16548 (March 24, 2020)

[3] 85 Fed. Reg. 16547 (March 24, 2020)



has encouraged nonimmigrant and immigrant medical professionals to review the website of their nearest U.S. embassy or consulate for procedures to request emergency visa appointments. Please note that the Department of State has indicated that those nonimmigrant visa holders in the U.S., who need to extend or adjust their visa status, must apply in the U.S. with U.S. Citizenship and Immigration Services (USCIS).

Please remember that we expect a report to be provided to President Trump soon (May 23) regarding potential restrictions to be placed on nonimmigrant visas based on his prior immigrant visa suspension proclamation outlined here.

It is important to remember that a nonimmigrant visa issued by the Department of State does not determine how long the nonimmigrant visa holder may remain legally in the U.S. The period of admission/ authorized stay is set by the I-94 admission record, which may be found after admission at the CBP website, on a separate I-94 paper card issued at a land border port of entry, on an admission stamp in a passport from a CBP officer, or at the bottom of an I-797 approval notice from USCIS depending on timing and the application process used.

WHAT ABOUT POTENTIAL QUARANTINES AFTER ADMISSION TO THE U.S., CANADA, OR MEXICO?

In the U.S., quarantine requirements depend on state and local policies. For those applicable in Canada or Mexico, the Department of State and its embassy websites provide useful resources. CBP, at the link below, outlines travel restrictions and updates to COVID-19 related policies and actions. In addition, The New York Times provides a helpful list of state shelter in place and reopening orders, while the National Conference of State Legislatures provides COVID-19 related policies and legislation state-by-state.

Here are some links for reference:

- https://travel.state.gov/content/travel/en/traveladvisories/ea/covid-19-information.html
- https://www.cbp.gov/newsroom/coronavirus
- https://mx.usembassy.gov/u-s-citizens-in-mexico-covid-19-information/
- https://ca.usembassy.gov/

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CROSS BORDER: REGISTRANT ACTIVITIES

DEALING WITH YOUR OBLIGATIONS TO CLIENTS DURING THE COVID-19 PANDEMIC

by Andre G. Poles, Bradley J. Wyatt, Frank Borger Gilligan, William H. Dorton, and Chantal A. Cipriano

While securities regulators on both sides of the border have provided some relief to dealers and advisors, the Canadian Securities Administrators ("CSA") and the Securities and Exchange Commission ("SEC") have not extended that relief to ease the duties owed by registrants to retail clients. In particular, registrants continue to be required to have sufficient current information about their client's situation and objectives when making recommendations to buy, sell, or hold securities. Dealers and advisors on both sides of the border should be acting now to assess client information with an eye to ensuring that they keep up with the altered and evolving market and economic conditions affecting us globally.

CANADA

When dealing with clients during the COVID-19 pandemic, registrants must continue to focus on their obligations to know their clients and to take reasonable steps to ensure that any trading is suitable for the client. Typically, registrants collect "know-your-client" ("**KYC**") information at the start of the client relationship and periodically thereafter. In particular, registrants have an obligation to update KYC when they become aware of a significant change to a client's circumstances.

In light of the massive disruption to the economy, workplaces, and financial markets, including the consequential impacts on investor incomes, portfolios, and wealth brought on by the COVID-19 pandemic, it would be unusual for a registrant to take the position that the requirement to update KYC has not been triggered.

Registrants that operate with discretionary authority over a client's assets should be proactively reaching out to their clients to understand if the client has experienced a change in financial status in light of the pandemic. In circumstances where there has been no significant change to a client's financial status, the current health crisis and economic conditions may still have resulted in changes to the client's short-term and long-term investment goals and liquidity needs. All of these changes will need to be understood and considered by the registrant when determining whether to continue to hold, sell, or acquire specific securities for the client's portfolio.

Similarly, registrants who deal with clients on a transactional basis will need to be aware of changes to the client's circumstances when accepting trading instructions or making trading recommendations.

In light of the physical distancing requirements imposed across Canada, registrants will need to develop and implement new and flexible measures related to their KYC update process. Firms should update policies and procedures to reflect the "new normal" when it comes to gathering information on a wide scale and communicating with clients whose information may require updating. Even while implementing changes in response to the pandemic, registrants should remain cognizant of the need for their compliance policies to both meet their regulatory obligations and reflect how they are actually operating. Once implemented, the "new normal" should be reviewed and revised regularly as the pandemic and its impacts evolve.

UNITED STATES

Similarly, in the United States, the SEC has not eased any of the requirements regarding the duties that are owed to retail investors by investment advisers or broker-dealers. In an April 2, 2020 statement, Chairman Jay Clayton reiterated that investors remain the top focus of the SEC and that the uncertainties caused by COVID-19 have not changed their perspective and commitment to protecting investors. Chairman Clayton also stressed that the June 30, 2020 deadline for broker-dealer compliance with Regulation Best Interest ("**Reg BI**"), Form CRS, and other related requirements remains intact.[1]

Broker-dealers and investment advisers must exercise reasonable diligence, care, and skill when making a recommendation to a retail customer in light of that client's investment profile and the potential risks, rewards, and costs associated with the recommendation. In light of the current pandemic, U.S. broker-dealers and investment advisers need to proactively assess their KYC information – and make appropriate updates as necessary – in order to ensure continuing compliance. In connection with such an assessment, U.S. broker-dealers and investment advisers should consider the following:

Reg BI was adopted on June 5, 2019 with a June 30, 2020 compliance deadline, and is a key component of the SEC's broader package of rules designed to raise the standard of care required of broker-dealers and to enhance the quality and transparency of retail investors' relationships with broker-dealers and investment advisers.

Broker-dealers and investment advisers must exercise reasonable diligence, care, and skill when making a recommendation to a retail customer in light of that client's investment profile and the potential risks, rewards, and costs associated with the recommendation. Both before and after the Reg BI compliance date, broker-dealers and investment advisers need to have sufficient current KYC information to meet their obligations. In light of these obligations and the current pandemic, broker-dealers and investment advisers in the U.S. should consider updating KYC in light of the following:

Changes in Current Financial Status. From the middle of March to the middle of April, approximately 18 million people in the U.S. filed first-time unemployment claims. As it stands now, an estimated 13% of the labor force in the U.S. is unemployed. At the height of the Great Recession, that number was 9.9%. More concerning is that these numbers are likely to continue to rise. Broker-dealers and investment advisers must assess the current financial status of their clients and should adjust investment strategies and recommendations accordingly.

[1] Reg BI was adopted on June 5, 2019 with a June 30, 2020 compliance deadline and is a key component of the SEC's broader package of rules designed to raise the standard of care required of broker-dealers, and enhance the quality and transparency of retail investors' relationships with broker-dealers and investment advisers. The SEC's Office of Compliance Inspections recently issued two risk alerts providing guidance regarding the scope of forthcoming examinations focusing on compliance with Reg BI and Form CRS. The examinations are scheduled to begin after the June 30 deadline. Watch for our upcoming release on this topic.

Changes in Investment Goals. Regardless of the employment and financial status of the client, the current health crises and economic conditions may have changed the client's short-term and long-term investment goals. Broker-dealers and investment advisers should consider new policies and procedures for reviewing and reassessing their clients' risk tolerances and strategic goals in light of the pandemic.

Need for Liquidity. Brokers and advisers should consider the client's need for liquidity before making recommendations or investment strategies. The ability to easily liquidate assets may be much more important to investors now that it was prior to the start of the pandemic.

Health Care and Insurance. Unfortunately, for most Americans, the loss of employment also means the loss of health care benefits. For those fortunate enough to be able to maintain coverage through COBRA or the private market, such coverage is expensive. Additionally, firms should consider the impact that COVID-19 might have on insurance carriers and stocks, as well as whether certain types of insurance could be sound investments for certain clients.

Please Note: These materials do not constitute legal advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently. As such, it is important to ensure you are aware of current information and that you consult with a lawyer before making your business decisions.

If you have any immediate questions or require further information, please reach out to your Dickinson Wright lawyer or contact the dedicated Dickinson Wright COVID-19 email at COVID19info@dickinsonwright.com.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

DETERMINING WHEN A COVID-19 ILLNESS IS "WORK-RELATED" AND "RECORDABLE" UNDER OSHA GUIDANCE

Posted by **Aaron Burrell** | **Jul 13, 2020**

With the exception of certain low-risk industries, many employers with more than 10 employees, especially those employers engaged in manufacturing, are required under law to keep a record of serious work-related injuries and illnesses. In our current climate, questions arise: is COVID-19 a "recordable illness?" And under what circumstances should employers record?

Under its May 19, 2020 Enforcement Memorandum, the United States Department of Labor's Occupational Safety and Health Administration (OSHA) reinforced its position that COVID-19 is a "recordable illness." According to the Memorandum, Employers must record cases of COVID-19 if three conditions are met:

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention;
2. The case is work-related, as defined by 29 CFR § 1904.5;
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1903.7. [Enforcement Memorandum, available here.]

An employer must consider an injury "work-related" if an "event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." *Id.* at n. 3. An employer must consider an injury to meet "general recording criteria," if, among other things, it results in "death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness." *Id.* at n. 4.

OSHA acknowledges the difficulty in determining "whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace." *Id.* To aid employers in determining whether a COVID-19 illness is "work-related" and "recordable," OSHA has articulated three factors:

1. *The reasonableness of the employer's investigation into work-relatedness*. Here, OSHA expects employers to "ask the employee how he believes he contracted the COVID-19 illness," "discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness," and "review[] the employee's work environment for potential exposure."
2. *The evidence available to the employer*. Here, OSHA notes that employers should look at information "reasonably available to the employer at the time it made its work-relatedness determination."
3. *The evidence that a COVID-19 illness was contracted at work*. Here, OSHA concedes that no "ready formula" exists. Instead, it asks employers to weigh additional factors to determine if the infection was work-related:

i. COVID-19 illnesses are likely work-related when several cases develop among workers with no alternative explanation.

ii. COVID-19 illnesses may be work-related if the employee contracts it shortly after lengthy exposure to a customer or client with a confirmed case, or contracts it while working in a location in the general public with ongoing community transmission, with no alternative explanation.

iii. In contrast, a COVID-19 illness may not be work-related if the employee is the only worker to contract the illness in her vicinity, and the job duties do not include frequent contact with the general public.

iv. A COVID-19 illness may not be work-related if a close family member or associate of an employee (who does not work for the company) is also infected or potentially infectious.

If an employer undergoes the inquiry above and is unable to determine whether it is "more likely than not" that exposure in the workplace played a causal role in a COVID-19 case, the employer does not have to record the illness. On the other hand, if, after its investigation, an employer determines that an employee's COVID-19 illness is, "more likely than not," "work-related," it has an obligation to record the incident.

Takeaways:

There is no bright-line rule to determine if an employee's contraction of COVID-19 is "work-related," and, thus, "recordable." Instead, employers must undergo the analysis above to determine if it is "more likely than not" that exposure occurred in the workplace. As OSHA admonishes, in "all events, it is important as a matter of worker health and safety, as well as public health, for an employer to examine COVID-19 cases among workers and respond appropriately to protect workers, regardless of whether a case is ultimately determined to be work-related." Ultimately, employers must adhere to their continuing responsibility to provide "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees." 29 U.S.C. § 654(a)(1).

About the Author:

Aaron Burrell (Member, Detroit & Troy) focuses his practice in the areas of complex commercial litigation, labor and employment law, appellate law, and minority business enterprises. As a member of the firm's labor and employment practice, he has successfully defended clients in a wide range of discrimination and unfair-labor-practice claims in state and federal court, as well as before the Equal Employment Opportunity Commission, the Michigan Department of Civil Rights, and the National Labor Relations Board. Mr. Burrell has also counseled clients on all aspects of the employment relationship including hiring, discipline, and the creation and enforcement of employment agreements. Mr. Burrell may be reached at 313-223-3118 or at aburrell@dickinsonwright.com.

Immigration Insights and Issues (III)

DHS ANNOUNCES REMOTE I-9 COMPLETION AND SUSPENSION OF AUDIT RESPONSES DUE TO COVID-19

Posted by **Kathleen Campbell Walker** | Mar 20, 2020

With all of the dark news surrounding COVID-19, the Department of Homeland Security (DHS) deserves a "thank you" from employers for their logical announcement related to Form I-9 compliance issues on March 20. The main points in the announcement are outlined below:

Remote Completion of Section 2 of Form I-9

For completion of Section 2 of the Form I-9, the prior position of DHS has been that the employee must be physically present in front of the business representative completing Section 2 of the Form I-9 as to their identity and work authorization. DHS has noted in the past that the employer's representative must review Section 2 documents not only visually – but physically as well. For example, does the card stock used to print a social security card appear to be appropriate? This expectation has always posed challenges for remote hires. Some notarial associations have advised their members not to perform this function as a company "agent" or "representative" for remote hire challenges, even though they are not being authorized to do so in a "notarial" capacity.

So what does this announcement do for Section 2 of the Form I-9 completion?

The text of the announcement provides –

Employers with employees taking physical proximity precautions due to COVID-19 ***will not be required*** *to review the employee's identity and employment authorization documents* ***in the employee's physical presence****. However, employers* ***must inspect*** *the Section 2 documents* ***remotely*** *(e.g., over video link, fax or email, etc.) and* ***obtain, inspect, and retain copies of the documents, within three business days for purposes of completing Section 2.*** *Employers also s****hould enter "COVID-19" as the reason for the physical inspection delay in Section 2 Additional Information field once physical inspection takes place after normal operations resume.*** *Once the documents have been physically inspected, the employer sh****ould add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or section 3 as appropriate.***

These provisions may be implemented by employers for a period of 60 days from the date of this notice (March 20) OR within 3 business days after the termination of the National Emergency, **whichever comes first**.

In addition, employers using this option must provide a written statement of their remote onboarding and telework policy for **each** employee. As to any audit of Forms I-9 for the future, employers are advised to use the later "in-person completed date" as the start date for these employees **only**.

Does this remote inspection rule apply to all new hires?

Disclaimer

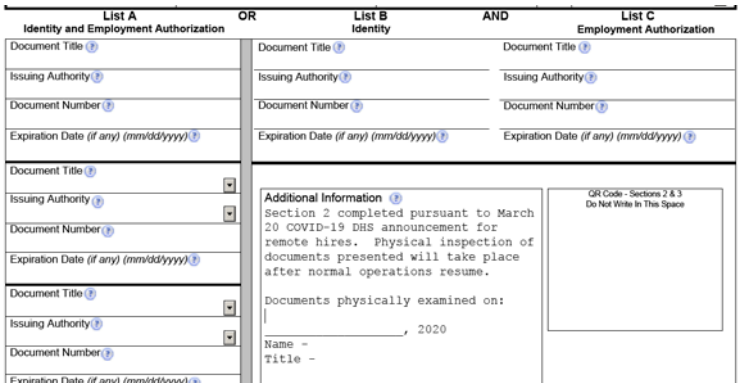
NO – The option only applies to employers and workplaces that are operating remotely due to the COVID-19 pandemic. If any employees are physically present at a "work location," **no exceptions** are applied. If, however, newly hired employees OR existing employees are subject to COVID-19 quarantine or lockdown, DHS will evaluate the use of the remote inspection option on a case-by-case basis. [In other words, if an employer chooses to do this, then they should prepare a memo to the compliance file regarding this decision for the affected employee(s)].

Of course, employers can still use the old option to designate a representative for Section 2 completion. They are not able to reduce their liability for accurate completion of the I-9 when they do use these designees.

How long does the remote inspection option apply to those allowed to do so under the policy?

Up to 60 days from March 20 (May 19) OR within three business days after the termination of the National Emergency, whichever comes first.

What might the Section 2 annotation, when applicable, look like?



What additional steps should employers consider to comply with this provision?

1. Prepare a memo to the compliance file noting names of employees used for the remote completion Section 2 option.
2. Determine dates to perform a physical inspection of the documents used for Section 2 completion.

- 60 days from March 20 OR
- Within three business days after the termination of the National Emergency, whichever comes first.

3. Remember that the documents reviewed remotely MUST be retained.
4. Employers should provide both the Form I-9 *and* the instructions for the Form in the completion process. Employees still must select the identity and work authorization documents to present.
5. Once normal operations resume, those employees for whom the Section 2 remote process was used must be advised to report to their employer within three business days for an in-person verification of their identity and work authorization documents. After physically inspecting the documents, employers must annotate the Form I-9 as to the date of inspection with a note in the "additional information field" of Section 2 of the Form I-9 or Section 3, as appropriate.

What about Form I-9 Notices of Inspection (NOI) served by DHS during March 2020 that are pending for response by the employer?

Employers who have not yet responded will be granted an **automatic extension** of 60 days from the *effective date.* That date may be the announcement date of March 20, but legal counsel should be consulted. DHS notes that future extensions may be available post the 60 day period, but that is not a guarantee and will be reviewed.

About the Author:

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Family Focus

DO I NEED A PANDEMIC CLAUSE IN MY DIVORCE DOCUMENTS?

Posted by Stuart Scott | Jul 10, 2020

The Coronavirus has upended long-standing post marriage relationships for a number of people. Parenting plans have been rendered impossible by quarantine and other mandates; well-established financial security has given way to the largest number of unemployed Americans since the Great Depression; and the ability to pay for the home one rents or owns has become difficult, if not impossible, for many.

Lawyers everywhere are scrambling to address numerous, complex and candidly oftentimes unanticipated, problems that have emerged from the unprecedented pandemic and its effects on the economy, health and jobs. Is now the time to take a look at divorce documents that are currently being negotiated, or which may later be negotiated, and try to address some of these problems?

Many businesses purchase insurance or put clauses in their contracts that address a legal occurrence called a "force majeure." A Force majeure clause, which some are now calling Pandemic Clauses, allow parties to either be excused from performance or suspend the time of performance, in whole or in part, due to events or conditions that are out of their control. Usually the events are of unanticipated catastrophic occurrences that are not foreseeable.

How then to protect against unforeseen circumstances that may put the ability to make spousal payments, child support payments, or other payments post-divorce impossible? One option could be a Pandemic Clause in the divorce documents, in states where they are allowed. Such a clause, if approved by court, could allow a person to later reduce their financial obligations in certain circumstances, and for this reduction to occur automatically.

For example, a Pandemic Clause could state that, under certain conditions, the requirement to pay alimony and/or child support could be reduced, or even suspended. A decrease might be directly related to any decrease in a party's gross income, i.e., a 20% reduction in payment if there is a 20% decrease in salary due to the unforeseen circumstances.

If such a clause were included in the divorce decree, the paying party's obligation could be automatically reduced at the time of such an event. It would be important to also include a provision in the decree that the court retains jurisdiction to change the financial obligation based on the facts in the particular case. But once a triggering event were to occur, and the conditions were to be met, the paying party *might automatically* be able to reduce their future financial obligations based upon an agreed-upon formula in the present.

There are many unanswered questions regarding Pandemic Clauses. Questions to consider with them include how might such a clause potentially affect performance obligations on the other side, including parenting time. If one parent is quarantined, might such a clause automatically stop the other parent's obligation to allow the child to be with that parent? State, regional and even local law mandates may provide assistance or a solution to this quandary.

Other areas of inquiry may include the following: if a Pandemic Clause automatically reduces support obligations, how long would this change last and how would the prior obligation resume? If there were to be such a reduction, might there be an obligation to later “make up” for the reduction in payments due to the Pandemic Clause temporary payment reduction requirement? By whom and how would the Pandemic Clause changes be monitored and controlled? What happens if the recipient’s pay is also reduced and how would the “double whammy” effect on that parent be accounted for?

Talk to your lawyer about how a Pandemic Clause might be appropriate in your case.

About the Author:

Stuart Scott is a litigation attorney with over 25 years of experience. He has tried hundreds of cases in both state and federal court. Some of his noteworthy victories have been featured in local, state and national publications. Stuart is also listed as a Tennessee Supreme Court Rule 31 Family Law Mediator. Stuart focuses his primary area of practice on family law. He represents people going through divorce and focuses his efforts on providing his legal services and advice to his clients in this area. Mr. Scott may be reached in our Nashville office at 615-620-1710.

CLIENT ALERT

DOJ AND FTC ANNOUNCE EXPEDITED ANTITRUST REVIEW PROCEDURE AND GUIDANCE IN RESPONSE TO COVID-19

by L. Pahl Zinn and Jeremy Belanger

On March 24, 2020, the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Bureau of Competition of the Federal Trade Commission ("FTC") released a Joint Antitrust Statement Regarding COVID-19 (the "Joint Statement") to announce expedited guidance and review of proposed collaborations between competitors[1] or antitrust compliance issues arising as part of the response to COVID-19. With health care providers and services specifically in mind, the agencies' ambitious goal is to respond to all COVID-19 requests within seven calendar days of receiving "all necessary information."

When businesses, particularly competitors, seek to engage in any collaboration, it can implicate Section 1 of the Sherman Act. One way to obtain antitrust guidance on a particular collaboration is to submit a request to the DOJ's Business Review Process or the FTC's Advisory Opinion Process (Review Processes). Recognizing that COVID-19 may "require unprecedented cooperation between . . . and among private businesses to protect Americans' health and safety," the agencies released the Joint Statement as a reminder of previous antitrust guidance on collaborations between competitors.

Recognizing that the Review Process can take months or longer, the agencies outline an expedited business review process for proposed collaborations in response to COVID-19. This is not a process that automatically applies by requesting a review; the expedited review needs to be specifically requested in writing and needs to include the following:

1. A description as to how it relates to COVID-19;
2. A description of the nature and rationale of the proposal (including the participants, the products or services provided under the proposal, and any temporal and geographic limitations);
3. Any proposed contractual or other arrangements among the parties (including copies of the operative documents);
4. Identification of major expected customers (e.g., hospitals, manufacturers of equipment, etc.);
5. Any available information regarding the competitive significance of other providers of the products or services (for example, if two hospitals were to collaborate on sharing services, they would need to identify who the other competitors in the market are and what their market share is); and
6. The name and contact information of a person that can provide additional information.

The request for the expedited review must be sent via email to ATR.COVID19@DOJ.GOV. Any additional information needed or requested can also be submitted via email or, at the agencies' discretion, orally. Because these expedited reviews are intended to be limited to responding to the emergency situation related to COVID-19, the statement of the agencies' intention to not enforce the antitrust laws against a proposed collaboration is limited to one year from the date the agencies respond to the request. If further time were needed, a new request would need to be submitted.

In addition, the agencies offer reminders of certain guidelines which, if met and absent extraordinary circumstances, generally safeguard collaborations from antitrust scrutiny. The previous guidelines include collaborations related to Health Care, Information Exchange, and Collaborations Among Competitors. Relevant to responding to COVID-19, the Joint Statement identifies certain instances where collaborations adhering to these guidelines offer a pathway to help businesses who have to act quickly:

- Research and development collaborations are typically procompetitive;
- Sharing technical know-how may be necessary for certain collaborations to "achieve [their] pro-competitive benefits";
- Absent extraordinary circumstances, collaboratively developing patient management standards to assist in clinical decision-making;
- Joint purchasing arrangements consistent with the safety zones among health care practices; and
- Private lobbying efforts consistent with *Noerr-Pennington* doctrine[2], including lobbying the government for federal emergency relief.

Notably, the agencies reiterate their dedication to enforcing against collaborations among competitors that are "naked" agreements to restrain trade, such as agreements to increase prices, share information related to prices, wages, or costs, fix prices or wages, rig bids, or allocate markets or customers.

Many states are releasing directives meant to address public health concerns, particularly related to concerns over having sufficient personnel or equipment for health care entities. For example, on March 30, 2020, the Governor of the State of Michigan released an Executive Order, E.O. 2020-30, which among other directives, permits the personnel of one health facility to be used by another facility. While this may address issues related to access to care, if the practice is the result of an agreement or collaboration between competitors such as hospitals, then it can implicate the federal antitrust law. While recognizing that facilities may need to share resources and services, there is no "safe passage" for such conduct in the Joint Statement and health care providers are wise to consult with legal counsel.

Dickinson Wright's health care and antitrust attorneys have considerable experience in assisting businesses in complying with the various requirements of state, federal, and local laws and requirements.

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[1] Under Section 1 of the Sherman Act, "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce . . . is declared illegal." 15 U.S.C. 1. Section 2 prohibits monopolizing, attempts to monopolize, or conspiracies to monopolize "any part of trade or commerce." 15 U.S.C. 2. The penalties for violating the Sherman Act are steep and can include a fine up to $100,000,000 for a corporation or $1,000,000 for an individual, imprisonment up to 10 years, or both. Additionally, there can be civil penalties up to three times the amount of damages.

[2] *Noerr-Pennington* offers antitrust immunity to certain types of conduct by private parties who petition or solicit governmental actions which could result in restrictions on competition. It is born from a series of antitrust cases arising from the intersection of free speech and antitrust law in the context of various governmental branches.

COVID-19 BUSINESS ALERT – ELECTRONIC CORPORATE FILINGS AND VIRTUAL SHAREHOLDER MEETINGS FOR ONTARIO CORPORATIONS

by Lucie D. Kroumova

On May 12, 2020, Bill 190 (the "**Bill**") received royal assent, providing temporary and necessary relief to Ontario businesses to permit corporations to conduct virtual meetings, (regardless of inconsistent provisions in corporate by-laws); to defer certain annual meetings in specified circumstances; and to allow the Ministry of Government and Consumer Services (the "**Ministry**") to accept copies of documents, electronic signatures on documents, and electronic filing of documents.

A. COPIES OF DOCUMENT, ELECTRONIC SIGNATURES, AND ELECTRONIC FILINGS

The Bill enacted the *Alternative Filing Methods for Business Act*, 2020 (the "**AFMBA**") which permits documents that are required or permitted to be filed by in-person delivery or mail under certain "business statutes" to be filed by alternative electronic methods instead. The definition of "business statutes" under the AFMBA is broad and includes the *Business Corporations Act* (Ontario) (the "**OBCA**"), the *Business Names Act*, the *Corporations Act*, the *Co-operative Corporations Act*, the *Corporations Information Act*, the *Extra-Provincial Corporations Act*, and the *Limited Partnerships Act*. These statutes have also been amended to reflect the new changes under the Bill.

In relation to corporations governed under the OBCA or the Corporations Act, companies may now submit notices and other documents to the Ministry electronically. Articles, letters patent, or applications that are otherwise required to be filed in-person or by mail can be filed as copies and deemed originals, including documents with photostatic or electronic signatures. In practice, electronic filings were already available for certain forms through private service providers. However, the amendment under the Bill will allow corporations to directly file forms electronically with the Ministry, thereby reducing the need for using private service providers.

Corporations filing articles, applications, or other forms approved under the new provisions of the OBCA, whether electronically or by another method, are still required to keep properly executed versions of such documents at the registered office in paper or electronic format, including records related to electronic signatures if such are used. Corporations may be "audited" and required at a later date to provide copies of such executed versions, including records related to the use of an electronic signature.

B. VIRTUAL SHAREHOLDER AND DIRECTOR MEETINGS

The Bill provides that despite any provisions in the articles, by-laws or a unanimous shareholder agreement of a corporation that provides otherwise, a shareholder meeting may be held by telephonic or electronic means. A shareholder who, through these means, votes at the meeting or establishes a communications link to the meeting is deemed for the purposes of the OBCA to be present at the meeting. The same applies to directors' meetings, provided that the method "permits all persons participating in the meeting to communicate with each other simultaneously and instantaneously."

Shareholder meetings under the OBCA required to be held within the period of the declared emergency can be deferred but no later than the 90th day after the day the Declaration of Emergency is terminated. If the shareholder's meeting is required to be held within the 30-day period that begins on the day after the day the Declaration of Emergency is terminated, the last day on which the meeting is required to be held is no later than the 120th day after the day the Declaration of Emergency is terminated. The Declaration of Emergency is currently set to expire on June 2, 2020, unless further extended by the Ontario government. The amendments under the *Corporations Act* offers similar extensions and relief provisions to the OBCA.

Under both the OBCA and the *Corporations Act*, if a notice of a meeting of shareholders has been sent for a shareholder meeting to be held on a day that falls within the period of the declared emergency, and, after the notice is sent, the date, time, or place of the meeting is changed in order to hold a virtual meeting, another notice of meeting is not required to be sent. However, the persons entitled to receive the notice must be informed of the change in a manner and within a time that is reasonable in the circumstances.

The above-referenced amendments offer much-needed flexibility during the COVID-19 pandemic and provide a continuation of some of the earlier repealed corporate measures under Ontario Regulation 107/20 pursuant to the *Emergency Management and Civil Protection Act* (Ontario). It is the hope of all Ontario business owners and advisers that these new provisions will cause the government to adopt and allow for greater electronic filings and virtual meetings following the COVID-19 pandemic.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

EMPLOYEE BENEFIT PROVISIONS IN THE CARES ACT PROVIDE EMPLOYER AND PARTICIPANT RELIEF

Posted by Jordan Schreier | Mar 30, 2020

The Coronavirus Aid, Relief, and Economic Security ("CARES") Act became law on March 27, 2020. The Act includes important provisions that impact employer sponsored benefit plans. Consistent with its name, the Act provides participants enhanced access to retirement plan money, provides employers relief regarding defined benefit pension plan funding, aids employees by requiring payment of certain Covid-19 related medical expenses, and expands employee access to health accounts to pay for over-the-counter medical products. A summary of the employee benefits portions of the Act follows.

Retirement Plan Provisions

New Distribution Option for Coronavirus Related Distributions and Waiver of 10% Early Withdrawal Excise Tax

The Act permits (but does not require) retirement plans including qualified plans, 403(b) plans and 457 plans to permit a new type of distribution to participants called a Coronavirus Related Distribution ("CRD"). CRDs are distributions (including in-service distributions regardless of age) of up to an aggregate of $100,000 made between January 1 and December 30, 2020 (the Act says December 30, not December 31) for participants impacted by the Coronavirus. Specifically, a CRD is a distribution to a plan participant who:

- is or whose spouse or dependent is diagnosed with COVID-19 or its virus, or
- experiences adverse financial consequences as a result of quarantine, furlough, layoff, or reduced work hours due to the virus, or
- can't work due to lack of child care due to the virus or due to closing or reduced hours of a business owned or operator by the participant due to the virus.

The Act permits a plan administrator to rely on an employee's certification that the distribution qualifies as a CRD. For purposes of the $100,000 limit, all plans sponsored by members of the same controlled group, group of trades or businesses under common control and affiliated service group are aggregated. CRDs are not permitted from nonqualified plans.

The Act waives the normal 10% Internal Revenue Code Section 72(t) excise tax that applies to early distributions (e.g., in-service prior to age 59 ½) from eligible retirement plans.

Under the Act, a participant may (but is not required to) spread the amounts required to be included in gross income from a CRD over three tax years. A participant may also repay the amount of CRDs to an eligible retirement plan any time during the three-year period beginning on the date of the distribution. Any repayment is treated as an eligible rollover distribution and is not counted against plan contribution limits. This is similar to the repayment of amounts distributed to a participant for a

qualified birth or adoption under the SECURE Act. At this time, the income tax treatment of a repayment is not clear from the Act.

A CRD is not considered an eligible rollover distribution so the usual 20% income tax withholding requirement does not apply. Instead, a 10% withholding applies unless the participant elects otherwise.

A plan sponsor is not required to permit CRDs but many will as a means of providing employees struggling financially due to the Coronavirus national emergency a source of tax favorable cash. Many plan record keepers have or are in the process of adjusting their systems to administer the CRD provision. Plan sponsors should promptly check with their record keepers to determine when CRDs will be available.

A plan is permitted to operate in compliance with the new rules pending adopting plan amendments, but plan sponsors must adopt conforming amendments no later than the last day of the plan year that begins on or after January 1, 2022 (2024 for governmental plans).

Improvement of Plan Loans

The Act increases the $50,000 maximum plan loan limit to $100,000 for loans made in the 180-day period from the date of the Act for participants who satisfy the CRD definition above. The Act eliminates the limit that a loan cannot exceed 50% of the present value of a participant's benefit. This appears to allow a participant to borrow against his or her entire vested plan benefit, although importantly, the Act did not change the legal requirement that a plan loan be adequately secured. Any due dates for loans due between the date of the Act and December 31, 2020 are extended one year, with the amount due adjusted for interest. The additional year is not counted for purposes of the five-year plan loan amortization rule.

This enhanced loans rules are also optional but most plans will also adopt the provisions. Plan sponsors should check with their record keepers to determine when the record keepers can administer the loan provisions.

A plan is permitted to operate in compliance with the new rules pending adopting plan amendments, but plan sponsors must adopt conforming amendments no later than the last day of the plan year that begins on or after January 1, 2022 (2024 for governmental plans).

Temporary Waiver of Required Minimum Distribution Rules

The Act waives for the 2020 year all required minimum distributions ("RMD") for participants under defined contribution plans (e.g., 401(k), profit sharing, etc.), 403(a) and 403(b) plans, and 457(b) plans maintained by governmental employers (but not tax-exempt employers), including for participants who turned age 70 ½ in 2019 but have not yet take a RMD in 2020. Given that 2020 RMDs are based on the value of participant accounts on December 31, 2019, the waiver will help participants avoid having to liquidate accounts based on values that may be substantially lower than at the valuation date. The Act provides a complete waiver for 2020. Participants are not required to double up on RMDs for 2021.

A plan is permitted to operate in compliance with the new rules pending adopting plan amendments, but plan sponsors must adopt conforming amendments no later than the last day of the plan year that begins on or after January 1, 2022 (2024 for governmental plans).

Delay in Pension Minimum Required Contributions and AFTAP Reliance

The Act provides cash flow relief to sponsors of single employer defined benefit pension plans by delaying the due date of all minimum required contributions due in 2020 until January 1, 2021. On that date, all 2020 minimum required contributions are due, with interest from the original due date to the payment date.

For plan years which include 2020, defined benefit pension plans can rely on their adjusted funding target attainment percentages (applicable to determine certain pension plan accrual and distribution restrictions) from the last plan year ending before January 1, 2020. Many pension plans obtain AFTAP certifications by April 1, 2020, so this relief is timely. It is not clear whether an AFTAP that has already been certified can be rescinded if the prior year's AFTAP is more favorable. Plan

sponsors should discuss with the plan's actuary the implications of using the prior year v. current year AFTAP certification.

Welfare Benefits Provisions

Group Health Plan Coverage of Covid-19 Services

The Act expands the types of COVID-19 diagnostic tests which must be paid for by health insurance and group health plans with no cost sharing (as originally provided for in the FFCRA). Under the Act, these diagnostic services must be reimbursed at the in-network rate, or for out of network providers, at the cash price posted by the provider on its website, or a lower rate negotiated with the provider. Group health plans and insurers must also provide as a no cost-sharing preventative benefit, certain qualifying coronavirus preventive services. A "qualifying coronavirus preventive service" is an item, service, or immunization that is intended to prevent or mitigate COVID-19 that satisfy certain federal standards. The coverage aspects of these provisions should be handled by an employer's insurance company or third party administrator.

HDHPs May Pay for Telehealth Pre-Deductible

The Act allows a high-deductible health plan with a health savings account to cover telehealth or other remote care services prior to a participant reaching the deductible limit. This increases services available to participants who may have been exposed to or have COVID-19 without resulting in the participant being ineligible for an HSA contribution. This applies for plan years beginning on or before December 31, 2021.

Purchase of Over the Counter Medical Products from HSAs/FSAs/MSAs/HRAs

The Act allows participants to use funds in health savings accounts, flexible spending accounts, Archer medical savings accounts, and health reimbursement arrangements, to purchase over-the-counter medications (expanded to include menstrual products), including those needed in quarantine and social distancing, without a prescription. This change is effective for amounts paid/expenses incurred after December 31, 2019.

Miscellaneous Provisions

DOL Authority to Delay Reporting and Disclosure Deadlines

ERISA provides that the DOL can delay any obligation such as reporting and disclosure deadlines for up to one year in the event of disasters and terrorist attacks. Public health emergencies have been added to the reasons for the delay.

Tax-Free Employer Paid Student Loan Repayments

Section 2206 of the Act allows employers to pay up to $5,250 annually on a tax-free basis to help a student repay a student loan between date of the Act and January 1, 2021. This applies to new and existing loan repayments and other educational assistance (e.g., tuition, fees, books) provided by the employer under current law.

About the Author:

Jordan Schreier is a Member in Dickinson Wright's Ann Arbor office and Chair of the Firm's Employee Benefits and Executive Compensation Practice Group. His practice primarily involves advising both for-profit and non-profit employers on planning and compliance issues involving all aspects of employee benefits, including welfare benefits, qualified retirement, and other deferred compensation plans. He can be reached at 734-623-1945 or JSchreier@dickinson-wright.com and you can visit his bio here.

All Things HR

EMPLOYER ACTIONS FOR 401(K) PLANS SICKENED BY CORONAVIRUS

Posted by Jordan Schreier | Mar 19, 2020

The realities of the Coronavirus (Covid-19) pandemic have quickly and dramatically changed the way we work, shop, seek health care, and interact with each other. Unfortunately, the impact of the virus on the economy and investment markets has been just as severe. We have seen increased market volatility, the end of a long bull market, and significant reductions in employees' 401(k) plan account values of the scope not seen since the great recession.

The employer sponsors of 401(k) plans and any employer-based fiduciary investment committees should consider taking steps now in response to these developments. These steps include:

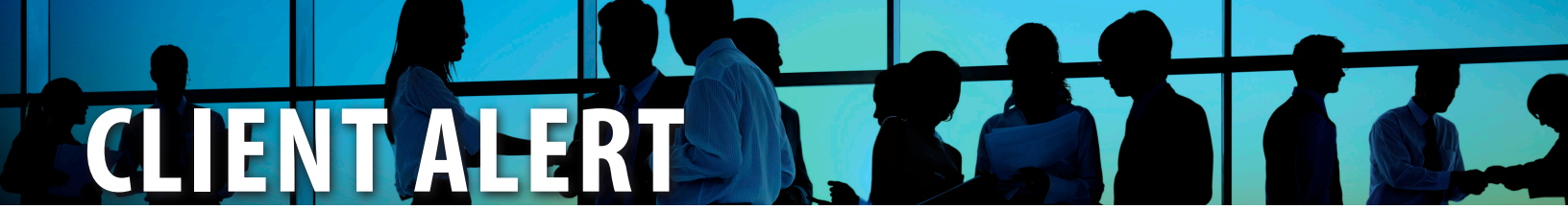
- Confirm Continued Availability of Service Providers – Be in constant contact with the plan's service providers including record keepers, trustees, investment managers, investment advisors, attorneys, and accountants and obtain confirmation on how each is planning to continue to provide required plan services during the pandemic, particularly for businesses that are requiring their employees to work remotely. Some record keepers have already notified employers that they have increased staffing to respond to higher telephone call volumes.
- Educate and Communicate – Record-keepers and investment advisors across the 401(k) industry have been producing educational and communication material designed to help participants understand the recent market downturn, market volatility, the historical benefits of long term investing, and how to use plan services and features (e.g., rebalancing). Employers should take advantage of these materials. As part of this process, employers should review their record keeper and investment adviser contracts to make sure they are receiving all contracted for educational and communication services, and understand the availability and cost of additional services such as communications customized to the employer's specific plan participant needs.
- Advise Participants to Seek Professional Guidance – Summary plan descriptions and plan investment material often advise participants to consult with their personal tax and financial advisers before selecting or changing investment funds. This is a good time to include in participant educational material a reminder that their own advisors can be a good source of information, guidance, and reassurance. Remind plan participants of the availability of managed account or managed advice services under the plan, if applicable. This is also a good time to make sure that electronic disclosures comply with Department of Labor regulations and that the plan has good addresses for participants for whom electronic disclosure is not permissible.
- Monitor Plan Investment Alternatives – Review each investment alternative under the plan with the plan's investment adviser, either at the next quarterly meeting or, even better, at a specially called interim status call. Under ERISA, a fiduciary must act as a prudent expert would in similar circumstances. This includes prudently monitoring existing investment alternatives under the plan. We have learned that a common allegation in a large number of fee and investment fund related breach of fiduciary duty lawsuits over the past decade is that fiduciaries failed to replace underperforming investment funds. Depending on the length and severity of the market downturn, there is every reason to think that these types of lawsuits will continue, with fiduciaries facing allegations that they should have replaced select investment funds with other funds that lost less

in the market. Extra due diligence such as interim calls with the plan's investment advisor, calls with investment managers, deeper market analysis, etc., is part of prudent fiduciary action and could be helpful in the event of future lawsuits. Fiduciaries should carefully document their decision-making.

- Deep Dive on Stable Value Funds – For plans with stable value funds, fiduciaries should perform extra diligence on the financial status of the stable value fund issuer (e.g., an insurance company) and the stability of any wrap insurance protection. The plan's investment advisor should assist with this review.

Despite that these are difficult and in many respects, unprecedented times, we take some comfort in the old saying, "this too shall pass." Nevertheless, plan fiduciaries who take prudent action now may help things pass just a bit more easily.

About the Author: Jordan Schreier is a Member in Dickinson Wright's Ann Arbor office and Chair of the Firm's Employee Benefits and Executive Compensation Practice Group. His practice primarily involves advising both for-profit and non-profit employers on planning and compliance issues involving all aspects of employee benefits, including welfare benefits, qualified retirement, and other deferred compensation plans. He can be reached at 734-623-1945 or JSchreier@dickinson-wright.com and you can visit his bio here.



LABOR AND EMPLOYMENT

EMPLOYERS' TOP 10 BURNING QUESTIONS ABOUT THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT ANSWERED

by Sara Jodka and Jeffrey Beemer

In light of the Families First Coronavirus Response Act, H.R. 6201 (FFCRA) passing into law, we put together a top ten list of questions employers have about the FFCRA.

1. What are the expansions for employers that require them to provide certain time off / payment benefits to employees?

There are two protections, or rather, benefit carve-outs for eligible employees under the FFCRA: (1) the Emergency Family and Medical Leave Expansion Act (FMLA Expansion); and (2) the Emergency Paid Sick Leave Act.

Each have their own eligibility requirements and differ in how they work, so understanding the differences between the two is critical to proper application.

2. What size of employer do each of the acts apply?

Both apply to employers with fewer than 500 employees, but in the case of public agencies, those employing one or more employees.

3. What about small businesses, *i.e.*, those with 50 or fewer employers?

The FFCRA would apply to employers with 50 or fewer employees, which is a departure from FMLA benefits.

However, both the FMLA Expansion and the Emergency Sick Leave Act include provisions that the Secretary of Labor has the authority to issue regulations, for good cause, that exempt small businesses with fewer than 50 employees. In the FMLA Expansion, the Secretary of Labor may exempt small businesses from providing public health emergency leave when the imposition of such would jeopardize the viability of the business as a going concern. In the Emergency Sick Leave Act, the Secretary of Labor may exempt small businesses from the qualifying reason of an employee having to be on leave to care for a minor child in the event of a school closure or day care provider impossibility when the imposition of such requirements would jeopardize the viability of the business as a going concern.

The Secretary of Labor is to issue regulations by March 25, 2020, which, hopefully will provide more information to small businesses about the application of these exceptions.

4. When does FFCRA go into effect and how long does it last?

It will go into effect no later than 15 days after the President signed it on March 18, 2020, which is April 2, 2020.

5. Is the FFCRA retroactive to cover time missed from work prior to the President's signature?

No.

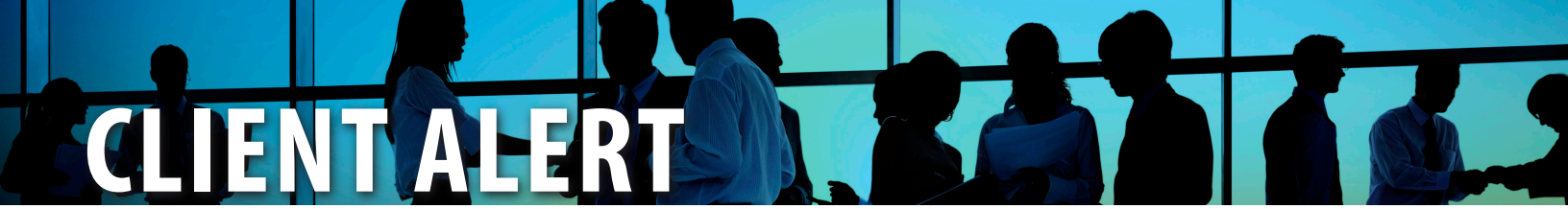
6a. What does the FMLA Expansion require employers to do?

The FMLA Expansion is covered by Division C of the FFCRA. It allows that eligible employees may take FMLA leave for a "qualifying need related to a public health emergency," which means that the employee is unable to work (or telework) in order to care for the employee's own son or daughter under 18 years old because the child's school or place of care has been closed or the child care provider of the child (*e.g.*, someone who receives compensation for providing child care services on a regular basis) is unavailable, due to a public health emergency.

To be eligible, an employee must have been employed for at least 30 calendar days by the employer from whom leave under the FFCRA is requested, which is significant reduction in working time required for benefits from the 1-year / 1,250 hour requirement in the pre-amended FMLA.

The first 10 days of the leave are unpaid; however, during that period, employees would be able to utilize any employer-provided sick leave balances that they might have. (They also may be able to use the sick leave entitlement provided under the Emergency Sick Leave Act discussed below). After that 10-day period, the employer will have to pay the employee at least 2/3 the employee's regular rate of pay for the hours the employee was or would have been normally scheduled to work. There is a cap, however, and that cap is that the employee cannot receive more than $200 a day or $10,000 in the aggregate for the entire duration of the leave.

Hourly Employee Example
An employee's child's school has been shut down by government closure since March 16, 2020 and the employee, who earns $18 an hour and regularly works 8 hours a day and 40 hours a week, took off work that day to care for the employee's under 18-year-old daughter. The FFCRA becomes effective by April 2, 2020. The employee's 10-day unpaid leave period is from April 2, 2020 through April 12, 2020 during which time the employee may use other sick leave and paid time off entitlements as the employee has available. As of April 13, 2020, the employee may receive reimbursement of $96 a day (2/3 the $144 the employer would have paid if the employee would have worked). The child's school is closed until the end of the school year (would be different if the leave is for a child care impossibility), May 29, 2020, meaning the employer would be responsible for paying the employee for 34 days, for a total of $3,266.00.



Salaried Employee Example

Using the same dates, but changing the scenario using a salaried employee who earns a $60,000 annual salary, beginning April 14, 2020, the employer would pay the employee $153.84 a day (the employee's regular rate would be $28.85 and 2/3 that rate for 8 hours a day would be $153.84). If the child's school (would be different if the leave is for a child care impossibility) is closed until the end of the school year, May 29, 2020, the employer would be responsible for paying the employee for 34 days, for a total of $5,230.56.

When an employee's schedule varies from week to week and the employer is unable to determine with certainty the number of hours the employee would have worked had the employee not taken leave, the employer would take a number equal to the average number of hours the employee was scheduled to work over the 6-month period ending on the date on which the employee takes leave, including hours for which the employee took leave of any type.

However, if the employee did not work over such a period, the reasonable expectation would be the average number of hours per day that the employee would normally be scheduled to work at the time the employee was hired.

Employees are to provide employers notice of the need for this leave as soon as practicable.

6b. Are employers required to restore employees to their original positions?

Yes, with the exception of employers with fewer than 25 employees in certain circumstances. For employers with fewer than 25 employees, if the employee's position no longer exists due to economic conditions or other changes in the operating conditions of the employer that affect employment, and that are caused by a public health emergency during the period of leave, then they do not have to restore the employee's employment. However, the employer must make reasonable efforts to restore the employee to an equivalent position.

6c. Are any employees exempt from the FMLA Expansion?

Yes. If the employee is a health care provider or emergency responder, the employer may elect to exclude the employee from the FMLA leave extension allowance.

6d. Can the employer require employees to substitute other leave?

No, but an employer may offer the employee the *option* to substitute any accrued vacation leave, personal leave or other leave for the unpaid leave portion of the allowance, which, in application, could mean that during the 10-day waiting period, the employee could receive full wages as opposed to the 2/3 benefit amount.

6e. Does the employer have to continue employee benefits during the leave?

Nothing was added or changed to the FMLA on this issue via the FFCRA, so employers will have to continue benefits just like they are required to do under the pre-amended FMLA requirements.

6f. Does the employee have to provide notice, just as required under the employer's FMLA policy?

Yes. If the employee's need for leave is foreseeable, the employee must provide as much notice as possible.

7a. What does the Emergency Paid Sick Leave Act require an employer to do?

The Emergency Paid Sick Leave Act is provided for in Division E of the FFCRA. It states that employers must provide paid sick time immediately (as opposed to the 10-day waiting period in the FMLA Expansion) to an employee if the employee is unable to work (or telework) because of one of the following reasons:

- The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for an individual subject to a local quarantine or isolation order or who has been advised by a health care provider to self-quarantine.
- The employee is caring for the employee's child if the child's school or childcare provider has been closed or is unavailable due to COVID-19 precautions.

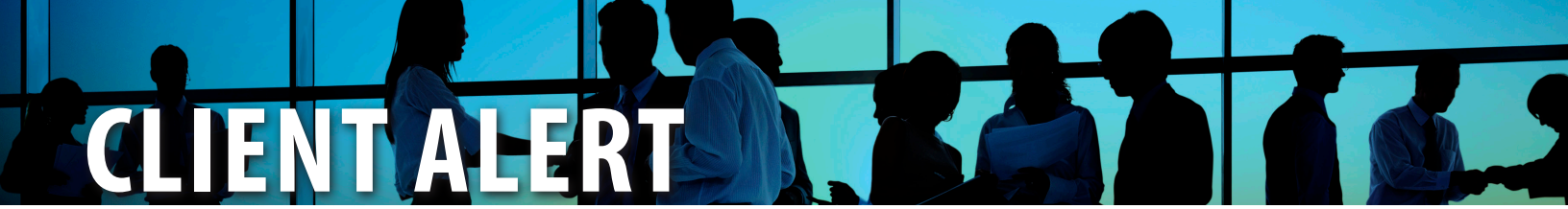
Full-time employees are entitled to up to 80 hours of paid sick time, and part-time employees are entitled to a number of paid sick time hours equal to the number of hours that the employee ordinarily works, on average, during a 2-week period.

7b. Are there different payment requirements if the leave is for the employee vs. caregiver leave?

Yes. Paid sick leave is calculated based on the employee's regular rate of pay for the number of hours the employee usually works, up to a maximum of:

- $511 per day and $5,110 in the aggregate where the employee him or herself is subject to a quarantine order related to COVID-19, has been advised by a health care provider to self-quarantine, or is experiencing symptoms and seeking a medical diagnosis, and;
- $200 per day and $2,000 in the aggregate where the employee is caring for another individual subject to a quarantine order, the individual has been advised by a health care provider to self-quarantine, or the individual is experiencing symptoms, or the employee is caring for a son or daughter due to school or childcare closure.

If the employee is off work because the employee is caring for an



individual who is subject to a Federal, State or local quarantine or isolation order, is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions, or 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, then the employee's rate of pay would be 2/3 the employee's regular rate of pay, not 100%.

7c. How long does an employee have to be employed by the employer before the employee is eligible for the emergency leave benefit?

Paid sick time is immediately available for use, regardless of how long the employee has worked for the employer.

7d. Does the Emergency Sick Leave Act allow employers to require employees to exhaust other leave, including paid time off, before they can use the Emergency Sick Leave Act Benefit?

No. The Emergency Paid Sick Leave Act includes an express provision that an employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under this Act.

7e. What are the other conditions or restrictions of the Emergency Sick Leave benefit?

- It does not carry over from year to year, and unused paid sick time is not payable upon separation from employment.
- The employer may not require, as a condition of providing paid sick time, that the employee search for or find a replacement employee to cover the hours during which the employee is using sick time.
- The employer may not discriminate or retaliate against the employee for taking leave under the Emergency Sick Leave Act.
- The employer may require employee follow reasonable notice procedures to continue to receive paid sick time.

7f. Are any employees exempt from Emergency Paid Sick Leave?

Yes. The Secretary of Labor will have authority to issue regulations for good cause to:

1. Exclude certain health care providers and emergency responders from the definition of employee.
2. Exempt small businesses with fewer than 50 employees from the requirements *if* the employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable.
3. As necessary to carry out the purpose of the Emergency Sick Leave Law.

Again, the regulations are to be issued by March 25, 2020, and we will provide more information at that time about how these exemptions may work.

7g. What is the penalty for failure to pay sick time under the Emergency Sick Leave Act?

Failure to pay is considered failure to pay minimum wage under the Fair Labor Standards Act, which would include liquidated damages of two-times the amount owed and attorneys' fees.

8. Do the FMLA Expansion and Emergency Paid Sick Leave Act ever work together?

Yes. Because both the FMLA Expansion and the Emergency Paid Sick Leave Act cover instances where leave is needed to take time off to care for an employee's son or daughter if the child's school or place of care has be closed or the child care provider is unavailable due to COVID-19 precautions.

Notably, the Emergency Paid Sick Leave Act, which has no waiting period, would actually allow the employee to obtain paid leave during the 10-day waiting period that is required under the FMLA Expansion. Because the 2/3 reimbursement would kick in due to the Emergency Leave being caregiver leave, the amount due to the employee from the employer would be the same under both the FMLA Expansion and the Emergency Paid Sick Leave Act.

Using our example from above:

The FMLA Expansion and Emergency Sick Leave Act Working Together
An employee's child's school has been shut down by government closure since March 16, 2020 and the employee, who earns $18 an hour and regularly works 8 hours a day and 40 hours a week, took off work that day to care for the employee's under 18-year-old daughter. The FFCRA becomes effective April 2, 2020. The employee's 10-day unpaid leave period is from April 2, 2020 through April 12, 2020. During this time, the employee complies with all eligibility requirements under the Emergency Paid Sick Leave Act and the business is not an employer with fewer 50 employees that has been approved for an exemption for these employees, and eligible to receive 7 workdays of pay during that time period / 8 hours a day (assuming the employee was scheduled to work weekdays only) for a total of 56 hours and $672 (at the employee's 2/3 hourly rate). As of April 13, 2020, the employee also would be eligible for the FMLA Extension, but would have 24 hours remaining under the Emergency Paid Sick Leave Act. Employee would use remaining 24 hours of Emergency Sick Leave through April 15, 2020 and, beginning, April 16, 2020, be eligible for the 2/3 rate under the FMLA Expansion, which would continue for up to $200 a day / $10,000 in total benefit. In the event the business is a small employer with fewer than 50 employees and properly applies for and received an exemption under the Emergency Sick Leave Act (assuming that the Secretary of Labor allows it), the employee (so long as employed by the employer for 30 days and off work due to a child's school closure or impossibility) would not be entitled to any compensation until eligible under the FMLA Extension as the Emergency Sick Leave Act would not be available.

9. Will employers be reimbursed for these payments to employees? If so, how?

Division G provides for Tax Credits for Paid Sick Leave and Paid Family and Medical Leave and provides that an employer will be allowed a tax credit against the employer's excise tax, which is 6.2% of the wage paid by the employer with respect to employment.

The amount of the credit allowed is increased by as much of the employer's qualified health plan expenses properly allocable to the qualified sick leave wages for which such credit is also allowed.

That is as much as we will get into taxes as our tax and employee benefits groups will issue separate publications specifically on the tax credit issue.

10. How does the FFCRA interrelate with state unemployment insurance benefits or in the event of a layoff situation or shutdown?

FMLA and emergency paid leave and unemployment deal with very different employment situations. For the leaves at issue in the FFCRA, an employee must miss work for specifically designated reasons.

Unemployment, on the other hand, applies when an employer no longer has a job for an employee and subjects that employee to a layoff, furlough, or termination situation.

As such, it is important to understand the difference of when an employee is on leave for one of the qualifying reasons to which the FFCRA would apply and to those where the employee is not working due to a plant/office/facility shutdown or closure where unemployment would be appropriate.

11. Are there any other requirements that employers need to be aware?

Yes. The Emergency Paid Sick Leave Act requires employers conspicuously post and keep posted a notice, to be prepared or approved by the Secretary of Labor. That poster will be issued by March 25, 2020.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of labor and employment law. The foregoing content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions relating to any of the topics covered.

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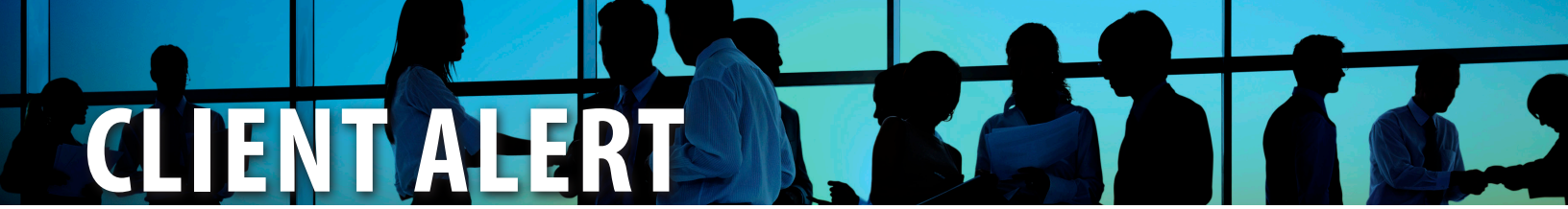

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EMPLOYERS' TOP BURNING QUESTIONS ABOUT THE DOL'S GUIDANCE ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT ANSWERED

by Sara H. Jodka and Jeffrey M. Beemer

For those employers still working on how they will comply with the Families First Coronavirus Response Act (FFCRA), the Department of Labor has issued a number of Q&A guidelines aimed at helping employers administer Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave Act (FMLA) Expansion pieces of that law. The Department of Labor has also issued questions and answers about posting requirements and a Field Assistance Bulletin regarding the Department of Labor's Wage & Hour Division's (WHD) 30-day non-enforcement policy. We wanted to put together another Q&A list to address the next round of questions employers are asking, in follow-up to our earlier Top Ten list.

TIMING AND RETROACTIVITY

1. When is the FFCRA effective? How long does it remain in effect? Does it apply retroactively?

The effective date is April 1, 2020, and no, that is not an April Fool's prank. It applies to leave taken between April 1, 2020 through December 31, 2020. It does not apply to any leave taken before April 1, 2020. Any leave granted before April 1, 2020 will not be eligible for the tax credits.

EMPLOYER COVERAGE

2a. What does "fewer than 500 employees" mean? How do you count the 500?

The FMLA Expansion applies to certain public employers and private employers with fewer than 500 employees, so employers who have 1-499 employees are covered.

The EPSL applies to all employers who are otherwise covered by the Fair Labor Standards Act with fewer than 500 employees, so 1-499 employees.

2b. When does an employer determine whether it has "fewer than 500" employees?

An employer must calculate its total employee headcount each time an employee takes leave. This could mean that an employer has fewer than 500 employees, or 500 or more employees, at different times while the law is in effect because of layoffs and other events that cause the employer's total number of employees to increase and decrease.

2c. What employees count toward the 500 number?

The following employees go into that calculation:

- Full-time and part-time employees (no independent contractors are counted);
- Only those employees within the United States (as the FMLA does not apply outside the United States and its territories);
- Employees on leave;
- Temporary employees who are jointly employed by the employer and another company (regardless of whether the jointly-employed employees are maintained on only one employer's payroll), which include those employed through a staffing agency or Professional Employer Organization (PEO); and
- Day laborers supplied by a temporary agency.

2d. How are employees counted if the employer has separate establishments or divisions?

A corporation (including its separate establishments or divisions) is considered a single employer and must count all of its employees toward the 500 threshold. Where a corporation has an ownership interest in another corporation, the two corporations are typically separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are joint employers, all of their common employees would be counted in determining whether the EPSL or the FMLA Expansion applies.

The FMLA's integrated employer test should be used to determine whether two or more entities are separate or combined for the FMLA Expansion. Those factors to be considered are whether the entities have common management, the scope of the interrelation between their operations, whether there is centralized control of labor relations, and the degree of common ownership/control. *See* 29 CFR 825.104(c)(2). If two entities constitute an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in that 500 employee threshold for purposes of the FMLA Expansion.

BENEFIT SCOPE AND PAY CALCULATIONS

3a. What benefits are included under the FFCRA?

Under the EPSL, a covered employer must provide all employees, regardless of how long they have worked:

- Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work (or telework) because the employee is quarantined or isolated (pursuant to federal, state, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work (or telework) because of a bona fide need to care for an individual subject to quarantine (pursuant to federal, state, or local government order or advice of a health care provider), or care for the employee's son or daughter (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor.

Under the FMLA Expansion, a covered employer must provide the following to employees whom it has employed for at least 30 days:

- 12 weeks of expanded family and medical leave, the last 10 weeks of which must be paid to the employee at two-thirds the employee's regular rate of pay where an employee is unable to work (or telework) due to a bona fide need for leave to care for the employee's son or daughter whose school or child care provider is closed or unavailable for reasons related to COVID-19

A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week. A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

3b. What does "unable to work" mean when seeking leave under the FMLA Extension?

If an employer permits teleworking, but an employee is unable to work because of one of the qualifying reasons for paid sick leave, then the employee would be entitled to take paid sick leave.

Similarly, if an employee is unable to perform those teleworking tasks or work the required teleworking hours because the employee needs to care for the employee's child whose school or place of care is closed or child care provider is unavailable because of COVID-19 related reasons, then the employee is entitled to take expanded family and medical leave. To the extent that employees are able to telework while caring for their child, they should do so. However, in that instance, paid sick leave and expanded family and medical leave are not available.

3c. How do you calculate the paid leave?

Employers must pay an employee for hours the employee would have been normally scheduled to work. For example, an employee who is normally scheduled to work 50 hours in a workweek would be entitled to 50 hours the first week of leave and 30 hours the next with the cap cutting off any additional leave or paid benefits at 80 hours.

3d. What is the employee's "regular rate of pay?"

The regular rate of pay is the average of the employee's regular rate over a period of up to six months prior to the date on which the employee takes leave. However, if an employee has not worked for the employer for six months, the regular rate is the average of the employee's regular rate of pay for each week the employee has worked for the employer.

Employers may compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and then dividing that sum by all hours actually worked during the same period.

If an employee is taking paid sick leave because the employee is unable to work (or telework) because the employee (1) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, the employee would be paid for each applicable hour the greater of:

- The employee's regular rate of pay;
- The federal minimum wage in effect under the FLSA; or
- The applicable state or local minimum wage.

Under these circumstances, employees would be entitled to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.

If an employee is taking paid sick leave because the employee is (1) caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for the employee's own son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services, the employee would be paid at two-thirds of the greater of the amounts above.

Under these circumstances, employees would be entitled to a maximum of $200 per day or $2,000 over the entire two week period.

If an employee is taking expanded family and medical leave under the FMLA Expansion, the employee may take paid sick leave for the first ten days of that leave period, or substitute any accrued vacation leave, personal leave, or medical or sick leave that the employee may have under an employer's policy. For the following ten weeks, the employee would be paid at an amount no less than two-thirds of the employee's rate of pay for the hours the employee would be normally scheduled to work. The regular rate of pay used to calculate this amount must be at or above the federal minimum wage or the applicable state or local minimum wage. However, the benefit is capped at no more than $200 per day or $12,000 for the twelve weeks that include both paid sick leave and expanded family and medical leave when an employee is on leave to care for the employee's own child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

3e. What does an employer do about commissioned employees?

Commissions, tips, or piece rates are included in the regular rate of pay.

3f. Does the paid sick leave benefit include overtime pay?

No. None of the payments under the EPSL or FMLA Expansion need to include overtime the employee would have been scheduled to work. Using the 50-hour example above, all 50 hours would be paid at the employee's regular rate, not 40 hours at the regular rate and 10 at the overtime premium.

3g. When is an employee employed for "at least 30 days" for purposes of the FMLA Expansion?

An employee is employed for at least 30 calendar days if the employer had the employee on its active payroll for the 30 calendar days immediately prior to the day the leave would begin. For example, if an employee wants to take leave on April 1, 2020, the employee must have been on the company's payroll as of March 2, 2020. In the case of a temporary employee, days the employee worked on a temporary basis would count toward the 30-day eligibility period.

3h. Does the 30-day eligibility window apply if the employee has been off due to a temporary layoff?

If the employee was on the employer's active payroll for 30 days prior to the day the employee's leave would begin, yes. If the employee has not been on active payroll, then the employee would have to meet the 30-day eligibility threshold before benefits under the FMLA Expansion would be available.

3i. What if an employee needs leave under a state quarantine order and later for a COVID-19 diagnosis?

Under the EPSL, an employee is only eligible for 80 hours leave if they are full-time and 2 weeks if they are part-time. Once that time has been used,

they are not eligible for any additional leave, even if they experience another qualifying event.

Under the FMLA Expansion, if an employee exhausts their 12 weeks of leave to take care of their child while the child's school or day care is unavailable, they will not be eligible for any additional leave or paid time off.

3j. Can an employer deny an employee's request for paid sick leave if the employer gave the employee paid leave for a qualifying reason under the Emergency Paid Sick Leave Act for FMLA Expansion prior to the FFCRA going into effect?

No. The FFCRA imposes a new leave requirement on employers and leave and payment allowances will begin April 1, 2020.

3k. Will health care benefits continue during sick leave?

Yes. If the employer provides group health coverage that an employee has properly elected, the employee will be entitled to continued group health coverage during leave. Employees, however, will be required to make their normal contribution payments to pay for their coverage.

INTERACTION WITH FMLA AND OTHER LEAVE

4a. Was all FMLA leave expanded, and do employees now get 24 weeks of FMLA leave?

Yes. This is an additional FMLA benefit for a specific need for leave and in addition to any other FMLA leave an eligible employee might otherwise qualify for during the applicable 12-month period.

4b. Is all FMLA leave paid now and subject to the 30-day employee eligibility threshold?

No. The only type of family and medical leave that is paid leave and subject to the lower 30-day employee eligibility requirement is expanded family and medical leave under the FMLA Expansion, and limited to when an employee must be off work to care for the employee's son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons.

4c. How does this apply for an employee on workers' compensation or short/long term disability leave?

The EPSL and FMLA Expansion will not apply, as those employees are not on leave for any qualifying conditions.

4d. What if an employee is already on leave for a qualifying condition as of April 1, 2020 and continues on leave?

Leave before April 1, 2020 would not be covered, but leave April 1, 2020 and after would be covered.

4e. Can leave under the FMLA Expansion be taken intermittently?

Yes. If the employer otherwise allows the employee to telework, the employer may agree to allow the employee to take sick leave intermittently while teleworking and caring for the employee's own child due to a school or day care closure due to a COVID-19 related reason. Further, an employee may take intermittent leave in any increment, provided the employee and employer agree. For example, they could agree that the employee take leave from 8:00 – 10:30 a.m.; work 10:30 a.m. – 2:30 p.m.; and take leave from 2:30 – 5:00 p.m.

4f. Can Emergency Paid Sick Leave be taken intermittently while working at the employer's normal worksite (as opposed to teleworking)?

No. Emergency Paid Sick Leave for most reasons much be taken in full-day increments. Only leave to care for the employee's own child due to a school or day care closure for a COVID-19 reason may be taken in increments.

INTERACTION WITH BUSINESS SHUTDOWNS AND SHELTER ORDERS

5a. If an employer lays off employees before April 1, 2020, are they covered in their laid-off status?

No. There are only six qualifying conditions for eligibility for EPSL, and layoff or business shutdown is not included in that list. However, keep in mind that a federal, state or local order that requires an individual to quarantine or self-isolate may cause a business closure that may meet the first qualifying condition under the EPSL. The DOL's guidance has been clear that if an employer's worksite closes for lack of business or because it was required to close pursuant to a federal, state or local directive, it will not trigger a qualifying reason. As such, and in terms of economic relief, the employee would be better served filing for state unemployment benefits.

5b. What happens if the employees return to work on April 14, 2020?

If an employee works during the effective period of the FFCRA, which is April 1, 2020 through December 31, 2020, and takes leave for any of the qualifying reasons, the employee would be eligible for paid leave under the FMLA Expansion and/or EPSL. The employee would have to meet the individual eligibility provisions for coverage.

5c. What happens if the employer announces a layoff after the law goes into effect?

A layoff or business shut down is not, in and of itself, a qualifying reason under the FFCRA for benefits. As such, if the layoff is due to business or other economic reasons (absent a federal, state, or local quarantine/isolation order) and does not otherwise trigger any of the qualifying reasons for the paid leave benefit, the FFCRA would not apply, but the state unemployment laws would likely kick in and be available for those laid-off employees.

Employees on leave while the business was open and operating would be entitled to pay but would not be eligible if the business closes for lack of business or because it is required to close pursuant to a federal, state, or local directive.

Relatedly, the same rules apply if the employer closes the worksite on or after April 1, 2020 (even if employees are told they will reopen): if the employer furloughs the employee but is open and employing other employees; or, if the employer reduces the employee's hours as the employee would not be eligible for hours the employee is no longer scheduled to perform.

5d. Do the various state shelter or stay-at-home orders trigger an employee's eligibility for paid leave if they cannot work from home?

It depends. The answer would be dependent on the language of the scope and wording of the shelter order. The EPSL is only triggered upon a federal, state or local quarantine or isolation order. Unless the order issued identifies those triggering qualifications, leave and benefits under the EPSL would not be available. Again, this is a state-by-state determination when it comes to these orders, so discuss with your legal counsel regarding interpretation.

EXEMPTIONS

6a. Who is a potentially exempt health care provider?

Under the FFCRA, an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employees from application of the expanded benefits. The definition of health care provider is the same one used under the FMLA. Under the FMLA, a health care provider is a doctor of medicine or osteopathy authorized in the state to practice medicine or surgery (as appropriate) or "any other person determined by the Secretary of Labor to be capable of providing health care services." This also includes podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners and nurse-midwives (who provide diagnosis and treatment of certain conditions), Christian Science Practitioners, and any health care provider that is recognized by the employer or accepted by the group health plan (or equivalent plan) of the employer.

6b. I have under 50 employees. Can I be exempted?

To elect the small business exemption, an employer should document why its business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

TAX CREDITS

7a. Do continued medical and other benefits count in the tax credit?

Yes. Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the FFCRA for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

7b. If an employer provides paid sick leave prior to the April 1, 2020 effective date, may they take a tax credit for that paid time off?

No. All provisions of the law are applicable April 1, 2020, so only paid leave paid from April 1, 2020 through December 31, 2020 will qualify for tax credit.

NOTICE

8a. Is an employer required to give employees a notice of their FFCRA rights?

Yes. That notice is available here.

8b. Where do I post this notice?

In a conspicuous place on the employer's premises where it is easily visible to all employees. Employers may also satisfy the notice requirement in one of the following ways:

- Emailing or direct mailing the notice to employees; or
- Posting the notice on an employee information internal or external website.

8c. Do I have to share this notice with applicants or recently laid-off employees?

No. The FFCRA requirements only apply to current employees.

DOCUMENTATION

9a. What documentation can an employer require from an employee to obtain leave?

An employer may require an employee to provide documentation in support of the reasons for paid sick leave. These documents may include a copy of the federal, state or local quarantine or isolation order related to COVID-19 or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19.

With respect to caregiver leave, the employer may require the employee provide documentation in support of the employee's expanded family and medical leave taken to care for the employee's child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. This requirement may be satisfied with a notice of closure or unavailability from the employee's child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to them from an employee or official of the school, place of care, or child care provider.

9b. Does the employer have to retain this documentation?

Yes. The employer must retain this notice or documentation in support of expanded family and medical leave, including while the employee may be taking unpaid leave that runs concurrently with paid sick leave – if taken for the same reason.

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GAMING & HOSPITALITY LEGAL NEWS

ESPORTS IN THE TIME OF PHYSICAL DISTANCING

by Jennifer J. Gaynor, Gregory R. Gemignani, Kate C. Lowenhar-Fisher, and Jeffrey A. Silver

The COVID-19 virus pandemic has been the most disruptive event to impact the gaming industry in Nevada in the past 100 years. Not since Nevada outlawed gaming in 1909 has the state's gaming industry faced compelled closure. In fact, in the years since Nevada brought back wide-open licensed gaming in 1931, Nevada's casinos have never been closed.

Nevada's casinos didn't close on or after the attack on Pearl Harbor on December 7, 1941; they didn't close when the U.S. went on high alert after the death of Stalin in 1953; and they didn't close after the terrorist attacks of September 11, 2001. Therefore, history was made on March 17, 2020 when the Governor of Nevada announced a general closure of all nonessential businesses, including gaming establishments, in order to slow the spread of COVID-19 in our state.

During the 2020 NFL Draft, aerial shots of the Las Vegas strip revealing no activity were broadcast to viewers around the world. To the outside world, Nevada gaming appeared to be completely dead, at least temporarily. In addition, with the NBA, NHL, and MLB pausing and then canceling all or part of their playing season and the NFL canceling its draft event, the sports wagering world in Nevada looked equally dead.

Looks may be deceiving, however. Although the sports wagering market in Nevada has been severely impacted, it is far from dead.

Since March 17th, the Nevada Gaming Control Board has administratively approved wagering on nearly a dozen esports events through Nevada licensed bookmakers. For those not familiar with the term, esports are competitive video game contests. Esports events that have been approved thus far include ELS Road to Rio (Counter Strike: Go), Call of Duty League, League of Legends European Masters, Overwatch League, North American League of Legends Championship Series, ESL One-DOTA2, Los Angeles, and others.

Although the volume of wagering on these esports events has been small compared to sports wagering under normal circumstances, wagering on esports has proven resistant to the measures taken to slow the spread of COVID-19. This is in part because competitive video gaming is a non-physical

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contact event. Therefore, it can easily meet physical distancing requirements. Likewise, because most popular games are PC-based, real-time streaming is common and streams can be watched at home, over popular streaming services (such as TWITCH, HUYA, and YouTube), and can even be adapted for streaming into limited occupancy viewing rooms to comply with distancing requirements once venues are permitted to reopen.

This durability is attractive at a time when the specter of repeated periodic industry closures looms overhead.

For years there has been a steady hum of hype surrounding esports and betting on esports events. The hype is directly related to viewership statistics. Globally, more than 100 million viewers watched the League of Legends championship – the largest global esports event – last year. To put this in perspective, 99.9 million people around the world watched the NFL Super Bowl Championship earlier this year. Additionally, tournament prizes and team salaries are significant enough to support a vibrant professional "esports athlete" community. While there is no question that esports events currently are more popular in Asian countries and European countries than they are in the U.S., viewership and participation at large events are rising rapidly in the United States.

Is Nevada ready to embrace a rise in esports? In terms of regulation, the answer is yes. In Nevada, sports pool businesses are permitted to take wagers on sporting events and "other events. "

Most major professional sports fall under the umbrella of "sporting events." They have unifying governing bodies, and Nevada books are permitted to accept wagers on events sanctioned by such governing bodies.

Esports events are not conducted under the auspices of a unifying governing body, and often events are conducted or sponsored by game publishers, independent leagues, or independent promoters. As such, esports events are deemed to be "other events" by Nevada gaming regulators. Thus, a sports pool licensee must get explicit approval from Nevada gaming regulators before taking wagers on such "other events."

A request for such approval must include the following:

- A full description of the event and the manner in which wagers would be placed and winning wagers would be determined.
- A full description of any technology which is necessary to determine the outcome of the event.
- Other information or documentation which demonstrates that:
    - The event is effectively supervised;
    - There are integrity safeguards in place;
    - The outcome of the event is verifiable;
    - The outcome of the event is generated by a reliable and independent process;
    - The outcome of the event is unlikely to be affected by any wager placed;
    - The event will be conducted in compliance with any applicable laws; and
    - The granting of the request for approval is consistent with the public policy of the state.
- The complete event rules and voting procedures.

In addition, although Nevada regulators do not recognize the current governing bodies of esports events like they do for many other long-established traditional sports leagues, there are memoranda of understanding with some organizations, such as the Esports Integrity Commission (ESIC). Based in the U.K., ESIC has a long-standing history of protecting integrity in esports competitions. As such, many ESIC-approved events receive approval in Nevada for the purposes of being an event on which wagering is permitted.

The approval process is thorough and the onus is on the applicant to convince regulators that wagering on the event is consistent with applicable laws and policies. Rejection (or further consideration that makes wagering irrelevant given the timing) is a significant risk.

GAMING & HOSPITALITY LEGAL NEWS

Moreover, the approval of wagers for esports tournaments is still done on a case-by-case basis, allowing only for straight bets on the winner of each tournament and qualifying round. The more esoteric wagers, such as number of kills or first to capture various landmarks, would have to be applied for with the appropriate proof that these events within the game, which might not necessarily determine the outcome, can be safely managed.

For these reasons, any bookmaker or event operator hoping to have wagering on an event should contact their gaming attorney right away to create a submission that has the highest chance for regulatory approval.

Once approved, Nevada regulators will publish the approval and all sports pool licensees will be permitted to accept wagers on the approved event.

Conclusion: Nevada is ready for and increasingly embracing esports. Though initial adoption has been slow, the staggering worldwide viewership numbers hold a lot of promise, and esports provide a glimmer of hope for ongoing competitive content and betting subject matter during times when physical distancing limits traditional sports events and wagering activity.

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Immigration Insights and Issues (III)

ESTA CANCELLATION RISKS AND THE SCHENGEN TRAVEL PRESIDENTIAL PROCLAMATION

Posted by **Kathleen Campbell Walker** | Mar 14, 2020

As a result of the March 11 Presidential Proclamation suspending the entry to the United States (U.S.)[1] of immigrants and nonimmigrants (Proclamation), who have been physically present in the Schengen Area[2] during the 14-day period preceding their attempted entry in an effort to stem the spread of COVID-19, U.S. Customs and Border Protection (CBP) advised carriers that effective at 11:59 p.m. eastern daylight time (EDT) on March 13, 2020, they will begin enforcing the Proclamation's terms.

Update – Additionally, on Monday, March 16 at midnight, the countries affected by the suspension of travel Proclamation will be extended to the United Kingdom and the Republic of Ireland as well.

In addition, CBP also posted a warning that any traveler with valid registration for travel using the Electronic System for Travel Authorization (ESTA) system, who attempts to travel to the U.S. in violation of the Proclamation, **will have their ESTA registration canceled**. If this occurs, ESTA will not refund application fees in this circumstance. It is important to note that CBP utilizes the Advance Passenger Information System (APIS) to review pre-arrival and departure manifest data coupled with Passenger Name Record (PNR) information. Through the use of APIS, commercial airline carriers are not supposed to permit the boarding of a passenger unless they are cleared by CBP. Also, private aircraft pilots are required to transmit traveler manifests no later than 60 minutes prior to departure of flights arriving in or departing from the U.S. A cancellation of ESTA will normally result in the traveler being forced to apply for a B-1 (business visitor) and/or B-2 (visitor for pleasure) visa at a U.S. Consulate or Embassy and be subjected to biometric intake and a consular interview. In this circumstance, we are not sure if a new registration will be possible after the travel suspension ends. Thus, ESTA registrants should book travel to the U.S. with a clear understanding of this warning. **In addition, any ESTA holder thinking about traveling to the U.S. should double-check if their ESTA registration has already been canceled/revoked related to these temporary travel restrictions. For those in the U.S. based on an ESTA admission, it is important to consult with legal counsel regarding a satisfactory departure approval from CBP, if they are unable to leave the U.S. timely before the expiration of their authorized stay.**

What travelers are exempt from the travel restrictions of the Proclamation? (Please note that U.S. citizens are not subject to the Proclamation.)

1. Any lawful permanent resident of the U.S.;
2. Any foreign national who is the spouse of a U.S. citizen or lawful permanent resident;
3. Any foreign national who is the parent or legal guardian of a U.S. citizen or lawful permanent resident provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;
4. Any foreign national who is the sibling of a U.S. citizen or lawful permanent resident provided that both are unmarried and under the age of 21;

Disclaimer

5. Any foreign national who is the child, foster child, or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;
6. Any foreign national traveling at the invitation of the U.S. Government for a purpose related to containment or mitigation of the virus;
7. Any foreign national traveling as a nonimmigrant pursuant to a C-1, D, or C-1/D nonimmigrant visa as a crewmember or any foreign national otherwise traveling to the U.S. as air or sea crew;
8. Any foreign national –

- seeking entry into or transiting the U.S. pursuant to an A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), E-1 (as an employee of TECRO or TECO or the employee's immediate family members), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 visa (or seeking to enter as a nonimmigrant in one of those NATO categories);
- whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement;

9. Any foreign national whose entry would not pose a significant risk of introducing, transmitting, or spreading the virus, as determined by the Secretary of Health and Human Services, through the Centers for Disease Control and Prevention Director, or his designee;
10. Any foreign national whose entry would further important U.S. law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee;
11. Any foreign national whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees; or
12. Members of the U.S. Armed Forces, spouses, and children of members of the U.S. Armed Forces.

How does the Proclamation affect those exempt from the Proclamation upon arrival to the U.S.?

Foreign nationals exempt from the Proclamation, BUT who have been present in the Schengen Area within the prior 14 days **and** who are seeking to enter the U.S. at an international airport must possess a valid passport and valid visa or other permissible travel authorization, **and one of the following**:

1. An I-551 (Green Card/Legal Permanent Resident Card);
2. An A-1, A-2, C-2, C-3, E-1, G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 visa; A C-1, D, or C-1/D visa; An advance parole document;
3. Documentation evidencing that the foreign national is traveling at the invitation of the U.S. government for a purpose related to containment or mitigation of the virus;
4. Other documentation from the U.S. Department of Homeland Security, CBP, or U.S. Department of State indicating that the foreign national has been determined to fall within an exception identified above; or
5. *For potential exceptions related to spouses, parents, siblings, or children of U.S. citizens or lawful permanent residents*, documentary evidence of the qualifying relationship and status of the relative, along with travel documents that would ordinarily be required for the stated purpose of the foreign national's travel.

How is travel to the U.S. for U.S. citizens and foreign nationals EXEMPT from the Proclamation affected?

This process applies to U.S. citizens as well as U.S. legal permanent residents. For flights departing after 11:59 p.m. EDT on March 13, 2020, the Secretary of Homeland Security directed all flights to the U.S. carrying persons who have recently traveled from, or were otherwise present within, the Schengen Area within 14 days of the person's entry or attempted entry into the U.S. to arrive at one of the 13 designated U.S. airports where the U.S. government has prepared public health resources to implement enhanced screening procedures. Crew, and flights carrying only cargo (i.e., no passengers or non-crew), are NOT SUBJECT to this requirement (includes deadheading crew). The 13 designated airports are:

- John F. Kennedy International Airport (JFK), New York;
- Chicago O'Hare International Airport (ORD), Illinois;
- San Francisco International Airport (SFO), California;
- Seattle-Tacoma International Airport (SEA), Washington;
- Daniel K. Inouye International Airport (HNL), Hawaii;
- Los Angeles International Airport (LAX), California;
- Hartsfield-Jackson Atlanta International Airport (ATL), Georgia;
- Washington-Dulles International Airport (IAD), Virginia;
- Newark-Liberty International Airport (EWR), New Jersey;
- Dallas-Fort Worth International Airport (DFW), Texas; and
- Detroit Metropolitan Airport (DTW), Michigan
- Boston Logan International Airport (BOS), Massachusetts; and
- Miami International Airport (MIA), Florida.

This list of affected airports may be modified by an updated publication in the *Federal Register* or by an advisory posted at www.cbp.gov.

[1] For purposes of this Notice, "United States" is defined as "the States of the United States, the District of Columbia, and territories and possessions of the United States (including Puerto Rico, the Virgin Islands, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and Guam)."

[2] There are twenty-six countries in the Schengen area: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

About the Author:

Kathleen Walker is a former national president and general counsel of the American Immigration Lawyers Association (AILA) and is Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. She serves on the AILA Board of Governors. In 2014, she received the AILA Founder's Award, which is awarded from time to time to the person or entity, who has had the most substantial impact on the field of immigration law or policy in the preceding period (established 1950). She has testified several times before Congress on matters of immigration policy and border security.

Tax Blog

ESTATE PLANNING AMIDST THE CORONAVIRUS PANDEMIC

Posted by Alexandre Zucco | Mar 19, 2020

The Coronavirus (COVID-19) Pandemic has impacted every corner of the world at this point. As medical experts, financial advisors, and our colleagues that specialize in healthcare law, employment law, and other related areas are busy advising clients on the best course of action for the weeks and months ahead, we – as estate planners – also want to remind our clients and friends of some important considerations during these uncertain times.

At this point, we would simply promote the following actions to ensure that your estate planning affairs are in order:

(1) **Review your existing documents**. Make sure that you have copies (either paper or electronic) of your existing estate planning documents, and review them to confirm that they still reflect your wishes. If you cannot locate your documents, consider calling or emailing your estate planning attorney to obtain copies.

(2) **Pinpoint any items that require attention sooner rather than later**. As you review, take note of any major changes that may have occurred in your family since you last updated your estate plan. These might include child births, deaths, marriages, divorces, etc. And also consider whether the individuals that you previously appointed to serve as your agents are still appropriate.

(3) **Follow up with your loved ones and advisors**.

- Make sure that your loved ones know if you have appointed them to any role in your estate plan. This includes your executor (i.e. personal representative under your will, or trustee of your trust), guardian for your minor children, attorney-in-fact under your financial durable power of attorney, and patient advocate under your health care power of attorney.
- Consider reaching out to your financial advisor, insurance advisor, etc. to ensure that your beneficiary designations are up to date and discuss any new planning opportunities relative to your current financial status.
- If you require any medical attention in the near future, confirm that your medical provider has a copy of your patient advocate designation and is informed as to who you wish to have access to your confidential health information.

NOTE – If you do not already have an estate plan, now is as good of a time as any to consider the opportunity before you. Having a will/trust, a financial durable power of attorney, and a healthcare power of attorney can certainly contribute to a healthy state of mind.

I hope that by taking these steps, you are able to ease anxiety and find solace in knowing that you have planned ahead and addressed your risks and concerns. If you have any questions or concerns about your estate planning affairs, please contact me (azucco@dickinsonwright.com) or any other member of the Dickinson Wright Estate Planning Practice Group.

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Alex Zucco

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Henry “Tip” Richmond

Tara Halbert

Nashville

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Phoenix

Les Raatz

Amber Hughes

Tax Blog

EVEN COVID-19 CAN'T STOP THE SCAMMERS

Posted by Emily Dorisio | Apr 2, 2020

With the extension of the income tax filing season through July 15th and the forthcoming stimulus funds that will be distributed to taxpayers, it is important for everyone to stay vigilant to avoid scammers and fraudsters who continue to prey on taxpayers. If you receive a stimulus check in the next few weeks, it is likely a fraudulent check. The IRS will first be sending stimulus money through direct deposit to those taxpayers with direct deposit information already on file with the IRS. For others, the IRS will be sending checks, but it will be several weeks before they begin to do that.

Be extremely wary of giving anyone your personal or business information, particularly if they represent that they are from the IRS or Treasury Department. The IRS will never ask for personal or business information by email, social media, direct calling or any other medium. Nearly all IRS initiated communication between the IRS and taxpayers is through the mail and the IRS will never ask a taxpayer through mail or otherwise to go to a website to verify personal or business information. The Treasury Department advises on its website (home.treasury.gov) that no one should respond to calls, emails or other communications claiming to be from the Treasury Department and offering COVID-19 related grants or stimulus payments in exchange for personal financial information or an advance fee, or charge of any kind, including the purchase of gift cards. The applies equally to communications from the IRS. In this time of COVID-19 and economic uncertainty, it is best to stay home, stay healthy and stay wary.

For more information, please contact Emily Dorisio in the Lexington, Kentucky office at 859.899.8714, or any one of the attorneys in our Tax Group.

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EXPIRED STATE IDENTITY DOCUMENTS TEMPORARILY ACCEPTED FOR FORM I-9 LIST B AND THE CASE-BY CASE REMOTE FORM I-9 COMPLETION RISK

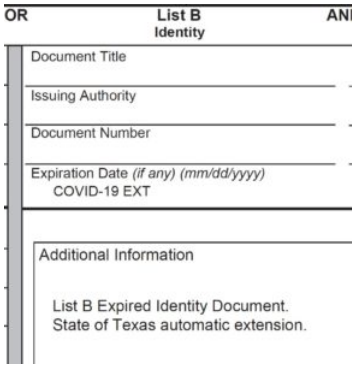
Posted by **Kathleen Campbell Walker** | Apr 22, 2020

U.S. Citizenship and Immigration Services (USCIS) recently issued a follow-up Question and Answer sheet (Q&A Sheet) to the March 20 announcement of the U.S. Department of Homeland Security (DHS) related to a limited relaxation to physical proximity requirements associated with Form I-9 completion due to COVID-19. While the acceptance of an expired state identity document for List B purposes based on state modifications is welcome, there is ongoing uncertainty for employers who have a combination of some of the workforce on site when trying to implement a procedure for remote document verification after the release of the Q&A Sheet.

Section 2 Expired Identity Documents

In recognition of the closure by many states of their driver's license offices and the decision by many states to suspend or extend driver's license renewal, the Q&A Sheet provides that, "if an employee's state ID or driver's license expired on or after March 1, 2020, and the state has extended the document expiration date due to COVID-19, then it is acceptable as a List B document."

USCIS recommends that the expiration date of the expired State ID or driver's license be entered in Section 2 of the Form I-9 with a reference to "COVID-19 EXT" in the expiration date blank along with a note in the additional information field of Section 2. For an example of the date and annotation, see below:



Note that it would not be necessary to reverify the validity of the identity document post the expiration of the state COVID-19 policy or order, since the document would be deemed as valid at the time of its presentation when expired. The complex part of this temporary policy is that each state's policy/order must be considered. For example:

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Texas – Applies to Texas DL, ID, CLP, CDL card or EIC if it expires on or after March 13, 2020. The waiver of the expiration date is for 60 days after the Texas Department of Public Safety provides further public notice that normal operations have resumed.

Michigan – Applies to Michigan ID and DL if it expires between February 1 to May 31, 2020 and suspends the necessity to extend until June 30, 2020.

Arizona – Applies to Arizona ID and DL if it expires between March 1, 2020 and September 1, 2020 and extends renewal requirements for six months from the expiration date.

These extension/suspension policies will provide some relief to those nonimmigrants with work authorization visas, who are submitting extension applications without the benefit of premium processing; especially in states, which require an approval of the extension by USCIS to extend a driver's license.

Delays in Social Security Number Assignments

It is important to remember that only E-Verify employers are mandated to obtain the social security number of a new employee to complete Section 1 of Form I-9. A new hire may still start employment, however, for even an E-Verify employer without a social security number. The following guidance is provided by the E-Verify website:

Newly hired employees must complete Section 1 of Form I-9 in its entirety on the first day of employment. They may complete Section 1 before this date, but only after acceptance of an offer of employment. Under general Form I-9 practice, employees can voluntarily provide their Social Security numbers (SSNs) on Form I-9. However, because SSNs are required for employers to create E-Verify cases, all employees whose employment eligibility will be verified in E-Verify must provide their SSNs.

If a newly hired employee has applied for, ***but has not yet received an SSN (for example, the employee is a newly arrived immigrant), attach an explanation to the employee's Form I-9 and set it aside.*** *Allow the employee to continue to work and create a case in E-Verify using the employee's SSN as soon as it is available. If the case was not created by the third business day after the employee started work for pay, indicate the reason for this delay. Employers may choose a reason from the drop-down list or state a specific reason in the field provided.*

Remote Completion and E-Verify

Q6 of the Q&A Sheet clarifies that when the remote inspection process for Form I-9 is used by an employer based on the March 20 announcement, the employer should use the following protocol as to E-Verify:

After they inspect the employee's documents remotely and determine whether the documents reasonably appear to be genuine and relate to the employee, they should create an E-Verify case for the employee. They should still follow current guidance and create the E-Verify case for their new hire within three business days from the date of hire. Employers must use the hire date from the employee's Form I-9 when creating the E-Verify case. If case creation is delayed due to COVID-19 precautions, select "Other" from the drop-down list and enter "COVID-19" as the specific reason.

Remote Completion and the Case-by-Case Provision

The March 20 announcement stated that the relaxation of the requirement to review the documents of new hires in person applied to "employers and workplaces" that are operating remotely. The announcement provided a possible expansion of this practice to locations where newly hired employees OR existing employees were subject to quarantine or lock-down protocols, with the warning that DHS would review employer's practices on a **case-by-case basis**.

The apparent intended example of this remote relaxation applies to new hires who are going to be working remotely when the physical worksite is closed due to COVID-19. When employees are still working at the normal worksite, it appears the expectation is for one of these individuals or an on-site agent to complete Forms I-9 for new hires at the worksite location. For larger operations, however, with a mixture of employees at a worksite and telecommuting from home based on the essentiality of their physical presence at the worksite, companies are faced with using well-trained human

resources staff who may be performing their duties from home while other employees, for example in the healthcare industry, are in the trenches at the worksite.

For employers, who might have chosen to use this case-by-case option to implement regarding the remote completion of Forms I-9 when, for example, human resources personnel were subject to shelter in place directives for an operational worksite; the New Q&A Sheet notes the following:

Q7. In the DHS March 20 announcement, the option for remote inspection only applies to remote workers. What if I have employees working both remotely and reporting in person to work?

*A. The current DHS guidance allows for flexibility **only** when completing a Form I-9 for a new employee that is only working remotely, but as stated in paragraph five of the DHS news release, "… if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis."*

So, Q7 indicates that the March 20 announcement was meant to apply only to a "remote" worker situation versus a case in which existing employees may be subject to COVID-19 isolation protocols implemented by a national, state, or local policy. It would be helpful to address the obvious issues of existing employees, who were encouraged/required to work from home due to COVID-19 policies whether based on a government executive order or company policy. While Q7 emphasizes the prior "case-by-case" review alternative of DHS, if a company with employees at a worksite uses the remote completion alternative for its Forms I-9; it will be critical to address why the remote completion protocol was implemented for review by DHS. Some suggested documentation points could be:

1. Company policies and announcements as to requirements or recommendations to work from home due to COVID-19.
2. Government mandates/orders regarding shelter in place as to COVID-19.
3. Company memoranda regarding the remote Form I-9 completion process.
4. Company lists of employees to be verified post resumption of on-site operations.
5. Emails or other communications to new hires subject to a remote Section 2 completion for the follow-up required to review the originals of their documents scanned/faxed to the company for Section 2 completion during the temporary COVID-19 related completion process.

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Kathleen Campbell Walker is a member of Dickinson Wright PLLC and serves as a co-chair of the Immigration Practice Group. She is a former national president and general counsel of the American Immigration Lawyers Association (AILA) and is Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. She serves on the AILA Board of Governors. In 2014, she received the AILA Founder's Award, which is awarded from time to time to the person or entity, who has had the most substantial impact on the field of immigration law or policy in the preceding period (established 1950). She has testified several times before Congress on matters of immigration policy and border security.

Health Law Blog

FAQS REGARDING THE CORONAVIRUS AND HEALTH CARE PROVIDERS – UPDATED 3/24/20

Posted by Health Law Team | Mar 19, 2020

UPDATED: March 24, 2020

As our country faces the coronavirus head-on, Dickinson Wright's health care law attorneys are actively assisting health care providers in understanding their legal obligations on matters relating to the situation.

Our team has put together some FAQs from health care providers regarding these legal obligations and our recommendations, including general, nationwide requirements as well as several state-specific guidelines. For more information, see the documents below.

United States

Arizona

Michigan

Tennessee

Disclaimer

The Health Law Blog is published by Dickinson Wright PLLC to inform the public of important developments within the firm and practice areas. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in this blog.

HEALTH CARE

FDA TAKES STEPS TO ADDRESS CRITICAL SHORTAGE OF PERSONAL PROTECTIVE EQUIPMENT

by Billee Lightvoet Ward

"Unprecedented" may be the most commonly-used adjective in the English language at the moment, but it accurately describes the circumstances faced by our nation and others as COVID-19 continues to spread throughout our populations. As our healthcare providers face this situation head-on, they do so under increasingly dire circumstances in which the protective equipment so critical to their jobs is largely unavailable. This is not news to anyone – it has received widespread media attention and has engaged many individual and corporate citizens eager to do their part to address the problem. The issue has not gone unnoticed at any governmental level, and the U.S. Food and Drug Administration (FDA); the agency responsible for public health in relation to the safety and effectiveness of drugs and medical devices, among other products; has taken recent action.

On March 24, 2020, Dr. Stephen Hahn, Commissioner of the FDA, issued a statement that, to increase U.S. supplies to support the U.S. response to COVID-19, the agency provided instructions to manufacturers importing personal protective equipment and other devices. In the statement, Commissioner Hahn notes:

> *"One of FDA's priorities in combating the COVID-19 pandemic is facilitating access to critical personal protective equipment (PPE) and devices. We are engaging with importers and others involved in the import trade community during this pandemic to facilitate the entry of needed products, including PPE, into the U.S. These instructions to importers clarify the types of PPE that can be imported without engaging with FDA. They also include information about the type of information importers can submit to facilitate their entries. We have adjusted our import screening to further expedite imports of legitimate products and are continually monitoring our import systems to prevent and mitigate any potential issues."*

Commissioner Hahn recognizes in the statement that "many companies are stepping up across America to help with manufacturing critical and life-saving medical supplies to strengthen the U.S. response." To facilitate communication with industry representatives, the FDA created an email inbox at COVID19FDAIMPORTINQUIRIES@fda.hhs.gov to specifically address questions or concerns in relation to importation of such products.

The FDA's instructions address three categories of personal protective equipment and other devices, and instructions relating to the importation of each.

- First, in relation to general purpose personal protective equipment (masks, respirators, gloves, etc.) intended for general purpose or industrial use (not for the prevention of disease or illness), the instructions note that such products are not regulated by the FDA and entry information should be transmitted to U.S. Customs and Border Protection, not the FDA.
- Second, in relation to products authorized for emergency use pursuant to the FDA's Emergency Use Authorization (EUA), the FDA provides instructions on submitting the necessary entry information to the FDA, and notes that it has reduced the information required. Further, the instructions provide direction on requesting an EUA, and note that certain diagnostic tests, masks and respirators are currently approved by an EUA.
- Finally, the FDA addresses products regulated by the FDA as a device, not authorized by an EUA, but where an enforcement discretion policy has been published in guidance. In issuing such enforcement discretion policies, the FDA exercises its "enforcement discretion" to decline to enforce certain medical device requirements in defined circumstances.

To date, specific to products related to COVID-19, the FDA has issued enforcement discretion policies relating to non-invasive remote monitoring devices, and vaccines and accessories and other respiratory devices. These enforcement policies, "Enforcement Policy for Non-Invasive Remote Monitoring Devices Used to Support Patient Monitoring During the Coronavirus Disease-2019 (COVID-19) Public Health Emergency" and "Enforcement Policy for Vaccines and Accessories and Other Respiratory Devices During the Coronavirus Disease-2019 (COVID-19) Public Health Emergency", were issued on March 20, 2020 and March 22, 2020, respectively.

The relaxation of certain FDA requirements as outlined in the importation instructions and enforcement policies referenced above is not intended to remain in effect long-term, but rather, reflects temporary measures taken by the agency to address specific issues in relation to the COVID-19 public health emergency.

ABOUT THE AUTHOR

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All Things HR

HIGH DEDUCTIBLE HEALTH PLANS AND EXPENSES RELATED TO COVID-19

Posted by Cyndi Moore | Mar 11, 2020

Many of the nation's largest insurers have announced that they will be waiving the deductible or other cost-sharing for testing or other expenses related to the 2019 Novel Coronavirus ("COVID-19"). Plan sponsors that offer coverage to employees through a high deductible health plan ("HDHP") asked whether this waiver would affect the health plan's status as a high deductible health plan and, relatedly, a participant's ability to make pre-tax contributions to a health savings account. Generally, an HDHP may not cover any expenses other than expenses for preventive care before the high deductible has been satisfied in order to qualify as an HDHP.

In a remarkably quick response, on March 11, 2020, the IRS announced in Notice 2020-15, that, until further guidance is issued, a health plan that otherwise satisfies the requirements to be an HDHP under the Internal Revenue Code will not fail to be an HDHP merely because the health plan provides medical care and services and items purchased related to testing for, and treatment of, COVID-19 prior to the satisfaction of the deductible. As a result, plan participants in the HDHP will not fail to be eligible individuals merely because of the provision of benefits for testing and treatment of COVID-19, and may contribute to an HSA on a pre-tax basis.

The IRS further notes that vaccinations are considered to be preventive care under the HDHP rules and, therefore, if a vaccine is developed for COVID-19, a HDHP may reimburse the cost for the vaccination as a preventive care service before the deducible is satisfied.

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Disclaimer

IRS ANNOUNCES EXTENSION OF CERTAIN TAX FILING AND PAYMENT OBLIGATIONS

by Julie Rhoades and J. Troy Terakedis

The U.S. Internal Revenue Service has announced the extension of certain tax filing and payment obligations in response to the ongoing COVID-19 pandemic. Pursuant to IRS Notice 2020-23, the due date is automatically postponed to July 15, 2020, for the following federal tax payment obligations, federal tax return or other form filing obligations, and time-sensitive actions due to be performed (originally or pursuant to a valid extension) on or after April 1, 2020, and before July 15, 2020:

Subject	Applicable Form	Additional Comments
Individual income tax	Form 1040, Form 1040-SR, Form 1040-NR, Form 1040-NR-EZ; Form 1040-PR, Form 104-SS	
Corporate income tax (Applies to calendar year or fiscal year corporate income tax payments and return filings)	Form 1120, Form 1120-C, Form 1120-F, Form 1120-FSC, Form 1120-H, Form 1120-L, Form 1120-ND, Form 1120-PC, Form 1120-POL, Form 1120-REIT, Form 1120-RIC, Form 1120-S, Form 1120-SF	
Partnerships (Applies to calendar year or fiscal year partnership return filings)	Form 1065, Form 1066	
Estate and trust income tax	Form 1041, Form 1041-N, Form 1041-QFT	
Estate and generation-skipping transfer tax	Form 706 (including Forms 706 filed pursuant to Rev. Proc. 2017-34), Form 706-NA, Form 706-A, Form 706-QDT, Form 706-GS(T), Form 706-GS(D), Form 706-GS(D-1)	For Form 706-GS(D-1), *Notification of Distribution from a Generation-Skipping Trust*, postponement to July 15, 2020, also applies to the due date for providing such form to a beneficiary
n/a	Form 8971 and any supplement Form 8971, including all requirements contained in Internal Revenue Code Section 6035(a)	
Gift and generation-skipping transfer taxes	Form 709	Applies to payments and return filings that are due on the date an estate is required to file Form 706 or Form 706-NA
Estate tax payments of principal or interest due as a result of an election made under Internal Revenue Code Sections 6166, 6161, 6163 and annual recertification requirements under Internal Revenue Code Section 6166	n/a	
Exempt organization business income tax	Form 990-T	Includes proxy tax under Internal Revenue Code Section 6033(e)
Private foundation excise taxes	Form 990-PF, Form 4720	
Quarterly estimated income taxes	Form 990-W, Form 1040-ES, Form 1040-ES (NR), Form 1040-ES (PR), Form 1041-ES, Form 1120-W	Applies to quarterly estimated income tax payments with respect to tax-exempt organizations, individuals, nonresident alien individuals, self-employed individuals and household employees who are residents of Puerto Rico, estates and trusts, and corporations.

Subject	Applicable Form	Additional Comments
Petitions filed with the Tax Court or for review of a decision rendered by the Tax Court	n/a	Deadline to file petitions with the Tax Court or for review of a Tax Court decision automatically extended
Claims for credit or refund	n/a	Deadline to file claims for credit or refund of any tax automatically extended
Suits for credit or refund	n/a	Deadline to file suits for credit or refund automatically extended

IRS Notice 2020-23 also provides the following:

- Taxpayers who need additional time to file (beyond the July 15, 2020, extension) their returns or other forms may file the appropriate extension by July 15, 2020, but the extension date may not go beyond the original statutory or regulatory extension date. Any extension will not extend the time to pay federal income tax beyond July 15, 2020.
- The above relief applies to the forms listed above as well as all schedules, returns, and other forms that are filed with the above-listed forms as attachments (including any elections that are made or required to be filed with one of the above listed forms).
- The period beginning on April 1, 2020, and ending on July 15, 2020, will be disregarded in the calculation of any interest, penalty, or addition to tax with respect to the above-listed tax payment obligations and forms.

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IRS DESIGNATES APRIL 1, 2020 AS THE BEGINNING DATE FOR CREDITS FOR PAID SICK LEAVE AND PAID FAMILY LEAVE

by Julie E. Rhoades

The Families First Coronavirus Response Act (the "Coronavirus Response Act"), P.L. 116-127, enacted on March 18, 2020, requires certain employers to provide expanded family and medical leave and paid sick leave to employees unable to work or telework due to certain circumstances related to COVID-19. To offset the economic costs of these requirements, the Coronavirus Response Act provides a subsidy to small employers (generally 500 or fewer employees) in the form of a tax credit for certain paid sick or family leave relating to the COVID-19 outbreak.

The tax credit is a credit against the 6.2% excise tax paid during each calendar quarter under Section 3111(a) or 3221(a) of the Internal Revenue Code of 1986, as amended (the "Code"). The Coronavirus Response Act provides a similar credit against the comparable tax paid for self-employed individuals under Section 1402 of the Code. The tax credit generally equals 100 percent of the "qualified sick leave wages" and "qualified family leave wages" required to be paid under the Coronavirus Response Act, subject to limitations. The tax credits are only available to wages paid with respect to a time period commencing on a date designated by the Secretary of the U.S. Department of the Treasury. The Secretary is required to designate the beginning date within 15-days of enactment of the Coronavirus Response Act.

On March 27, 2020, the IRS issued Notice 2020-21, 2020-16 IRB (March 27, 2020), designating the covered period as beginning on April 1, 2020. Thus, the tax credits will apply to wages paid for the period beginning on April 1, 2020, and ending on December 31, 2020.

The CARES Act provides for advance refunding of these credits that were established under the Coronavirus Response Act. The CARES Act further grants the IRS broad authority to issue regulations or other guidance permitting the advancement of the credits.

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Tax Blog

IRS PROVIDES DETAILS ON THE EXTENSION OF THE APRIL 15 FILING DATE

Posted by Deborah Grace | Mar 26, 2020

In a series of FAQ's issued on March 24, the IRS has provided additional information on the extension of the April 15 tax deadline announced in response to the COVID-19 pandemic. As mentioned in a prior tax blog prepared by Dickinson Wright, the IRS has provided an automatic extension to July 15, 2020 of Federal income tax returns and payments that would otherwise be due on April 15. This tax blog highlights a few of the FAQ's that may be of interest to individuals and sponsors of retirement plans.

- Individuals or businesses that have a Federal income tax filing that would otherwise be due on April 15 do not need to file an extension form to take advantage of the automatic extension to July 15.
- Contributions to individual retirement accounts (IRAs) made on or before July 15 may be designated as a contribution for the 2019 tax year.
- Contributions to health savings accounts (H.S.A.s) made on or before July 15 may be designated as a contribution for the 2019 tax year.
- An individual's first quarter 2020 estimated income tax payment has been postponed from April 15 to July 15, 2020. However, the second quarter 2020 estimated tax payment is still due on June 15, 2020.
- Unrelated business income tax returns (Form 990-T) that are due on April 15 have been granted an automatic extension to July 15. Calendar year retirement plans and IRAs that have $1,000 or more of unrelated trade or business gross income (usually from investments in partnerships) are required to file IRS Form 990-T.
- Employers with an April 15 Federal income tax due date now have until July 15 to make contributions to their retirement plans for their prior tax year.
- Payroll and excise tax returns due April 15 have not been extended.
- Information returns, such as IRS Form 5500, due April 15 have not been extended, although an extension may be requested using IRS Form 5558.
- ACA information returns, on IRS Form 1095-C and 1094-C due March 31 for electronic filers, have not been extended, although a 30-day automatic extension will be granted by filing Form 8809 before March 31.
- Gift tax returns (IRS form 709) due April 15 have not been extended, although an extension can be requested using IRS Form 8892.
- Estate tax returns (IRS form 706) due April 15 have not been extended, although an extension can be requested using IRS Form 4768.
- The April 15 deadline for removing 2019 excess elective deferrals from an employer's retirement plan has not been extended.
- Taxpayers who have filing or payment due dates other than April 15 have not been granted relief at this time.

The IRS relief does not apply to state tax filings and payment deadlines which vary from state to state. Taxpayers should check with their individual state tax agencies for details of any extension.

For more information, please contact Deb Grace at 248-433-7217, or any one of the attorneys in our Tax Group or Employee Benefits and Executive Compensation Group.

IRS PROVIDES RELIEF FOR NONRESIDENT ALIENS AND FOREIGN BUSINESSES IMPACTED BY COVID-19 TRAVEL DISRUPTIONS

by Julie Rhoades and Peter J. Kulick

On April 21, 2020, the IRS issued FAQs providing relief from the U.S. income tax on U.S. trade or business income to certain nonresident aliens and foreign corporations.

BACKGROUND

Nonresident alien individuals who perform services or other activities in the U.S. and foreign corporations who employ individuals or engage individuals as agents to perform services or other activities in the U.S. may be considered engaged in a U.S. trade or business ("USTB"). In general, a nonresident alien or foreign corporation that is engaged in a USTB is taxed on its business income connected to that USTB though an income tax treaty may reduce or eliminate such tax unless the business is conducted through a "permanent establishment" such as an office.

RELIEF UNDER IRS FAQS

In the newly-issued FAQs, the IRS acknowledges that as a result of the COVID-19 pandemic, individuals may be unable or unwilling to travel due to government orders, canceled flights, or a desire to follow social distancing recommendations, among other factors. The IRS acknowledged that these travel disruptions may cause a nonresident alien or foreign corporation to become engaged in a USTB when the nonresident alien or foreign corporation would not be so engaged if these individuals were not present in the U.S.

Under the relief set forth in the FAQs, a nonresident alien, foreign corporation, or a partnership in which either is a partner may choose an uninterrupted period of up to 60 calendar days, beginning on or after February 1, 2020, and on or before April 1, 2020, during which services or other activities conducted in the U.S. will not be taken in account in determining whether the nonresident alien or foreign corporation is engaged in a USTB, provided that such activities were performed by one or more individuals temporarily present in the U.S. and would not have been performed in the U.S. but for COVID-19 travel disruptions. In addition, services or other activities performed by one or more individuals temporarily present in the U.S. will not be taken into account to determine whether the nonresident or foreign corporation has a permanent establishment in the U.S., provided that the services or other activities of these individuals would not have occurred in the U.S. but for COVID-19 travel disruptions.

The FAQs advise that contemporaneous documentation be maintained to establish the 60-day period chosen and that the relevant business activities conducted during that period would not have been undertaken in the U.S. but for the COVID-19 travel disruptions. The FAQs further indicate that the FAQs may be updated as the COVID-19 situation evolves.

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IS NOW THE RIGHT TIME FOR AN ESTATE FREEZE?

by Jennifer C. Leve and Carly J. Walter

IS AN ESTATE FREEZE THE RIGHT TAX MOVE?

In the midst of COVID-19 and the surrounding economic uncertainty, Canadians have found themselves significantly impacted. Business owners have seen their enterprises grind to a halt, while investors have watched their portfolios bottom out. With much out of our control, it may still be possible to regain control by taking advantage of the current conditions with tax-saving measures to provide some financial security and future certainty.

WHAT IS AN ESTATE FREEZE AND WHY MIGHT YOU BENEFIT FROM ONE NOW?

An Estate Freeze is a mechanism by which the value of an individual's assets, including an active business, can be "frozen" at a particular moment in time. To see why an Estate Freeze may benefit you now, it's important to understand the tax implication on death for an individual holding private company shares and/or investments directly.

Capital gains are imposed on death by way of a "deemed disposition" on private company shares and investments to the extent of the "gain" which is equivalent to the market value of the asset over the amount of its cost. In a typical example, a security purchased for $100 and worth $1000 on the date of death will give rise to a $900 capital gain of which 50% ($450) is included in income and subject to tax. In the case of private company shares, most of which were likely subscribed for by the initial shareholder at a nominal value (for example, $10 on incorporation), the value of the capital gain on death can be quite substantial if no tax planning is undertaken prior to death and the business has appreciated significantly. The result of this can be a large capital gain on death and a large tax burden to the beneficiaries of the estate.

Before undertaking an Estate Freeze, the taxpayer may have to perform an additional step to move his or her assets into a corporation. Once a shareholder of a private company, the individual may perform the Estate Freeze. With a properly administered Estate Freeze, the taxpayer's shares are essentially converted from participating common shares into "frozen" preferred shares, which are equivalent to the value of the common shares they exchanged but which do not participate in future growth of the assets or business. Generally, new shareholders, such as the next generation or a family trust, become the new common shareholders and can participate in future growth as the assets and business appreciate in value. As the business and/or assets increase in value over the years, that increase is attributed to the participating common shares, while the taxpayer's frozen preferred shares can never increase in value.

When undertaken properly, significant tax and family objectives may be achieved. Along with "freezing" the maximum capital gain tax liability to today's value at the time of death, a correctly made gift of shares to a child during a child's marriage should fall outside of the ambit of that child's "net family property" meaning it should not have to be shared with that child's spouse in the event of a breakdown of the marriage.

An additional benefit is that every individual is entitled to what is referred to as the "Lifetime Capital Gains Exemption," which can currently shelter up to $883,000 of capital gains on the sale of certain types of active business corporation shares. If available, a taxpayer can freeze their shares and, if new shareholders are introduced as part of the estate freeze, can multiply the number of capital gains exemptions that can be available on the sale of the shares down the road, potentially resulting in significant savings in the future.

IS NOW THE RIGHT TIME TO UNDERTAKE AN ESTATE FREEZE?

If you believe the value of your assets and/or business have hit a low point, it may be the right strategy to capture this lower value (and minimize your future tax burden) in new frozen preferred shares which would not increase in value as the markets, and your business, recover down the road.

If, in the past, you have already performed an Estate Freeze and already own frozen preferred shares, you may still take advantage of the reduced value of your underlying business and assets and lower your future tax bill by completing a "thaw" of those frozen preferred shares and "re-freezing" at today's lower value.

HOW DOES A FAMILY TRUST FIT IN TO AN ESTATE FREEZE?

A family trust can be implemented at the same time as the Estate Freeze to hold the participating common shares and can provide you with additional flexibility and tax planning opportunities, as well as allow you to maintain control of your business and assets. A properly formed family trust can assist not only with tax planning, but with family and even creditor protection objectives.

HOW WE CAN HELP

We remain committed to paying attention to the changing circumstances and taking advantage of planning opportunities. Contact a Dickinson Wright LLP team member to discuss your current financial situation and see what is the best option for you.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

LIMITATION OF LIABILITY DURING THE CORONAVIRUS PANDEMIC

by Jeremy Belanger and Mark E. Wilson

In response to the COVID-19 pandemic, state and federal authorities have recognized a need for as many trained, experienced, and qualified health care providers as possible. To ensure those providers are fully enabled to provide critical care in response to COVID-19, several laws limit the tort liability of health care providers providing services in response to COVID-19.

Michigan Action

Under Section 7 of Executive Order 2020-30, Michigan Governor Gretchen Whitmer used the Emergency Management Act, MCL 30.401 *et seq.*, to limit the liability of health care professionals to provide care. Specifically, the Order provides:

> *[A]ny licensed health care professional or designated health care facility that provides medical services in support of this state's response to the COVID-19 pandemic is not liable for an injury sustained by a person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained.*

The Emergency Management Act limits liability for specified providers, whether licensed in Michigan or in another jurisdiction, "render[ing] services during a state of disaster declared by the governor and at the express or implied request of" the State. MCL 30.411(4). Those covered under the Act include:

1. Doctors of medicine or osteopathic medicine and surgery;
2. Licensed hospitals;
3. Registered nurses;
4. Practical nurses;
5. Nursing students;
6. Dentists;
7. Veterinarians;
8. Pharmacists or pharmacist interns acting under the supervision of a licensed pharmacist;
9. Paramedics; and
10. Medical residents undergoing training.

This limitation of liability does not apply to the following:

a. Conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results ("gross negligence"); or
b. Willful conduct.

Note — despite the statute, permitting providers licensed in other states to obtain the immunity under Michigan law, for any action brought alleging willful or gross negligence, those providers are judged by the relevant standard of care in Michigan.

The Federal Volunteer Protection Act

The Federal Volunteer Protection Act of 1997 ("VPA"), 42 USC 14503, provides additional limitations on liability for others, including non-health care providers. Under the VPA, a volunteer of a nonprofit organization or governmental entity shall not be liable for harm caused by an act or omission of the volunteer on behalf of the organization if:

1. The volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission; and
2. If appropriate or required, the volunteer was properly licensed, certified, or authorized in the state in which the harm occurred and acted within the scope of the volunteer's authority and responsibilities in the nonprofit organization or governmental entity;

The limitation of liability does not apply to harm caused by:

a. Willful or criminal misconduct, including:
   i. Violent crime or terrorism;
   ii. A hate crime;
   iii. A sexual offense as defined by state law; or
   iv. Federal or State civil rights law violations.
b. Gross negligence;
c. Reckless misconduct;
d. A conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer;
e. The volunteer was under the influence of intoxicating alcohol or any drug; or
f. The volunteer was operating a motor vehicle, vessel, aircraft, or other vehicle for which the state requires the operator or the owner of the vehicle, craft, or vessel to possess an operator's license or maintain insurance.

The VPA preempts any state law that is inconsistent with the VPA, unless it either:

a. Provides greater protection from liability; or
b. A state enacts a statute and declares that the VPA does not apply.

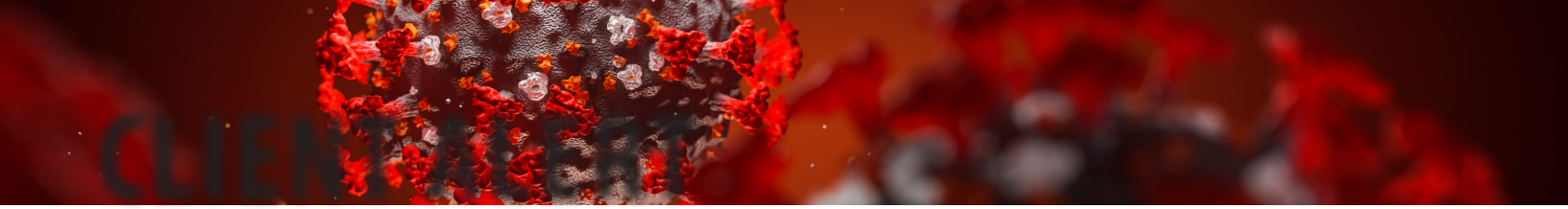
The VPA protections only apply to volunteers that do not receive compensation, other than reasonable reimbursement or an allowance for expenses actually incurred or any other thing of value exceeding $500 per year.

One drawback to the VPA is that it does not affect the liability of the organization or governmental entity. Thus, while a doctor or nurse providing volunteer services is protected under the VPA, a nonprofit entity where he or she provides services is not.

The CARES Act

To expand the scope of the VPA, Congress decided to step further into an area traditionally under state law. Section 3215 of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") limits the liability under federal or state law for any harm (e.g., physical, nonphysical, economic, noneconomic) caused by an act or omission of a health care professional if:

1. He or she is providing care or services as a volunteer;
2. The act or omission occurs in the course of providing services in the capacity of a volunteer;
3. The services are within and do not exceed the scope of his/her license under state law;



4. The services were related to the diagnosis, prevention, or treatment of COVID-19 or the assessment or care of an actual or suspected case of COVID-19; and
5. The professional was acting in good faith.

This limitation of liability does not apply under the following circumstances:

a. Willful or criminal misconduct;
b. Gross negligence;
c. Reckless misconduct;
d. Conscious flagrant indifference to the rights or safety to the individual harmed; or
e. The provider was under the influence of alcohol or an intoxicating drug.

Section 3215 preempts any laws of any state or political subdivision that is inconsistent with Section 3215, unless they provide greater protection from liability.

In order to qualify, a "provider" must be "an individual" licensed to provide health care services. Thus, like the VPA, Section 3215 does not protect business entities. The individual must be a "volunteer" that does not receive compensation or anything of value, including payments from any insurance policy or Federal health care program. However, a provider can receive items to provide health care services and reimbursement for travel more than 75 miles from the provider's principal place of residence.

One significant difference with the VPA is that a provider does not need to be providing services through a nonprofit entity or governmental entity.

Health care providers providing services in response to COVID-19 should consult with their health care attorneys to ensure they qualify for these limitations of liability. Dickinson Wright attorneys have the knowledge and experience to assist providers evaluating these rules.

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Tax Blog

LOW INTEREST RATES AND ASSET VALUES: A SPECIAL OPPORTUNITY FOR LEVERAGED LIFETIME TRANSFERS

Posted by Robert Joslyn | May 4, 2020

The IRS recently announced minimum interest rates that need to be charged to avoid gift, estate, and generation-skipping taxation ("transfer taxes") on intrafamily obligations. They are extraordinarily low. For those occurring in May, the Applicable Federal Rates ("AFRs") range from 0.25% for obligations due on demand or within three years, 0.58% for those payable in three years and before nine years, and 1.15% for those payable nine years or later. The IRS interest rate for trusts in which the donor has a retained interest will be 0.80%.

These low interest rates, coupled with depressed asset values (especially publicly traded equities), provide very attractive opportunities for shifting significant amounts of wealth by leveraging the sale of depressed value assets to family members or trusts for their benefit in exchange for AFR compliant promissory notes. Be aware, however, that unless the purchaser of the assets is a "grantor trust", there will be a taxable gain or, if the purchaser is related to the seller, a nonrecognizable loss for each asset transferred to the extent the asset's then current value is more or less than its cost basis at the time of sale. Leveraging the current low interest rates and asset values by making gift transfers to grantor retained annuity trusts (GRATs) can also accomplish significant wealth transfers to family members with only a miniscule effect on transfer taxes.

The result of these intrafamily sales and transfers is the shifting of all appreciation and income from the transferred assets and their replacement assets after the sale or transfer to the new owners (i.e., the payees of the notes and the residual beneficiaries of the GRAT upon its termination). Thus, the transferor has frozen his or her estate for transfer tax purposes to the extent of the assets' values at the time of their sale or transfer except for the small amounts received as promissory note interest or GRAT distributions.

For more information, please contact Bob Joslyn in the Troy office at 248-433-7437 or anyone in the firm's Tax or Estate Planning Group.

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M&A PRACTICES IN A POST-COVID-19 WORLD

by Mark R. High and William L. Rosin

This is certainly a situation where the (purportedly) ancient curse would seem to apply: May you live in interesting times. Living, however, implies moving forward, and that is what the business world is trying to do. While we as a Firm have seen several current acquisition or disposition transactions slow down, we have not seen any abandoned yet. In fact, we have clients who are witnessing the upheavals of the last few weeks and seeing opportunity.

We should, therefore, see whether we need to be doing anything different in our documents and practices to respond to the COVID-19 pandemic and its effects. Here are a few topics that deserve a fresh look.

Deferring Purchase Price Payments

Enterprise value is typically based on some measure of the target company's revenues or earnings, or some combination thereof. Factoring in the long-term and short-term impact of the pandemic on such measuring sticks is virtually impossible at the present time. Transaction parties may want to consider some sort of post-closing calculation and payment arrangement for a portion of the purchase price. For example, an earn-out will enable the buyer to condition certain purchase price payments on the target achieving certain post-closing performance metrics, while encouraging the seller to meet those goals.

Material Adverse Change Definitions

Most purchase agreements have a concept of (and often a definition for) a material adverse change or material adverse effect. This describes a situation where either a seller is representing that something is true but doesn't have a material adverse effect on the seller or the business being sold, or sometimes is even used as a closing condition so that a buyer need not complete the transaction if there has been a material adverse change to the target business. Without getting into detail, there are often exceptions in these definitions which exclude certain events from being categorized as triggering a material adverse effect. We anticipate that sellers will want to exclude not just effects arising from the current coronavirus situation, but more generally exclude the effects of pandemics or other general public health events. Buyers may bow to the inevitability of accepting this as an unforeseen situation, while trying to limit it to truly general events affecting the economy as a whole, and which don't have a disproportionate effect on the target.

Representations and Warranties

Buyers and sellers generally provide representations to each other about the current state of their business situation. Buyers want promises regarding the seller's business and to learn what the seller knows that may not be evident from its own due diligence inquiries. From the seller's side, it will want to accurately describe the current situation, but allow for changes that might be outside of its control. In both circumstances, we should review several of the standard representations to see if they should be updated.

For example, sellers are generally asked to describe their relationships with customers and suppliers, perhaps with respect to having received notice regarding terminating a contract or reducing contracted volumes. Buyers may start asking sellers for assurance regarding whether any of their customers or suppliers have issued notices claiming force majeure or otherwise delaying or threatening to delay their performance. Arguably, this may have been covered under the prior language, but we might anticipate as sellers, or initiate as buyers, having language more specifically addressing these issues "in an abundance of caution."

It is easy to imagine other provisions that might be affected. Representations regarding employees, compliance with laws, taxes, accuracy of financial statements, undisclosed liabilities, and probably others deserve a second look under the current circumstances.

Operating the Business Pending Closing

Many deals are structured as sign-and-close transactions, meaning that the purchase agreement is signed and the deal closes simultaneously. However, in deals which include a period between signing and closing, buyers generally want to restrict how the seller will operate the business during that interim period. Sellers often commit to continue operating the target business in the ordinary course, consistent with past practices, maintaining good relationships with their employees, customers, suppliers, and other business associates, and preserving their business structure, property, equipment, and so forth. How can a seller observe its commitments if it suddenly, under governmental order, has to close down its operations, curtail its sales, and lay off its employees? We expect it is essential for sellers to be given exceptions in these covenants that allow them to respond to unanticipated events without triggering a breach of these covenants.

Deal Timing

We certainly expect that transaction timing, like many matters, is going to get stretched during this immediate period. It remains to be seen how long this will last, but it is probably worth anticipating that it will take longer to get customer consents, bank approvals, landlord approvals, governmental approvals, UCC searches, environmental reviews, surveys, and just about anything else needed to complete a deal for the foreseeable future. Even a buyer's internal approval process could be impaired. Thus, take a look at any deadline requirements in light of the current situation and adjust them accordingly. Even when initiating a deal, consider whether it would be good to obtain a longer exclusivity period to allow for unanticipated stumbling blocks. Yes, deadlines can always be amended or waived, but providing for a realistic time frame can help keep everyone's attention on the substance of the deal, and not be distracted by watching the calendar.

Representation and Warranty Insurance

Representation and warranty insurance has become, if not standard, at least an accepted part of the M&A landscape. In our experience, that is not likely to change going forward. What may very well change is some of the coverage provided by these policies, and certainly some of the information required in the policy applications. We are hearing reports that exclusions are being added to policies with respect to COVID-19 effects as they are "known issues" that the insureds are able to assess for themselves, but that these exclusions are subject to negotiation. Different insurers are taking different approaches and evidencing different levels of flexibility on these issues, so it might be worthwhile to do a little more shopping around. Suffice it to say that the whole area is in flux, and an insurer's approach today may be dramatically different a week later.

Due Diligence

Certainly coming out of the changes in representations, covenants, and R&W insurance, buyers should do a deep dive into their due diligence questionnaires. Obvious topics include the anticipated effects on a target's business operations, employees, and facilities from any shutdown orders, as well as availability of business interruption insurance coverage and stopgap health and disability coverage for the target's employees and welfare plans. Second level inquiries might focus on what the seller has learned from its suppliers and customers, and examine other supply chain risks. Has the target experienced logistical difficulties? Has it updated its business plan? How are its IT systems coping? Has it experienced recent layoffs, and does it anticipate that these will be temporary? How is it keeping employees safe, and have any employees questioned that process? The topics are almost limitless.

Sellers should anticipate the needs of the buyer (and related lenders, R&W insurers, etc.) and preemptively gather the appropriate information/data that will be requested. While it has always been the case that a well-prepared seller improves the chances that a deal will close, that is especially true in today's environment.

Conclusion

These are interesting times, indeed. It remains to be seen whether this is a minor disruption or one that will have lasting effects on our world, and on our transaction processes. We anticipate many of these provisions on pandemics, like references to "terrorist events" after 9/11, will become part of the boilerplate language in most situations. It is in our job descriptions to consider risks, and help our clients pragmatically respond to and evaluate them. It is not in our nature to shy away from these challenges, and, in that case, perhaps being interesting can also be inspiring.

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The authors would like to acknowledge the guidance provided in the webinar presented by the American Bar Association Business Law Section, Mergers and Acquisitions Committee, on March 24, 2020, entitled When COVID-19 Impacts Your Deal: Evolving M&A Practices and Provisions. More information is available to BLS members at https://www.americanbar.org/groups/business_law/events_cle/breaking_news/archive/202003/

MAINTAINING TRADE SECRETS AMID THE COVID-19 PANDEMIC

by Steven A. Caloiaro and Caleb Green

Over the last few months, the widespread transmission of the coronavirus disease of 2019 (COVID-19 or the "coronavirus") has prompted immediate action from employers and businesses throughout the United States. As of publication, 42 states have issued statewide stay-at-home orders, limiting several business operations. While many companies have ceased public- facing operations, many remain operational to provide essential and public health services and are making abrupt changes to their work environment, resulting in an unprecedented increase in employees working remotely for the first time. Additionally, several organizations are scrambling to make employment and corporate adjustments, in response to the changing landscape and effects of the coronavirus crisis.

s a result, companies are also facing novel challenges for safeguarding their trade secrets and confidential business information as many employees are forced to work remotely from home. Meanwhile, many of these same businesses are shifting away from their normal business operations and are creating new products to address public needs in the face of the COVID-19 pandemic, including manufacturing hand sanitizer and personal protective equipment ("PPE"). Finally, some unfortunate companies are facing the complicated reality that layoffs and personnel changes might be necessary to save their businesses.

Crises like COVID-19 can make or break a company's intellectual property assets. Accordingly, as businesses scramble to navigate the changing legal landscape and adopt alternative methods of operation, they should remain vigilant and take the proper precautions necessary to maintain valuable trade secrets and confidential information. While addressing business disruptions due to COVID-19, businesses should take reasonable steps now to ensure the preservation of intellectual property rights once this pandemic is over.

WHAT IS A TRADE SECRET

A trade secret can be any information that derives financial value from being secret, provided the owner takes reasonable steps to protect the information. Trade secrets have no expiration date so long as they remain secret, and therefore they tend to create perpetual monopolies. Courts have protected various forms of information under this broad definition, s uch a s fi nancial, bu siness, scientific, tec hnical, eco nomic, or engineering information. Coca-Cola's secret formula, the secret recipe for Kentucky Fried Chicken, the Google search algorithm, Tinder's dating software, and even client lists are all examples of court recognized trade secrets.

Trade secret protection is a counterpart to patent protection. While patents require the inventor to provide detailed disclosures about the invention in exchange for the right to exclude others from practicing the invention for a limited period, trade secrets require complete secrecy. Furthermore, trade secret protection vests instantly once information derives financial value from its confidentiality, whereas patent protection requires a rigorous application and vetting process.

Throughout the ongoing pandemic, companies may experience urgent and unexpected demand as they scramble to adjust and respond to the effects of COVID-19. In fact, some companies may fi nd new opportunities to introduce products or pivot their business operations to take advantage of these new business opportunities, address public health issues, or supplement growing demand. However, during this time of transition, company confidential information and trade secrets may be at an increased risk of exposure. As such, company leadership should implement proper measures to ensure protection of its intellectual property during and post-pandemic.

Creating and protecting trade secrets throughout the current pandemic and post-coronavirus requires a continuous process of constant vigilance to ensure the secrecy of your new process, method, or formula. A key step to establishing trade secret rights is limiting the knowledge to key employees, and then having key employees, who have access or have knowledge of key trade secrets, sign a confidentiality agreement or non-disclosure agreement ("NDA"). Additionally, companies should consider having employees sign non-compete agreements to ensure their competitors do not steal their new trade secret assets and projects amid employee turnover during the COVID-19 crisis.

Each state has adopted its own trade secret protection laws, which provide a different degree of protection. Accordingly, business leaders should consult with an attorney to determine their trade secret rights and ensure they are taking the proper steps to preserve their rights therein.

DESTRUCTION OF TRADE SECRET

As mentioned above, trade secrets can be created instantaneously. However, as quickly trade secret protection can be established, it can be destroyed if proper measures are not taken. Trade secrets, unlike other forms of intellectual property, can be destroyed by inadvertently failing the keep them secret. As such, during these unprecedented times, companies should exercise prudence and take the necessary precautions to protect proprietary information from third parties and competitors.

Risks Associated with Remote Working

Several employers are providing employees with remote access options, in response to the effect of COVID-19, enabling them to work outside of the traditional corporate environment. While providing a work-from-home option for employees is a convenient and necessary measure to reduce transmission of the coronavirus, business leaders must be aware of the risks that remote systems pose to trade secrets. Remote access relies on the exchange and transfer of information and data, typically over the Internet. While teleworking, employees are often transmitting, accessing, and handling sensitive information, including company trade secrets, customer personal information, or confidential financial data. With more employees relying on technology to work remotely and access proprietary information, hackers are increasing their attempts to exploit sensitive data through company information systems.

For example, in 2018, over 10 years of confidential car manufacturing trade secrets were exposed after hackers infiltrated a robotics engineering firm storing sensitive information. Among the car manufactures were clients of the engineering firm, including Volkswagen, Chrysler, Toyota, General Motors, Tesla, and ThyssenKrupp. The 157 gigabytes of compromised trade secrets were made available online and included over a decade of assembly line schematics, factory floor plans, robotic configurations and documentation, employees ID badge request forms, contracts, and non-disclosure agreements.

Remote workers can also jeopardize company trade secret exposure

from the comfort and convenience of their own homes, via voice assistance systems, smart speakers, and home surveillance systems such as Siri, Google Assistant, Amazon Alexa, Echo, and Ring. These popular household gadgets have a history of security vulnerabilities that have led to several instances of eavesdropping and spying. For example, hackers have focused on the home security company Ring by gaining unauthorized access to homeowner's accounts and commandeering cameras and microphone hardware embedded within the security system. Recently, hackers successfully accessed Ring security cameras within the home and spied on the homeowners and their family members.

Given the increased risk to trade secrets in the work-from-home environment, companies must adopt measures to protect their proprietary information. It is paramount that businesses create a culture of compliance by establishing corporate policies and exercise reasonable efforts to maintain the secrecy of trade secrets. Namely, companies should work with legal counsel to craft remote-working policies that address the importance of protecting confidential company information. For example, companies should limit printing and physical copies of confidential information, and restrict remote access to any such printed information within their homes, just as they would in the office. Companies should also prevent employees from storing proprietary information on their personal devices or transmitting work-related information over public networks by equipping employees with work-issued devices and secure network access (e.g. virtual private network accessibility). Companies should require that the most confidential documents are password protected when its most sensitive documents are transferred electronically and that the email or communication containing the password is sent separately and part from the document. Finally, if you are setting up remote virtual desktops, ensure only key employees have complete access to the trade secret information.

Companies should also ensure that existing confidentiality practices are transitioned and enforced in the remote setting. Teleworkers and employees should be consistently reminded that working remotely does not create any exception to existing confidentiality and non-disclosure agreements or company policies, manuals, or practices. For example, if your standard practice is to have third parties sign an NDA during an in-person meeting, in the work-from-home environment, employees should be sure to send NDAs to third parties before a phone call or virtual meeting. Company policies should also prohibit employees from discussing confidential information in the presence of third parties, including family members, friends, or smart devices (i.e. speakerphone, Ring, Google Assistant, Alexa, etc.). Finally, teleworkers should be brought up to speed on increased cybersecurity threats that seek sensitive information under fraudulent communications related to the COVID-19 pandemic.

Risk Associated with Off-boarding Employees

The most common way trade secrets can be exposed is through disclosures by employees and workers. When employees who have been trusted with confidential trade secret information are laid-off, furloughed, or otherwise let go from their positions in the company, many will transition to other companies and competitors, carrying trade secrets and proprietary information. Accordingly, a company must have employees sign non-disclosure agreements and have a proper off-boarding process in place to ensure employees are not taking its valuable confidential information. Departing employees subject to non-disclosure agreements should be reminded of their post-employment contractual obligations. These measures and practices can increase the likelihood of enforceability and amass rapport and social capital with the outgoing employees.

Limitation to Trade Secret Enforcement

Additional trade secret protection protocols are especially necessary during the ongoing pandemic. Successfully obtaining enforcement of trade secret rights from courts is unlikely at this time as access to the courts is extremely restricted or completely unavailable. As a result, obtaining temporary restraining orders and preliminary injunctions are difficult amid the current climate. Even post-pandemic, when the courts are fully accessible again, the backlog of pending matters will likely delay any relief or enforcement of intellectual property rights. Therefore, businesses must take active steps immediately to protect their confidential and proprietary information.

CONCLUSION & RECOMMENDATION

In the face of the COVID-19 pandemic, businesses must adopt measures to prevent exposure and destruction of its valuable trade secrets. Companies are at an increased risk of losing valuable intellectual property and proprietary information. While businesses navigate through these unprecedented times, they must prioritize the preservation of confidential information throughout the pandemic. Further, they must keep in mind that because court enforcement is likely to be extremely limited, the existence of sound protection protocols is of the utmost importance.

Businesses must have policies and measures in place to safeguard their trade secrets. Even if your company already has a trade secret preservation policy in place, protocols should be analyzed and revised to address COVID-19 specific threats that may jeopardize your company's valuable intellectual assets, including employee turnover and cyber-security threats. For businesses venturing or considering a transition into new areas of operation to address the COVID-19 emergency (i.e., manufacturing sanitization products, medical products, PPE, etc.), business leaders should consider protecting emerging intellectual property rights.

For new initiatives that will take time and resources to incorporate into the corporate infrastructure fully, businesses should consider patent protection. New inventions, products, or methods are patentable until a year after they are publicly disclosed. However, trade secrets are well suited for new processes, products, inventions that will be rushed or introduced into the market more swiftly.

As employers and businesses consider new measures to protect confidential information, corporate leadership should seek legal counsel. Intellectual property attorneys can assist companies in identifying proprietary information, recommending best practices, and constructing proper policies and safeguards to insulate your trade secrets from exposure. Dickinson Wright's attorneys have considerable experience in assisting companies and individuals in protecting their intellectual property. The firm remains committed to helping our clients navigate this unprecedented time and remains fully available to provide any assistance that may be required.

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BANKRUPTCY, INSOLVENCY & CREDITORS' RIGHTS

MANAGING UNCERTAINTY THROUGH FINANCIAL CRISIS REQUIRES PROACTIVE GUIDANCE

The COVID-19 situation has already had a significant effect on the economy, and it will no doubt continue to do so. Almost every type of business is likely to experience some form of financial upheaval. We simply cannot have a widespread shutdown of industries (service or manufacturing) without an accompanying impact on cash flow. This, in turn, affects not only immediate day to day operations, but the potential ability of a business to recover and re-establish itself once stability returns. Hence many businesses will need some sort of financial restructuring, whether that means merely a level of discussion with a subset of creditors or a more fulsome process. The impact will similarly be felt amongst the lender community, just as it will among the industry community.

While we don't know how the COVID-19 virus will finally be contained or when the multitude of closures and stop-work and stay-home orders will be lifted, based upon our years of experience in advising clients in crises , we can reasonably anticipate the following in the interim:

- Issues will affect all sides — borrowers, lenders, trade creditors, landlords, employees, equity holders, etc. — as revenues are impacted, defaults increase, and credit tightens. For companies that were already distressed, the current crisis may be the straw that breaks the camel's back.
- Businesses tend to move slowly or even freeze up when faced with uncertainty, but a wait and see approach is not likely to be a longterm solution in the current environment. A better solution is likely to be a pro-active one.
- Cash is and will be king for the foreseeable future. It will be necessary for almost everyone to take measures to preserve cash. Preparing and updating cash flow projections and determining the business' "burn rate" will be critical.
- Now is the time to actively review loan agreements, to analyze credit availability, and to consider issues that may arise with loan covenants. It will likely be necessary to negotiate with lenders regarding amendments, waivers, and forbearances to address business disruption.
- Consider the review and revisions that will be necessary to your business plan and explore the ins and outs of developing an overall restructuring plan. It may be necessary to consider bankruptcy or other turnaround solutions that can be implemented to achieve new goals.
- Realize that adversity can also present opportunity. Consider seeking advice on how to evaluate possible transactions that may present themselves, and how to put buyers and sellers together. Insolvency situations present unique opportunities to complete deals.

Dickinson Wright has taken its own proactive measures and formed a SOLVENCY TASK FORCE to assist clients with their questions as we all address this period of financial uncertainty. Often a number of options are available to a struggling client, all of which might not be readily apparent. Our focus is helping clients sort out what to do with limited resources, connecting them with other needed financial advisors, advising on transactions that may arise in this context, and ifneeded, helping them seek relief from the courts. Sometimes the answers are not pretty – or easy. But there are always answers. Below is a list of our attorneys by our offices—but we are not location-specific. You can contact any of us as you find most useful for your situation—and we'll make sure you get lined up with the right personnel.

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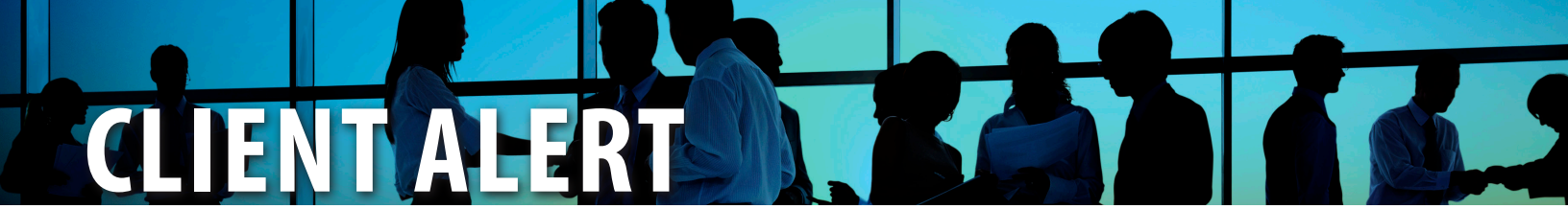

LABOR AND EMPLOYMENT

MICHIGAN AND OHIO HAVE ISSUED NEW UNEMPLOYMENT RULES RELATING TO COVID-19

by Christy McDonald, Dave Deromedi, and Sara Jodka

On March 16, 2020, Michigan's Governor issued Executive Order 2020-10 (COVID-19) available here. The Michigan Executive Order provides that, effective immediately and through April 14, 2020 at 11:59 pm, Michigan employees will be permitted to collect unemployment insurance benefits for certain COVID-19 related layoffs or absences.

- Employees will be permitted to collect unemployment if:
  - They are self-isolating or self-quarantining as a result of COVID-19 "due to being immunocompromised, displaying the symptoms of COVID-19, having contact in the last 14 days with someone with a confirmed diagnosis of COVID-19, the need to care for someone with a confirmed diagnosis of COVID-19, or a family care responsibility as a result of a governmental directive" (e.g. K-12 public school closure); or
  - They are deemed laid off or unemployed as a result of COVID-19 "because of self-isolation or self-quarantine . . . due to being immunocompromised, displaying the symptoms of COVID-19, having contact in the last 14 days with someone with a confirmed diagnosis of COVID-19, the need to care for someone with a confirmed diagnosis of COVID-19, or a family care responsibility as a result of a governmental directive."
- Employees may register for benefits at the Michigan UIA webpage or by calling 1-866-500-0017 or TTY 1-866-366-0004. A useful fact sheet regarding unemployment benefits is available here.
- The employer of a covered employee who makes a claim must seek a registration and work search waiver from the Unemployment Insurance Agency.
- Unemployment benefits may not issue if an otherwise covered employee is "already on sick leave or receives a disability benefit."
- Employees must file claims within 28 days of the last day worked.
- Unemployment for affected persons will be available for up to 26 weeks.
- Employers will not be charged for unemployment benefits if their employees become unemployed because of an executive order requiring them to close or limit operations.

Ohio Executive Order 2020-01D was adopted March 9, 2020, and is available here.

Governor DeWine issued Executive Order 2020-01D, declaring a state of emergency in Ohio to protect the well-being of Ohioans from COVID-19. In addition, unemployment benefit insurance qualifications have been relaxed as follows.

- Employees will be permitted to collect unemployment if:
  - They are required by a medical professional, local health authority, or employer to be isolated or quarantined as a consequence of COVID-19, even if they are not actually diagnosed with COVID-19.
  - The employer lays off the employee due to the loss of production caused by COVID-19.
  - The employee is in mandatory quarantine because of suspicion of having COVID-19.
- All other eligibility requirements remain in place, which would include the requirement that the employee work for the relevant time period. Also benefits may not be available if the employee is already on sick leave or receives a disability benefit.
- Unlike the Michigan law, Ohio's Executive Order does not provide unemployment for those employees who self-isolation or self-quarantine if they as asymptomatic. The reason is because the individual-not the employer-is choosing not to work and, therefore, would not be eligible. However, the facts of each circumstance are important. If the employer allowed this individual to telework, they would not qualify for benefits because they would not be unemployed. If the employer required the individual to stay home but did not offer telework, the individual might be eligible for benefits if they met the monetary and weekly eligibility criteria.
- In addition, benefits will be available immediately as the normal 1-week waiting period has been waived.
- For tipped workers, the availability of benefits will depend on how the employer reports tipped wages. If the employer reported tips as part of the employees wage, it would be reflected on their tax reporting and therefore the UI benefit would be based on wage with tips. If the employer did not include tips in the wage, the employee will need to file an affidavit with their tipped wages for Ohio Job and Family Services to review.
- Employees may file for unemployment here or by calling 1-877-644-6562 or TTY 1-614-387-8408.

- In terms of costs to employers, for contributory employers, charges during Ohio's emergency declaration period will be mutualized, meaning they will be charged out of the mutual account. Reimbursing employers will follow existing charging requirements under Ohio Revised Code Chapter 4141.

- If COVID-19 creates a situation where employers submit their quarterly reports and/or payments late, penalties will be waived.

- It is also worth noting that, there is a notice under the Ohio Unemployment Compensation Law that employers inform Ohio Department of Job and Family Services of a layoff or separation of 50 or more employees because of a lack of work within any seven-day period. The employer must provide notice at least three working days before the first day of the separation or lay off. R.C. 4141.28(C). Understandably, the three-day notice may not be doable, but employers should try to give the agency as much of a heads up as possible so it can more easily process those claims for payment without delay.

The federal Families First Coronavirus Response Act (H.R. 6201) was passed in the U.S. House of Representatives on March 14, 2020. The bill is not yet binding legislation. We are monitoring the progress of this bill and will provide updates when a new law is enacted.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of labor and employment law. The foregoing content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions relating to any of the topics covered.

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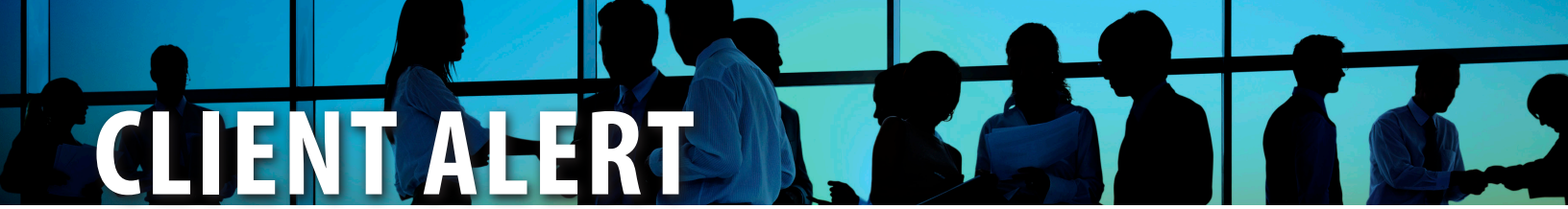

MICHIGAN EXPANDS TELEHEALTH COVERAGE

by Kimberly J. Ruppel

Although the current health pandemic resulted in a temporary relaxation of rules concerning remote healthcare services at both the local and federal levels, telehealth is undeniably here to stay. Michigan's Governor Gretchen Whitmer recently signed into law a set of five bills that will expand coverage of telehealth services.

Three of the new bills add "store and forward online messaging" as a covered telehealth service, removing the requirement that a patient and healthcare professional interact in real-time at the time services are provided. This change applies to claims submitted to private and state payers as well as for behavioral health encounters. Examples of "store and forward" information include photos, videos, x-rays or lab reports which a patient may transmit to a provider for consultation and treatment.

One of the new bills requires Michigan's medical assistance program and the Healthy Michigan program to cover remote patient monitoring services, defined as "digital technology to collect medical and other forms of health data" which is transmitted in a HIPAA compliant electronic format between patient and provider who are in separate locations. This type of telehealth service is useful in areas involving heart monitoring, glucose management, pregnancy, weight management, and elder care, among others.

Finally, beginning October 1, 2020, Michigan's medical assistance program and the Healthy Michigan program will allow coverage of telehealth services at additional "originating sites" which include a recipient's home or school in addition to other originating sites allowed by Medicaid.

For assistance in remaining compliant and up-to-date with the rapidly changing state and federal rules on telehealth or implementing a telehealth program with your business, reach out to your Dickinson Wright healthcare law attorney.

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MICHIGAN GOVERNOR RESCINDS SOME AND EXTENDS OTHER SCOPE OF PRACTICE RULES

by Jeremy L. Belanger and Peter J. Domas

On July 13, 2020, Michigan Governor Gretchen Whitmer issued Executive Order ("EO") 2020-150, which renewed and, at the same time, rescinded different relief measures previously granted to health care professionals in Michigan during the COVID-19 state of emergency.

On April 1, 2020, to increase access to care in response to COVID-19, the Governor issued EO 2020-61[1], which suspended provisions of Article 15 of the Public Health Code, MCL 333.16101 *et seq.*, as they related to scope of practice, supervision, and delegation. Specifically, EO 2020-61 permitted medical services to be provided without the need of supervision or a practice agreement with a licensed physician for physician assistants, advance practice registered nurses (e.g., nurse practitioners, clinical nurse specialists, and certified nurse midwives), and nurse anesthetists otherwise acting within their scope of practice. EO 2020-61 also permitted RNs and LPNs to order throat or nasopharyngeal swabs from patients suspected of being infected by COVID-19. Additionally, licensed pharmacists were to provide routine care for health maintenance, chronic disease states, or similar conditions with supervision. Medical students, physical therapists, and EMTs were permitted to act as "respiratory therapists extenders" if they were acting under the supervision of licensed physicians, respiratory therapists, or APRNs. In addition, EO 2020-61 permitted health care professionals (including drug manufacturers and wholesalers) licensed and in good standing in other states or territories to perform services in Michigan without a Michigan license. Finally, the Governor limited the liability for licensed health care professionals for any injury or death that occurred while services were being provided in response to COVID-19 – except for circumstances of gross negligence or willful conduct.

EO 2020-150 rescinded all of the above-mentioned relief granted in EO 2020-61. The Governor's reasoned that "the pressures on hospitals has eased," and the need for such "broad relief . . . has waned." However, EO 2020-150 extends other relief provided for in EO 2020-61. First, requirements for an exam, fingerprints, and continuing education have been temporarily suspended if they cannot be provided due to COVID-19. Second, professional certification for individuals in basic life support, advanced cardiac life support, and first aid shall remain in effect, even if they were due to expire. Third, any deadlines for telecommunicators and trainee telecommunicators employed by primary public safety commission are temporarily suspended for a period of sixty (60) days after the state of emergency is over.

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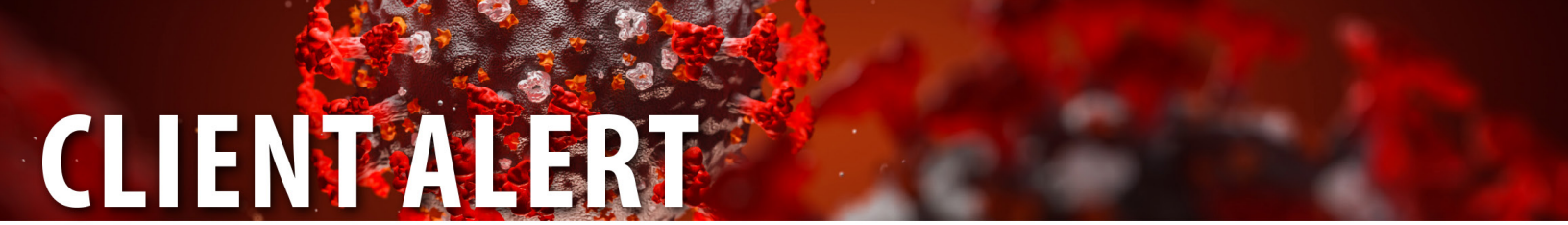
[1] EO 2020-61 expanded prior relief granted under EO 2020-30.



CLIENT ALERT

LABOR AND EMPLOYMENT

EMPLOYERS: ARE YOU FOLLOWING MICHIGAN'S NEW MANDATORY EMPLOYEE SAFETY REQUIREMENTS?

by Christina McDonald, Kathryn Wood, Dave Deromedi

Coronavirus continues to impose hardships on lives around the globe. Employers of American workers have to adjust to constantly-evolving laws and regulations governing their operations to keep their employees safe.

On Friday, April 24, Michigan's Governor Whitmer issued an extension of her "Stay Home, Stay Safe Order," through May 15, 2020. Executive Order 2020-59 (COVID-19) contains new, mandatory requirements for employers who continue to operate in-person or who are now permitted to "resume" in-person operations.

For example, as of April 26, 2020 at midnight, employers must "provide non-medical grade face coverings to their workers" who perform in-person work. All Michiganders who can "medically tolerate a face covering" must wear a "cover over his or her nose and mouth – such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space." Persons wearing masks are protected from discrimination on the basis of their mask-wearing under Michigan's anti-discrimination laws.

In addition, Employers with in-person operations must have a written "COVID-19 preparedness and response plan" that is consistent with CDC and OSHA safety guidance. Employers must adopt cleaning and disinfecting protocols; adopt policies to prevent workers from entering the premises if they have respiratory symptoms or have had contact with a person who tested positive for COVID-19; follow all social distancing and mitigation measures recommended by the CDC; and provide other appropriate personal protective equipment.

Employers should honestly assess their employees' risk of occupational exposure to COVID-19, their social distancing and safety measures, and guidance from OSHA and the CDC to update safety practices.

Attorneys at Dickinson Wright are available for you if you have any questions or concerns about your company's compliance with current guidance, regulations, and standards. In addition, Dickinson Wright can assist your business with developing a required COVID-19 Preparedness and Response plan. Please contact us for more information.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in Labor and Employment. The foregoing content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions relating to any of the topics covered.

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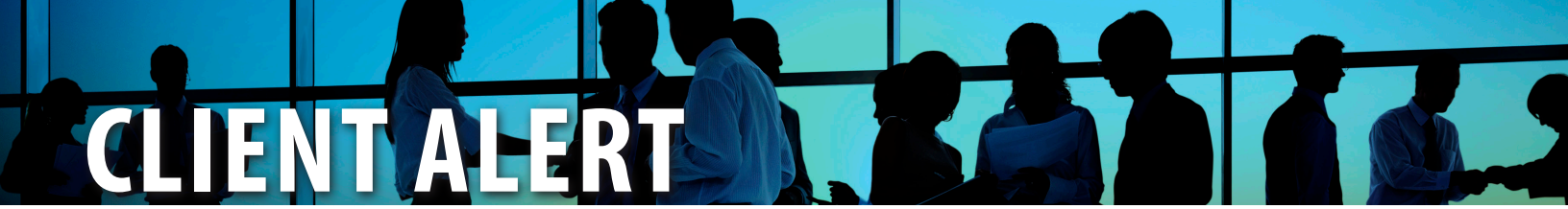


COVID-19 UPDATE

MICHIGAN GOVERNOR ISSUES STAY-AT-HOME ORDER

by Angelina Irvine

On Monday, March 23, 2020, Michigan Governor Gretchen Whitmer issued a statewide stay-at-home order to fight the ongoing coronavirus outbreak. The executive order, effective at 12:01 am on Tuesday, March 24, 2020, will continue for at least the next three weeks.

Individuals may only leave their home or place of residence under very limited circumstances. Businesses must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation.

Dickinson Wright attorneys are working hard to assist our clients navigate the challenges created by the coronavirus pandemic. During these unprecedented circumstances, our attorneys are creating a database with articles, blogs and other information on legal issues affecting our clients regarding the Coronavirus (COVID-19). We are continuously keeping this list updated as materials are being produced. The database can be found here:

https://www.dickinson-wright.com/news-alerts/coronavirus-related-article-and-blogs

If you have any questions, please reach out to your Dickinson Wright attorney or contact Dickinson Wright at COVID19info@Dickinson-Wright.com.

Executive Order No. 2020-21

Starting: March 24, 2020 at 12:01 a.m.
Ends: April 13, 2020 at 11:50 p.m.

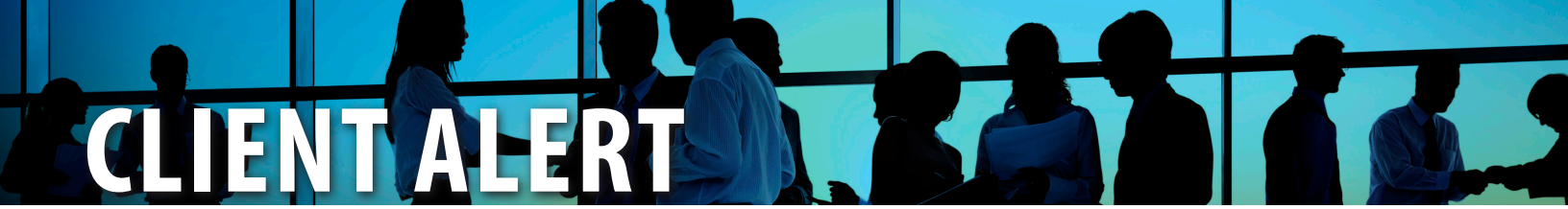
The Order is to be "construed broadly to prohibit in-person work that is not necessary to sustain or protect life."

In general, all individuals living in Michigan are ordered to stay at home. All gatherings of any number involving individuals from more than one household are prohibited. Anyone who leaves their home must remain at least 6 feet from any person who is not in their household to the greatest extent possible.

Businesses must cease all in-person operations except to the extent that certain workers are:

- **(1) necessary to sustain or protect life, or;**
- **(2) to conduct minimum basic operations.**

- Workers **necessary to sustain or protect life – "critical infrastructure workers"**
  - Critical infrastructure workers are those described in the U.S. CISA 3/19/20 guidance.[1]
  - This includes some workers in:
    - Health care and public health
    - Law enforcement, public safety, and first responders
    - Food and agriculture
    - Energy
    - Water and wastewater
    - Transportation and logistics
    - Public works
    - Communications and IT, including news media
    - Other community-based government operations and essential functions
    - Critical manufacturing
    - Hazardous materials
    - Financial services
    - Chemical supply chains and safety
    - Defense industrial base
    - Child care workers (only as necessary to serve the children of critical infrastructure workers)
    - Insurance industry (only to the extent the work cannot be done remotely)
    - Workers and volunteers for operations that provide food, shelter, and other necessities for economically disadvantaged or otherwise needy persons
    - Workers who perform critical labor union functions (work should be done remotely where possible)
    - Workers at designated suppliers and distribution centers:
      - A business employing critical infrastructure workers may designate suppliers, distribution centers, and service providers whose continued operation is necessary for the work of the critical infrastructure workers.
      - Those designated suppliers, distribution centers, and service providers can, in turn, designate workers as critical infrastructure workers when those workers are necessary for the work of the original business's critical infrastructure workers.
      - Designated suppliers, distribution centers, and service providers can, in turn, designate additional suppliers, distribution centers, and service providers whose continued operation is necessary for the work of their critical infrastructure workers.
      - Such additional suppliers, distribution centers, and service providers may designate workers as critical infrastructure workers *only* to the extent those workers are necessary to enable, support, or facilitate the work of the critical infrastructure workers at the supplier, distribution center, or service provider that has designated them.
      - All of these designations must be in writing, but can be oral until March 31, 2020 at 11:59 p.m.



- Businesses that employ critical infrastructure workers must designate which workers are critical infrastructure workers and inform these workers that they have been designated as such.
  - These designations must be in writing (e-mail, public website, etc.), but can be oral until March 31, 2020 at 11:59 p.m.
  - Business need not designate:
    - Health care and public health workers
    - Workers performing **necessary government activities** (*1 – necessary to sustain or protect life, 2 – necessary to support businesses and operations that are necessary to sustain or protect life, or 3 – necessary to conduct minimum basic government operations*)
      - Critical infrastructure workers
      - Law enforcement
      - Public safety
      - First responders
      - Public transit
      - Trash pick-up and disposal
      - Overseeing elections
      - Maintenance of safe and sanitary public parks
    - Workers and volunteers of operations providing food, shelter, and other necessities for economically disadvantaged or otherwise needy individuals
- **In-person activities that are not necessary to sustain or protect life must still be suspended.**

- Workers who are **necessary to conduct minimum basic operations** are those whose in-person presence is strictly necessary to:
  - maintain the value of inventory and equipment;
  - care for animals;
  - ensure security;
  - process transactions (including payroll and employee benefits); or
  - facilitate the ability of other workers to work remotely.

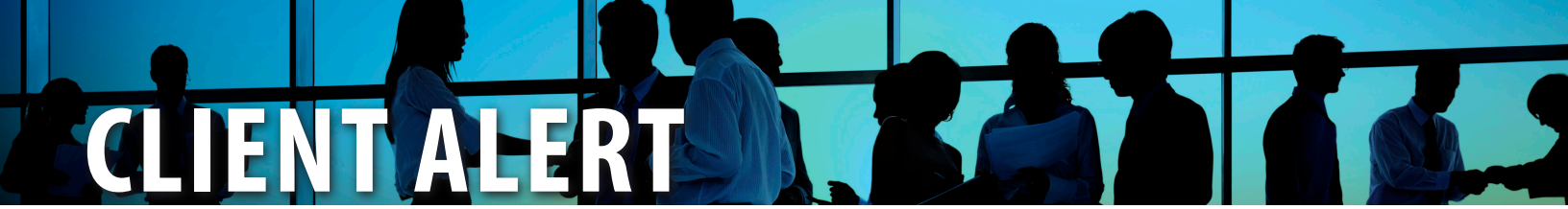
  Business must designate which workers are necessary to conduct minimum basic operations and inform these workers that they have been designated as such.
  - These designations must be in writing (e-mail, public website, etc.), but can be oral until March 31, 2020 at 11:59 p.m.

In all cases, any in-person operations must adopt social distancing and mitigation measures:

- Only have workers on-site that are strictly necessary to perform (1) critical infrastructure functions or (2) necessary minimum basic operations
- Promote remote work as much as possible
- Workers and patrons must be at least 6 feet from each other as much as possible
  - Includes customers in line
- Increase facility cleaning and disinfecting
  - Develop protocols regarding cleaning and disinfecting in the event of a COVID-19 case in the workplace
- Adopt policies to prevent workers with symptoms or who have had contact with known or suspected COVID-19 from entering the workplace
- Any other measures recommended by the CDC

Other Exceptions:
In addition to leaving the home to perform work as critical infrastructure workers or workers necessary to conduct minimum basic operations, individuals may also leave the home **as necessary**:

- To engage in outdoor activity (*must remain at least 6 feet from anyone not in the individual's household*)
- To perform tasks necessary to their health and safety and the health and safety or their family or household members (including pets).
  - Secure medication, seek medical or dental care necessary to address a medical emergency or preserve health and safety
  - Obtain necessary services and supplies for themselves, their family or household members, and their vehicles, such as groceries, take-out food, gas, medical supplies, and other basic safety, sanitation, and home products (*should secure services and supplies via delivery as much as possible*)
- To care for a family member or a family member's pet in another household
- To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons
- To visit an individual under the care of a health care facility, residential care facility, or congregate care facility
- To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court
- To work or volunteer for businesses or operations that provide food, shelter, and other necessities of life for economically disadvantages or otherwise needy individuals



- To travel:
  - Home to Michigan from outside Michigan
  - To leave Michigan for a home or residence outside Michigan
  - Between two residences in Michigan
  - As required by law enforcement or a court order (including transporting children pursuant to a custody agreement)

[1] https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf

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ADDITIONAL RESOURCES:

- Employers' Top 10 Burning Questions About the Families First Coronavirus Response Act Answered
- CORONAVIRUS (COVID-19) PRECAUTIONS FOR EMPLOYERS | 新型冠状病毒疫情雇主需注意事项
- Contractors: Are You Protected From The Coronavirus Infecting The Project Schedule?
- Coronavirus (COVID-19) Precautions for Employers
- High Deductible Health Plans and Expenses Related to COVID-19
- Michigan and Ohio Have Issued New Unemployment Rules Relating to COVID-19
- Pandemic Workplace Response: Now What?
- Update on Coronavirus: Travel Restrictions and Quarantine Now Extended to Certain Travelers from Iran
- ESTA Cancellation Risks and the Schengen Travel Presidential Proclamation
- Treasury Secretary Announces Extension of Time to Make Tax Payments
- SBA COVID-19 Economic Injury Disaster Loan Program
- Employer Actions for 401(K) Plans Sickened by Coronavirus
- Estate Planning Amidst the Coronavirus Pandemic
- FAQS Regarding the Coronavirus and Health Care Providers
- •DHS Announces Remote I-9 Completion and Suspension of Audit Responses Due to Covid-19

GOVERNOR WHITMER EXTENDS DATES FOR SOME 2020 PROPERTY TAX ASSESSMENT APPEALS

by Robert F. Rhoades

As a general rule, the deadline for filing a property tax assessment appeal with the Michigan Tax Tribunal is May 31 for commercial real property, industrial real property, developmental real property, commercial personal property, industrial personal property, or utility personal property. Executive Order 2020-87 has extended that deadline to **July 31 for 2020** appeals due to the coronavirus emergency.

For other classes of property, particularly residential and agricultural property, the rules generally require an appeal to the March Board of Review and then an appeal to the Tribunal by July 31. Some Local Boards of Review were unable to finish their work due to the emergency. Pursuant to the Order, they may finish their appeals in July. This may allow some residential property owners who may not have appealed to the March Board of Review to do so in July. They would then be allowed to appeal an adverse decision within 35 days of the decision.

The Order provides in part:

4. Strict compliance with the jurisdictional requirements set forth in the Tax Tribunal Act, 1973 PA 186, as amended, MCL 205.735a, is temporarily suspended to allow for the following extensions of time:

(a) The May 31 deadline set forth in MCL 205.735a(6) for assessment disputes as to property classified under section 34c of the GPTA as commercial real property, industrial real property, developmental real property, commercial personal property, industrial personal property, or utility personal property is extended to July 31. This order does not change or otherwise affect the July 31 deadline set forth in MCL 205.735a(6) for assessment disputes as to property classified under section 34c of the GPTA as agricultural real property, residential real property, timber-cutover real property, or agricultural personal property.

(b) With respect to all other matters, including assessment disputes arising out of decisions made by boards of review meeting in July in accordance with sections 3(a) and 3(b) of this order, the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, or determination.

The Executive Order also addresses other property tax deadlines. If we can assist you in property tax matters, please let us know.

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GOVERNOR WHITMER EXTENDS JOB PROTECTED LEAVE TO EMPLOYEES RELATED TO COVID-19 SYMPTOMS OR EXPOSURE

by David R. Deromedi

On April 3, 2020, Governor Whitmer issued Executive Order 2020-36 declaring that individuals permitted to go to work pursuant to the Governor's current stay-at-home order Executive Order 2020-21 must stay home when either they or their close contacts are sick related to COVID-19 – and they must not be punished by their employer for doing so. The Governor's recent Order provides certain protections against workplace discrimination to such individuals, to ensure they can do what is most needed from them to protect the health and safety of everyone.

The Governor's Order declares that effective immediately it is public policy of Michigan that an employer shall not discharge, discipline, or otherwise retaliate against an employee for staying home when he or she is at particular risk of infecting others with COVID-19.

The order prohibits employers from discharging, disciplining, or otherwise retaliating against an employee who stays at home from work as follows:

- The employee tests positive for COVID-19 or displays one or more of the principal symptoms of COVID-19 and is to remain in their home or place of residence, even if they are otherwise permitted to leave under Executive Order 2020 until: (1) three days have passed since their symptoms have resolved; and (2) seven days have passed since their symptoms first appeared or since they were swabbed for the test that yielded the positive result. This right to leave from work for a personal COVID-19 illness ceases if the person, after showing symptoms, receives a negative COVID-19 test.
- The employee has had close contact with an individual who tests positive for COVID-19 or with an individual who displays one or more of the principal symptoms of COVID-19 and should remain in their home or place of residence, even if they are otherwise permitted to leave under Executive Order 2020-21 until either: (1) 14 days have passed since the last close contact with the sick or symptomatic individual; or (2) the symptomatic individual receives a negative COVID-19 test.
    - This particular part of the Governor's Order excludes health care professionals, workers at a health care facility, as defined in section 7(d) of this order, first responders (e.g., police officers, fire fighters, paramedics), child protective service employees, and workers at child caring institutions, as defined under Michigan law, and workers at correctional facilities.

Employers are also prohibited from discharging, disciplining, or retaliating against an employee described above for failing to comply with a requirement to document that the employee or the individual with whom the employee has had close contact has one or more of the principal symptoms of COVID-19.

The Order applies to all employers regardless of size. Employers are to treat such an employee as if he or she were taking medical leave under the Michigan Paid Medical Leave Act. If the employee has paid time available under the Paid Medical Leave Act the employee can use that time. If no paid time is available then the leave is unpaid. The length of leave is not limited by the amount of paid time the employee has available. The leave must extend as long as the employee remains away from work for the periods described above.

Employers should review each individual situation carefully because affected employees may also qualify for emergency paid sick leave pursuant to the Families First Coronavirus Response Act.

The Governor's executive order may be found at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-524136--,00.html

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MICHIGAN'S NEW COVID-19 REQUIREMENTS FOR LONG-TERM CARE FACILITIES

by Peter J. Domas and Jeremy L. Belanger

On April 15, 2020, Michigan Governor Gretchen Whitmer issued a new Executive Order, No. 2020-50 (the "E.O."), to protect residents and staff of long-term care facilities and to ensure continued access of care. This E.O. applies to nursing homes, homes for the aged, adult foster care facilities, or assisted living facilities. The requirements of the E.O. shall remain in effect until at least May 13, 2020 (the "Emergency Period").

ADMISSION/READMISSION REQUIREMENTS

Long-term care facilities are not permitted to prohibit the admission or readmission of a resident based on COVID-19 testing requirements, unless doing so is consistent with guidance issued by the Michigan Department of Health and Human Services ("MDHHS").[1]

When a resident, who had temporary housing outside of the long-term care facility, seeks readmission, the long-term care facility must comply with the following:

1. The long-term care facility must not condition readmission on forfeiture of any right the resident had before the Emergency Period when a resident was hospitalized or on therapeutic leave.
2. If the long-term care facility can meet the medical needs of the resident, has the capacity, and has no other statutory grounds to refuse admission, the long-term care facility must readmit the resident. The Statutory grounds are:
    a. Medical reasons;
    b. The patient's welfare; and
    c. The welfare of other patients or employees;
3. The long-term care facility must comply with guidance issued by MDHHS on returning residents, which include without limitation screening patients for COVID-19 symptoms (e.g., fever, atypical cough, atypical shortness of breath), checking the residents' temperature, and, if necessary, isolating those patients that are symptomatic.

Long-term care facilities with a census below 80% are required to create a dedicated unit, either within the facility or, for long-term care facilities with multiple facilities, designating a dedicated facility, for the care of COVID-19 positive residents. The dedicated unit must have sufficient PPE for staff to care for the patients.

When a COVID-19 positive patient is being discharged from a hospital to a long-term care facility, the hospital must first attempt to discharge the patient to a long-term care facility with a dedicated unit, if there is availability. If there is capacity, the long-term care facility with the dedicated unit must accept the patient. When that is not possible, the patient should be discharged to a regional hub, which is a nursing home designated by MDHHS as dedicated to the temporary and exclusive treatment of COVID-19 infected patients.

If a regional hub is not available, the hospital will transfer the resident to an "alternate care facility," which is a facility designated to provide relief to hospitals exceeding their patient capacity. These alternate facilities are required to accept the resident if capacity allows. These alternate facilities should transfer the resident to an appropriate long-term care facility as soon as capacity exists.

PROTECTIONS FOR RESIDENTS AND EMPLOYEES

While a resident is admitted to a long-term care facility, the facility must adhere to the following guidelines to protect employees and residents:

1. Employees who test positive, or are symptomatic for COVID-19, are not permitted to work, and long-term care facilities are not permitted to discharge, discipline, or otherwise retaliate against those employees for staying home.
2. Cancel all communal dining and internal and external activities during the Emergency Period.
3. Ensure all CDC guidelines for cleaning and disinfecting the facility are complied with.[2]
4. To the extent possible, provide employees interacting with residents with PPE and hand sanitizer.
5. Inform employees when an affected resident is in the facility no later than 12 hours after identification.
6. Keep accurate and current information about the PPE available, including quantity and type, which must be reported upon MDHHS's request.
7. Report all positive or presumed positive cases of COVID-19 to MDHHS as soon as possible, but no later than 24 hours.[3]

DISCHARGES AND TRANSFERS OF COVID-19 PATIENTS FROM LONG-TERM CARE FACILITIES

Long-term care facilities are prohibited from evicting or involuntarily discharging residents for non-payment or to otherwise deny access to a resident, except as described in the E.O. Once a resident has been identified as having COVID-19, the long-term care facility must first determine whether the patient is stable or requires hospitalization. Some of the factors to asses for hospitalization include without limitation:

1. Trouble breathing;
2. Persistent pain or pressure in the chest;
3. New confusion or inability to arouse; or
4. Bluish lips or face.

If a patient does not require hospitalization, long-term care facilities must determine whether to transfer a patient. If there is a dedicated unit, the long-term care facility must transfer the resident to that unit. If the long-term care facility does not have a dedicated unit, the resident should be transferred

[1] https://www.michigan.gov/documents/coronavirus/LTC_Guidance_to_Protect_Residents_Final_4-10_686874_7.pdf
[2] https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html
[3] https://www.michigan.gov/documents/coronavirus/MDHHS_PUI_Form_Fillable_v04.09.2020_686599_7.pdf

to a regional hub, if one is available and has capacity. If not, the long-term care facility should attempt to transfer the patient to a hospital, or as a last resort to an alternate facility. All transfers should include the patient's advance directives and notifications to the resident's representative. Transfers made under these guidelines are considered to be for the safety of the residents and facility employees.

Dickinson Wright health care attorneys can assist long-term care facilities with ensuring they comply with the requirements of the Executive Order while providing care and treatment to their residents.

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COVID-19 IMPACT ON CONTRACTUAL RELATIONSHIPS UNDER NEVADA LAW

by Michael N. Feder and Brooks T. Westergard

Businesses around the world are currently experiencing issues in dealing with our collective effort to "flatten the curve" with respect to the spread of the novel coronavirus (COVID-19). In conjunction with the global effort to mitigate the spread of COVID-19, a growing majority of states, including Nevada, have issued directives instructing businesses to either suspend operations, or to institute measures to facilitate social distancing.

On March 20, 2020, Governor Sisolak ordered a mandatory shutdown of most non-essential businesses, schools, and gaming facilities until April 16, 2020. On April 1, 2020, Governor Sisolak issued a "stay at home" directive, which extended the mandatory shutdown through April 30, 2020. In addition to extending the duration of the mandatory shutdown, Governor Sisolak issued a statewide travel advisory, urging Nevadans to self-quarantine for at least 14 days after returning from out of town. Based on the Governor's Declaration of Emergency, as extended on April 1, 2020, the Nevada Gaming Control Board required all gaming devices, machines, tables, games, and any other equipment related to gaming activity, to be shut down through April 30, 2020.

Amid the mandatory shutdown and corresponding social distancing and travel restrictions, many businesses will be reviewing their contractual relationships to determine whether their obligations can be temporarily, or even permanently, excused. The following addresses some of the legal theories Nevada businesses may need to consider in the coming days, weeks and possibly months, when reviewing these contractual relationships.

THE *FORCE MAJEURE* PROVISION

A *"force majeure"* clause is a contract provision that typically relieves the parties to the contract from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.

While the Nevada Supreme Court has not specifically weighed in on what types of events constitute *force majeure*, other courts considering the applicability of *force majeure* look to whether: (1) the triggering event is expressly identified in the contract; (2) nonperformance was foreseeable; and (3) performance is truly inadvisable, commercially impracticable, illegal, or impossible.[1]

The World Health Organization's classification of COVID-19 as a "pandemic" would trigger a *force majeure* clause that expressly accounts for pandemics. It is unclear, however, how the courts will apply a *force majeure* clause that excludes, or is silent as to, pandemics, but covers mandatory governmental shutdowns and forced closures, or similar types of events akin to those ordered and issued by Governor Sisolak. The outcome may hinge on whether a court determines the governmental order itself a triggering event, or whether it was issued, and thus caused by, the pandemic.

While there may be some questions concerning applicability of a *force majeure* clause to the present COVID-19 circumstances, if a Nevada business believes the circumstances are, or may be, covered by a contractual *force majeure* clause allowing for a temporary or permanent excuse of performance under a contract, the business should immediately provide written notice to the other party as required under the contract.

OTHER OPTIONS IF A CONTRACT LACKS A *FORCE MAJEURE* CLAUSE

In the absence of, or in addition to, a *force majeure* clause, the common law doctrines of "impossibility" and "frustration of purpose" may provide a basis to excuse performance under a contract.

In Nevada, the doctrine of impossibility applies when an unforeseen event has made it impossible for one party to perform its obligations under the agreement.[2] The key questions are: (1) whether the unforeseen event rendered performance objectively impossible; and (2) whether the nonoccurrence of the unforeseen event was an underlying assumption of the agreement. If both questions can be answered in the affirmative, the impossibility doctrine may apply.

Similar to the impossibility doctrine, under Nevada law, the doctrine of frustration of purpose applies when an unforeseen event has changed the circumstances surrounding the contract. Under the doctrine of frustration of purpose, the main purpose of the contract is essentially destroyed, even though the parties could still technically perform.[3] The overarching question is whether there was an unforeseeable event that has significantly altered the agreement such that performance would no longer fulfill any aspect of its original purpose.

Akin to the *force majeure* clause, if a Nevada business believes the common law doctrines of impossibility or frustration of purpose apply, it should immediately provide written notice to the other party.

MOVING FORWARD

If a Nevada business believes that the COVID-19 pandemic or Governor Sisolak's governmental orders have resulted in its or its counterpart's inability to perform under a contract, it should assess the viability of either a written *force majeure* clause or common law principles of nonperformance excusal. Under either a *force majeure* or common law analysis, the determination of whether a party will be excused from performance is a fact-intensive inquiry that will necessarily hinge on the language of the agreement between the parties and the circumstances surrounding nonperformance.

Dickinson Wright attorneys have and will continue to support the Nevada business community. As the global pandemic continues to evolve, our team is ready and available to answer any legal questions or concerns that may arise. Please don't hesitate to reach out to us today.

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[1] See Richard A. Lord, 30 Williston on Contracts § 77:31 (4th Ed.).

[2] Cashman Equip. Co. v. W. Edna Assocs., Ltd., 132 Nev. 689, 702, 380 P.3d 844, 853 (2016); see also Restatement (Second) of Contracts § 261 (1981).

[3] Restatement (Second) of Contracts § 265 (1981); see also Max Bear Productions, Ltd. v. Riverwood Partners, LLC, 2010 WL 3743928 (D. Nev. 2010); Graham v. Kim, 111 Nev. 1039, 899 P.2d 1122 (1995) (recognizing the doctrine of "commercial frustration").

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DICKINSON WRIGHT GOVERNMENT AFFAIRS UPDATE

NEVADA STATE AND LOCAL GOVERNMENTS MAKE LICENSING AND PERMIT ACCOMMODATIONS TO HELP BUSINESSES AMID THE COVID-19 CRISIS

by Caleb L. Green and Jennifer J. Gaynor

Like many other states in response to the widespread transmission of COVID-19, Nevada has banned business operations for non-essential businesses and enacted limitations on operations for those businesses considered essential. As a result, Nevada business owners have been forced to seek alternative ways to continue lawful operations as they navigate through the coronavirus pandemic. This has prompted state and local governments to make changes and accommodations concerning the administration of business licenses and permits.

On March 31, 2020, Governor Steve Sisolak signed Emergency Directive 009, which made several changes and adjustments to the administration of business licensing and permits in Nevada. Namely, this Directive extends the deadline for state permits and business licenses that expired or would otherwise expire since the March 12, 2020, Declaration of Emergency. Expiring permits are extended ninety (90) days from their current expiration or after the termination of the Declaration of Emergency, whichever is longer.

Under the authority of Directive 009, local governments have also made administrative adjustments to licensing requirements in an effort to accommodate Nevada businesses. These include extending deadlines and providing other forms of temporary relief to business licenses and permit holders.

TEMPORARY BUSINESS LICENSES FOR PACKAGED LIQUOR DELIVERY AND CURBSIDE SERVICES

Nevada's restaurants and package liquor stores remain closed or are operating on a limited basis as non-essential businesses. In an effort to allow these businesses to boost sales during the pandemic, however, several Nevada business-licensing authorities throughout the Clark County and Washoe County areas are temporarily allowing package liquor stores and restaurants to offer delivery or curbside service of package liquor and alcohol products to customers during the Governor's Declaration of Emergency.

Liquor stores and related businesses can apply for a temporary delivery license at the county and city levels and, once the license is secured, will be allowed to deliver beer, wine, spirits-based products in addition to, in some cases, hard alcohol (rum, vodka, gin, whiskey, among others). Likewise, restaurants can apply for temporary licenses to serve alcohol products through curbside services. The following is a non-exhaustive list of the Clark County and Washoe County licensing authorities that provide one or both of these temporary licenses:

- Clark County
- Washoe County
- City of Las Vegas
- City of North Las Vegas
- City of Henderson
- City of Mesquite (Curbside Service Only)
- City of Reno
- City of Sparks

Businesses that secure these licenses must adhere to jurisdiction-specific restrictions and guidelines, however, generally, when delivering these goods, the requirements include that:

- Alcohol products being delivered must remain in their original, unopened containers and comply with open container laws;
- All deliveries must be made to locations away from the licensed premises;
- Deliveries cannot involve a third-party vendor such as Uber Eats, Door Dash, and Postmates. Instead, deliveries must be made by the licensee's employees to the individual placing the order;
- The licensee is responsible for ensuring that their respective employees are verifying the age of the purchaser and is ultimately accountable for the employee's actions;
- There are limitations on refills of used containers (e.g. restrictions on growlers);
- In some instances, depending on the jurisdiction and type of business, the customer must also order food in conjunction with the alcoholic beverages;
- Furthermore, delivery and business activities must be in full compliance with the Governor's Emergency Directives regarding public health, including social distancing and sanitation.

At this time, these licenses are temporary and may be extended upon request throughout the duration of the governor's mandated closures.

CITY AND COUNTY BUSINESS LICENSE ACCOMMODATIONS

City of Las Vegas

To ease the burden on businesses that have been forced to close due to COVID-19, the City of Las Vegas is providing:

- A 60-day grace period for city business license renewals with due dates of March 1, 2020, April 1, 2020, or May 1, 2020;
- An option for liquor license holders to pay a reduced fee during the temporary closure; and
- An option for gaming license holders to pay a reduced fee during the temporary closure.

City of North Las Vegas

The City of North Las Vegas has also made it a priority to assist businesses who have had to change their operations during this time. Some of the measures taken to offer relief and support businesses impacted by COVID-19 include:

- A 60-day grace period for flat-fee business license renewals due by March 31; and
- A 60-day grace period for multi-jurisdictional contractor business license renewals due by April 30.

City of Reno

The City of Reno has also provided licensing accommodations to businesses. For annual or quarterly business license fees that are due between March 27, 2020, and April 30, 2020, the City of Reno has automatically extended the deadline for an additional 30 days from the original due date. In addition, businesses that had to cease all or part of its business operations according to the State of Nevada business closure directives and whose business licensing fees are due

outside of the March 27 to April 30 period can apply to extend deadlines to pay license fees.

CONCLUSION

Properly navigating the business licensing process can be onerous. In the face of the ongoing global pandemic, this challenge is compounded as business owners must navigate the changing legal landscape while maintaining lawful business operations. Accordingly, Nevada business owners should consult with legal counsel to help them navigate through the licensing process and to identify applicable accommodations.

Dickinson Wright's attorneys have considerable experience assisting companies in complying with the various requirements of state, federal, and local laws. The firm remains committed to helping our clients navigate this unprecedented time and remains fully available to provide any assistance that may be required. Business owners who have been negatively affected and have experienced barriers in their ability to navigate the business licensing process are encouraged to consult with one of Dickinson Wright's attorneys experience in Government Affairs.

Our Government Affairs team is dedicated to keeping you informed of pertinent information as we continue facing the novel coronavirus. We will be providing periodical updates on the matter over the next few weeks.

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RE-OPEN FOR NEVADA: NEVADA OSHA ISSUES GUIDELINES FOR NONESSENTIAL NEVADA BUSINESSES RESUMING OPERATIONS

by Caleb Green and Jennifer J. Gaynor

Nearly two months after Nevada issued closures of nonessential businesses to reduce the spread of the coronavirus pandemic, the state of Nevada is now preparing to return to normal operations. On May 8, 2020, Nevada Governor Steve Sisolak released Nevada Emergency Directive 018 ("Directive 18"), which initiates the reopening of certain nonessential businesses within Nevada through a "phased-in" process. Directive 18 introduced additional reopening guidelines for qualifying businesses and is summarized in the guidance document titled "Roadmap to Recovery for Nevada." Due to the decrease in COVID-19 cases since April 21, 2020, the Governor stated that the trend is strong enough to meet the criteria for Phase One. The new Directive, effective May 9, 2020, will expire on May 30, 2020, unless otherwise ordered.

Notably, the Nevada State Occupational Safety and Health Administration (NV OSHA) has played a significant role in ensuring the safety of the Nevada public as the state gradually gets back to normal. Throughout the statewide response to the COVID-19 pandemic, NV OSHA has and continues to issue and enforce safety, sanitization, and social distancing guidelines for Nevada businesses resuming operations. Namely, the governor has relied upon NV OSHA to guide Nevada's reopening initiative in several Emergency Directives establishing safety measures for various businesses and activities such as grocery stores, financial institutions, recreational activities, and now, through Directive 18, certain nonessential businesses.

Directive 18 requires that: "All essential and nonessential businesses opening or continuing operations in Phase One must adopt measures promulgated by the NV OSHA to minimize the risk of spread of COVID-19, including social distancing and sanitation measures, and abide by all other guidance promulgated pursuant to the Phase One directive.

In addition, Section 10 of Declaration 18 provides that "all businesses must adopt measures that meet or exceed the standards promulgated by NV OSHA to minimize the risk of spread of COVID-19. And that NV OSHA shall enforce all violations of its guidance, protocols, and regulations."

The NV OSHA recommendations/requirements for all essential businesses and nonessential businesses opened during Phase One include, but are not limited to, the following:

General Operations:

- All employers must provide face coverings for employees assigned to serving the public and shall require these employees to wear the face coverings.
- Prohibit gatherings of 10 or more people.
- Promote frequent and thorough hand washing, including providing workers, customers, and worksite visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol.
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces and equipment with Environmental Protection Agency-approved cleaning chemicals from List N or that have label claims against the coronavirus. See: https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2
- Provide sanitation and cleaning supplies for addressing common surfaces in multiple user mobile equipment and multiple user tooling. Recommended based on the specifics of a business's services and procedures.
- Conduct daily surveys of changes to staff/labor health conditions. NV OSHA is emphasizing the need for business leadership to be working with and aware of the health and well-being of its staff.
- Ensure that any identified first responders in the labor force are provided and use the needed Personal Protective Equipment (PPE) and equipment for protection from communicable or infectious disease.
- Provide access to potable and sanitary water

The following measures are required to be implemented by the employer when employees are conducting specific job functions where 6 feet of social distancing is infeasible/impractical.

- A Job Hazard Analysis (JHA) may be completed for each task, procedure, or instance that is identified where social distancing is infeasible/impractical. Any JHA drafted for this purpose must be equivalent in detail and scope as identified in Federal OSHA publication 3071. https://www.osha.gov/Publications/osha3071.pdf
- A JHA developed for this purpose must identify the task being addressed, hazard being addressed (spread of COVID-19), and controls to be used to address the hazard.
- Any policy, practice, or protocol developed pursuant to the JHA must be as effective or more effective as the 6 feet social distancing mandate in the Declaration of Emergency Directive #003.
- Engineering controls, administrative controls, and PPE identified and developed through the JHA to address the hazard must be supplied by the employer.
- Training must be provided to staff for any policy, practice, or protocol that is used to address the hazard via a JHA.
- Training must be provided to staff for any equipment, engineered process, administrative control, or PPE that was identified and developed through the JHA to address the social distancing requirements or alternative policies, practices, or protocols implemented when social distancing is infeasible/impractical.

Social Distancing during breaks, lunches/dinners, and other slack periods:

- Employers are recommended to monitor employees during break, lunch/dinner, and slack periods to ensure that they are maintaining proper social distancing protocols.
- If an employer representative identifies an instance where proper social distancing protocols are not being followed, the employee will be subject to the employer's existing methods established for ensuring compliance with safety rules and work practices per NAC 618.540(1)(e).
- These observations apply to parking lots, staging areas, and any other location identified by the employer to be a supportive part of the overall business.

ENFORCEMENT:

NV OSHA emphasizes in this guidance that slowing/addressing the spread of COVID-19 is a required aspect of all activities/tasks/services associated with open businesses and that NV OSHA will continue to enforce or promote the use of identified measures to address this public health crisis. NV OSHA also notes that any guidance that is produced by the State of Nevada to support the Roadmap to Recovery for Nevada will be enforced by NV OSHA.

Specifically, any guidance that pertains to a particular industry sector may/will have a column of "mandatory" measures that apply to that industry sector. Any mandatory measures found in the state's promulgated guidance will be deemed enforceable if not specifically addressed in previously published guidance, regulations, or memorandums.

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CLIENT ALERT

DICKINSON WRIGHT GOVERNMENT AFFAIRS UPDATE

STAY HOME FOR NEVADA: NEVADA EMERGENCY DIRECTIVE 013 TIGHTENS SANITIZATION/SOCIAL DISTANCING AND ADDS ENFORCEMENT TEETH

by Caleb L. Green and Jennifer J. Gaynor

On March 11, 2020, the World Health Organization declared the rapidly spreading coronavirus disease of 2019 (COVID-19 or the "coronavirus") a pandemic, acknowledging that the virus posed a worldwide threat. The coronavirus has caused institutions and governments alike to make sweeping changes to combat the further spread of the virus.

Evolving developments and the widespread transmission of COVID-19 has prompted immediate action from the State of Nevada. Accordingly, in response to the global pandemic, on March 12, 2020, Nevada Governor Steve Sisolak declared a state of emergency throughout the State of Nevada, directing all state agencies to prioritize efforts to reduce the spread of the coronavirus. The Emergency Declaration ordered the creation of the Nevada Health Response team, an organization charged with consolidating information and resources for concerned Nevadans.

Since then, Governor Sisolak has issued a series of Emergency Directives to combat the spread of COVID-19, including mandating social distancing practices, closing nonessential businesses, and issuing a temporary moratorium against evictions and foreclosures. Most recently, Governor Sisolak issued Emergency Directive 013, providing additional social distancing measures in Nevada.

NEVADA EMERGENCY DIRECTIVE 013 – APRIL 8, 2020

In summary, Emergency Directive provides the following starting at 11:59 pm on April 8, 2020, throughout the duration of the State of Emergency in Nevada:

- Requires sports and recreational venues including golf courses, driving ranges, tennis courts, basketball courts, among others to close.
- Requires showrooms used to display goods for same at essential businesses to close (Exception: sales via delivery and curbside services are permitted).
- Bans in-person gatherings of ten or more people at places of worship and pop-up religious assemblies.
- Requires Nevada OSHA to ensure that all essential businesses to provide adequate protections and adopt sanitization protocols that minimize the risk of the spread of COVID-19 in the workplace.
- Prohibits Nevada licensed cosmetologists and barbers from providing in-house grooming services.
- Requires essential business to adopt measures to control in-store traffic to ensure social distancing standards are maintained.
- Supermarkets and grocery stores are prohibited from offering self-service food stations, salad bars, and unpackaged goods, such as unpackaged nuts, candies, bean, and coffee.
- Reaffirms that a violation of Section 1-3 of Directive 008, about evictions and foreclosures, constitutes conversion, duress, or intimidation in a transaction under NRS 598.0923(4).
- Allows government agencies to adopt ordinances to enforce this directive.

CITY OF NORTH LAS VEGAS ORDINANCE – APRIL 8, 2020

Also, on April 8, 2020, the City of North Las Vegas passed an ordinance that allows the city to penalize or fine, those who violate emergency directives from the governor or the city. Specifically, the law penalizes landlords and managers of residential and commercial properties who violate the state's moratorium on evictions during the COVID-19 pandemic. According to the new ordinance, violators are subject to administrative fines of up to $1,000 per day, revocation of business licenses or permits, or misdemeanor charges carrying penalties of up to six months in jail and a fine of up to $1,000.

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STAY HOME FOR NEVADA: NEVADA EMERGENCY DIRECTIVE 016 LOOSENS AND MODIFIES RESTRICTIONS FOR NONESSENTIAL BUSINESSES AND VARIOUS ACTIVITIES

by Caleb Green and Jennifer J. Gaynor

Is that a tiny bit of light at the end of the COVID-19 tunnel? And what is "pickleball"? These are questions that Nevadans are asking themselves as they review the governor's latest emergency directive.

As death tolls slow and new positive cases subside after weeks of stay-at-home and business-closure orders, state governments, including Nevada, are rolling out their plans to reopen their economies. On April 29th, Nevada Governor Steve Sisolak issued Emergency Directive 016. To the disappointment of many, but the surprise of few, this directive did extend the general stay-at-home and nonessential business closure order until May 15. It also, however, gave Nevadans something they hadn't seen for a while: an emergency directive that loosened, rather than tightened, the social and business restrictions under which the state has been operating since mid-March.

Emergency Directive 016 provides modifications to existing safety measures, including reopening select nonessential business, extending expiration dates for state-issued licenses, and lifting some limitations on gatherings. In summary, the Directive:

- Relaxes some restrictions instituted by previous Emergency Directives. This includes:
  - » Permitting nonessential retail businesses to resume retail sale activities on a curbside or home-delivery basis effective May 1, 2020.
  - » Permitting cannabis dispensaries to engage in retail sales on a curbside or home-delivery basis effective May 1, 2020.
  - » Permitting golf, tennis, and pickleball activities to resume beginning May 1, 2020, if they can do so in a manner consistent with Directive 007s requirements for social distancing.
  - » Permitting places of worship and religious institutions to host worship services on an in-car or drive-by basis effective May 1, 2020. The ban on in-person worship services of more than ten persons, per Directive 013, remains in effect.
  - » Permitting individuals to leave their residences to travel to nonessential retail businesses offering curbside or delivery services (but encouraging them to wear a protective mask as they do so).
- Grants authority to the Nevada Gaming Control Board (the "Board") to allow gaming operations to resume when the Board determines those operations can resume safely.
- Provides the following extensions for business licenses, permits, and DMV-issued credentials, effective May 1, 2020:
  - » Extends the expiration date of specific licenses, permits, and DMV-issued credentials that have expired or will expire during DMV closures to 90 days after the DMV reopens.
  - » Extends the expiration date of specific licenses, permits, and DMV-issued credentials that will expire within 30 days after the DMV reopens to an additional 60 days after the DMV reopens.
- Requires Nevada OSHA to ensure that all reopening nonessential businesses provide adequate protections and adopt sanitization protocols that minimize the risk of the spread of COVID-19 in the workplace.

Additionally, all resuming retail and cannabis businesses must exercise social distancing standards, adopt Nevada OSHA sanitization measures to prevent the spread of COVID-19, and prevent congregating and the formation of queues on their premises to the extent practicable. Furthermore, Directive 016 extends all other previous Emergency Directives until May 15, 2020.

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CLIENT ALERT

NEW ADDITIONS FOR THE CANADA EMERGENCY WAGE SUBSIDY (CEWS) ASSISTS TECH AND START-UP COMPANIES

by Wendy G. Hulton and Daniel D. Ujczo

Today, the Government of Canada proposed further expansions regarding the scope and criteria for employers seeking relief utilizing the Canada Emergency Wage Subsidy (CEWS). Dickinson Wright previously issued a Client Alert which discussed the scope of these programs.
https://www.dickinson-wright.com/news-alerts/ca-provides-expanded-relief-to-covid19-pandemic

To address concerns expressed by the tech sector and not-for-profits, the proposed changes include:

- The 30% revenue loss threshold for triggering CEWS benefits would be reduced to 15% for the month of March only. This attempts to address the issue that many companies did not see negative impacts from COVID-19 until late-March and April.
- To measure their revenue loss, it is proposed that all employers have the flexibility to compare their revenue of March, April and May 2020 to that of the same month in 2019 (as previously advised), or to an average of their revenue earned in January and February 2020. The new 2020 comparison period is designed to assist start-ups that may not have comparable data from 2019.
- Employers eligible for the CEWS would be entitled to receive a 100% refund for certain employer-paid contributions to Employment Insurance, the Canada Pension Plan, the Quebec Pension Plan, and the Quebec Parental Insurance Plan. This refund would apply to the entire amount of employer-paid contributions in respect to remuneration paid to furloughed employees in a period where the employer is eligible for the CEWS.
- Employers would be allowed to measure revenues either on the basis of accrual accounting (as they are earned) or cash accounting (as they are received).
- Companies are not required to pay the remaining 25% of the employee's wages but are strongly encouraged to do so.
- Businesses would be required to designate someone responsible for the accuracy of their financial information.
- Anyone caught abusing the program would be subject to fines up to 225% of what they received and up to five years in prison.

The Government is still waiting for Parliament to approve the program. There is no firm date yet for payments, but it will likely be late-April to May.

For official Government of Canada updates and information about Canada's response to COVID-19, visit: http://canada.ca/coronavirus/.

Dickinson Wright's teams in Canada and the U.S. are available to assist with navigating these programs.

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Tax Blog

NEW DEADLINES FOR RETIREMENT PLANS, TAX FILINGS AND PAID LEAVE POLICIES

Posted by **Roberta Granadier** | Apr 27, 2020

The Coronavirus Aid, Relief and Economic Security Act ("CARES"), and IRS and Department of Labor ("DOL") rules establish new and revised deadlines for retirement plans and other benefit programs. The following is an outline of key dates:

Item	**Date**
Paid Leave Effective date for paid sick and childcare leave under Families First Coronavirus Relief Act ("FFCRA") for covered employees	*April 1, 2020*
Reimbursable tax credits under FFCRA for paid leave, cost of healthcare for employees on paid leave and cost of employer-paid Medicare Tax	*Due Dates for Quarterly Form 941 for FFCRA leave taken after April 1, 2020 and before December 31, 2020*
Retirement Plans Coronavirus-Related Distributions ("CRD") for eligible participants up to $100,000 ***Optional – Plans Are Not Required to Offer***	*CRD Distributions made between January 1, 2020 and December 31, 2020*
Participant Loan Maximum Increased from $50,000 to $100,000	*New Loans for Eligible Employees taken from March 27, 2020 to September 22, 2020*
Participant Loan Repayment – One Year Suspension	*Applies to Loan Repayment Dates for Eligible Employees between* *March 27, 2020 – December 31, 2020*
Plan Amendment for Coronavirus-Related Distributions, Required Minimum Distributions and Loan Changes	*December 31, 2022 for calendar year plans*
401(k) Excess Deferral Distributions	*July 15, 2020 (extended from March 15, 2020)*

Disclaimer

Form 5500	*No Filing Date Extension for Calendar year Plans* *Form 5500 filings due April 1-July 14, 2020 are extended to July 15, 2020*
Defined Benefit Plan PBGC 4010 and Premium Payments Due April 1 – July 14, 2020	*July 15, 2020*
Defined Benefit Plan Minimum Required Funding Contributions Due in 2020	*January 1, 2021 – September 15, 2021*
Student Loan Debt Employer Paid Student Loan Debt up to $5,250	*Payments made to lender or directly to employee between March 27, 2020 and January 1, 2021*

About the Author: Roberta Granadier is an attorney in Dickinson Wright's Troy office, where she practices in the area of employee benefits law. She has extensive experience with benefits issues in corporate transactions, executive compensation, ESOPs and public retirement plans. Roberta can be reached at 248-433-7552 or RGranadier@dickinsonwright.com and you can visit her bio here.

NEW DETAILS ABOUT THE CANADA EMERGENCY COMMERCIAL RENT ASSISTANCE PROGRAM AND THE ONTARIO-CANADA EMERGENCY COMMERCIAL RENT ASSISTANCE PROGRAM

by Andrew J. Skinner and Jacky Cheung

On April 24, 2020, the Federal Government provided some details about the Canada Emergency Commercial Rent Assistance program (**CECRA**) for small businesses and commercial landlords which had been announced on April 16, 2020. The CECRA is intended to provide relief for small business tenants and in some respects, landlords. The CECRA will be delivered jointly by the Federal Government with each of the Provinces and Territories. In Ontario, the CECRA will be delivered through the Ontario-Canada Emergency Commercial Rent Assistance Program (**OCECRA**). Under the OCECRA, the Ontario and Federal Government will offer forgivable loans to the landlord equal to 50% of the before-profit rent for landlords who reduce the tenant's monthly rent to 25% of rent comprising "fixed costs" for the months of April, May, and June, 2020. The landlord will be responsible for the remaining 25%.

In order to formalize the rent reduction, landlords must enter into a "rent forgiveness agreement" with their tenant. The agreement is to provide a moratorium on evictions for three months.

Landlords should note that by applying for this program, they are required to forego their "profits" derived from the rental income. The government will reimburse landlords for only their "before-profit" rent.

The forgivable loans will be administered by Canada Mortgage and Housing Corporation (**CMHC**) and the funds will be disbursed to the mortgage lender of the commercial property owner. CMHC has indicated it will consider alternative loan forgiveness arrangements for landlords who have no mortgages, such as applying the forgivable loans to other forms of "debt facilities" or fixed cost payment obligations, such as utilities.

ELIGIBILITY FOR SMALL BUSINESS TENANTS

For a tenant to be eligible under the OCECRA, the tenant must:

1. Pay monthly rent which does not exceed $50,000 in "gross rent" payments; and
2. Be a nonessential small business that has temporarily closed, or that is experiencing a 70% drop in pre-COVID-19 revenues (determined by comparing revenues in April, May, or June to the same month in 2019 or alternatively compared to average revenues for January and February 2020).

The following would not be considered a qualifying small business under the OCECRA:

1. Entities owned by individuals holding political office;
2. Entities that promote violence, incite hatred or discriminate on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability; and
3. An entity in the "Lenders" special accounts or Restructuring Group prior to March 1, 2020.

Not-for-profit organizations and charitable entities also qualify for the program.

ELIGIBILITY FOR LANDLORDS

Eligibility for the OCECRA will extend to commercial properties with a residential component, and residential mixed-use properties with a 30% commercial component but only with respect to the commercial tenants.

In addition to the rent reduction requirement, property owners must be the registered owner of their property and the landlord of the particular tenant.

HOW TO APPLY

No details have been announced on how or when landlords can apply for the OCECRA, however, eligible landlords who qualify under the program have until September 30, 2020 to apply.

REMAINING QUESTIONS

There are many unanswered questions with respect to the OCECRA. It is not clear for example, whether the program will require a prescribed form of the "rent forgiveness agreement." Guidelines will be required to indicate how landlords calculate "pre-profit rent" and "fixed rent."

It will be interesting to see how this program will impact rent due on May 1st and the strategic approaches of both commercial tenants and landlords going forward.

Dickinson Wright's team in Canada is available to assist with navigating this program.

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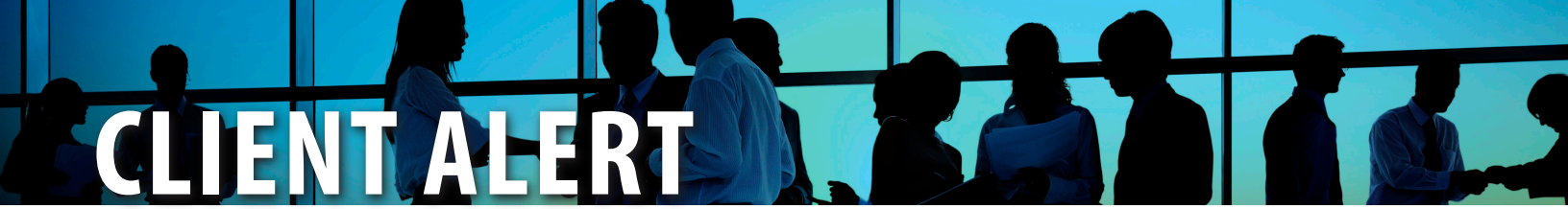
Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.



NONIMMIGRANT AND IMMIGRANT VISA PROCESSING HALTED BY PRESIDENTIAL PROCLAMATION - EFFECTIVE JUNE 24 FOR CERTAIN NONIMMIGRANTS

by Kathleen Campbell Walker[1]

After numerous rumors in the past few days regarding the suspension of immigration to the United States (U.S.), President Trump's Proclamation was finally published on June 22 (June Visa Processing Proclamation or JVVP) after numerous discussions regarding its scope. Please refer to my prior summary on the April 22, 2020 Proclamation 10014 as to the suspension of immigrant visa processing at consular posts (April Immigrant Visa Suspension Proclamation or AIVSP).

The JVVP references the unemployment rate in the U.S. and its associated economic contraction as the basis to suspend the entry, through December 31, 2020, of certain immigrants and nonimmigrants to the U.S. While the Department of Homeland Security (DHS) and the Department of State (DOS) have yet to issue official guidance regarding the JVVP, this summary will outline some basic facts we know.

What is the effective date of the JVVP?

- June 22 as to the continuation of the AIVSP. That means a continuation of the immigrant visa suspension explained above through December 31, 2020.
- June 24 at 12:01 am eastern daylight time through December 31, 2020 as to the new nonimmigrant entry restrictions.

Within 30 days of the effective date of the JVVP and every 60 days thereafter, the DHS Secretary in consultation with the Secretary of State and the Secretary of Labor will recommend any modifications as needed.

What agencies will be enforcing the provisions of the JVVP?

U.S. consular officers of the Department of State and U.S. Customs and Border Protection (CBP) officers at our ports of entry are the agencies responsible for visa issuance and admission to the U.S., respectively. U.S. Citizenship and Immigration Services' (USCIS) processing of petitions and applications for benefits for the specified nonimmigrant categories are not affected at the moment.

What Nonimmigrant visa categories are affected by the JVVP?

a. An H-1B or H-2B visa and any alien accompanying or following to join such alien (H-4);
b. (b) A J visa, to the extent the alien is participating in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and any alien accompanying or following to join such alien (J-2); and
c. (c) An L visa, and any alien accompanying or following to join such alien (L-2).

What is the significant impact of the JVVP?

Many applicants for immigrant visas at consular posts outside of the U.S. will likely face an ongoing suspension of consular appointments to obtain immigrant visas through December 31, 2020. The same lack of consular appointments will occur now for certain L-1/L-2, H-1B/H-4, H-2B, and J-1/J-2 nonimmigrant visa applicants through December 31, 2020. It will be incumbent upon the visa applicants to prove that they are not subject to the JVVP. Of course, consular posts suspended most consular services back in March due to COVID-19, as announced by DOS. Currently, consular appointments are randomly available on a post by post basis for nonimmigrants. In addition, CBP officers at our ports of entry will deny admission to these affected nonimmigrants applying for entry to the U.S.

Who is exempted from application of the JVVP?

i. Any lawful permanent resident of the U.S.;
ii. Any foreign national who is the spouse or child, as defined in section 101(b)(1) of the Immigration and Nationality Act, as amended (INA), of a U.S. citizen;
iii. Any foreign national seeking to enter the U.S. to provide temporary labor or services *essential to the U.S. food supply chain*; and
iv. Any foreign national whose entry would be in the national interest as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees.

To determine who is covered under the "national interest" exemption, the Proclamation directs the Secretaries of State, Labor, and Homeland Security to establish standards to assess which individuals are:

- critical to the defense, law enforcement, diplomacy, or national security of the U.S.;
- involved with the provision of medical care to individuals who have contracted COVID-19 and are currently hospitalized;
- involved with the provision of medical research at U.S. facilities to help the U.S. combat COVID-19;
- necessary to facilitate the immediate and continued economic recovery of the U.S.; or
- children who would age out of eligibility for a visa because of this proclamation or due to the AIVSP.

As to services essential to the food supply chain, on May 14, 2020, DHS issued a final rule for H-2B workers indicating that work essential to the U.S. food supply chain includes a variety of industries and occupations where the H-2B worker is performing temporary nonagricultural services or labor, including but not limited to work related to the processing, manufacturing, and packaging of human and animal food; transporting human and animal food from farms, or manufacturing or processing plants, to distributors and end sellers; and the selling

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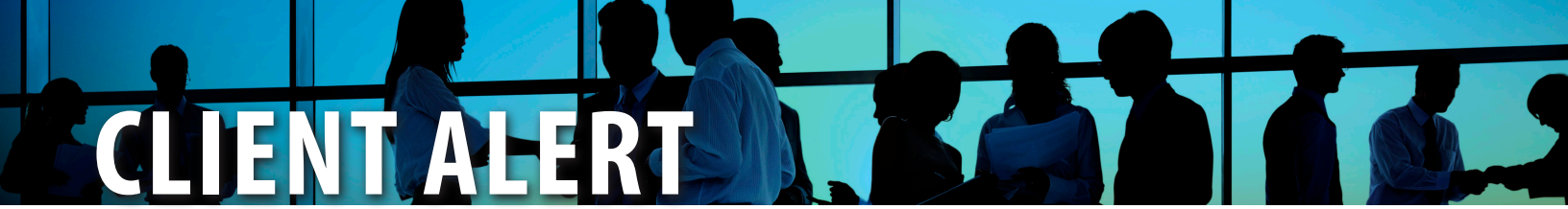

of human and animal food through a variety of sellers or retail establishments, including restaurants. We do not have guidance yet on the interpretation of this exemption in light of the proclamation.

How does the JVVP define who is subject to the entry ban?

The suspension and limitation on entry applies only to any foreign national who:

i. is outside the U.S. on the effective date of the proclamation (June 24);
ii. does not have a nonimmigrant visa that is valid on the effective date of the proclamation; **and**
iii. does not have an official travel document other than a visa (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on the effective date of this proclamation or issued on any date thereafter that permits him or her to travel to the U.S. and seek entry or admission.

So, in theory, affected nonimmigrant visa holders are only subject to the ban if they are outside of the U.S. on June 24, they do not have a valid visa on June 24, **and** they do not have a valid travel document on June 24. So, if you are inside of the U.S. on June 24, you should be able to apply for an L-1, H-1B, H-2B, or J-1 (including dependents) visa at a consular post, if appointments are available, and be admitted to the U.S. In addition, if you are outside of the U.S., but have a valid visa, then the ban should not be applied. Again, agency confirmation would be helpful.

Will all entries to the U.S. be prohibited by the JVVP as to the affected nonimmigrant categories ([i.e. L-1, H-1B (not H-1B1), H-2B, and J-1 – and dependents]?

No, but we are waiting for further guidance from the federal agencies. Those in the U.S. or outside of it on June 24, who have valid nonimmigrant visas should not be affected. This means that they may apply for visas in the same category or another of the restricted categories. They should also be able to apply at ports of entry to be readmitted to the U.S. in those categories. *On June 24, some CBP officers have indicated that the JVVP will not apply for foreign nationals with valid visas.*

Are those with expired visas but valid I-94 admission records and passports able to still use the automatic visa revalidation regulation at 22 CFR 41.112(d) to return to the U.S. and apply for new visas in the affected nonimmigrant categories?

We are not sure. If someone is in the U.S. before June 24, they will have a valid travel document to use to seek entry to the U.S. That document is an I-94 admission record along with their passport and expired visa. Until DHS provides guidance on this point, the safer course of action is to be in the U.S. and to remain in the U.S. until guidance is issued. *On June 24, we are receiving word from some CBP officers that automatic visa revalidation will NOT be affected by JVVP and that the I-94 issued by CBP or USCIS on an I-797 notice will not be considered as travel documents.*

Certainly, Canadians who are visa exempt are not subject to the JVVP?

Canadian nationals are visa exempt with respect to the affected nonimmigrant categories. Their passport and visa exemption serves as their travel document. The expectation is that Canadians will not be affected by the ban…. at least at the moment. In addition, the ability to apply for L status at ports of entry on the northern border should be untouched, but at present; certain northern ports of entry are suspending initial L adjudications for Canadians on June 23. We do not know yet the official word on this issue. *On June 24, we are receiving word from some CBP officers that visa exempt Canadians will NOT be affected by JVVP.*

What about those in the U.S. or outside of the U.S. with ESTA Registrations?

Since an ESTA registrant is able to enter the U.S. as a B-1/B-2 visitor, don't they possess a travel document in the form of the ESTA registration? So, if the person is outside or inside of the U.S. with a valid ESTA registration on or after June 24, are they eligible to apply for one of the designated restricted nonimmigrant categories at a consular post (assuming appointment availability) and be admitted to the U.S., if the visa is issued? We will have to wait and see.

Is being in the U.S. on June 24 enough to escape JVVP implications?

Based on the wording of the JVVP, it would appear the answer is yes. Thus, a visa application and subsequent admission to the U.S. in one of the restricted categories should be possible. Again, we will have to wait and see. I would hate to be a CBP or consular officer trying to figure this out and what documentation will be necessary to prove the required elements to qualify.

Will the JVVP cause the imposition of other measures as to immigrant and nonimmigrant visa processing or admission to the U.S.?

Possible. Some of the measures included are as follows::

- Direct DHS and DOS to ensure compliance with biographic and biometric data collection requirements.
- Direct DHS to " take appropriate and necessary steps, consistent with applicable law, to prevent certain aliens who have final orders of removal; who are inadmissible or deportable from the United States; or who have been arrested for, charged with, or convicted of a criminal offense in the United States, from obtaining eligibility to work in the United States."

- Issue regulations or take additional actions to ensure that those who have already been admitted, or are seeking admission on an EB-2 immigrant visa, EB-3 immigrant visa, or H-1B nonimmigrant visa do not limit opportunities for U.S. workers in violation of labor certification or labor condition application regulations. These actions may include prioritizing the highest paid H-1B workers in the annual numerical cap.
- The Secretary of Health and Human Services will provide guidance to the Secretaries of State and Homeland Security regarding measures to reduce the risk of those seeking admission to the U.S. introducing or spreading COVID-19 within the U.S. This may require subjecting individuals to a COVID-19 test before arrival.

Has the DOS resumed visa processing/consular services?

Somewhat. It is still very difficult to schedule nonimmigrant or immigrant visa appointments and visa processing is practically at a standstill in comparison to normal operations.

Currently, it is a maze to address travel ban proclamations, visa processing suspensions, USCIS processing times, and now this JVVP among other issues. It will be critical to assess the application of the JVVP as to each employee and to plan for delays in transfers of critical personnel, who fall subject to the proclamation through the end of the year. The presidential election is on November 3, which might have an interim effect. Again, we will have to monitor developments day-to-day in this unpredictable time.

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DICKINSON WRIGHT

EXPLORING OPPORTUNITIES
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On-Demand Webinar: An Employer's Guide to the Employee Benefits Provisions of the CARES Act and Other COVID-19 Benefits Concerns [Click Here to Register Now]

Summary

Dickinson Wright's Jordan Schreier and Eric Gregory will discuss the provisions of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act that affect employer sponsored benefit plans and other employee benefits issues facing employers responding to Coronavirus. The speakers will discuss:

- The new Coronavirus Related Distribution option and implications for employers and employees;
- Additional flexibility for participant loans in retirement plans;
- Waiver of 2020 required minimum distributions;
- Single-employer defined benefit pension plan funding relief;
- Coverage of COVID-19 testing and preventive services;
- Exemptions for telehealth services;
- Reimbursements for over-the-counter drug
- Considerations for employers experiencing mass layoffs under the Affordable Act, ERISA, and the Internal Revenue Code; and
- COVID-19 related concerns for executive-level compensation.

The webinar is complimentary but registration is required.

Speakers

Jordan Schreier
Member and Employee Benefits Practice Group Chair
Dickinson Wright PLLC

Jordan represents clients primarily in the area of ERISA, employee benefits and compensation. His practice involves advising profit and nonprofit employers on planning and compliance issues involving all aspects of employee benefits, including welfare benefits, qualified retirement and other deferred compensation plans. His experience includes counseling on executive compensation programs, controlled group planning, multiemployer benefits plans, consumer directed health care, ERISA reporting and disclosure issues, prohibited transactions, fiduciary compliance and best practices, flexible benefits, COBRA, FMLA, ADA, HIPAA and other benefits issues. He counsels employers on compliance with health care reform and serves as legal counsel to numerous pension and 401(k) investment and administrative committees.

Eric Gregory
Member
Dickinson Wright PLLC

Eric's practice is focused primarily in the areas of ERISA, employee benefits, and executive compensation. Eric advises clients on all aspects of employee benefits including qualified retirement plans, welfare plans, and nonqualified compensation programs. Eric assists clients with plan design, drafting, and implementation of 401(k), profit sharing, 403(b), 457, and defined benefit plans. He also provides advice on the design, implementation, and administration of insured and self-insured medical plans, dental plans, life insurance, disability, and cafeteria plans, including pre-tax premium plans, and flexible spending account plans. Eric assists clients regarding regulatory compliance with HIPAA, the Affordable Care Act (healthcare reform), COBRA, FMLA, GINA and ADA.

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EXPLORING OPPORTUNITIES
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On-Demand Webinar: Business Interruption Insurance, Captives, and Coronavirus [Click Here to Register Now]

Summary

The Coronavirus crisis is interrupting and disrupting business more dramatically than anything most of us have seen in our lifetimes, so it's natural to ask whether—and many undoubtedly will hope that—their "business interruption" insurance will cover or at least minimize their business-income losses. As the crisis triggers business interruption insurance claims; clients may also find they lack key coverages and need to consider alternative insurance mechanisms for the future, including captive insurance. Join attorneys from our Nashville, Lansing, and Phoenix offices who are ready to answer your questions.

Key discussion topics include:

- State of the Insurance Market and Recent Activity by State Regulators
- What is Business Interruption Insurance?
- Pros and Cons of Submitting Claims
- Proper Claims Handling
- How a Captive Can Help
- Your Questions

The webinar is complimentary but registration is required.

Speakers

Ryan Shannon
Member and Insurance-Regulatory Practice Group Chair
Dickinson Wright PLLC

Ryan focuses his practice on insurance, administrative and regulatory, and commercial and business litigation. He has drafted and provided legal consultation to multiple insurance and financial industry clients regarding legislative amendments made to the Michigan Insurance Code and other insurance laws.

Timothy Strong
Member and Insurance Litigation Practice Group Chair
Dickinson Wright PLLC

Tim focuses his practice on the defense of complex insurance coverage and bad faith actions. Tim has successfully defended high-stakes cases ranging from class actions attacking institutional claim-handling practices, to individual personal-lines bad-faith cases, to complex commercial matters seeking coverage under D&O, CGL, builders risk, commercial property, and cyber-risk policies.

P. Bruce Converse
Member
Dickinson Wright PLLC

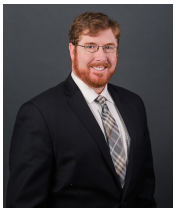
Bruce has been particularly focused on the representation of insurance carriers in a range of matters, from individual and class action bad faith claims to regulatory issues and market conduct examinations. Bruce provides coverage advice and litigation defense to carriers in both personal lines and commercial settings.

Bennett Evan Cooper
Member
Dickinson Wright PLLC

Ben's practice emphasizes both trial-court and appellate representation in such fields as insurance coverage and bad-faith defense, intellectual-property protection and e-commerce disputes.

Kevin Doherty
Member
Dickinson Wright PLLC

Kevin serves as President of the Tennessee Captive Insurance Association, and he helped to rewrite the captive insurance law in Tennessee in 2011. Since that time, Tennessee has formed over 150 captives and 350 related cells (more than 500 risk bearing entities) and has become one of the leading domestic domiciles for captives.



Tony Greer
Of Counsel Dickinson
Wright PLLC

Tony practices insurance regulatory law, with particular emphasis on traditional life, health, and property and casualty insurers, as well as captives, risk retention groups, and self-insurance funds.

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EXPLORING OPPORTUNITIES
EXPANDING POSSIBILITIES

On-Demand Webinar: FFCRA Playbook: Tackling the DOL's Guidance [Click Here to Register Now]

Summary

As we approach the April 1 effective date of the Families First Coronavirus Response Act (FFCRA), the Department of Labor has issued a number of Q&A guidelines aimed at helping employers administer the Emergency Paid Sick Leave (EPSL) and Emergency Family Medical Leave Act (FMLA) Expansion pieces of that law. Dickinson Wright's Jeff Beemer, Sara Jodka, and Eric Gregory have the playbook you need to tackle all the DOL's recent guidance.

Specifically, we will take a deep dive into the following:

- The nuts and bolts of the EPSL and Emergency FMLA Expansion
- Whether your business is a covered employer under the FFCRA and the potential risks of misclassification
- When your employees are entitled to receive these new benefits
- The interplay between the FFCRA and your current paid leave policies
- Employee benefits and ERISA issues
- Your questions

This program is being presented in conjunction with the Middle Tennessee Society for Human Resources Management (MT|SHRM).

Speakers

Jeffrey M. Beemer
Member
Dickinson Wright PLLC

Jeff Beemer is a business lawyer who works with clients to achieve effective resolution of a variety of business disputes. He provides proactive advice on litigation avoidance and risk management, including daily counseling for employers on all aspects of employment law. As a seasoned trial advocate, Jeff has significant experience achieving favorable results for clients in employment cases and commercial disputes, as well as in litigation involving significant personal injury claims, product liability, and insurance coverage disputes. Jeff’s experience covers a broad range of industries, with particular emphasis on manufacturing, social services, electric utilities, transportation, and governmental entities.

Sara H. Jodka, CIPP-US
Member
Dickinson Wright PLLC

Sara H. Jodka is a member in Dickinson Wright's Columbus office. She is a certified privacy professional (CIPP-US) and regularly works with clients on various data privacy and cybersecurity issues, including data breach preparation and response, legal compliance with GDPR, CCPA, HIPAA, GLBA, etc.

Eric Gregory
Member
Dickinson Wright PLLC

Eric's practice is focused primarily in the areas of ERISA, employee benefits, and executive compensation. Eric advises clients on all aspects of employee benefits including qualified retirement plans, welfare plans, and non-qualified compensation programs.

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EXPLORING OPPORTUNITIES
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On-Demand Webinar: Pandemic Workplace Response: Now What? [Click Here to Register Now]

Summary

In the wake of state and local governments requiring some businesses to restrict hours, restrict the number of people allowed in one place at a time, or requiring businesses to shut down completely during the COVID-19 outbreak, employers are having to deal with significant employment, supply chain, and other related issues. Given how fast the state of things keep changing, employers will need to be able to react quickly to ensure they keep workers, vendors, and customers safe; comply with the laws; and most important, stay afloat and remain profitable. This webinar will break down what employers need to know what the upcoming days and weeks to handle their workplace. Specifically, we will discuss the following topics:

- The latest on the Families First Coronavirus Relief Act and similar state legislative efforts
- Teleworking and related privacy issues
- Furloughs, layoffs, and WARN Act issues
- Collective bargaining issues
- Unemployment
- FMLA, ADA, and Fair Labor Standards Act issues
- Considerations if your business does stay open

This program has been awarded 1 hour of General HR recertification credit.

Speakers

Jeffrey M. Beemer
Member
Dickinson Wright PLLC

Jeff Beemer is a business lawyer who works with clients to achieve effective resolution of a variety of business disputes. He provides proactive advice on litigation avoidance and risk management, including daily counseling for employers on all aspects of employment law. As a seasoned trial advocate, Jeff has significant experience achieving favorable results for clients in employment cases and commercial disputes, as well as in litigation involving significant personal injury claims, product liability, and insurance coverage disputes. Jeff’s experience covers a broad range of industries, with particular emphasis on manufacturing, social services, electric utilities, transportation, and governmental entities.

Sara H. Jodka, CIPP-US
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ONTARIO CLOSING NON-ESSENTIAL BUSINESSES EFFECTIVE AT MIDNIGHT TONIGHT

by Richard Schuett

The Government of Ontario announced on Monday the mandatory closure of all non-essential workplaces effective as of Tuesday, March 24th at 11:59 PM. This closure will be in effect for 14 days with the possibility of extending the order as the situation evolves.

The mandatory closure includes any businesses that are for-profit, non-profit, or otherwise providing goods or services. Importantly, this does not preclude businesses to provide services either online, by telephone, or by mail/ delivery. All teleworking and online commerce are permitted at all times for any business.

Businesses that are permitted to remain open can be found on the Government of Ontario's webpage. Nineteen specified categories have been deemed essential, each with their own sub-categories. Please read these categories carefully to see if your business is impacted by the closures. For a brief list of the essential businesses, see below.

The mandatory closures remain ongoing and are subject to change. If you are concerned that you or your business may be impacted, please contact **Dickinson Wright LLP.**

List of Essential Businesses

- Supply chains
- Retail and wholesaling
- Food services and accommodations
- Institutional, residential, commercial and industrial maintenance
- Telecommunications and IT infrastructure/ service providers
- Transportation
- Manufacturing and production
- Agriculture and food production
- Construction
- Financial activities
- Resources
- Environmental services
- Utilities and community services
- Communications industries
- Research
- Health care and seniors care and social services
- Justice sector
- Other businesses (miscellaneous, but including mail delivery services, professional services, security services, among others)
- Business regulators and inspectors

ABOUT THE AUTHOR

Richard Schuett is an articling student in Dickinson Wright's Toronto office. He can be reached at 416-646-6879 or RSchuett@dickinsonwright.com.

ONTARIO GOVERNMENT ISSUES ORDER TO TEMPORARILY EASE SHAREHOLDER AND DIRECTOR MEETING REQUIREMENTS DUE TO THE COVID-19 PANDEMIC

by Philip M Aubry, Jack B. Tannerya, and Carly J. Walter

THE ORDER

Pursuant to the *Emergency Management and Civil Protection Act*, the Ontario Government recently issued an order (the "**Order**") that provides corporations governed by the *Business Corporations Act* (Ontario) (the "**OBCA**") and the *Corporations Act* (Ontario) (the "**Corporations Act**") with temporary relief in connection with ***when*** and ***how*** annual shareholder and/or member meetings must take place.

The relief measures offer flexibility to ensure that shareholders and directors have the ability to attend, participate in, and vote at meetings while remaining in compliance with public health recommendations and rules.

THE EMERGENCY PERIOD

The Ontario Government declared an emergency period in connection with the COVID-19 Pandemic on March 17, 2020. For the purposes of this article, the period from March 17, 2020 until the date that the Ontario declaration of the emergency is terminated, is referred to as the "**Emergency Period**".

TIMING OF SHAREHOLDER MEETINGS

Under the OBCA and the *Corporations Act*, a corporation is required to hold an annual meeting not later than 18 months after the company comes into existence and subsequently not later than 15 months after its last annual meeting.

The Order provides temporary relief in connection with the Emergency Period as set out below.

- If the normal deadline day for the annual meeting falls within the Emergency Period, the Order extends that deadline to the day being 90 days after the Emergency Period.

- If the normal deadline day for the annual meeting falls within the 30-day period immediately after the Emergency Period, the Order extends that deadline to the day being 120 days after the Emergency Period.

VIRTUAL MEETINGS FOR SHAREHOLDERS AND DIRECTORS

Under normal circumstances, shareholders and directors meetings can only be held electronically if the corporation's articles or by-laws allow it. The Order provides temporary relief in that the Order temporarily suspends and eliminates this requirement enabling corporations to hold their meetings electronically during the Emergency Period, regardless of whether such virtual meetings are provided for in the corporation's articles or by-laws.

In contrast, federal corporations under the *Canada Business Corporations Act* and the *Canada Not-for-profit Corporations Act* are expected to comply with all statutory requirements for annual meetings during the COVID-19 outbreak. That being said, Corporations Canada has encouraged corporations to hold virtual meetings to the extent that their by-laws allow.

NOTICE OF SHAREHOLDER MEETINGS

Section 96(1) of the OBCA requires that notice of the time and place of a meeting of shareholders shall be sent, in the case of an offering corporation, not less than 21 days and, in the case of any other corporation, not less than 10 days, but, in either case, not more than 50 days, before the meeting,

a. to each shareholder entitled to vote at the meeting;
b. to each director; and
c. to the auditor of the corporation.

The Order provides that during the Emergency Period, if: (i) a notice of meeting has already been sent for a meeting to be held on a day that falls within the Emergency Period; and (ii) after the notice is sent, the date, time or place of meeting is changed in order to hold the meeting by telephone or electronically, another notice of meeting is **not** required to be sent but the person entitled to receive the notice must be informed of the change in a reasonable manner given the circumstances.

VOTING AT SHAREHOLDER MEETINGS

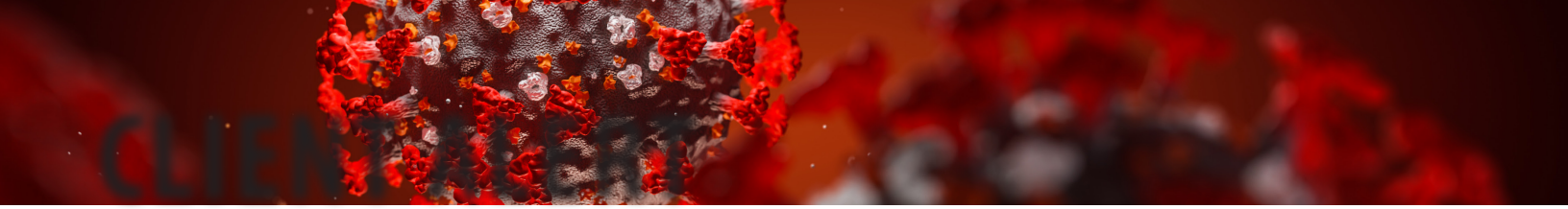
Section 103(1) of the OBCA provides that, unless the by-laws of the corporation otherwise provide, voting at a meeting of shareholders shall be by show of hands, except where a ballot is demanded by a shareholder or proxy holder entitled to vote at the meeting. Section 103(2) of the OBCA provides that a shareholder or proxy holder may demand a ballot either before or after any vote by show of hands.

During the Emergency Period, when a meeting of shareholders is held virtually (i.e. by telephone or electronically), the Chair may direct voting by alternative means if a show of hands or by a ballot is infeasible.

It is important that corporations intending to hold a virtual annual meeting should ensure their shareholders have the ability to attend, participate in, and vote at the meeting to the same extent that they otherwise would if it were held in person.

CONTACT US

We remain committed to paying attention to the changing circumstances and assisting you with your needs, both in Canada and the United States. While this should not be construed as legal advice, should you require any assistance, please do not hesitate to contact a Dickinson Wright team member.



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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

ONTARIO LIFTING SUSPENSION OF LIEN PERIODS

by Robert Farmer

On March 20, 2020, the Ontario government introduced an emergency order under the *Emergency Management and Civil Protection Act* which suspended the running of limitation periods, including those under the C*onstruction Act* (the **"Order"**). The suspension was retroactive to March 16, 2020.

One of the perhaps, unintended consequences of this order was the suspension of the deadline for suppliers of goods and services on construction projects to register / perfect a lien (**"Lien Periods"**). By suspending the Lien Periods, owners could no longer release holdbacks on construction projects without the risk of having a supplier of goods or services lien the subject property after release of the holdback – resulting in adverse consequences to the owner who may have to pay additional amounts for the same supply of goods and or services.

Although lenders who fund draw requests during the suspension of the Lien Periods maintain their priority relative to future liens (assuming the lender conducts a lien search at the time of funding the advance), there could still be adverse consequences to the lenders related to potentially inaccurate determination of project lien holdbacks in the calculation of the "costs to date" margin and the extended period during which a lien could be registered against the project lands.

As expected, the Ontario government has addressed these issues by introducing an amendment to the Order which lifts the suspension of limitation periods and procedural time periods under the *Construction Act*.

In a letter dated April 9, 2020, the Attorney General of Ontario stated, "The suspension will be lifted on April 16, 2020, to give the industry time to prepare for these changes. Once lifted, parties will have the same amount of time to meet a deadline that had been remaining before the suspension began on March 16, 2020."

This is welcome news to lenders, developers, construction trades, and suppliers.

In these circumstances, we recommend that care be taken to ensure that all draw requests properly calculate the project lien holdback amount factoring in (i) the period remaining prior to the beginning of the suspension on March 16, 2020 and (ii) resumption of the running of the limitation period commencing on April 16, 2020.

In addition to the above guidance, lenders and developers should remain prudent and continue to follow the rules for holdbacks under the *Construction Act*.

ABOUT THE AUTHORS

Robert Farmer is Of Counsel in Dickinson Wright's Toronto Office. He can be reached at 416.777.2404 or rfarmer@dickinsonwright.com.

OPEN FOR BUSINESS IN A PANDEMIC: GUIDELINES FOR HOW TO SAFELY REOPEN AND MAINTAIN A BUSINESS

by Michael N. Feder and Brooks T. Westergard

States across the nation have started to relax government-ordered closures and stay-at-home directives related to the novel coronavirus (COVID-19). Depending on the state, businesses such as surgical centers, dental offices, restaurants, movie theatres, gyms, golf courses, and salons will be allowed to reopen soon, or have already been allowed to resume operations. However, regardless of the type of business, each state that has moved toward reopening its respective economy has mandated that businesses take the necessary precautions to protect the public and to avoid a resurgence of COVID-19 in the community.

In anticipation of our nation's gradual reopening, businesses will likely face numerous questions as they navigate issues that arise after they resume business operations. The following will address the safety guidelines businesses should adhere to when considering resuming operations.

PLAN FOR SAFETY

The CDC has emphasized that businesses and employers should plan to respond in a flexible way to varying levels of disease transmission in the community and be prepared to refine their business response plans as needed. According to OSHA, most American workers will likely experience low or medium exposure risk levels at their job or place of employment.[1] However, in preparing a plan to reopen, businesses should strive to achieve the following objectives: (1) reduce transmission among employees, (2) maintain healthy business operations, and (3) maintain a healthy work environment. The CDC recommends that, in striving to achieve these directives, businesses should coordinate with state and local health officials so timely and accurate information can guide appropriate responses.

1. Reduce Transmission Among Employees

One of the primary goals of businesses preparing to resume operations is to take active steps to reduce transmission of COVID-19 among employees. The CDC has offered the following guidelines to achieve that goal:

- Actively encourage sick employees to stay home
- Identify where and how workers might be exposed to COVID-19 at work
- Separate sick employees
- Educate employees about how they can reduce the spread of COVID-19

2. Maintain Healthy Business Operations

The plan businesses implement to safely resume operations should also take into consideration how businesses will continue to maintain healthy business operations while remaining in compliance with federal and state guidance regarding the mitigation of the spread of COVID-19. The CDC has offered the following steps to achieve that goal:

- Identify a workplace coordinator who will be responsible for COVID-19 issues and their impact in the workplace
- Implement flexible sick leave and supportive policies and practices
    - The CDC advises that employers should not require a positive COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or return to work, as requiring such documentation may impede operations of overwhelmed health care providers
- Assess essential functions and the reliance that others and the community have on services and products
    - The CDC advises that businesses should (1) be prepared to change business practices if needed to maintain critical operations, (2) identify alternate supply chains, and (3) communicate with business and supply-chain partners to share best practices
- Determine how the business will operate if absenteeism spikes from increases in sick employees, those who stay home to care for sick family members, and those who must stay home with children who are unable to attend school or childcare programs
- Implement protocols to continue social distancing

3. Maintain a Healthy Work Environment

Finally, the plan businesses implement should include considerations regarding how employers will maintain a healthy work environment once operations resume. In furtherance of that goal, the CDC has offered the following guidelines:

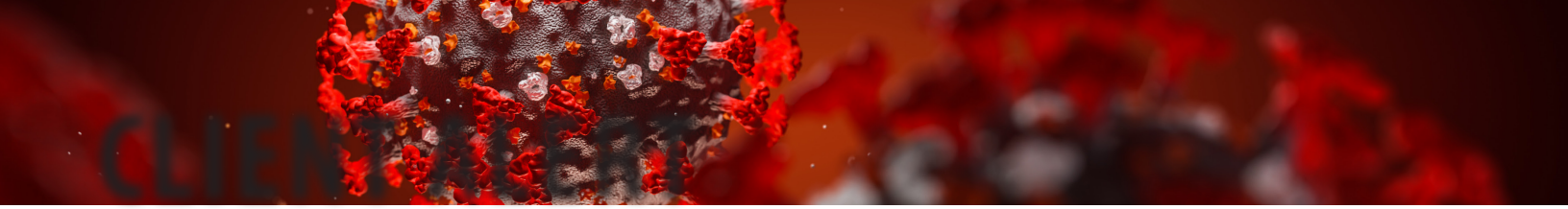
- Consider improving the engineering controls using the building ventilation system by increasing ventilation rates and increasing the percentage of outdoor air that circulates into the system
- Support respiratory etiquette and hand hygiene for employees, customers, and worksite visitors
    - The CDC advises that businesses should (1) provide tissues and no-touch disposal receptacles, (2) provide soap and water or an alcohol-based hand sanitizer that is at least 60% alcohol, (3) place hand sanitizers in multiple locations to encourage hand hygiene, and (4) encourage the use of non-contact methods of greeting, instead of handshaking
    - The CDC also recommends that businesses should advise employees to (1) continue to practice active social distancing (specifically, stayingsix feet away from others when you must go into a shared workspace), (2) avoid touching eyes, nose, and mouth, and (3) wear cloth face coverings
- Perform routine environmental cleaning and disinfection
- Perform enhanced cleaning and disinfection after persons suspected or confirmed to have COVID-19 have been in the workplace
- Discourage unnecessary travel
- Reduce or eliminate in-person meetings and other gatherings

STATE-BY-STATE GUIDELINES: AN EXAMPLE FROM NEVADA

While the guidelines offered by the CDC are meant to apply to a wide variety of businessesand only represent best practices, businesses should prepare to adhere to any guidelines promulgated by their state and local governments, and by any regulatory agencies that govern their business.

On April 28, 2020, Nevada Governor Steve Sisolak issued an emergency directive which at the same time extended Nevada's stay at home order

[1] *See* OSHA guidance for employers for more information about job risk classifications.



that was already in place, and eased some restrictions that were ordered through previous directives. For example, the Governor's directive now allows nonessential retail businesses to resume retail sales on a curbside or home delivery basis, and allows certain recreational facilities to reopen, including golf courses and tennis courts. The directive also requires the Nevada Occupational Safety and Health Administration to ensure that all reopening nonessential businesses provide adequate protections and adopt sanitization protocols that minimize the risk of spreading COVID-19 in the workplace. The Governor also announced relaxed restrictions on certain medical, surgical, and dental procedures.

Interestingly, the Governor's directive also grants the authority to the Nevada Gaming Control Board (the "Board") to allow gaming operations to resume when the Board determines those operations can resume safely. This grant of authority comes on the heels of the Board's Policy Memorandum, issued on April 21, 2020, which provides that Nevada gaming licensees must establish and submit to the Board a "Reopening Plan" at least seven days before reopening occurs or as soon as reasonably possible thereafter. In addition to the guidance provided by the Board, the Nevada Health Response has already issued guidelines for reopening golf courses[2] and retailers engaging in "curbside commerce."[3]

The lesson from Nevada is any business that is, or will soon be, allowed to resume operations should take care to comply with any state, local, or government agency guidelines that are promulgated to mitigate the spread of COVID-19 and protect the community as we ease back to normalcy. Strict adherence to federal, state, and local guidelines for reopening businesses should reduce the exposure to potential liability resulting from resuming operations.

Dickinson Wright PLCC is a national law firm with attorneys across the country that are ready and able to answer any questions business owners and employers may have as they plan to resume business operations.

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[2] For more information, see https://nvhealthresponse.nv.gov/wp-content/uploads/2020/04/Guidance-Best-Practices-for-Golf-4-29-2020.pdf

[3] For more information, see https://nvhealthresponse.nv.gov/wp-content/uploads/2020/04/04.29-curbside.pdf

Family Focus

PARENTING PLANS DURING A PANDEMIC: 5 TIPS FOR COMPLYING WITH PARENTING ORDERS

Posted by Marlene Pontrelli | Apr 17, 2020

One of the most common question family law attorneys have been receiving is whether parents who live separate and apart must still comply with parenting orders during the pandemic. The short answer, even before most states and counties announced guidelines, is yes. Many states and counties now have specific guidelines regarding custody orders and you should check the appropriate court website for specific rules. However, the following tips may be helpful in understanding how to implement your parenting plan while stay at home orders are in place.

1. Follow-the regular school schedule. Absent court orders to the contrary, even though children are not in school, follow the parenting schedule as if the children are in school. Accordingly, if school is out of school at 3 p.m. and the normal schedule provides that the exchange of parenting time to take place after school, the exchange should take place at 3 p.m. In addition, summer parenting time should start when the regular school year would normally end.
2. Find neutral places for the exchange. School is a typical place for exchanges. However, with school out, many parents may not want to exchange at the other parent's residence. In such cases, consider neutral places for the exchange. Empty school, church and restaurant parking lots all make good choices for exchanges. Choose a place that is equal distance from each parent's home.
3. Follow social distancing guidelines. While it is understandable that you may wish to invite grandparents, aunts, uncles, cousins and friends over to visit with the children during your parenting time, avoid such interactions when the children are present. The failure to follow social distancing rules will likely lead to complaints by the other parent and potential motions filed in court.
4. Essential travel includes parenting exchanges, not vacations. With the children out of school, it may be tempting to want to travel to visit relatives and friends. While parenting time exchanges are essential travel, vacations are not.
5. Consider temporary modifications of parenting plans. During these unusual times where parents are responsible for education and entertainment of young children, while also having to work from home, consider making temporary changes. Week on/Week off schedules may work better than children switching households every couple of days. In addition, although long-distance parenting plans that have children traveling by plane out of state for parenting time are still in effect, some accommodations and modifications may be appropriate. Talk to the other parent about limiting out of state travel and devising a plan for make-up time so the parent who agrees to give up time now is not penalized in the future for missing parenting time.

It is often difficult to discuss any changes or come to any agreements with the other parent under normal circumstances. However, this is a time when parents should try to come together, find common ground, and make accommodations in the best interest of the children. Showing your flexibility now may serve to buy you a bit of goodwill in the event changes to your parenting plan are needed in the future.

About the Author:

Marlene Pontrelli is a Member in our Phoenix office and co-chair of the firm's Family Law Practice. Marlene is a certified specialist in family law. Her practice focuses on all aspects of family law including dissolution, post-dissolution, paternity, child custody and child support matters. She is admitted to practice in California and Arizona. She is a judge pro tem for the Superior Court of Maricopa County in family law. She has extensive trial and appellate experience including appearing before the Arizona Court of Appeals, Arizona Supreme Court and Ninth Circuit Court of Appeals.

Ms. Pontrelli has written several books, including as a co-author of the Divorce in Arizona book. She is a frequent lecturer in the area of family law and has conducted workshops throughout the country. Ms. Pontrelli is also an adjunct professor at The Sandra Day O'Connor School of Law at Arizona State University, where she teaches the family law class. Marlene may be reached in our Phoenix office at 602-285-5081.

PAUSE IN IMMIGRANT VISA PROCESSING IMPOSED BY PRESIDENTIAL PROCLAMATION - EFFECTIVE APRIL 23 FOR SIXTY DAYS AT CONSULAR POSTS

by Kathleen Campbell Walker[1]

After numerous rumors in the past few days regarding the suspension of immigration to the United States (U.S.), President Trump's Proclamation (Suspension Proclamation) was finally published on April 22. The Proclamation references the disruption of the economy post COVID-19 as a basis for the Proclamation. The Proclamation does not address the current dichotomy between family-based and employment-based legal paths to permanent residency or the inadmissibility ground related to public charge, which has been subject to extensive changes to increase the level of difficulty to immigrate to the United States (U.S.). In addition, most employment-based cases require a test of the U.S. labor market, but due to government delays and the lack of visa availability, applicants using the employment-based and family-based paths to permanent residence can wait in line to immigrate legally for more than ten to twenty years in some cases. The Suspension Proclamation also ignores the important role that immigrants play in caring for the sick and in essential industries during the pandemic.

Immigrant visa processing to obtain lawful permanent residence (LPR) in the U.S. occurs outside of the U.S. at consular posts or inside of the U.S. at offices of U.S. Citizenship and Immigration Services (USCIS). *So, what does the Suspension Proclamation not do?*

The Suspension Proclamation *DOES NOT* apply to immigrant visa processing for adjustment of status to become an LPR in the U.S.

In addition, the Suspension Proclamation *DOES NOT* apply to *nonimmigrant* visa processing at U.S. consular posts abroad (e.g. H-1B, H-1B1, L-1, E-1, E-2, E-3, F-1, J, TN, O, P, etc.). Please read about the potential review of this point in the future below.

WHAT IS THE SIGNIFICANT IMPACT OF THE SUSPENSION PROCLAMATION?

Many applicants for immigrant visas at consular posts outside of the U.S. will face a suspension of consular applications to obtain immigrant visas, which will cause further delays in their ability to immigrate legally to the U.S. after following a long and bureaucratically challenging path. Of course, consular posts suspended most consular services back in March due to COVID-19, as announced by the U.S. Department of State (DOS).

WHAT IS THE EFFECTIVE DATE OF THE SUSPENSION PROCLAMATION?

April 23, 2020 at 11:59 p.m. Eastern Daylight Time.

HOW LONG WILL THE SUSPENSION PROCLAMATION REMAIN IN EFFECT?

60 days from April 23, 2020 (June 22), subject to review for an extension no later than 50 days from April 23 (June 12).

WILL THE SUSPENSION PROCLAMATION AFFECT PERM LABOR CERTIFICATION APPLICATIONS?

No, the Labor Certification process is governed by the Department of Labor and is completed prior to immigrant visa processing as a separate, independent process.

WHAT IMMIGRANT VISA APPLICANTS AT U.S. CONSULAR POSTS ARE EXEMPT FROM THE SUSPENSION PROCLAMATION BUT ARE STILL SUBJECT TO DOS CONSULAR SERVICES SUSPENSIONS IN EFFECT?

1. Immediate Relatives (spouses, children, and prospective adoptees of U.S. citizens under IR-4 or IH-4). Note that the Suspension Proclamation DOES apply to those immediate relatives who qualify as parents of U.S. citizens.
2. EB-5 Immigrant Investor Visa applicants.
3. Immigrant visa applicants who are members of the U.S. Armed Forces, and their spouses and children.
4. Immigrant visa applicants for Special Immigrant Visas (SI/SQ), which relates to certain Iraqi and Afghan Translators/Interpreters and Iraqis who worked for/on behalf of the U.S. government.) and their spouses and children; subject to conditions imposed by the U.S. Secretary of State.
5. Immigrants whose entry would be in the national interest as determined by the U.S. Secretary of State.
6. Immigrants who are seeking immigrant visas to enter the U.S. to perform services as a physician, nurse, or other healthcare professional to perform medical research or other research to combat the spread of COVID-19 or to perform work essential to combating, recovering from, or otherwise alleviating the effect of COVID-19, as determined by the U.S. Secretary of State, in addition to their spouses and any unmarried children under 21 of the immigrant visa applicants.
7. Lawful Permanent Residents, who, of course, already have their immigrant visas and have entered the U.S. to become an LPR.
8. Immigrant Visa Applicants already issued an Immigrant Visa at the consular post.
9. Immigrant Visa Holders or Applicants with a travel document such as a transportation letter, boarding foil, or advance parole document.

[1] Kathleen Campbell Walker is a member of Dickinson Wright PLLC and serves as a co-chair of the Immigration Practice Group. She is a former national president and general counsel of the American Immigration Lawyers Association (AILA) and is Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. She serves on the AILA Board of Governors. In 2014, she received the AILA Founder's Award, which is awarded from time to time to the person or entity, who has had the most substantial impact on the field of immigration law or policy in the preceding period (established 1950). She has testified several times before Congress on matters of immigration policy and border security.

WILL THE SUSPENSION PROCLAMATION AFFECT NONIMMIGRANT VISAS AT CONSULAR POSTS?

No…but, there is a notice that within 30 days of April 23 (May 23), the Secretary of Labor and the Secretary of Homeland Security will review nonimmigrant visa programs and recommend measures to stimulate the U.S. economy and ensure the prioritization, hiring, and employment of U.S. workers.

Since nonimmigrant consular services are not currently addressed by the Suspension Proclamation and consular appointments for nonimmigrant visas are practically impossible to schedule over the next 60 days, applicants needing nonimmigrant visas will often be forced to apply to extend or change their nonimmigrant status in the U.S. with U.S. Citizenship and Immigration Services and face the increasing number of Requests for Evidence (RFEs), even in simple extension cases with the same employer, in addition to facing long wait times due to the current suspension of premium processing. – Stuck between a rock and a hard place comes to mind.

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Tax Blog

PAYCHECK PROTECTION PROGRAM FLEXIBILITY ACT MODIFIES PAYCHECK PROTECTION PROGRAM

Posted by Troy Terakedis and Peter Kulick | Jun 4, 2020

On May 28, 2020, the Paycheck Protection Program Flexibility Act of 2020 (the "Act") was passed by the U.S. House of Representatives. On June 3, 2020, the Act was passed by unanimous consent by the Senate. The Act now awaits signature by the President. The Act makes significant changes to the Paycheck Protection Program ("PPP"), as enacted as part of the CARES Act, including provisions related to loan forgiveness. The more significant changes introduced by the Act include:

- The "covered period" for making permissible expenditures (payroll costs, rent, utilities, and mortgage interest) in connection with loan forgiveness has been changed from the original 8 week period following loan origination to a 24 week period following loan origination (or December 31, 2020, if earlier). A borrower can elect to have the original 8-week period continue to apply.
- The amount that must be expended on payroll costs for loan forgiveness has been reduced from 75% (as provided in SBA guidance) to 60%. However, as drafted, the Act provides that a borrower *must spend at least 60% of the loan proceeds on payroll costs* (during the covered period). The language of the Act suggests that if a borrower does not meet the 60% threshold, then *none of the loan will be forgiven*. Under existing SBA guidance, the amount of loan forgiveness is reduced — but not eliminated entirely — if less than 75% of the loan proceeds are used for payroll costs. That is, under existing guidance, loan forgiveness is not completely eliminated if the 75% threshold is not met. Senators had raised concerns about this issue; however, the Senate acquiesced to pass the House version to avoid sending the legislation to a conference committee. At this time, it is unknown if the SBA will issue guidance providing for a reduction in loan forgiveness, rather than eliminating loan forgiveness altogether if the 60% threshold is not met. Senator Marco Rubio has previously requested guidance whether the Department of the Treasury can adopt the more flexible forgiveness standard through administrative regulations.
- A borrower now has until December 31, 2020 (instead of June 30, 2020) to restore their workforce levels and wages to pre-pandemic levels in order to avoid a reduction in the loan forgiveness amount due to a decrease in such levels during the covered period.
- The Act provides that the amount of loan forgiveness will be determined without regard to a proportional reduction in the number of full-time equivalent employees if the borrower, in good faith, is able to document (i) an inability to rehire individuals who were employees of the borrower on February 15, 2020 and an inability to hire similarly qualified employees for unfilled positions before December 31, 2020, or (ii) an inability to return to the same level of business activity as the borrower was operating at before February 15, 2020 , due to compliance with requirements or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020, related to COVID-19.
- Loans made after the effective date of the Act will have a minimum maturity of 5 years (previously, loans had a 2 year maturity). The interest rate on PPP loans remains unchanged at 1%.

- Under the Act, a borrower that has a PPP loan forgiven will be eligible for the deferral of payroll taxes as provided in the CARES Act. Previously, such deferral was prohibited if a borrower was afforded loan forgiveness.

As of June 4, 2020, approximately $130 billion in PPP funding allocation remained available. Thus, small business that have not previously received a PPP loan can still apply.

For more information, please contact Troy Terakedis at 614-619-2203 or Peter Kulick at 517-487-4729.


POST-COVID OPPORTUNITIES AND LEGAL CONSIDERATIONS TO FRANCHISE RESALE

by Jennifer Stallings Dewey and Rebecca Papi

It would be difficult to find any person or business that has not been affected by COVID-19. Over the last few months, most states have issued "stay at home," "shelter-in-place," and other similar orders. Businesses all over the country have ceased operating. Many others that have remained opened have experienced a substantial decrease in their business volume. Americans have filed for unemployment in record numbers. Franchise systems are no exception and have faced closures, layoffs, and myriad other issues. While this ongoing crisis is causing hardship all around, franchise systems will eventually recover. This will undoubtedly present opportunities for existing and prospective franchisees interested in buying or selling franchise units amidst recovery from this difficult period.

These mandated closures (or decreased business) and an uncertain economic climate will uniquely, and perhaps disproportionately, affect franchise businesses. Although a number of franchisors have made concessions to their franchisees (i.e. waiving or deferring royalty payments or making concessions relating to defaults), not all franchisors are able or willing to make such accommodations. This means that many franchisees are not only losing revenue, and subject to the normal expenses of a business (rent, utilities, labor costs, and the cost of supplies and/or inventory), but they may also still be liable for royalty fees and/or required purchases.

These forced closures may make it impossible or undesirable for some franchise units to return to business as usual. Some businesses will suffer financial hardship such that reopening will be impossible. Other franchise owners may have used this mandatory time off to consider what might be next for them. Regardless of the reason, it may be time for many franchisees to consider selling their businesses.

The good news is that there will probably be continued, and maybe even increased, interest in purchasing a franchise. Over 30 million Americans have filed for unemployment since the beginning of this pandemic.[1] With relief afforded under the CARES Act, this not only includes traditional employees, but also self-employed contractors and business owners. For those in this position looking for a new beginning, it may be a good time to consider investing in a franchise. While there are of course risks with opening a business, franchises offer certain advantages including: 1) a business model (everything from pricing to branding) that has already been established and proven; 2) scale for purchasing supplies and inventory; 3) communal knowledge and experience across the system; and 4) shared operating costs such as marketing. These elements benefit franchises as they reopen following quarantine and make these businesses attractive to prospective purchasers. Further, according to Franchise Direct, even though the 2008-2010 recession took a toll on the U.S. economy, franchises fared better than most other retail chains and small businesses.[2]

Franchising is a unique and complex business model and the resale of a franchise unit by the franchisee includes a number of considerations. This article will address pertinent legal concerns relating to this type of sale and discuss some of the steps that can be taken now in preparation of a sale.

Franchise Agreement and Other Contractual Obligations

When addressing any question or issue relating to a franchise, the first stop should always be the relevant franchise agreement. A franchise agreement outlines all of the terms of the franchise relationship. Most franchise agreements contain provisions relating to the transfer of the franchise. The franchise agreement may contain provisions relating to any or all of the following:

- Franchisor must approve of the sale.
- Purchaser will have to be approved by the franchisor and a franchisee.
- Franchisee must pay a transfer fee.
- Franchisee must comply with the franchise agreement and other related agreements.
- Purchaser must execute franchisee's current franchise agreement (or a new franchise agreement), and any subsequent addendums, or ancillary agreements.
- Franchisee must execute a general release of the franchisor from obligations under the franchise agreement and related agreements.
- The purchase agreement between franchisee and purchaser relating to the sale of the franchise must be approved by the franchisor.
- Franchisor requires franchisee or purchaser to update the franchise to the most current facility image, which may include design, construction, signage, and equipment specifications required by the franchisor.
- Franchisee must pay all costs of the franchisor in granting approval.

The franchise agreement may also contain provisions relating to a franchisee's conduct following its termination (which would occur along with a sale). Such provisions may include any or all of the following:

- Non-compete, exclusivity, or territorial requirements – prohibition against franchisee engaging in business that competes with the franchise system, owning competitor franchises, or locating a new franchise in another franchisee's exclusive territory.
- Non-solicitation – prohibition against the franchisee recruiting customers, suppliers or employees of the business being sold.
- Confidentiality obligations with respect to the franchisor's trade secrets, financial information, business model, etc.
- Requirement that the franchisee ceases using the franchisor's trade name, service marks, or trademarks.
- Requirement that the franchisee de-identify or disassociate property with the franchise system (in the event the selling franchisee retains such property)

[1] *https://www.nytimes.com/2020/04/30/business/stock-market-today-coronavirus.html*

[2] *https://www.franchisedirect.com/information/a-look-at-how-franchises-impact-the-economy*

If a franchisee owns multiple units or has additional arrangements with the franchisor, such as an area development agreement or territory agreement, there may be additional documentation to consider relating to a sale of one or multiple franchise units. Each such document should be carefully reviewed by an attorney experienced in franchise law to determine what contractual obligations exist between the franchisor and franchisee that will affect the sale.

In addition to the franchisor, there may be other parties affected by the sale. If there is any financing associated with the business, it may be necessary to obtain the lender's approval for the sale. Likewise, depending on whether real property is owned or leased, approval from a lender, transfer of the property, or assignment of a lease may need to occur. If the business involves special licenses or permits, those may need to be transferred and may require approval of a government agency or other third party. When updating a facility image, there may be local governmental approvals required in connection with design and construction. Lastly, the sale may trigger contractual rights of other parties such as suppliers or customers that may have a right to notice or consent to the sale.

Statutory Law

Generally, franchises are governed by both state and federal law. The federal law, the Federal Trade Commission's Franchise Rule, focuses on the disclosure requirements for a franchisor selling franchises and does not contain anything specific to subsequent transfers. A number of states contain statutes specific to franchises. A smaller subset of those states have what is known as franchise relationship laws. Certain relationship laws contain provisions relating to the transfer of franchises. If the business is located in one of the ten states[3] with such laws, it is important that the seller be familiar with the obligations or rights provided in this legislation.

These laws differ in content but generally impose one or both of the following: 1) restrictions on the franchisor's right to approve or disapprove the sale of the franchise and/or 2) notice requirements that provide certain time periods during which the franchisee must provide notice of the proposed sale to the franchisor. These state statutes will overrule the contractual terms contained in the franchise agreement.

Preparing for Sale

The purchaser of a franchise business from a franchisee (as opposed to purchasing a new unit directly from a franchisor) will need to assume the rights and obligations of the existing franchisee under the franchise agreement (or enter into a new franchise agreement). Further, the purchaser will assume all or some of the assets (including contract rights and obligations) of the seller. The purchaser will learn all about the brand and related franchise system from the franchisor; however, the seller will be responsible for providing detailed information about its specific unit(s). This process, common in the sale of all businesses (not just franchises), is typically referred to as due diligence.

During the due diligence process, the purchaser will request a considerable amount of information about the business it is purchasing. Requests for information may include some or all of the following documentation:

- Corporate records (formation documents, bylaws, operating agreements, minute books, list of officers, directors, and/or managers, organization chart)
- Member or shareholder information
- Financial statements for the past 3-5 years (as well as internal budgets, projections and other financial reports)
- Financings/encumbrances (debt agreements, financing arrangements, details of any governmental grants, subsidies, or other financial assistance)
- Lists of assets
- Material contracts and commitments (vendor contracts, distributor contracts, sales representative contracts, joint ventures or partnership agreements, franchise agreements, license agreements, advertising, and consultant agreements, equipment or other personal property leases, installment sales agreements, standard form contracts, etc.)
- Tax returns for the past 3-5 years (including any correspondence from the IRS, audits and reports by the IRS, list of any deficiencies, fines, penalties or assessments, etc.)
- Legal/liability issues (including all law suits, claims, administrative proceedings or other governmental investigations, etc.)
- Intellectual property (including registered and unregistered patents, trademarks, copyrights, tradenames, domain names, software licenses, technology sharing, use and disclosure agreements, etc.)
- Insurance policies
- Environmental matters
- Human resources (including a list of all employees, including positions salaries and bonuses paid, employment agreements, non-solicitations or non-competition agreements, employee benefits, retirement plans, company handbook, etc.)

The list above is not exhaustive. The information a prospective purchaser will need to evaluate depends on the type of business involved and the individual circumstances underlying the transaction. Ideally, every business would maintain accurate and complete records. Realistically, this does not always happen. It is not uncommon for records to be disorganized, out of date or incomplete. The recent closures and/or decline in business due to COVID-19 may be a great time to do an internal audit of records and get things in order. This is especially a good idea if a sale is on the horizon.

Conclusion

The decision to buy or sell a franchise is a difficult one. As outlined in this article, there are a number of considerations to take into account

[3]Arkansas, California, Hawaii, Indiana, Iowa, Michigan, Minnesota, Nebraska, New Jersey and Washington. See ARK. CODE ANN. § 4-72-205(a); CAL. BUS. & PROF. CODE § 20027; HAW. REV. STAT. ANN. § 482E-6(2)(I); IND. CODE ANN. § 23-2-2.7-2(3); IOWA CODE § 523H.5; MICH. COMP. LAWS ANN. § 445.1527(g); MINN. R. 2860.4400; NEB. REV. STAT. § 87-405; N.J. STAT. ANN. § 56:10-6; WASH. REV. CODE ANN. § 19.100.030.

and the initial decision is just the beginning of the process. The current state of affairs in the world with mass quarantines, business closures, and economic uncertainty is alarming to say the least. While no one is certain when things will return to business as usual, we do know it will happen eventually. This crisis may give rise to an increase in opportunity for the purchase and sale of franchise businesses. Securing experienced and knowledgeable advisors to assist with this process including attorneys, accountants and financial advisors is invaluable preparation for such opportunities.

Whether you are a prospective franchisee, an existing franchisee looking to expand within their current system, or a departing franchisee ready to sell their business; Dickinson Wright PLLC is in a position to assist. Our firm is full service with attorneys experienced in representing all types of businesses in mergers and acquisitions as well as advising clients with respect to the unique and varied issues that come along with the franchise business model. The sale or purchase of a franchise can be a trying process, but we are here to assist at every turn and protect our client's interests so that they can focus on looking toward closing the transaction and planning a new beginning.

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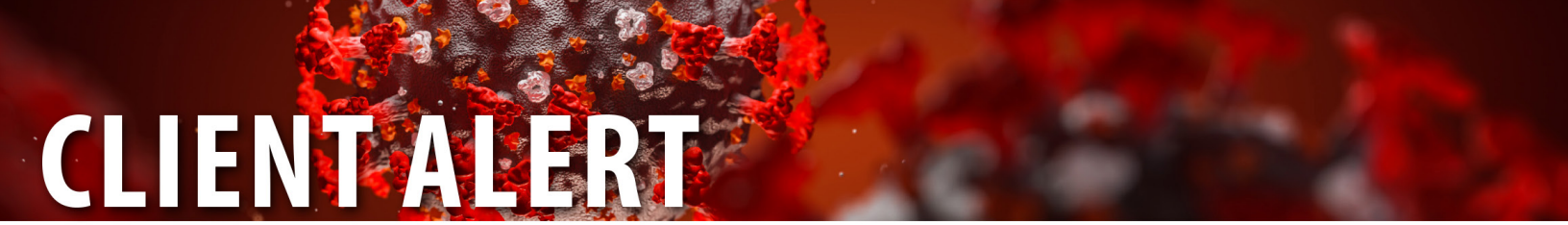

COVID-19/CANADA

PRACTICAL BUSINESS ISSUES AND COVID-19

by Mark Redinger, Mark Shapiro and Jacky Cheung

In this series, DW LLP will explore different issues related to the financial impact of COVID-19 on businesses, employment, financial matters, and commercial issues. We aren't giving you legal advice but rather some practical tips about dealing with events as they arise. This article will cover debtor-creditor matters and we intend periodic alerts to cover other topical issues related to the on-going pandemic.

The Implications of COVID-19 on Creditors and Borrowers in Canada

In the current crisis, there has been much discussion about the availability of remedies under Force Majeure and Material Adverse Change (MAC) clauses in respect of COVID-19.

Force Majeure and MAC clauses are remote provisions in agreements that lawyers love to debate. At a very high level the principle behind such provisions is that a party should not be obligated to perform its obligations under the contract if a material event (such as an 'act of the almighty') has changed the environment in which the agreement was originally drafted. Litigation around these provisions is scant although when it is engaged it is understandably highly contentious.[1]

The most typical example in a debtor-creditor context permits a lender to deny funding on the occurrence of Force Majeure event or MAC to the borrower. As lender friendly provisions these clauses do not generally protect borrowers from paying creditors or suspending default rights in lending arrangements.

Why is COVID-19 Different?

We do not have any precedent for the entire shut-down of sectors of the economy that parallels what we are experiencing with COVID-19. The two events most often cited for comparison, namely the attacks on the World Trade Centre and the Pentagon in 2001 and the SARS Pandemic in 2003, were relatively short in duration and isolated geographically. Neither event involved a prolonged disruption to the supply chain. What makes COVID-19 unique is the unknown duration of the disruption, the global geographic spread and the fact that it is not sector specific.

In this environment, what steps can parties take to ensure that once the crisis passes, their contractual rights remain in force?

Non-executory arrangements typically have time-sensitive obligations, for example interest and principal payments, rent, reporting requirements (financial statements or otherwise) which cannot easily be waived, or which one party, or the other, may, for commercial reasons, desire not to waive.

Absent contractual protection, or government decree, or a negotiated waiver, some commercial parties may be surprised to lean COVID-19 does not provide relief from the risk of a default by one party or the ability of another to call a default.

Never waste a good crisis….

A typical small business is an intertwined market participant. It will owe money to its various suppliers, the landlord, the bank and employees; in turn these parties will owe money to their suppliers, lenders, banks, employees and so on. But what happens when the supply chain breaks down (not merely slows down) and payments are not flowing at all?

Absent COVID-19 and in an isolated incident, the business example may face all manner of remedies including notices of default or enforcement actions brought by its creditors. It would have similar remedies against parties that owed it money.

But when the system breaks down, what can a creditor really do, and what do borrowers have to do? While remedies through the courts may be forestalled, can creditors really rely on defaults caused by events beyond the borrower's control after the dust has settled?

Courts in Canada have been trending, albeit in varying circumstances, to a broader obligation of good faith in the course of commercial conduct. There is no reason to believe that coming out of the COVID-19 crisis this trend will reverse or moderate and the crisis may give judicial authorities more opportunity to push the law in this area even further. Parties that are advancing claims or relying on events that occurred as a result of the current crisis should be extremely careful in their conduct.

In *Bhasin v Hrynew* the Supreme Court recognized an organizing principle of good faith. Contracting parties are expected to have appropriate regard to the legitimate contractual interests of the contracting parties, not seek to undermine those interests in bad faith, and act honestly in the performance of contractual obligations. This duty of good faith and honest performance extends to the exercise of contractual discretion and may include situations where a creditor is contemplating advancing a default.

In *Greenberg v Meffert*, a real estate company refused to pay an ex-employee commissions he had earned while he was employed. The company relied on the terms of the employment agreement which gave it sole discretion to decide whether to pay commission earned by an ex-employee. Notwithstanding the language of the agreement, the Ontario Court of Appeal found the company exercised its discretion improperly after previously reassuring the plaintiff he would receive the commission. The Court noted that provisions which make payment or performance subject to the discretion of a party must be exercised reasonably. Moreover, any discretion must always be exercised honestly and in good faith.

While the law in Canada is evolving, courts in the United States have imposed a requirement to act reasonably when exercising a contractual discretion. In *Legend Autorama Ltd v Audi of American Inc.*, the New York Court of Appeal found that notwithstanding the words "sole discretion," every contract contains an implied covenant of good faith and fair dealing,

which encompasses any promise that a reasonable person would understand to be included. Some American courts have held that this duty does not prevent a lender from enforcing the terms of the contract as written; however, it appears that lenders must still act in good faith.

Another concept that may be relevant in evaluating the risk of exercising discretion is the concept of lender's liability which is a well-developed in the United States. For example, in *Koontz v Wells Fargo, N.A.*, a lender had the sole discretion to modify the terms of a mortgage or close on the property after the borrower had defaulted. The U.S. District Court of West Virginia found that despite having sole discretion, the lender was confined by the covenant of good faith and was required to act toward the borrower in a commercially reasonable manner. In the United States, lenders who have been found to act in bad faith can be liable for compensatory damages and consequential damages.

Being on the right side of the point…

Given the current climate, parties should be careful when advancing on defaults. While a contract may specify a right or remedy a court may disagree, often with disastrous results. Advancing or relying on a default that occurred in the middle of an ongoing pandemic may be considered unreasonable.

Commercial parties should assume that in the event of a subsequent dispute their actions will be closely scrutinized after the fact by persons that may not be overly-sympathetic to their contractual rights in making choices. A party should consider the following advice:

1. **Act Reasonably** – Notwithstanding what the commercial agreement states or a party's rights and obligations – if your decision is challenged before a court or tribunal in the future, will you be able to convincingly explain why your actions were reasonable and in good faith given the COVID-19 crisis?

2. **Consider the Broader Implications** – Often there is a broader context to your arrangements. Does 'squeezing' one aspect of the supply chain potentially negatively affects other parties? You do not want to be the poster child for shutting down an entire business operation or sector.

3. **Document, Document, Document** – Write everything down; communicate via email; and if you agree to waive or alter the strict terms of your agreement, specify that it is temporary and not a waiver. Also, keep a record.

Finally, how can we help? In uncertain times it's often not just legal advice you need. Checking your decision-making can provide comfort in your choices and avoid longer-term issues. If have an issue that sounds similar to the above, or you just want a second view, give us a ring…

[1] The ABCP in Canada involved considerable discussion about the ability of liquidity providers to rely on MAC provisions to avoid providing liquidity in strained credit markets.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in COVID-19. The foregoing content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions relating to any of the topics covered.

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DW-CHINA TRADE UPDATE (31ST EDITION)
迪克森律所中国团队简报（第三十一期）

PRESIDENT TRUMP RENEWS THREAT OF TARIFFS AGAINST CHINA IN RESPONSE TO COVID-19 PANDEMIC
特朗普总统重申对中国加征关税的威胁应对新冠疫情的大流行

by Mark Heusel

As the United States continues to combat COVID-19, the Trump Administration has turned a page in its playbook from solving the problem to finding fault with adversaries of the Administration, both internal and external. In a few swift announcements last week, what started a few weeks ago as saber-rattling when Secretary Pompeo placed blame for the pandemic on China, is now promising to move the U.S. further into isolationism and threaten the unfulfilled peace between China and the U.S. These unfortunate developments portend new protectionist policies from the Administration that are already shaking the markets. It further suggests that over the next several months, as election fervor returns and the President seeks cover from the economic fallout of the pandemic, the President will be more intent on finding fault and punishing China than restoring the early seeds of success in the Phase I U.S. – China Trade Agreement.

随着美国继续与新冠疫情作战，特朗普政府已将其抗疫战术从解决问题转移到了在政府内部政敌和外部对手身上寻找过失。从过去一周所发布的公告来看，几周前国务卿彭佩奥剑拔弩张地就新冠疫情的大爆发对中国发出的指责现在已有望使美国进一步走向孤立主义且威胁着美中之间尚未实现的和平。这些令人遗憾的事态发展意味着政府新的贸易保护主义政策已经动摇了市场。这进一步表明，在未来几个月，随着大选热潮的回归以及总统试图寻求掩盖疫情给美国经济带来的后果，与恢复在第一阶段美中贸易协定中达成的成功萌芽相比，总统将更倾向于借机指责和惩罚中国。

Last Thursday, President Trump announced that his Administration was considering retaliatory measures against China as punishment for the coronavirus outbreak. Notably, Trump called to impose new tariffs on Chinese imports and said that the trade deal with China was now "*of secondary importance*" to the COVID-19 pandemic. Currently, $370 billion worth of Chinese goods remain subject to as much as 25% additional tariffs on imported goods, which were justified by the Administration as necessary to change China's own trade policies. With Trump's new undefined threat, there may not be much left in the cupboard to cajole Beijing but perhaps just enough to build the President's record on China in anticipation of the November elections. Nonetheless, on Sunday, Trump told reporters, "*tariffs at a minimum are the greatest negotiating tool that we have ever devised and we never used for negotiations,*" and "*it's the ultimate punishment.*" Trump, however, did not stop with China and turned his anger towards the World Health Organization and many other countries, including Canada.

上周四，特朗普总统宣布，他的政府正在考虑对中国采取报复措施，作为对新冠疫情爆发的惩罚。其中值得注意的是，特朗普呼吁对中国进口商品征收新关税，并表示较目前新冠疫情相比，与中国签订的的贸易协定现在已是"*次要的*"。目前，价值3700亿美元的中国商品仍需缴纳最高25%的额外关税，且美国政府认为这是改变中国贸易政策所必需采取的行动。特朗普尚未明确的新关税的威胁，可能橱柜里已经没有多少可以用来说服北京方面的东西了，但这或许足以让总统在11月大选之前建立起其对中国强硬政策的记录。在周日，特朗普告诉记者："*最低关税是我们设计的最伟大的谈判工具，我们从未在谈判中使用过*"而且"*是最终的惩罚。*"然而，特朗普并没有止步于中国，他把愤怒转向了世界卫生组织和包括加拿大在内的许多其他国家。

Following Trump's statements, the U.S. Markets responded quickly with a level of new anxiety, only worsening what has been a dismal first two quarters. Voices from various industries opposing the imposition of new tariffs also came out after the news.

特朗普发表声明后，美国市场迅速做出了回应，产生了新的焦虑情绪，这只会让前两个季度的低迷局面进一步恶化。该消息传出后，各行各业也发出了反对征收新关税的声音。

On Friday, the President declared a national emergency over potential foreign threats to the nation's electricity grid, thereby paving the way for the government to block imports of certain equipment necessary to supporting the U.S.'s demands. Again, this move suggests that the Administration intends to de-couple from China in areas that it feels threaten the U.S.'s national security interest, a common retort throughout Trump's term. Over the weekend, the Administration's deputies took to supporting the President's actions and promising that economic measures were in the works to unravel the U.S.'s reliance on China's supply chain. All of these moves will leave U.S. companies that are invested in China in turbulent waters as Beijing will certainly retaliate, just as it did when the Administration rolled out the Section 301 tariffs.

上周五，总统宣布全国紧急状态，以应对外国对美国国家电网可能构成的威胁，从而为政府禁止进口美国所需的某些设备铺平了道路。这一举动再次表明，美国政府打算在其认为威胁到美国国家安全利益的领域与中国脱钩，国家安全利益是特朗普任期惯用的采取反击举措的领域。上周末，美国政府的代表们开始纷纷表态支持总统的行动，并承诺将采取经济措施来瓦解美国对中国供应链的依赖。所有的这些举动必将使已经在中国这一全球最大的市场开展业务的美国公司陷入动荡的旋流，因为北京方面很可能如美国政府推出301关税条款一样实施报复性举措。

As we have seen over the last two years, this remains a fluid situation. We will continue to monitor the latest moves from the Administration and its impact on U.S.-China trade relations.

正如我们在过去两年中所看到的那样，美中贸易局势仍然是不稳定的。我们将继续关注政府的最新动向及其对美中贸易关系的影响。

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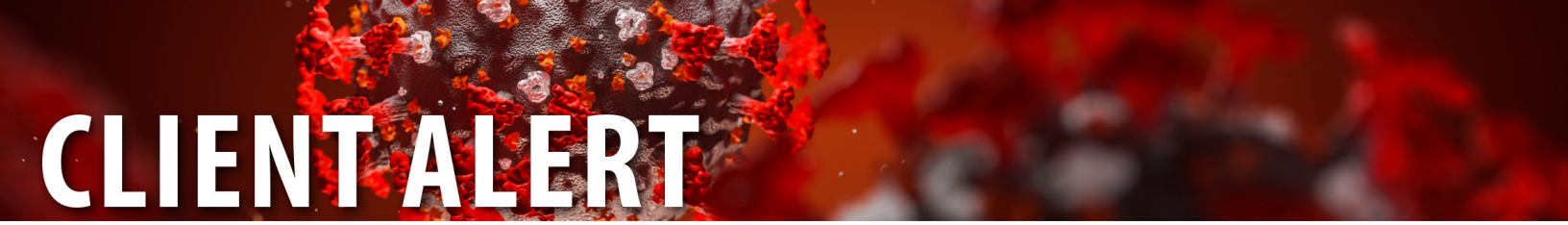

ANTITRUST & TRADE REGULATION

PRICE GOUGING DURING THE COVID-19 CRISIS

by L. Pahl Zinn and Jared A. Christensen

Price Gouging During The Covid-19 Crisis The ongoing COVID-19 crisis has stunned the world in unimaginable ways, presenting unforeseen challenges for businesses of all sizes and in all industries. In order to cope with these challenges, and in an effort to remain flexible throughout these uncertain times, many businesses have begun to expand, or transition, into the production and sale of different products. Specifically, products that have seen an increase in demand because of COVID-19, such as certain cleaning products, hand sanitizers, and protective masks. What many view as both a prudent and socially conscious business decision, however, also presents consumer protection risks. While businesses take steps to adapt, one thing is certain, compliance with rapidly changing executive action and state consumer protection laws cannot be quarantined.

Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., and Michigan Executive Order 2020-8

Michigan, like many other states, had taken steps to combat price gouging, long before this current crisis. The MCPA, enacted prior to the COVID-19 crisis, considers "[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold" to be an unfair trade practice, subject to both private claims and enforcement by the state Attorney General. MCL 445.903(1)(z); 445.911; 445.905-906. "Causing coercion and duress as the result of the time and nature of a sales presentation" is also an unfair trade practice pursuant to the MCPA. MCL 445.903(1)(aa).

In addition, Michigan's Governor, like that of many other states, has issued an executive order specifically combating price gouging during the ongoing crisis. On March 15, 2020, Michigan's Governor signed Executive Order 2020-8, which temporarily imposes enhanced restrictions on the excess pricing of goods, materials, emergency supplies, and consumer food items.

Executive Order 2020-8 provides: "[b]eginning March 16, 2020…and continuing until April 13, 2020…if a person has acquired any product from a retailer, the person must not resell that product in this state at a price that is grossly in excess of the purchase price at which the person acquired the product." Throughout that same time, "a person must not offer for sale or sell any product in this state at a price that is more than 20% higher than what the person offered or charged for that product as of March 9, 2020, unless the person demonstrates that the price increase is attributable to an increase in the cost of bringing the product to market."

Michigan's Attorney General has been quick to act issuing notices of intended actions in response to consumer complaints about price gouging. Using the MCPA as the statutory enforcement mechanism, Michigan's AG is going after those businesses who are looking to make a quick buck by excessively increasing prices on products in high demand.

Executive Action across the United States

Michigan is not an outlier; rather, many state governors have taken similar executive action to combat price gouging. Currently, all 50 states, including the District of Columbia, have declared a state of emergency for purposes of combatting the crisis and many of these governors have enacted similar executive orders to combat price gouging or have existing legislation in place to the same effect. Some examples include Arizona, California, Florida, Kentucky, Tennessee, Texas, Virginia and the District of Columbia. Other states that do not have pre-existing price gouging laws likely have broad consumer protection statutes under which price gouging may be prosecuted.

Typically, anti-price gouging laws prohibit the pricing of products "grossly in excess" of what would generally be charged. "Grossly in excess" is by no means subject to mathematical calculation. As a result, certain states in their executive orders have given an appropriate limitation on price increases, which provide some general guidance: "grossly in excess" is anywhere between a 10-20% increase in price than what was being charged for a product before the COVID-19 crisis.

What Can Businesses Do?

These turbulent times coupled with vague consumer protection laws present unique challenges for businesses; namely those who have not previously sold a specific product and those who are transitioning to selling new goods and services now in high demand. For those new business entrants, it is important to consistently and thoroughly benchmark prices of competing products in order to lessen the risk of being accused of price gouging.

For example, in Michigan, under Executive Order 2020-8, businesses who transition to production and sale of a new product would be smart to survey prices as of March 9, 2020, if possible. Every attempt should be made to survey a wide range of sellers in order to get the largest possible cross-section of prices. Once a benchmark number is reached, the business should determine if any price increase exceeds 20%.

If it proves difficult to benchmark prices as of March 9, 2020, a business should look to current prices for competing products. It is possible that the surveyed competitors may have already increased their prices by some percentage, so any increase based upon a benchmark of current prices should be approached with caution.

Conclusion

While the ongoing COVID-19 crisis plagues businesses with a myriad of legal and other issues, one area in which businesses may be able to remain flexible and profitable is the expansion or transition into production and

sales of new products. Businesses who go this route must be aware of the ongoing restrictions upon price increases and the limitations put in place by their state executives. Legal counsel must be prepared to advise their clients on the current state of any restrictions enacted in their jurisdiction, as well as guide them through the benchmarking and price-setting process, so as to better serve their clients in this uncertain time.

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PROVINCE RELEASES UPDATED LIST OF "ESSENTIAL" WORKPLACES, DIRECTING ADDITIONAL CLOSURES AND RESTRICTIONS DURING COVID-19 STATE OF EMERGENCY

by Chantal A. Cipriano

On April 3, 2020, the Government of Ontario announced that it would be ordering more workplaces to close or restrict their businesses as part of the extraordinary steps to limit the spread of COVID-19 in order to protect its employees and the public at large.

This updated list follows the government-mandated closures of non-essential businesses by way of an order effective 11:59 p.m. on Tuesday, March 24th. The previous emergency order was amended to further restrict the list of businesses deemed "essential," directing additional businesses to close and restricting other specified businesses to provide services only by alternate methods such as curbside pick-up and delivery, except in exceptional circumstances.

The following businesses are no longer considered essential as of April 3, 2020 and are directed to close as of 11:59 p.m. on said date:

- Cannabis stores and cannabis producers (details in section below)
- Businesses that provide products and services that support research activities
- Professional services including engineers, accountants, and translators
- Non-urgent veterinary care
- Various construction activities (details in section below)

Stores that sell any of the following items and provide them to the customers may only do so through an alternative method of sale such as curbside pick-up or delivery, except in exceptional circumstances:

- Hardware products
- Vehicle parts and supplies
- Pet and animal supplies
- Office supplies and computer products including computer repair
- Safety supplies

CANNABIS INDUSTRY

Legal cannabis retail stores have been closed in order to help fight the spread of COVID-19. Cannabis is still available for purchase online at the Ontario Cannabis Store (OCS.ca).

Due to COVID-19 precautions, Canada Post has temporarily changed its delivery method. They will not be delivering parcels that require a signature or proof-of-age to the customer's door. Instead, Canada Post will leave a notice card directing customers to a nearby post office where they can pick up their items by showing proof of identity.

Three-Day delivery operated by Domain Express continues to operate as Direct-to-Door service, with the delivery window being between 9 a.m. and 10 p.m.

CONSTRUCTION INDUSTRY

Contrary to the previous Government of Ontario order, construction businesses are no longer included on the "List of Essential Workplaces."

Permitted construction activities have been significantly reduced to include only the following:

- Construction projects and services associated with the health care sector, including new facilities, expansions, renovations, and conversion of spaces that could be repurposed for health care space.
- Construction projects and services required to ensure safe and reliable operations of, or to provide new capacity in, critical provincial infrastructure, including transit, transportation, energy and justice sectors beyond the day-to-day maintenance.
- Critical industrial construction activities required for:
  - » the maintenance and operations of petrochemical plants and refineries;
  - » significant industrial petrochemical projects where preliminary work has already commenced; or
  - » industrial construction and modifications to existing industrial structures limited solely to work necessary for the production, maintenance, and/or enhancement of Personal Protective Equipment, medical devices (such as ventilators), and other identified products directly related to combatting the COVID-19 pandemic.
- Residential construction projects where:
  - » a footing permit has been granted for single-family, semi-detached, and townhomes;
  - » an above-grade structural permit has been granted for condominiums, mixed-use, and other buildings; or
  - » the project involves renovations to residential properties and construction work was started before April 4, 2020.
- Construction and maintenance activities necessary to temporarily close construction sites that have paused or are not active and to ensure ongoing public safety.

For any questions relating to the closures, the province can contact the Stop the Spread Business Information Line at 1-888-444-3659. The information line is available from Monday to Sunday, 8:30 a.m. to 5:00 p.m. Please note, there are significant wait times to speak to a representative, and queries relating to whether your business is deemed essential will not be answered by a representative. Our Dickinson Wright team can assist you with making a determination as to whether your business is considered essential.

Please Note: These materials do not constitute legal advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently. As such, it is important to ensure you are aware of current information and that you consult with a lawyer before making your business decisions.

If you have any immediate questions or require further information, please reach out to your Dickinson Wright LLP lawyer or contact the dedicated Dickinson Wright LLP COVID-19 email at COVID19info@dickinsonwright.com.

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*Special thank you to our articling student **Carly J. Walter** for her contribution to this piece.*

INTELLECTUAL PROPERTY CLIENT ALERT

RELIGIOUS INSTITUTIONS V. COVID-19: WHY RELIGIOUS INSTITUTIONS SHOULD THINK TWICE BEFORE LIVE STREAMING

by Andrea L. Arndt and Caleb L. Green

RELIGIOUS INSTITUTIONS TURNING TO LIVE STREAMING IN THE FACE OF COVID-19

In a few short weeks, the widespread transmission of COVID-19 (the "coronavirus") has caused institutions and governments alike to make sweeping changes to combat the further spread of the virus. In response, organizations are adopting measures to ensure the health and safety of the general public. For example, recently, California, Michigan, and New York issued shelter-in-place orders, mandating that state residents remain in their homes. Meanwhile, several other states are currently proposing and considering similar crowd bans, nonessential business restrictions, and additional measures to assist in facilitating social distancing and further reducing transmission of the coronavirus. Religious institutions such as churches and places of worship are not exempt from these evolving changes caused by the COVID-19 pandemic. As a result, religious institutions are scrambling to find alternatives to in-person gatherings, including live streaming services. However, by adopting streaming services, these religious institutions may be unintentionally exposing themselves to intellectual property liability.

Nowadays, it is easier than ever to share content with audiences throughout the world without physical presence. The Internet has ushered in various ways for religious institutions to share various content with worldwide audiences. Through social media and live streaming services, such as Facebook Live, Periscope, YouTube, and podcasting services, religious groups can share their messages beyond the walls of their houses of worship and reach thousands of individuals in the comfort of their homes. It is no surprise then that these institutions are live streaming services as an alternative to in-person gathering in the face of the coronavirus pandemic. However, by using online tools to combat the spread of the coronavirus, religious institutions may be exposing themselves to copyright infringement liability. Religious institutions typically do not need to pay for licenses to play or perform copyrighted music during a worship service; however, this exception does not apply when copyrighted music is recorded or streamed online. Accordingly, religious institutions will need to consult with legal counsel to secure the proper licensing for the visual and musical content they share across a variety of digital platforms.

Several religious institutions have been subjected to copyright infringement lawsuits for improper streaming and recordings. A clear example of the potential risks and liabilities for copyright infringement occurred in late 2011 when music composer Yesh Music filed a complaint against First Baptist Church of Smyrna, Tennessee, seeking a judgment exceeding $150,000. The church performed two of Yesh's musical compositions in a worship service live-streamed from its website. More recently, Yesh filed a similar $3 million lawsuit against renowned pastor Joel Osteen and Lakewood Church in Houston, Texas for streaming Yesh's song "Signaling Through the Flames" during a worship gathering.

U.S. COPYRIGHT LAW

U.S. Copyright laws protect authors of original literary, musical, and artistic works and prohibit others from reproducing, distributing, transmitting, or publicly performing these works without the author's permission. Copyright protected works include hymnals, sheet music, musical compositions, lyrics, and even photos. Unlike other laws, copyright laws are laws of strict liability. In other words, the fact that a church did not know that it was infringing the copyright law is not a valid defense to copyright liability.

Compliance with U.S. Copyright laws is critical for religious institutions not only because violating such laws are unlawful, but also because violations can trigger stiff penalties. Copyright owners who timely register their works are entitled to recover statutory damages ranging from $750 to $30,000 per work, or up to $150,000 per work for instances of willful infringement. Even if they failed to timely register their works, copyright owners can still collect actual damages from infringing reproductions or recover profits religious institution receives for selling or collecting donations for any recordings containing their protected works.

LIMITATIONS TO THE COPYRIGHT RELIGIOUS SERVICE EXEMPTION (RSE)

While U.S. Copyright laws include an exemption for religious institutions playing or performing copyrighted works during a religious service, they do not excuse religious institutions from certain forms of musical and literary rebroadcasting and recordings. Specifically, the U.S. Copyright Act provides a limited exception for the performance of nondramatic literary or musical works of a religious nature in the course of services at a place of worship. Federal courts have interpreted the exemption for religious institutions narrowly, holding that it applies in only "a place of worship" and does not provide protection for online live streaming or recording copyrighted works. Accordingly, unauthorized live streaming or rebroadcasting a recording of protected works in a service can be unlawful because it may constitute reproduction outside of the place of worship. Similarly, the use of copyright-protected photos or visual aids during a rebroadcasted worship service, or a music performance during a worship service, may exceed the scope of the religious service exemption.

The religious copyright exemption is also limited to "religious assemblies" and may not apply to all aspects of a religious institution. Reproduction or public performance of copyrighted works during concerts, school events, workshops, or other nontraditional religious assemblies are also considered infringing acts that will trigger penalties under U.S. Copyright laws.

EXPECTED INCREASE IN COPYRIGHT LAWSUITS

The number of copyright infringement lawsuits is estimated to increase in the coming years as Congress considers passing the Copyright Alternative in Small-Claims Enforcement Act of 2019 (CASE). The purpose of CASE is to give creators of protected works practical and affordable means to enforce their intellectual property rights (e.g., their copyrights). If the law passes, it will allow for the creation of a small claims board at the U.S. Copyright Office that will adjudicate copyright disputes and allow for recovery of damages up to $30,000. This board will create a more affordable mechanism for copyright owners to enforce their rights and will likely result in an increased number of copyright lawsuits. Frankly, many religious institutions do not have the resources to combat a copyright lawsuit. Accordingly, it is important to ensure that religious institutions are operating within the scope of U.S. Copyright law.

CONCLUSION & RECOMMENDATION

As religious institutions consider live streaming as an alternative to mass

gatherings in the face of the coronavirus, they can protect themselves from incidental copyright liability by securing the proper licenses and permissions to use copyrighted works. Not all religious institutions have the same needs, and the evolving regulations regarding coronavirus may influence each differently. To avoid the penalties of noncompliance and liability for copyright infringement, church leaders and decision-makers should consult with legal counsel before live streaming and recording their religious services. A licensed attorney can provide an informed recommendation and secure the proper licensing that is tailored to religious activities in the face of the COVID-19 pandemic.

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Tax Blog

SBA COVID-19 ECONOMIC INJURY DISASTER LOAN PROGRAM

Posted by Julie Gulledge | Mar 18, 2020

Pursuant to the Coronavirus Preparedness and Response Supplemental Appropriations Act that was recently signed by the President, the U.S. Small Business Administration ("SBA") is offering Economic Injury Disaster Loans to provide working capital to small businesses suffering substantial economic injury as a result of the Coronavirus ("COVID-19"). The SBA's Economic Injury Disaster Loans can offer up to $2 million to help small businesses overcome the temporary loss of revenue they may be experiencing as a result of COVID-19. The loans may be used to pay fixed debts, payroll, accounts payable, and other bills. The interest rate will be 3.75% for small businesses and 2.75% for non-profits, with a maximum 30-year payback period. Qualification for and terms of a loan will be determined on a case-by-case basis.

Status of Availability

At this time, the SBA has designated 31 areas, including entire states, as eligible to apply for the SBA COVID-19 Economic Injury Disaster Loan. Additional areas are expected to be added daily. For up to date information and an updated listed of eligible counties and states, click here.

Application Process

If your area has been declared as a designated area that is eligible for this program, you can apply for a loan here. And, information regarding the SBA's three-step application process can be found here.

If your area has not been declared as a designated area that is eligible for this program at this time, you cannot yet submit an application. However, it is advisable to begin gathering federal income tax returns, bank statements, and other financial documents in digital form in order to prepare and submit the application as soon as possible if it becomes available. Keep in mind that there is no guarantee your area will be designated in the future.

Resources are available for applicants to the SBA COVID-19 Economic Injury Disaster Loan Program. If you have questions regarding the program, you can reach out to your local SBA office. They may be able to put you in contact with free local resources which can provide assistance with the preparation of the application.

For businesses located in Michigan, the Small Business Development Center ("SBDC") is available to assist with the preparation of the application once it becomes available. The SBDC can be reached at 734-487-0355.

If you have questions or need assistance from Dickinson Wright regarding this program, you can reach out to Julie Gulledge at jgulledge@dickinson-wright.com or 313-223-2680.

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SEC ISSUES GUIDANCE REGARDING DISCLOSURE OBLIGATIONS IN LIGHT OF COVID-19

by Frank Borger-Gilligan

This past week, the Securities and Exchange Commission's Division of Corporate Finance issued guidance regarding disclosure and other securities law obligations that companies should consider with respect to the COVID-19 pandemic. The following is a summary of the Commission's release:

SEC CF DISCLOSURE GUIDANCE: TOPIC NO. 9

On March 25, 2020, the Commission issued a release that guides companies as they prepare disclosure documents during the current international health crisis and sudden unprecedented economic shutdown. Although the Commission states that it encourages timely reporting, it recognizes that the broad and unpredictable effects of COVID-19 on businesses and individuals make it difficult for companies to assess what they expect the future impact on the company, the related industry, and overall health of the economy will be. Consequently, public companies currently face the challenge of timely reporting information concerning the effects of the pandemic in order to help investors makeinformed decisions. In its release, the Commission offers a series of questions for companies to consider when making the required disclosures.

COVID-19-RELATED DISCLOSURES

Current SEC rules require disclosure of known or reasonably likely risks, including the type of risks presented by COVID-19 and resulting business interruptions. As with all risk factors, disclosures should be specific to the company and the related industry. Accordingly, the Commission's Guidance offers a series of questions for companies to consider in regards to their disclosure obligations. Such questions include:

- How has COVID-19 impacted your financial condition and results of operations?
- How do you expect that COVID -19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets?
- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so?
- Do you expect COVID-19 to materially affect the demand for your products or services?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

A complete, yet non-exhaustive list of questions to consider can be found here.

COMMISSION CAUTIONS AGAINST TRADING ON MATERIAL NON-PUBLIC INFORMATION

The release also cautions companies and their directors and officers to refrain from trading in the company's securities if they are aware of material, non-public information regarding the effects of COVID-19 on the company's business and operations. The Commission specifically cautions that "where COVID-19 has affected a company in a way that would be material to investors or where a company has become aware of a risk related to COVID-19 that would be material to investors, the company, its directors and officers, and other corporate insiders who are aware of these matters should refrain from trading in the company's securities until such information is disclosed to the public."

The Commission further advises companies to take necessary steps to avoid disclosing selective information when disclosing material information to the public. Those steps can be found in Regulation FD which was promulgated by the Commission in 2000 to address the selective disclosure of information by publicly traded companies and other issuers. Regulation FD provides that when an issuer discloses material nonpublic information to certain individuals or entities—generally securities market professionals such as stock analysts or holders of the issuer's securities who may well trade based on the information—the issuer must make public disclosure of that information.

EARNINGS AND FINANCIAL REPORTS

Although the Commission does not specifically indicate how it will address the timeliness of filing financial reports in light of the COVID-19 pandemic, it acknowledges that the impact of the pandemic will likely make it more difficult for companies and their auditors to maintain such timely filings. The Commission, therefore, encourages companies to proactively address their financial reporting requirements to the extent possible.

The release provides further guidance with respect to the presentation of non-GAAP financial measures in a company's disclosures. Specifically, to the extent a company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, the disclosure should highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations.

For further information on this release, or other securities law matters, please contact Dickinson Wright, PLLC.

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SEC ISSUES SUPPLEMENTAL COVID-19 GUIDANCE ON DISCLOSURE CONSIDERATIONS RELATING TO OPERATIONS, LIQUIDITY, AND CAPITAL RESOURCES

by William H. Dorton, Bradley J. Wyatt, Rasika A. Kulkarni, and Julie D. Gulledge

On June 23, the Division of Corporation Finance at the U.S. Securities and Exchange Commission (the *"SEC"*) released additional disclosure guidance with respect to operations, liquidity, and capital resources disclosures in light of the COVID-19 pandemic. The new guidance supplements CF Disclosure Guidance Topic 9 issued on March 25, 2020.

The initial guidance, issued while public registrants and the investing community were still absorbing the massive impact of the pandemic, was broad in tone and global in scope, providing a laundry list of disclosure items and probing questions of how those items might be affected by COVID-19. It makes sense, now that the impact has settled in for nearly three months, that the staff would narrow its sights to more targeted disclosure issues. The most recent guidance is aimed at what is arguably the heart of MD&A disclosure: operations, liquidity, and capital resources.[1] In a sense, the new guidance is a granular unpacking of the "known trends and uncertainties" aspect of MD&A disclosure – because the "known trend" of COVID-19 is ubiquitous, the staff has provided general guidance on how issuers might assess its impact on their public disclosures. There is a reason that these issues feature prominently in the SEC's overall disclosure regime: they comprise the core of most companies' operational success and ability to achieve and maintain profitability. We believe it is important, for legal and business reasons (and especially as the SEC shines its light on this area), for issuers to make an honest and earnest assessment of COVID-19's impact on operations, liquidity, and capital resources.

OPERATIONAL CHALLENGES

The staff notes its appreciation for the fact that most public issuers are still "in the process" of adjusting their operations to account for the impact of COVID-19. From the transition to telework, to supply chain and distribution adjustments, to the litany of health and safety guidelines companies have had to comply with, the staff reminds registrants to carefully consider these in light of their disclosure obligations. The key consideration, of course, is whether or not any of these matters would be material to an investment or voting decision, requiring disclosure to investors.

Our summary of the staff's thought questions with respect to potential disclosure of operations-related issues is below:

- What operational challenges have you faced and are you continuing to monitor?[2]
- What was the impact, if any, of implementing health and safety policies?
- What was the impact of having your employees absent and/or working remotely? What was or will be the impact of having your employees return to work?
- Have you altered payment terms with your customers? Are you relying on supplier financing in a way you were not before the pandemic?
- Are any of the above matters temporary? Permanent? What facts will you consider in deciding to extend or curtail them?

LIQUIDITY

Access to liquidity is nearly always a top-of-mind consideration for a business and its investors, and the uncertainty of liquid capital has been a particularly harrowing aspect of the pandemic for many. Thus it is natural and appropriate for the staff to emphasize the importance of effective disclosure in this area. The staff notes in the new guidance (and we have anecdotally observed) that companies have undertaken a diverse range of financing activities in response to the pandemic. Of course, appropriate consideration must be given to an issuer's disclosure obligations respecting such arrangements. We have summarized the key issues raised in the guidance and questions issuers should ask themselves below:

- How have your operational challenges impacted your financial condition and short- and long-term liquidity outlook? Have your revenues and/or cash flows been materially impacted? How are you currently situated, considering revenue and cash flow levels, in terms of your sources and uses of liquidity? How long do you expect this to last?
- If your assumptions regarding the duration and magnitude of COVID-19's impact are wrong, how might that impact your liquidity position and outlook?
- Do you disclose cash burn rate or daily cash use? If so, are you providing a clear definition of this metric and explaining how management uses it in assessing liquidity? Do you make material assumptions or estimates in calculating this metric?
- Do you have a credit facility? Are you able to service your debt? Are you at material risk of defaulting? Have you sought waivers and/or forbearances or amended your credit agreement? Has your credit been downgraded? Have you been required to post additional collateral and/or make additional guarantees?
- Are you able to access traditional funding sources on the same or reasonably similar terms?
- Have you suspended share (or bond) repurchase and/or dividend programs?
- Are any of the above matters temporary? Permanent? What facts will you consider in deciding to extend or curtail them?

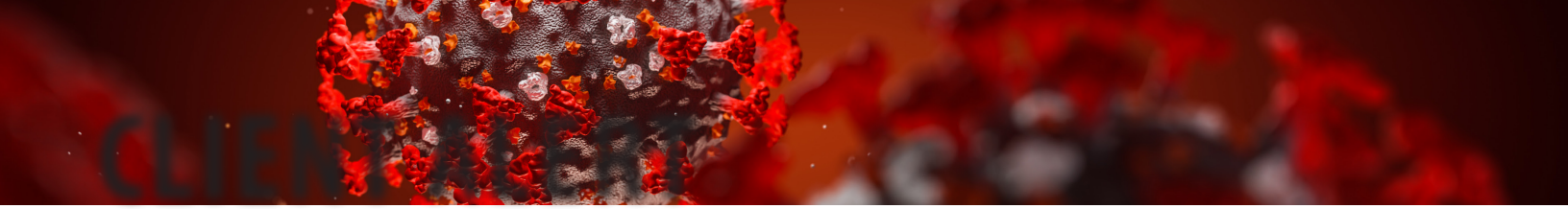
CAPITAL RESOURCES

Capital resources provide a barometer of the health of companies in some industries. In light of the economy-wide impact on operations and liquidity, it is appropriate to assess the material current and expected impact on an issuer's capital resources. The substance of capital resources disclosure will vary across industries, but the principles emphasized in the recent guidance should be used as a guide for all issuers. We have provided our summary of the staff's guidance below:

- Have you reduced your capital expenditures generally and/or with respect to specific business lines? If so, how?
- Have you exited any material business lines and/or disposed of any material assets? Have you ceased any material business operations?

[1] See Regulation S-K, Item 303.

[2] We would suggest that a general frame of reference when assessing the materiality of operational challenges would be to consider the extent to which those challenges rose (or should have risen) to the level where executive management and/or the board of directors become aware of, assessed and discussed them.



- Have you materially reduced or increased your human capital resource expenditures?
- Are any of the above matters temporary? Permanent? What facts will you consider in deciding to extend or curtail them?

CARES ACT

The new guidance includes a discrete section concerning disclosure issues relating to the short- and long-term impacts of the loans and tax relief provided to eligible companies under The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). Issuers who received CARES Act loans, for example, should consider the impact of those loans on their financial condition, liquidity, and capital resources. These issuers should address the material terms, conditions, and restrictions associated with CARES Act loans and determine whether or not they will be able to comply with them. Likewise, such issuers should assess whether their repayment obligations will have a material impact on revenues. Issuers who received tax relief are instructed to assess how such relief impacted their short-and long-term liquidity and to consider whether to disclose any material tax refunds for prior periods. Finally, recipients of CARES Act relief are asked to assess whether or not their receipt of relief caused them to make any material accounting estimates or judgments that should be disclosed.

GOING CONCERN ISSUES

As the COVID-19 pandemic has caused massive disruption in the global economy and financial markets, it is not surprising that SEC staff would provide guidance concerning an issuer's assessment of whether conditions and events have conspired to raise substantial doubt about its ability to continue as a going concern. The staff indicates in the guidance that issuers should focus on the conditions and events that may have given rise to such substantial doubt. For example, issuers should assess whether work stoppages and or labor challenges have produced these conditions, and consider how to disclose their plans, if any, to address such issues.

As the pervasive impact of the COVID-19 pandemic continues to unfold, we understand that public company disclosure issues are only one in a constellation of concerns for executive management teams and boards of directors. We believe the new staff guidance is a timely and helpful tool to assist public registrants in navigating this unexpected and sometimes challenging new terrain.

For more information on this release, COVID-19-related public disclosure issues or other securities law matters, please contact Dickinson Wright, PLLC.

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STARK LAW AND ANTI-KICKBACK STATUTE WAIVERS FOR COVID-19

by Jeremy Belanger, Erica A. Erman, and Ralph Levy, Jr.

In light of the COVID-19 pandemic, on March 30, 2020, the Secretary of the U.S. Department of Health and Human Services (the "Secretary") released blanket waivers (the "Waivers") under Section 1135 of the Social Security Act (the "Act") as to certain referral-related activities that would normally result in sanctions under the Federal Physician Self-Referral Law, 42 U.S.C. 1395nn (the "Stark Law"). Shortly thereafter, on April 3, 2020, the Office of the Inspector General ("OIG"), the entity that enforces the Federal Anti-Kickback Statute ("AKS"), issued a policy statement that it would not seek "administrative sanctions" for conduct that complied with certain of the Secretary's Waivers. Health care providers should be aware of the scope and limitations on these newly announced waivers.

THE STARK LAW WAIVERS

The Stark Law prohibits referrals between a physician (or immediate family member) and an entity for "designated health services" paid for by Medicare or Medicaid if there is a financial arrangement between the entity and the physician or the physician's immediate family. Financial arrangements include direct and indirect ownership, investment, and compensation arrangements. The Stark Law is a strict liability statute, meaning proof of ill intent is not required for there to be a violation. However, exceptions protect certain specified arrangements which strictly meet their requirements. Sanctions that can be imposed under the Stark Law include denial of payments, requiring refunds, and imposing civil monetary penalties and exclusions. Similar to the Stark Law exceptions, the Waivers exempt certain conduct from liability for violation of the Stark law during the period of the public health emergency.

Under Section 1135 of the Act, the Secretary can temporarily waive or modify sanctions imposed under the Stark Law. Recognizing the need for flexibility during this emergency period, the Secretary has used its authority under Section 1135 to waive sanctions for certain good-faith arrangements between physicians and entities to provide care that, under normal circumstances, would not comply with the Stark Law. These Waivers only apply during the emergency period and if the requirements are met. However, the Secretary did back date these Waivers to March 1, 2020, so that arrangements that began on or after that date are protected.

The first requirement to qualify for any of the Waivers is that the arrangement must be for a "COVID-19 Purpose." This phrase is broadly defined to mean any one of the following:

a. Diagnosis or medically necessary treatment of COVID-19, whether or not the patient is diagnosed with a confirmed case of COVID-19;
b. Securing the services of physicians and other health care practitioners to furnish medically necessary services to patients, including services not related to the diagnosis and treatment of COVID-19;
c. Ensuring the ability of the provider to address patient and community needs in response to COVID-19;
d. Expanding the capacity of health care providers to address patient and community needs in response to COVID-19;
e. Shifting the diagnosis and care of patients to appropriate alternative settings in response to COVID-19; or
f. Addressing medical practice or business interruption due to COVID-19 in order to maintain the availability of medical care and related services for patients and the community.

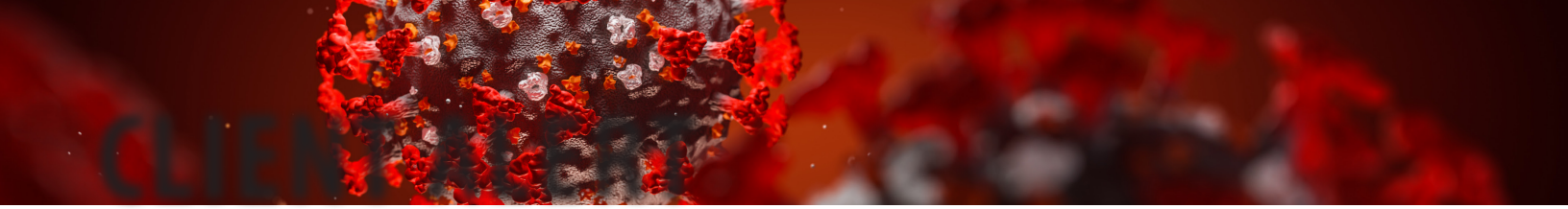
So long as the conduct is for a "COVID-19 Purpose," relationships which would otherwise violate the Stark Law are protected if they comply with one of two types of Waivers. The Waivers are:

THE REMUNERATION WAIVERS

1. Remuneration paid by an entity that is **above or below** the fair market value for services personally performed by the physician (or the immediate family member of the physician) to the entity.
2. Rent paid by an entity that is below fair market value for the entity's lease of office space from the physician (or the immediate family member of the physician).
3. Rent paid by an entity that is below fair market value for the entity's lease of equipment from the physician (or the immediate family member of the physician).
4. Remuneration from an entity that is below fair market value for items or services purchased by the entity from the physician (or the immediate family member of the physician).
5. Rent paid by a physician (or an immediate family member of a physician) to an entity for office space that is below fair market value.
6. Rent paid by a physician (or an immediate family member of a physician) to an entity for leased equipment that is below fair market value.
7. Remuneration from a physician (or an immediate family member of a physician) to an entity that is below fair market value for the use of the entity's premises or for items or services purchased from the entity.
8. Remuneration from a hospital to a physician in the form of medical staff incidental benefits that exceeds $36 for calendar year 2020.
9. Remuneration from an entity to a physician (or the immediate family member of a physician) in the form of nonmonetary compensation that exceeds $423 for calendar year 2020.
10. Remuneration by an entity resulting from a loan by the entity to the physician (or the immediate family member of the physician): (1) with an interest rate below fair market value; or (2) on terms that are unavailable from a lender that does not receive referrals.
11. Remuneration from a physician (or the immediate family member of a physician) to an entity resulting from a loan to the entity: (1) with an interest rate below fair market value; or (2) on terms that are unavailable from a lender that does not generate business for the physician (or the immediate family member of the physician).

THE OWNERSHIP WAIVERS

12. The referral by a physician owner of a hospital that temporarily expands its facility capacity above the number of operating rooms, procedure rooms, and beds for which



the hospital was licensed without prior application and approval of the expansion of facility capacity.

13. Referrals by a physician owner of a hospital that converted from a physician owned ambulatory surgical center to a hospital on or after March 1, 2020, provided that: (i) the hospital does not meet the requirements to be a rural provider; (ii) the hospital enrolled in Medicare as a hospital during the emergency period; (iii) the hospital meets the Medicare conditions of participation and other requirements not waived by CMS during the emergency period; and (iv) the hospital's Medicare enrollment is not inconsistent with the Emergency Preparedness or Pandemic Plan of the state in which it is located.
14. The referral by a physician of a Medicare beneficiary for the provision of designated health services to a home health agency: (1) that does not qualify as a rural provider; and (2) in which the physician (or an immediate family member of the physician) has an ownership or investment interest.
15. The referral by a physician in a group practice for medically necessary designated health services furnished by the group practice in a location that does not qualify as a "same building" or "centralized building" for purposes of the in-office ancillary services exception.
16. The referral by a physician in a group practice for medically necessary designated health services furnished by the group practice to a patient in his/her private home, an assisted living facility, or independent living facility when the physician does not generally treat patients in their private homes.
17. The referral by a physician to an entity with which the physician's immediate family member has a financial relationship if the patient resides in a rural area.
18. Referrals by a physician to an entity with whom the physician (or an immediate family member of the physician) has a compensation arrangement that does not satisfy the writing or signature requirement(s) of an applicable exception but satisfies the other requirements of the applicable exception.

The Secretary's Waivers are an attempt to provide physicians and entities greater flexibility to address health care needs in this emergency. Much like the Stark Law exceptions, these Waivers for COVID-19 Purposes are technical, and physicians and other health care providers should consult with their health care attorneys prior to entering into any arrangement that is intended to take advantage of the waivers.

OIG POLICY STATEMENTS REGARDING ANTI-KICKBACK ENFORCEMENT

Under Section 1135 of the Act, the Secretary has the authority to waive or modify sanctions under the Stark Law. For consistency, on April 3, 2020, the OIG issued a policy statement that it would not seek "administrative sanctions" for conduct that complies with the Secretary's Waivers regarding remuneration (but not for the Waivers regarding ownership).

The AKS makes it illegal for anyone to knowingly and willfully solicit, receive, offer, or pay "any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind" in return for referring a patient for any item or service for which payment may be made, in whole or in part, by a Federal health care program (e.g., Medicare, Medicaid, Tricare, etc.). The AKS requires an intent to pay remuneration for a referral; however, the AKS is violated if even one purpose is to induce a referral, regardless of whether there are other valid reasons for the referral. Like the Stark Law, the AKS has exceptions, called Safe Harbors, which can automatically protect an arrangement. Unlike the Stark law, failure to meet the requirements of a Safe Harbor does not make an arrangement illegal under the AKS.

The OIG has advised that if conduct that complies with Waivers 1 through 11 described above (the Remuneration Waivers), it will exercise its discretion and not seek enforcement of "administrative sanctions." The sanctions OIG cites that it would not seek are permissive exclusion or civil monetary penalties. This exercise of discretion does not apply to the Ownership Waivers. One interesting note is that the OIG made no mention of the criminal sanctions if conduct complies with the Waivers, only that is would not pursue two specific administrative sanctions. Additionally, even though the Waivers are back dated to March 1, 2020, the OIG stated that it would only exercise its discretion for conduct occurring on or after April 3, 2020.

Despite the much needed flexibility that the Waivers provide to respond to COVID-19, like the Exceptions and Safe Harbors, they create many pitfalls for health care providers and entities to which health care providers refer patients. Dickinson Wright's health care attorneys can advise those impacted in how to comply with the Waivers.

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SUD PROGRAM PRIVACY RULES MODIFIED BY CARES ACT

by Behavioral Health Group

In this country, people who need Substance Use Disorder (SUD) treatment often choose not to pursue professional treatment, not because of the cost, but because there is a societal negative stigma attached to the disease. In 1975, the federal government acted to eliminate the stigma and simultaneously encourage people suffering from SUD to voluntarily ask for help through enactment of vigorous regulations prohibiting the disclosure of SUD records created through programs receiving federal money. The acknowledged benefits of the government's 1975 solution are today incongruent with the need for information sharing of patient records through health information exchanges and the integration of behavioral and physical care.

The 1975 government regulations are referenced as "Part 2" protections for people suffering from SUD. Some twenty years after the implementation of Part 2, the federal government sought to ease the exchange of protected health information without patient consent for purposes of treatment, payment, or certain health care operations.[1] The laws and regulations surrounding this initiative are referred to as the "HIPAA" privacy and security provisions.

As one might suspect, a natural struggle between the policy of information sharing under HIPAA and the policy of Part 2 information lockdown developed. The policy tension became more real as the integration of behavioral and physical health began to take center stage. In part, the tension was created by individuals in need of treatment abusing the system through "doctor shopping" between their physical health practitioners and their behavioral health practitioners, and the clear and present dangers associated with a physician prescribing counter-indicated medications to individuals undergoing Medication-Assisted Treatment (MAT). It was the clear and present danger that lead to Senators Joe Manchin (D-WV) and Shelley Moore Capito (R-WV) to introduce the Jessica Grubb's Legacy Act in the 115th Congress (S.1850) and twice again in the 116th Congress (S.1012 and S.3374). All versions of the Legacy Act were aimed at changing Part 2 protections with the goal of ensuring that medical providers do not accidentally prescribe potentially fatal medications to individuals in recovery as was the case with Jessica Grubbs. Jessica, having battled SUD for 7 years, was sober and in recovery. While rebuilding her life in Michigan and training for a marathon, she suffered an injury requiring surgery. Without any knowledge of Jessica's SUD history, the discharging physician sent her home with 50 oxycodone. Jessica consequently died from an overdose.

On Friday, March 27, 2020, President Trump cracked open the closed door of non-disclosure of SUD records by signing the Legacy Act. President Calvin Coolidge once said that "persistence and determination alone are omnipotent." It took the coronavirus pandemic CARES Act to finally achieve the Legacy Act language in Section 3221. While taking up just shy of 11 pages of the 883 page Cares Act, Section 3221 packs a mighty punch. In addition to formally erasing the phrase "Substance Abuse" in favor of the more politically correct phrase "Substance Use Disorder," Section 3221 makes the following changes to Part 2 privacy provisions:

- Prior Written Consent, Purpose, & Re-disclosure. Part 2 records may now be used by a Part 2 program, a covered entity or a business associate for treatment, payment, or certain[2] health care operations upon execution of a single, revocable, prior-written consent applicable to all future use.
- Stronger Prohibitions against Use in Proceedings. Part 2 records may not be disclosed or used in any civil, criminal, administrative, or legislative proceeding conducted by any federal, state, or local authority, against a patient. This means Part 2 records cannot be entered as evidence, cannot be part of the record, cannot be used for law enforcement purposes or investigations, and cannot be used to obtain warrants.
- Stronger Anti-Discrimination Protections. With the loosing of some disclosure comes stronger non-discrimination protections applicable to both intentional and inadvertent disclosure. Entities are prohibited from discriminating against individuals relative to:
  - access to health care as well as admission and treatment;
  - employment (including receipt of worker's compensation);
  - housing;
  - access to courts; and
  - government funded social services and benefits. Specifically, "[n]o recipient of Federal funds shall discriminate against an individual on the basis of information received by such recipient pursuant to an intentional or inadvertent disclosure of such records or information contained in [the Part 2 records] in affording access to the services provided with such funds."
- Change in Penalties. Wrongful disclosures of Part 2 information were historically subject to the criminal penalty. The penalties for wrongful disclosure now range from a maximum of $50,000 fine and 1 year in prison for a wrongful disclosure, to a maximum of $100,000 and 5 years in prison if false pretenses were involved, to a maximum of $250,000 and 10 years in prison if the information was used for personal gain or to cause malicious harm.

If you have questions or concerns when navigating the new statutes during this public health emergency, please contact the Dickinson Wright Behavioral Health Law Group!

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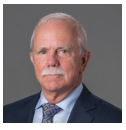

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[1] The Health Insurance Portability and Accountability Act ("HIPAA") can be found at 42 USC § 1320d et. seq. along with its implementing regulations at 45 CFR Parts 160 & 164.

[2] Permissible operations include use of de-identified information for certain public health purposes but excludes uses or disclosures for the creation of de-identified health information or a limited data set and for the purpose of fund raising for the benefit of a covered entity.

All Things HR

SUMMARY OF EMPLOYEE BENEFITS PROVISIONS IN CARES ACT (AS PASSED BY U.S. SENATE)

Posted by Jordan Schreier | Mar 27, 2020

On March 25, 2020, the Senate passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, as a follow-up to the Families First Coronavirus Response Act. The Act contains a number of employee benefits related provisions to address the COVID-19 emergency. The House of Representatives intends to take up the legislation on March 27, 2020. A summary of the Senate version of the Act follows.

Retirement Plan Provisions

Waiver of 10% Early Withdrawal Excise Tax for Coronavirus Related Distributions and Improvement of Plan Loans – Section 2202 of the Act waives the normal 10% Internal Revenue Code Section 72(t) excise tax that applies to early distributions (e.g., in-service prior to age 59 ½) from eligible retirement plans (qualified plans, 403(b) plans, 457 plans, etc.), provided the distributions for an individual (a) do not exceed $100,000 in the aggregate for a tax year, (b) are made between January 1 and December 30, 2020, and (c) are Coronavirus Related Distributions (CRD). All controlled group, trades or businesses under common control and affiliated service group entities are aggregated for these rules. The definition of CRD is broad. A CRD is a distribution to a plan participant (i) who is or whose spouse or dependent is diagnosed with COVID-19 or its virus, or (ii) who experiences adverse financial consequences as a result of quarantine, furlough, layoff, or reduced work hours due to the virus, or (iii) can't work due to lack of child care due to the virus or closing or reduced hours of a business owned or operator by the participant due to the virus. Fortunately, a plan administrator can rely on an employee's certification that the distribution is a CRD. The excise tax is usually self-reporting so that has not changed.

Importantly, a CRD is a permissible distribution from a retirement plan, even in-service, and even for a 401(k) plan, regardless of age.

A participant may (but is not required to) spread the amounts required to be included in gross income from a CRD over three tax years. A participant may also repay the distribution to an eligible retirement plan any time during the three year period beginning on the date of the distribution and the repayment is treated as an eligible rollover distribution. This is similar to the repayment of amounts distributed to a participant for a qualified birth or adoption under the SECURE Act. At this time, the income tax treatment (basis or otherwise) is not clear from the Act. A CRD is not considered an eligible rollover distribution so the usual 20% income tax withholding requirement does not apply. Instead, a 10% withholding applies unless the participant elects otherwise.

The $50,000 maximum plan loan limit is increased to $100,000 for loans made in the 180-day period from the date of the Act to participants who satisfy the CRD definition above and the limit that a loan cannot exceed 50% of the present value of the participant's benefit is eliminated. This appears to allow a participant to borrow against his or her entire vested plan benefit. The due date for any loans due between the date of the Act and December 31, 2020 are extended one year, with the

amount due adjusted for interest. The additional year is not counted for purposes of the five year plan loan amortization rule.

Conforming plan amendments are due no later than the last day of the plan year that begins on or after January 1, 2022 (2024 for governmental plans) and a plan has to operate in compliance with these rules in the interim.

Temporary Waiver of Minimum Required Distribution Rules – Section 2203 of the Act waives for the 2020 year the minimum required distributions (required distributions at age 72) for participants who hit the minimum age in 2020 for defined contribution plans (e.g., 401(k), profit sharing, etc.), 403 (a) and 403(b) plans, and 457(b) plans maintained by governmental employers.

Conforming plan amendments are due no later than the last day of the plan year that begins on or after January 1, 2022 (2024 for governmental plans) and a plan has to operate in compliance with these rules in the interim.

One-Year Delay in Pension Minimum Required Contributions and AFTAP Reliance – Any single employer defined benefit pension plan minimum required contribution due in 2020 is delayed one year, subject to an interest adjustment. Plans can also rely on their adjusted funding target attainment percentages (which applies to determine certain pension plan distribution restrictions) from the last plan year ending before January 1, 2020 for plan years which include 2020. Many pension plans obtain AFTAP certifications by April 1, 2020 so this relief is timely. It is not clear whether an AFTAP that has already been certified can be rescinded if the prior year's AFTAP is more favorable.

Welfare Benefits Provisions

Group Health Plan Coverage of Covid-19 Services – Sections 3201-3203 of the Act clarifies language in the FFCRA that all diagnostic testing for COVID-19 or its virus are to be covered by health insurance and group health plans without cost sharing. Plans and insurers must also pay providers for COVID-19 testing at either the pre-emergency contract rate, or, if none, a cash price posted by the provider. Plans and insurers must also provide free coverage without cost-sharing of certain rated vaccines within 15 days for COVID-19. The coverage aspects of these provisions should be handled by an employer's insurance company or third party administrator.

HDHPs May Pay for Telehealth Pre-Deductible – Section 3701 of the Act allows a high-deductible health plan with a health savings account to cover telehealth or other remote care services prior to a participant reaching the deductible limit. This increases services available to participants who may have been exposed to or have COVID-19 without resulting in the participant being ineligible for an HSA contribution. This applies for plan years beginning on or before December 31, 2021.

Purchase of Over the Counter Medical Products from HSAs/FSAs – Section 3702 of the Act allows participants to use funds in HSAs and flexible spending accounts to purchase over-the-counter menstrual products, including those needed in quarantine and social distancing, without a prescription. This change is effective for amounts paid/expenses incurred after December 31, 2019.

Miscellaneous Provisions

DOL Authority to Delay Reporting and Disclosure Deadlines – ERISA provides that the DOL can delay any obligation such as reporting and disclosure deadlines for up to one year in the event of disasters and terrorist attacks. Public health emergencies have been added to the reasons for the delay.

ESOPs Are Eligible Entities for EIDLs – Section 1110 of the Act makes it clear that an Employee Stock Ownership Plan (ESOP) with fewer than 500 employees is eligible for SBA Economic Injury Disaster Loans (EIDL), the same as other eligible entities. Under the emergency grant portion of this section, an entity that has applied for an EIDL due to COVID -19 may request an advance of up to $10,000 and advances may be used for a number of purposes, including to pay sick leave to employees unable to work due to the direct effect of COVID -19. Advances are not required to be repaid, even if the EIDL is not granted.

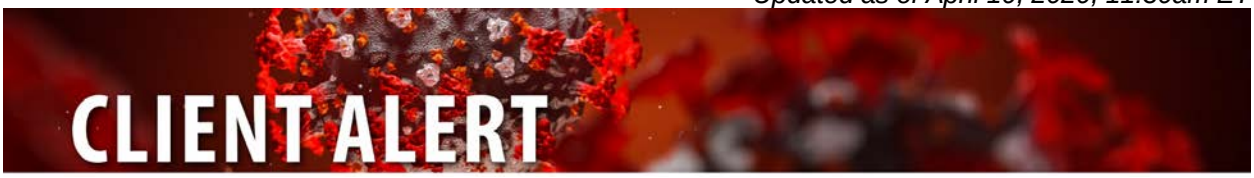
Tax-Free Employer Paid Student Loan Repayments – Section 2206 of the Act allows employers to pay up to $5,250 annually on a tax-free basis to help a student repay a student loan between date

of the Act and January 1, 2021. This applies to new and existing loan repayments and other educational assistance (e.g., tuition, fees, books) provided by the employer under current law.

About the Author:

Jordan Schreier is a Member in Dickinson Wright's Ann Arbor office and Chair of the Firm's Employee Benefits and Executive Compensation Practice Group. His practice primarily involves advising both for-profit and non-profit employers on planning and compliance issues involving all aspects of employee benefits, including welfare benefits, qualified retirement, and other deferred compensation plans. He can be reached at 734-623-1945 or JSchreier@dickinson-wright.com and you can visit his bio here.

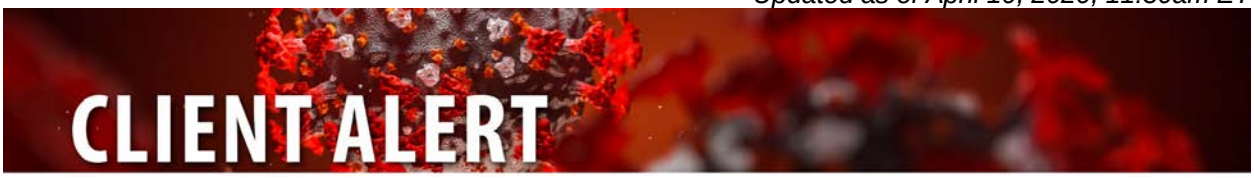
Updated as of April 10, 2020, 11:30am ET



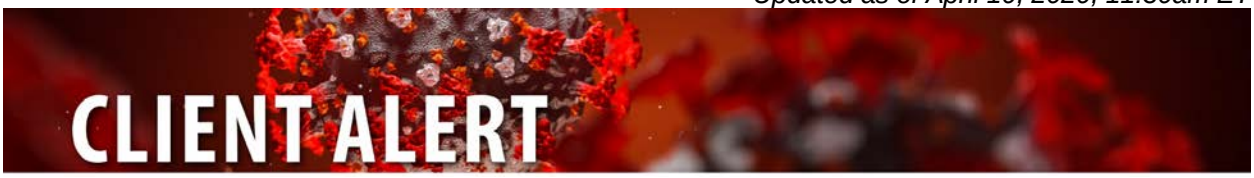
Summary: SBA Financial Assistance Under the CARES Act

The recently federally enacted Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") greatly expanded the United States Small Business Administration's ("SBA") ability to serve small and mid-sized businesses by offering new loan programs and favorably modifying existing loan programs, including increasing the number and type of U.S. companies eligible for SBA loan programs to address the impact of the coronavirus disease 2019 ("COVID-19"). Below is a summary of the updated SBA loan programs addressing COVID-19.

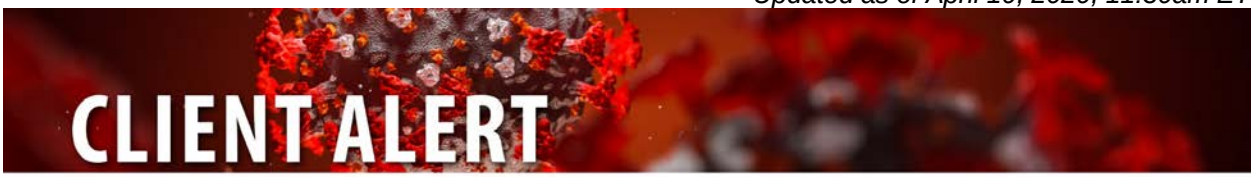
Paycheck Protection Program ("PPP"): loan to fund costs associated with retaining employees during COVID-19 by temporarily expanding the traditional SBA 7(a) loan program to cover payroll and other operating costs and providing for certain loan forgiveness	
Uses	• Payroll costs • Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums • Interest payments on mortgage obligations • Rent • Utilities • Interest payments on other debt obligations that were incurred before February 15, 2020 • Refinancing an EIDL loan made between January 31, 2020 and April 3, 2020 • 75% of the PPP loan must be used for payroll costs
Eligibility Requirements	• Business, private non-profit organization (including religious), veteran organization, tribal business, independent contractor, sole proprietorship (with or without employees), and certain self-employed individuals • In operation on February 15, 2020 • Affected by COVID-19 for the period between February 15, 2020 and June 30, 2020 (the "Crisis Period") • Meets one of the following size requirements based on affiliation[1]: 1. Qualifies as a "small business concern" based on one of the following: **(a)** meets employee-based or revenue-based size standard for applicable industry set by SBA **OR**



	(b) meets "alternative size standard" test: • maximum tangible net worth of not more than $15 million **AND** • average net income after federal income taxes (excluding any carry-over losses) of not more than $5 million, calculated based on the two full fiscal years before the date of application **OR** 2. Has 500 or fewer employees Certain exceptions to size requirements include: • Hospitality and restaurant businesses with more than 1 location- eligible if no more than 500 employees at any 1 location • Hospitality and restaurant businesses with 500 or fewer employees- not required to include affiliates in size calculation • Franchises recognized by the SBA- not required to include affiliates in size calculation • Recipients of Small Business Investment Company funds- not required to include affiliates in size calculation • Faith-based organizations- not required to include affiliates in size calculation [1] *Affiliation requires affiliated businesses to combine their employee headcounts for purposes of calculating size. A business and another entity are affiliates if one entity controls or has the power to control the other entity, or a third party controls or has the power to control both entities. Control can arise from ownership, management, agreement (including stock options, convertible securities, agreements to merge, management agreement), and identity of interest, among other bases.*
Loan Amount	250% of the average total monthly payroll costs incurred during calendar year 2019 (or during the 12-month period prior to the date the PPP loan is made for certain businesses); plus any EIDL loans being refinanced with the PPP loan Overall maximum amount of $10,000,000
Term	2 years from the date borrower applies for forgiveness of the PPP loan
Interest Rate	1%, with accrual beginning on the date the PPP loan is made



Repayment Terms	Portion of PPP loan that is used for the following during the 8-week period following receipt of the PPP loan is 100% forgiven: • Payroll costs • Interest payments on covered mortgage* obligations • Rent payments on covered lease* obligations • Covered utility* payment ***Note this does not include forgiveness for all permitted uses of the PPP loan. 75% of the amount to be forgiven must be attributable to payroll costs.*** Forgivable amounts are reduced (1) proportionately to the extent the number of full-time employees overall is reduced, and (2) dollar for dollar to the extent the salary of any employee with an annual compensation of less than $100,000 is reduced by more than 25%^ Borrower can apply for forgiveness (process to be determined), which will be determined within 60 days of such application, with submission of the following: • Documentation verifying number of full-time equivalent~ employees on payroll and their pay rates, including payroll tax filings and state income, payroll, and unemployment insurance filings • Documentation verifying payments on covered mortgage* obligations, covered lease* obligations, and covered utilities* Principal and interest payments on the PPP loan are deferred for at least 6 months and up to 1 year, and only the amount advanced but not forgiven must be repaid Amount of PPP loan forgiven is excluded from gross income Interest accrued on amount of PPP loan forgiven will also be forgiven * *Covered mortgage means a mortgage obligation that was incurred prior to the Crisis Period; covered lease means a lease that was in force prior to the Crisis Period; covered utility means utility service that began prior to the Crisis Period.* ^ *Employee headcount and salary reductions made between February 15, 2020 and April 26, 2020 can be undone by June 30, 2020 to avoid a reduction in the forgivable amount of the PPP loan.*



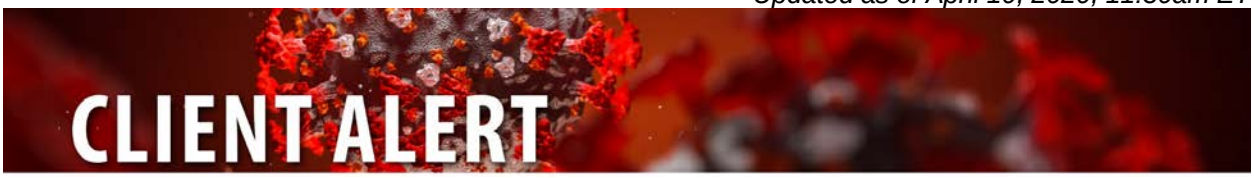
	˜ *SBA has not defined "full-time equivalent" for the PPP loan program.*
Collateral	None
Personal Guarantee	None
Fees	None paid by borrower
Prepayment Penalty	None
Application Process	Through local SBA approved commercial lender. If you need a referral, please contact a DW attorney
Estimated Timeline	• Small businesses and sole proprietorships are able to apply for and receive PPP loans beginning April 3, 2020 • Independent contractors and self-employed individuals are able to apply for and receive PPP loans beginning April 10, 2020 • Approval within 24 hours after application is submitted • Funds disbursed 10 days after approval • Program available through June 30, 2020

NOTE: For PPP loan purposes, the SBA has provided the following guidance:

"**Employee**" only includes an employee *whose principal place of residence is in the US*. Unless noted, "employee" includes full-time, part-time, or other employees, and does not include independent contractors.

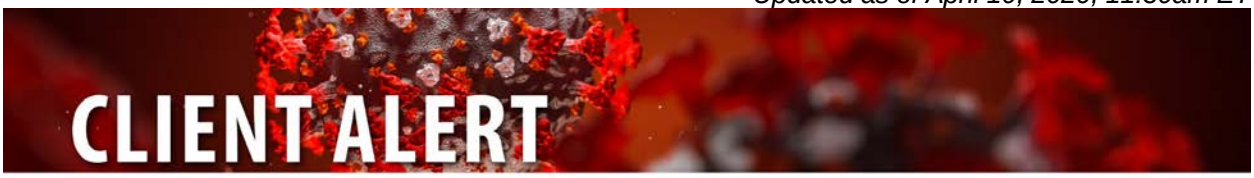
"**Payroll cost**" includes compensation to employees in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent; payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; and payment of state and local taxes assessed on compensation of employees. "**Payroll cost**" for independent contractor or sole proprietor includes wage, commissions, income, or net earnings from self-employment or similar compensation.

The following are *excluded* from "**payroll cost**": any compensation of an employee whose principal place of residence is outside of the US; compensation of an individual employee in excess of an annual salary of $100,000, prorated as necessary; federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees;



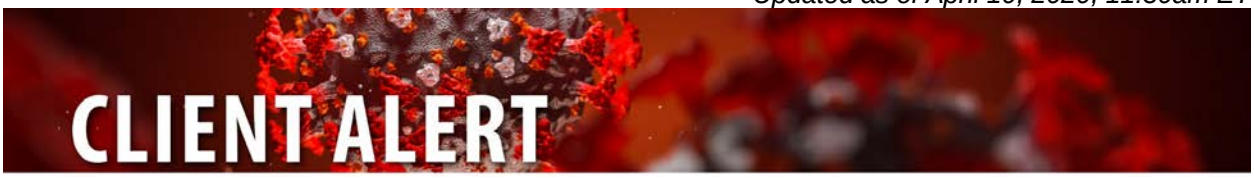
and qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act.

Economic Injury Disaster Loans ("EIDL"): provide economic relief to businesses that are currently experiencing a temporary loss of revenue due to COVID-19 by expanding the traditional SBA 7(b)(2) disaster relief loan program	
Uses	The following that could have been paid had COVID-19 not occurred: • Fixed debts • Payroll • Accounts payable • Insurance premiums • Rent • Other bills
Eligibility Requirements	• Business, private non-profit organization (including religious organizations), tribal business, independent contractor, sole proprietorship (with or without employees), self-employed individual, cooperative, ESOP, agricultural cooperative • In operation on January 31, 2020 • Meets one of the following size requirements based on affiliation+: 1. Employee-based or revenue-based size standard for applicable industry set by SBA **OR** 2. Has 500 or fewer employees • Otherwise complies with SBA guidelines (other than no credit elsewhere), including located in disaster-declared area and ability to repay
Loan Amount	Up to $2,000,000, based on SBA's review of borrower's financials; may be increased on a case-by-case basis after initial funding
Term	Up to 30 years
Interest Rate	3.75% (2.75% for non-profit organizations) with accrual beginning on the date the EIDL loan is made
Repayment Terms	Principal and interest payment deferred for 1 year



Collateral	None for EIDL loans $25,000 or less, SBA 7(a) requirements for EIDL loans over $25,000; can be waived
Personal Guarantee	None for EIDL loans $200,000 or less; SBA 7(a) requirements for EIDL loans over $200,000
Fees	None paid by borrower
Prepayment Penalty	None
Application Process	SBA (https://COVID-19relief.sba.gov/#/)
Estimated Timeline	• Approval within 2-3 weeks after application is submitted • Funds disbursed within 5 days after application is approved • Program available through December 31, 2020

EIDL Emergency Advance ("EIDL Advance"): advance on a potential EIDL loan to address the economic need between application submission and loan funding	
Uses	• Providing paid sick leave to employees unable to work due to the direct effect of the COVID-19 • Maintaining payroll to retain employees during business disruptions or substantial slowdowns • Meeting increased costs to obtain materials unavailable from original source due to interrupted supply chains • Making rent or mortgage payments • Repaying obligations that cannot be met due to revenue losses
Eligibility Requirements	• Business, private non-profit organization (including religious organizations), tribal business, independent contractor, sole proprietorship (with or without employees), self-employed individual, cooperative, ESOP, agricultural cooperative • In operation on January 31, 2020 • Meets one of the following size requirements based on affiliation+: 1. Employee-based or revenue-based size standard for applicable industry set by SBA **OR** 2. Has 500 or fewer employees
Loan Amount	Up to $10,000



Term	N/A
Interest Rate	N/A
Repayment Terms	Borrower is not required to repay any EIDL Advance, even if subsequently denied an EIDL loan If borrower transfers into or is approved for a PPP loan, the EIDL Advance amount will be reduced from the loan forgiveness amount for a PPP loan
Collateral	N/A
Personal Guarantee	N/A
Fees	N/A
Prepayment Penalty	N/A
Application Process	Apply for EIDL loan and request that $10,000 of the EIDL loan be immediately advanced
Estimated Timeline	• Funded within 3 days after application is submitted • Program available through December 31, 2020

SBA Express Bridge Loan ("Bridge Loan"): support to small businesses to help overcome the temporary loss of revenue due to COVID-19 while waiting for EIDL loan approval; can be used as an amortizing term loan if no EIDL loan	
Uses	Working capital to support the survival and/or reopening of the small business
Eligibility Requirements	• Small business • Operational as of March 13, 2020 • Adversely impacted by COVID-19 • Otherwise comply with Section 7(a) requirements (including no credit elsewhere), other than disaster-location requirement (COVID-19 location requirement is any state, territory and the

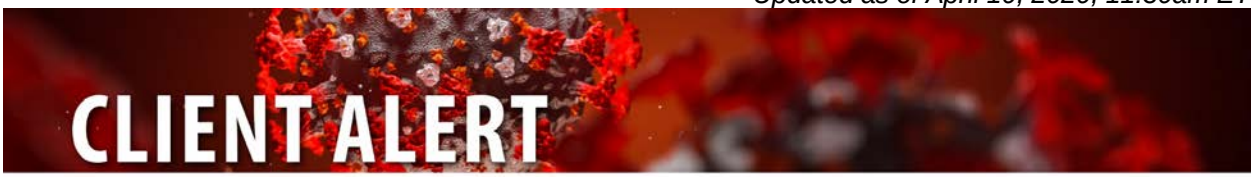
	District of Columbia that has been adversely impacted by COVID-19)
Loan Amount	Up to $25,000
Term	Up to 7 years
Interest Rate	Prime plus 6.5% with accrual beginning on the date the Bridge Loan is made
Repayment Terms	Repaid in full or in part by proceeds from EIDL loan OR Loan may amortize if borrower does not obtain EIDL loan
Collateral	Same as Section 7(a) loans
Personal guarantee	Same as Section 7(a) loans
Fees	Same as Section 7(a) loans
Application Process	Through SBA Express Lender that borrower has existing banking relationship with
Timeline	• Funded within 45 days after approval is received • Available through March 13, 2021

Additional COVID-19-related relief programs:

SBA Debt Relief
The SBA will automatically pay the principal, interest, and fees of current SBA 7(a), 504, and microloans for a period of 6 months.

The SBA will automatically pay the principal, interest, and fees of new SBA 7(a), 504, and microloans issued prior to September 27, 2020 for a period of 6 months.

Grants
The SBA will provide grants to (i) resource partners (small business development center, women's business center, and SCORE mentorship center) to provide education, training, and advising re: COVID-19 related issues to covered small business concerns and employees, and (ii) minority business centers and minority chambers of commerce for



providing education, training, and advising re: COVID-19 related issues to minority business enterprises and employees.

There will be high demand for these loans, so it will benefit you to get started on the process as soon as possible-- compile all information needed for your application; maintain complete records regarding all expenses you wish to have covered by the applicable loan; consult with your DW attorney regarding how an SBA loan may impact your existing and future obligations.

DW can help by:

- Analyzing whether an entity is an affiliate for purposes of qualifying for a PPP loan
- Advising on exceptions to eligibility requirements for a PPP loan
- Reviewing which employees can be counted for purposes of the PPP loan amount
- Explaining how changes in payroll (personnel and rate) impact the forgivable portion of the PPP loan
- Reviewing your specific circumstances to determine which loan program may work for you
- Determining whether you can you take advantage of more than one loan program

In addition to the COVID-19-related loan programs discussed, the SBA continues to offer its traditional loan programs. Many states and localities have also established programs to assist businesses with the impact of COVID-19. We are committed to guiding you not only through the SBA loan program process, and helping you secure the other capital you need, but through all of the uncertainties surrounding COVID-19. Visit our COVID-19 Development resource center for more information on how we can help.

The foregoing is a general summary on the SBA programs and is being provided with the understanding that DW is not rendering legal, tax or other professional advice, positions or opinions on specific facts or matters and, therefore, assumes no liability whatsoever in connection with its use. All requirements and terms are subject to change. We are here to consult with you regarding your specific needs and circumstances.

Please watch for in-depth descriptions of the COVID-19-related SBA loan programs and their components in our Client Alerts, as well as full coverage of the CARES Act.

Tax Blog

RELIEF FOR PARTNERSHIPS

Posted by Emily Dorisio | Apr 20, 2020

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") offers tax relief which may be beneficial to entities taxed as partnerships. These provisions include (i) retroactive relief for entities taxed as partnerships by temporarily increasing the interest deduction limitation from 30% to 50% of adjusted taxable income, and (ii) clarifying that "qualifying investment property" qualifies for bonus depreciation. These changes are retroactive to the 2018 and 2019 tax years. On April 8th, the IRS issued Rev. Proc. 2020-23 to provide procedures for partnerships subject to the Centralized Partnership Audit Regime enacted in the Bipartisan Budget Act of 2015, which includes partnerships that either did not or could not elect out of the Centralized Partnership Audit Regime provisions ("BBA Partnerships"), to allow a BBA Partnership to amend its Form 1065 U.S. Return of Partnership Income. In the absence of Rev. Proc. 2020-23, a BBA Partnership could not amend its Form 1065. Its only means of taking advantage of the retroactive CARES Act provisions would have been the filing of an Administrative Adjustment Advance, which only benefits a partner on a current income tax return, many of which would not have eligible for filing until 2021. The ability to amend the Form 1065, provides for a more immediate benefit for BBA Partnerships and their partners.

If you have questions about the CARES Act and its impact on partnerships, please call Emily Dorisio at 859.899.8714 or one of the other tax attorneys in our Tax Group.

Tax Blog

TAX RETURN FILING DEADLINE EXTENDED; TAX CREDITS MADE AVAILABLE FOR SMALL AND MIDSIZE EMPLOYERS

Posted by Troy Terakedis | Mar 24, 2020

Tax Return Due Date Extended to July 15; Tax Payments Deferred

On Friday, March 20, 2020 the United States Treasury extended the April 15, 2020 tax-filing deadline to July 15, 2020. Treasury Secretary Steven Mnuchin communicated this extension via Twitter stating, "All taxpayers and businesses will have this additional time to file and make payments without interest or penalties."

The automatic extension applies to all individual and business *federal income tax filings* that would otherwise be due on April 15.

In IR 2020-18, the IRS also confirmed that taxpayer can defer federal income tax payments (including 1st quarter estimated taxes) that were otherwise due on April 15, 2020, to July 15, 2020, without incurring penalties and interest (regardless of the amount owed). IR 2020-18 explains that this deferment applies to all taxpayers, including individuals, trusts and estates, corporations and other non-corporate tax filers as well as those who pay self-employment tax.

Importantly, taxpayers *do not need to file any additional forms* for this automatic federal tax filing and payment relief.

The deferral does not apply to payroll taxes, estate taxes or excise taxes, nor does it apply to estimated taxes due on June 15, 2020.

Tax Credits

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the "Act") which provides relief to employees and small and midsize businesses due to the COVID-19 outbreak.

Under the Act, *employers with less than 500 employees* that are required to provide emergency paid sick leave and emergency paid family and medical leave under the Act are entitled to certain tax credits based on qualifying leave they provide between the effective date of the Act and December 31, 2020. Similar credits are available to self-employed individuals as well.

For employees that are unable to work because of their own COVID-19-related health issues, such employers may receive a refundable tax credit at the employee's regular rate of pay, up to $511 per day for 10 days (for a maximum of $5,110).

For an employee who is caring for another with COVID-19-related health issues (or is caring for a child due to a school or child care facility closure or unavailability of child care provider due to COVID-19 issues), such employers may receive a refundable tax credit at two-thirds of the employee's regular rate of pay, up to $200 per day for 10 days (for a maximum of $2,000).

In addition to the aforementioned tax credits related to sick leave, if an employee is unable to work because of a need to care for a child affected by a school or child care facility closure or whose child care provider is unavailable due to COVID-19 issues, such employers may receive a refundable child care leave tax credit at two-thirds of the employee's regular pay, up to $200 per day (up to a maximum of $10,000). A total of 10 weeks of qualifying leave can be counted towards the child care leave tax credit.

The Department of Treasury and the IRS have indicated that guidance will be released this week allowing eligible employers who pay qualifying sick leave or child care leave to retain a corresponding amount of payroll taxes instead of depositing them with the IRS.

For more information, please contact J. Troy Terakedis at 614-744-2589, or any one of the attorneys in our Tax Group or Employee Benefits Group.

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Estate Planning Amidst the Coronavirus Pandemic

IRS Provides Details on the Extension of the April 15 Filing Date

Tax Blog

TAX TIP FOR TAX-EXEMPT HOSPITALS: IRS RELIEF FOR THE COMMUNITY HEALTH NEEDS ASSESSMENTS REQUIREMENTS

Posted by Emily Burdick | Jul 27, 2020

Recognizing the increased burdens that the COVID-19 pandemic has placed on hospitals, the IRS has relaxed its deadline for meeting the Community Health Needs Assessments (CHNA) requirements per Internal Revenue Code Section 501(r)(3). See Notice 2020-56. To maintain their tax-exempt status, non-profit entities that operate hospitals must meet additional requirements, one of which relates to the conduct of a Community Health Needs Assessment and the adoption of an implementation strategy to meet the community health needs identified in the CHNA.

The new deadline is December 31, 2020—previously, the IRS extended it to July 15, 2020.

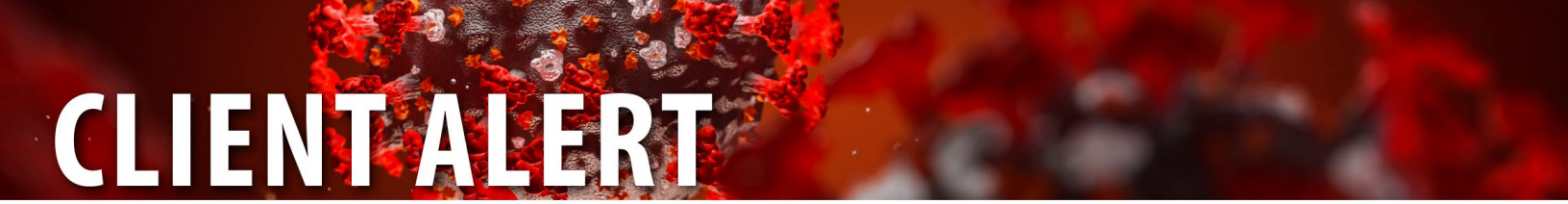
Tax-exempt hospital organizations filing Forms 990 are ordinarily required to indicate on Schedule H if they have conducted a CHNA in the current taxable year or in either of the two immediately preceding taxable years and if they have adopted an implementation strategy to meet the significant health needs identified through the most recently completed CHNA. Failure to do so may affect the hospital's tax-exempt status and the IRS may impose a $50,000 tax on a hospital organization for each hospital facility that fails to meet either or both of these requirements.

IRS requires that hospitals using the relief in Notice 2020-56 that file Form 990 prior to December 31, 2020, should state in the narrative of Part V.C. of Schedule H (Form 990) that they are eligible for and are relying on the relief provided in the Notice 2020-56, and should not be treated as failing to meet the requirements of section 501(r)(3) prior to December 31, 2020.

In practice this means, "for example, if a[] [tax exempt hospital] was required to conduct a CHNA by April 30, 2020 (the end of the third taxable year) and was required to adopt an implementation strategy by September 15, 2020, the [tax exempt hospital] now has an extension until December 31, 2020, to complete both steps." Notice 2020-56. The tax exempt hospital cannot perform either step in a later tax year after December 31, 2020.

If you have any questions or would like more information, please contact Emily L. Burdick in the Detroit office at (313) 223-3127 or any other member of the Dickinson Wright Tax Team.

Disclaimer



INTELLECTUAL PROPERTY ALERT

UPDATED: TEMPORARY AUTHORITY OF DIRECTOR OF THE USPTO DURING THE COVID–19 EMERGENCY

by Steven D. Lustig

The U.S. Congress, as part of its Coronavirus Aid, Relief, and Economic Security (CARES) Act, passed a measure giving the Director of the USPTO the authority to toll, waive, adjust, or modify, any timing deadline under the Trademark Act and the America Invents Act. The Director's authority is temporary and lasts for the duration of the COVID-19/coronavirus emergency. The bill was signed into law March 27th.

The Director has been authorized to take such action if it is determined that: 1) the emergency materially affects the functioning of the Patent and Trademark Office; 2) prejudices the rights of applicants, registrants, patent owners, or others appearing before the Office; or 3) prevents applicants, registrants, patent owners, or others appearing before the Office from filing a document or fee with the Office.

Pursuant to this authority, the Director published a notice on March 31st, that can be found here: https://www.uspto.gov/coronavirus.

For **trademarks, deadlines that would have fallen between March 27th and April 30th will be extended 30 days,** provided that the filing is accompanied by a statement that the delay was due to the COVID-19 outbreak. **The 30 day extension is not automatic and will only be applied where the filing is accompanied by a statement that the delay was due to the COVID-19 outbreak.** The 30 day extension includes the following: Responses to office actions; Notices of Appeal; Statements of use or corresponding extension requests, Declarations of use or excusable non-use; Renewal applications; Notices of opposition or corresponding extension requests, Paris convention application priority deadlines; and Madrid protocol transformation deadlines. For further details relating to trademark proceedings, click here.

For **patents, deadlines that would have fallen between March 27th and April 30th will be extended 30 days,** provided that the filing is accompanied by a statement that the delay was due to the COVID-19 outbreak. **The 30 day extension is not automatic and will only be applied where the filing is accompanied by a statement that the delay was due to the COVID-19 outbreak.** The 30 day extension includes the following: Responses to office actions during examination or pre-examination; Issue fees; Notices of Appeal; Appeal Briefs; Requests for oral hearings; Responses to a substitute examiner's answer; Amendments in response to, or a request for rehearing; maintenance fees; and Requests for rehearing of a PTAB decision. For further details relating to patent proceedings, click here.

Similar authority has been given to the Register of Copyrights.

Dickinson Wright will update this Client Alert as more information becomes available. Updated USPTO notices related to the COVID-19/coronavirus emergency can be found at this link: https://www.uspto.gov/coronavirus.

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Health Law Blog

TEMPORARY RELAXATION OF SUPERVISION AND CREDENTIAL REQUIREMENTS FOR HEALTHCARE PROVIDERS

Posted by Kimberly Ruppel | Mar 30, 2020

On March 29, 2020, Governor Gretchen Whitmer issued Executive Order 2020-30 temporarily suspending a number of supervision and credential requirements applicable to healthcare providers. These changes are intended to remain in effect during the public health emergency resulting from the COVID-19 pandemic and apply only to healthcare providers currently in possession of a license in good standing, as well as to hospitals, nursing homes, surgical outpatient facilities, and medical first response services, whether state-run or privately owned.

Suspension of Scope of Practice, Supervision, and Delegation Requirements. Scope of practice, supervision and delegation requirements are temporarily suspended with respect to healthcare services provided in response to the COVID-19 pandemic, appropriate to the professional's education, training, and experience, as follows:

- No criminal, civil or administrative penalties will be imposed related to lack of supervision by a licensed physician or lack of a written practice agreement with a physician;
- Physician assistants may practice appropriate to the professional's education, training, and experience without a written practice agreement with a physician;
- Advanced practice registered nurses, including nurse anesthetists may practice appropriate to the professional's education, training, and experience without a written practice agreement with a physician;
- Registered nurses and licensed practical nurses may order the collection of throat or nose swab specimens from individuals for COVID-19 testing;
- Licensed practical nurses may practice appropriate to the professional's education, training and experience without supervision by a registered nurse;
- Licensed pharmacists may provide care for routine health maintenance, chronic disease states or similar conditions, as appropriate to the professional's education, training, and experience without physician supervision.

Students Allowed To Support COVID-19 Response. Based on the discretion of a facility's medical leadership, students and others may assist in the following manner:

- Students enrolled in a healthcare profession program may assist in response to the COVID-19 pandemic as appropriate to the student's education, training, and experience;
- Medical students, physical therapists, and emergency medical technicians may assist as "respiratory therapist extenders" under the supervision of a physician, respiratory therapist or advanced practice registered nurse. Allowed services include assisting respiratory therapists and other healthcare professionals in the operation of ventilators or related devices and other services

necessary to support the response to the COVID-19 pandemic, as appropriate to the provider's education, training, and experience.

Authorization for Out of State Shipment and Distribution of Controlled Substances. Drug manufacturers or wholesale distributors licensed in another state are temporarily authorized to distribute and ship controlled substances into Michigan hospitals, licensed manufacturers, or wholesale distributors.

Use of Other Facilities' Personnel or Volunteers. One facility may use qualified volunteers or personnel affiliated with another facility as set forth in this Order, including temporary suspension of supervision requirements set forth above.

Limitations on Liability. Healthcare services provided in response to COVID-19 are not subject to liability or absent gross negligence.

- Unlicensed volunteers or students are entitled to immunity from liability as disaster relief personnel;
- Licensed healthcare professionals and designated healthcare facilities are entitled to immunity from liability sustained in connection with services provided.

Suspension of Credential Renewal and Expiration Rules. Renewal of a license, certification or registration will not be denied and expirations will be suspended in the following circumstances:

- Suspension of exam requirement, to the extent administration of the exam was canceled during the public health emergency;
- Suspension of fingerprinting requirement, to the extent a location is unavailable due to closures. All employee fingerprinting conditions for licensure and certification of hospitals, nursing homes, county medical care facilities or psychiatric hospitals are temporarily suspended;
- Professional certifications in basic life support, advanced cardiac life support or first aid will not expire during the public health emergency;
- Deadlines for 911 telecommunicators and trainees to complete training or continuing education are suspended for 60 days.

About the Author:

Kimberly Ruppel is a Member of Dickinson Wright's Troy office. For over 19 years, Kim has provided counsel and representation to clients in a range of commercial and business disputes and litigation. Known as a trusted advisor with a skill for developing efficient and cost-sensitive solutions, Kim represents clients in matters related to healthcare disputes and litigation, HIPAA compliance, governmental investigations, ERISA and insurance claims and coverage issues, probate, fiduciary and trust litigation, and class actions in state and Federal courts. Kim can be reached at 248-433-7291 or kruppel@dickinsonwright.com.

THE CARES ACT: CHANGES SPECIFICALLY IMPACTING HEALTH CARE PROVIDERS AND SUPPLIERS

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act, also known as the CARES Act (the "Act"). The purpose of the Act is to address the numerous areas impacted by the COVID-19 pandemic, including public health, business, economic, and others. This article sets forth major impacts of the Act on health care providers and suppliers.

Health Insurer Reimbursement of COVID-19 Services

The Act modified the Families First Coronavirus Response Act ("FFCRA") to increase access to care during the COVID-19 pandemic. Health insurance plans covering diagnostic tests are required under the Act to reimburse a provider either at a rate negotiated with the provider or an amount equal to the cash price for the test listed on the provider's public website. It is important to note that the Act requires providers of COVID-19 diagnostic tests to make their cash price for their tests available on their public websites. Providers who do not publicize the cash price for their diagnostic test(s) could face a civil monetary penalty of $300 per each day that they are out of compliance.

Additionally, health insurance plans are required to cover the costs of any "qualifying coronavirus preventive services" without cost-sharing being imposed on the patients. "Qualifying coronavirus preventive services" are items, services, or immunizations that are intended to prevent or mitigate COVID-19 and are either an evidence-based item or service with an "A" or "B" rating, or an immunization that recommended by the Centers for Disease Control and Prevention.

Limitations on Liability

Congress has stepped into an area of traditional state law by limiting the liability of a health care professional for any harm caused by any act or omission while providing services under certain circumstances during the public health emergency. The limitation of liability applies if the professional is:

1. Providing care or services as a volunteer;

2. The act or omission occurs in the course of providing services in the capacity of a volunteer;

3. The services are within and do not exceed the scope of his/her license under state law;

4. The services were related to the diagnosis, prevention, or treatment of COVID-19 or the assessment or care of an actual or suspected case of COVID-19; and

5. The professional was acting in good faith.

This limitation on liability does not apply if the professional acted with willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed or if he/she provided services while under the influence of alcohol or an intoxicating drug.

Confidentiality of Substance Use Disorder Records

The Act makes several important changes to the confidentiality of substance use disorder records. While consent of the patient is still required to make a disclosure, once prior written consent is obtained, the contents "may be used or disclosed by a covered entity, business associate, or a program subject to this section for purposes of treatment, payment, and health care operations as permitted by the HIPAA regulations. Any information so disclosed may then be redisclosed in accordance with the HIPAA regulations." 42 U.S.C. 290dd-2(b)(1)(B). The patient's consent only needs to be obtained once, unless the patient revokes the consent in writing. Additionally, the Act permits substance use disorder records to be de-identified in accordance with HIPAA and to be disclosed to a public health authority. Please see "SUD Program Privacy Rules Modified by CARES ACT" available at: https://www.dickinson-wright.com/news-alerts/sud-program-privacy-rules-modified-by-cares-act for more information on these changes.

Congress has directed the Secretary to issue guidance within 180 days after the enactment of the Act on sharing a patient's information in response to public health emergencies.

Additional Telehealth Modifications

The Act modifies a number of provisions related to telehealth services to increase access during this emergency period. Most of these changes have been made to increase access for Medicare and Medicaid beneficiaries. One interesting change not directly related to reimbursement is the modification to the Internal Revenue Code's (the "IRC") deductions for Health Savings Accounts ("HSAs"). 26 U.S.C. 223. Under the IRC, individual taxpayers are eligible for an itemized deduction for payments to HSAs. For eligibility, an individual must be covered by a high-deductible health plan, which is a plan with an annual minimum deductible of $1,000 for an individual or $2,000 for a family, and the sum of the annual deductible and other out-of-pocket expenses of not more than $5,000 for an individual and $10,000 for a family. The modification creates a safe harbor so that plans charging no deductible for telehealth and other remote care services can still qualify as a high-deductible health plan and individuals can remain eligible for the deduction for contributions to HSAs.

The Act also modifies the waiver authority under Section 1135 of the Social Security Act (the "SSA"), 42 U.S.C. 1320b-5, to give the Secretary greater flexibility to grant waivers from requirements related to telehealth during an emergency period. The limitation requiring a "qualified provider" to provide the service was removed. A "qualified provider" was a physician

or practitioner who furnished services to a beneficiary or is in a practice with another physician who furnished an item or services to a beneficiary in the three years prior to the telehealth service. Additionally, the limitations that the facility fee can only be paid to an "originating site" and that a telephone used for telehealth must have audio and video capabilities were removed. These provisions were limitations on the Secretary's Section 1135 waiver authority; they do not change the general telehealth requirements.

Prior telehealth coverage requirements specified that the "physician or practitioner located at a distant site that furnishes a telehealth service to an eligible telehealth individual" would receive payment. A "distant site" was previously limited to "the site where the physician or practitioner delivering the service is located at the time the service is provided via a telecommunications system." 42 C.F.R. 410.78(a)(2). However, during an emergency period, Federally Qualified Health Centers and Rural Health Clinics now can also act as distant site providers and be reimbursed by Medicare for the telehealth services. Additionally, Congress has advised that these payments made to Federally Qualified Health Centers and Rural Health Clinics are not to be used to calculate payments under the prospective payment system.

The Act also makes important changes to the use of telehealth for certain home care services. Prior requirements for patients receiving home dialysis treatment required a physician to complete an in-person clinical assessment monthly during the initial three month period and then once during each subsequent three month period. These restrictions have been temporarily suspended to permit the monthly assessments to be done through a telehealth service. Additionally, the face-to-face encounter prior to the 180th-day recertification for home health services can be completed through telehealth. Congress has directed the Secretary to consider how telehealth, remote patient monitoring, and other technology-based services can be used by home health agencies to provide services in a manner consistent with the patient's plan of care. It is important to remember, these changes are for the emergency period only, and do not permanently modify restrictions on these services.

Congress granted the Secretary additional authority to authorize grants related to telehealth networks and services, for the purpose of expanding access to these services and supporting initiatives that utilize telehealth technologies.

Modifications to Home Health Services

The Act also makes important changes to the normal provision of home health services. One important change is the expansion of the scope of nurse practitioners, clinical nurse specialists, and physician's assistants in the provision of home health services, from the date of enactment of the Act to a period set by the Secretary no more than six months from enactment. Nurse practitioners, clinical nurse specialists, and physician assistants will be permitted, during this period, to certify and recertify patients for home health services and review the patient's plan of care. Additionally, while prior law required patients to be under the care of a physician, during

the emergency period, beneficiaries can be under the care of nurse practitioners, clinical nurse specialists, and physician's assistants and still qualify for services. Finally, during this period, nurse practitioners, clinical nurse specialists, and physician's assistants may also prescribe covered osteoporosis drugs to be furnished by a home health agency. In order to qualify, nurse practitioners, clinical nurse specialists, and physician's assistants must be licensed and acting within the scope of State law and must be enrolled as Medicare providers. This expansion also applies to Medicaid covered home health services.

Modifications to Payments

The Act includes multiple modifications to the payment rates. The weighting factor for the diagnosis related group for a discharge of a beneficiary diagnosed with COVID-19 under the inpatient prospective payment system ("IPPS") is to be increased by 20%. Notably, this increase is not to be used in applying budget neutrality requirements of the IPPS.

Payments for durable medical equipment ("DME") are transitioning based on a list of factors enumerated in 42 C.F.R. 414.210. Medicare had originally established a transition period that went through December 31, 2020. However, Congress has extended these transition periods through the emergency period, if the emergency period extends past that date. For rural and noncontiguous areas (Alaska, Hawaii, and U.S. territories), the payment amount will be equal to 50% of the adjusted amount and 50% of the unadjusted fee schedule amount. For other areas, the DME fee schedule is equal to 75% of the adjusted payment amount and 25% of the unadjusted amounts for items furnished.

Finally, Congress has expanded which hospitals with significant cash flow problems may request accelerated payments. This expansion now includes hospitals with inpatient populations predominantly under the age of 18, hospitals operating a demonstration project, hospitals recognized as comprehensive cancer centers, cancer research centers, or clinical centers, and critical access hospitals. These hospitals may request accelerated payments on a periodic or lump sum basis. Additionally, at the request of the hospital, the Act provides a 120-day grace period before claims are offset to recoup the accelerated payments and grants the hospital 12 months before the full amount of the accelerated payment is due.

Increased Access to Acute Care and Post-Acute Care Services

The Act permits acute care hospitals serving a disproportionate number of low-income patients to provide home and community-based services approved by the Secretary under a waiver or demonstration project, so long as the services are identified in an individual's person-centered care plan, provided to meet the needs of the patient that are not met through hospital services, do not substitute for hospital services the hospital is required to provide, and are designed to ensure smooth transitions between acute care and home and community-based services.

The Act also waives several requirements related to post-acute care for patients in an inpatient rehabilitation facility ("IRF") and long-term care hospitals ("LTCH"). The requirements that beneficiaries be capable of three hours of therapy, five days per week ("15-hour therapy requirement") in order for an IRF claim to be considered medically necessary have been waived for the emergency period. For LTCHs, the requirements that they must achieve a 50% discharge payment percentage and the site-neutral IPPS payment rate for admissions have been waived during the emergency period.

Medication Changes

The Act has included the "COVID-19 vaccine and its administration" in the definition of "Medical and other health services" under Medicare Part B. Additionally, the COVID-19 vaccine and its administration have been excluded from the deductible beneficiaries are required to pay, so that beneficiaries would not be required to pay for these services.

Congress has also directed that Medicare Part D prescription drug plans or Medicare Advantage Prescription Drug Plan ("MA-PD") permit enrollees to receive a three-month supply of their Part D covered medication unless there is an applicable safety edit assigned to that drug.

Increased Funding for Certain Programs

The Act has expanded both the time period numerous programs may receive funding and the amount of funding they may receive. Funding for Qualified Teaching Health Centers for direct and indirect expenses related to maintaining, expanding, and establishing new graduate medical residency training programs has been increased for 2018 and 2019 to $126,500,000 for the fiscal year 2020, and an additional $21,141,096 has been approved for the period of October 1, 2020, through November 30, 2020.

There is additional funding for diabetes programs. For programs researching type I diabetes, there is an increase for the fiscal year 2020 to $150,000,000 and an additional $25,068,493 for the period of October 1, 2020, through November 30, 2020. For programs for the prevention and treatment of diabetes through Indian health facilities, there is an increase to $150,000,000 through the fiscal year 2020 and an additional $25,068,493 for the period of October 1, 2020, through November 30, 2020.

Congress has also appropriated $1,320,000,000 for the fiscal year 2020 for supplemental grants awarded by the Secretary of the U.S. Department of Health and Human Services (the "Secretary") for "the detection of SARS-CoV-2 or the prevention, diagnosis, and treatment of COVID-19."

The Act modifies grants for rural health care services. The current Public Health Act grants apply to programs "to expand access to, coordinate, and improve the quality of *essential* health care services." 42 U.S.C. 254c(d)(2)(A) (emphasis added). The Act modifies this to apply to "basic

health care services," rather than "essential health care services. Additionally, an entity no longer needs to be a rural public or rural nonprofit private entity to qualify for these grants. The Act expands the qualifications to any "entity with demonstrated experience serving, *or the capacity to serve*, rural underserved populations." These modifications, while small in words, could have significant benefits to providers looking to serve rural areas and the services they can provide.

Congress has appropriated $40,737,000 for eligible entities or health professional schools/programs to establish Geriatrics Workforce Enhancement Programs. Grant recipients shall support the training of health professionals in geriatrics. Additionally, the Secretary may provide geriatric academic career awards to eligible entities to promote career development of academic geriatricians or geriatrics health professionals. Awards are limited to five years and shall be at least $75,000 for the fiscal year 2021, and will be adjusted in subsequent years in accordance with the consumer price index.

Congress also expands grants to nursing programs and creates a new Authorized Clinical Nurse Specialist Program to provide training to clinical nurse specialists and qualified nurses to effectively provide care through the wellness and illness continuum to patients with acute and chronic illnesses.

Medical Supplies and Shortages

Under the Act, Congress directed the Secretary to review and assess the medical product supply chain within 60 days, focusing on critical drugs and devices sourced or manufactured outside the United States, gaps in the supply chain, and the economic impact of increased domestic manufacturing, and to report on recommendations to improve the supply chain. Such recommendations could have significant impacts on supply chains for practitioners, affecting where and how they get their medical supplies in the future.

Manufacturers of life-supporting drugs, life-sustaining drugs, drugs for a debilitating disease and condition, or drugs critical to public health emergencies must now disclose the reason for a discontinuance or interruption of such drugs. Congress directed the Secretary to prioritize and expedite the review of new drug applications for drugs to help mitigate the harm of discontinuation or interruption. The Secretary is also directed to prioritize and expedite inspections of facilities that could help mitigate or prevent drug shortages. Manufacturers of such drugs must also develop Risk Management Plans to identify and evaluate the risk to drug supplies, and such plans may be inspected and copied by the Secretary.

Congress has also placed a new obligation on medical device manufacturers. A manufacturer of a device that is critical during a public health emergency or which the Secretary determines information is needed in the event of potential disruptions must notify the Secretary of a permanent discontinuance or an interruption that would likely lead to a meaningful disruption in the supply of that device. Manufacturers will be required to submit this notification either during

or in advance of a public health emergency; or at least six months (or as soon as practicable) prior to an expected discontinuance or interruption.

Additionally, the Secretary must establish and make an up-to-date list of devices the Secretary determines to be in shortage in the United States which shall be disclosed to appropriate organizations, including physicians, health providers, patient organizations, and supply chain partners. However, the Secretary is not permitted to violate any rights to trade secrets and confidential information in these public filings or disclose information that would adversely affect public health.

Conclusion

Above are key highlights of the changes implemented by the CARES Act. Do not hesitate to reach out to your Dickinson Wright Health Care Attorneys with any questions you may have regarding the changes. We are here to help you navigate through these changes.

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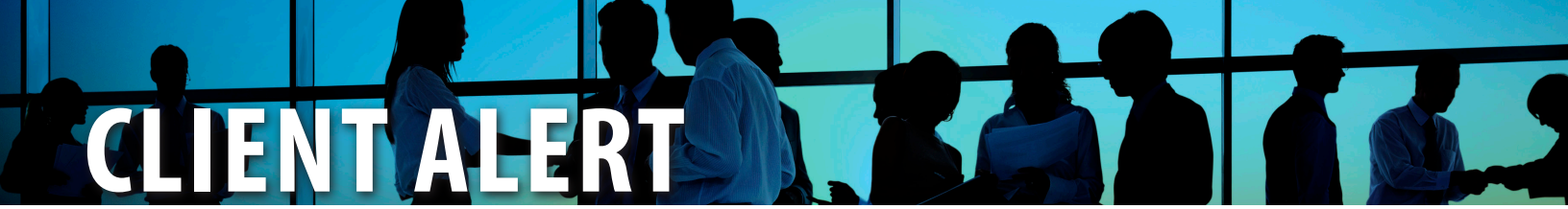

CORPORATE

THE CRISIS LURKING WITHIN: *FORCE MAJEURE* AND THE CORONAVIRUS

by Scot C. Crow and William H. Dorton

Since doctors first identified a new strain of the coronavirus (COVID-19) in China last December, the virus has rapidly spread throughout the world leaving government officials, non-governmental organizations, health care workers and the general population scrambling.

By January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization (WHO) had declared the outbreak a "public health emergency of international concern." And, as of March 26, 2020, over 160 countries, including the United States, have reported cases of the coronavirus, with the death toll climbing.[1]

Due to these unprecedented times, government and non-governmental organizations have implemented state and nationwide quarantines as well as shelter-in-place orders and travel restrictions in an attempt to contain the virus. These massive disruptions to transportation and supply chains have created economic turbulence and caused substantial disruption to normal course operations in nearly every industry and market sector.

Businesses are faced with difficult choices in this challenging and evolving environment. Working with an attorney to examine your contractual and legal rights and obligations is critical to safeguarding yourself from the chaotic and potentially damaging impacts of these unpredictable and unprecedented disruptions.

Many businesses will be forced to invoke contractual *force majeure* clauses – a legal term commonly buried deep in business contracts that offers parties a potential escape clause if an event beyond their control prevents fulfilling their contractual obligations. We have provided a summary of some of the common issues relating to *force majeure* provisions with emphasis on the current market disruption due to COVID-19.

What is a *force majeure* clause?

Force majeure clauses are contractual defenses that may be invoked when a party is forced to suspend or discontinue its performance under certain unusual circumstances. Generally, the affected party must not have reasonably been able to foresee or avoid the precipitating event and must take appropriate steps to mitigate its impact where possible. The affected party must also provide timely notice to its counterparty.

These clauses are creatures of contract law. As such, the state law that governs the contract will apply to their interpretation. Courts will generally enforce a *force majeure* provision in accordance with its stated terms, similar to any other contractual provision. It should be noted, though, that the tendency is to construe these provisions narrowly as courts consider them to be somewhat extraordinary relief. It is also important to note that the party seeking to invoke the *force majeure* provision as a defense to non-performance must have otherwise been capable of performing. *Force majeure*, in other words, will not excuse non-performance unless such non-performance was directly caused by the precipitating event.

Does the coronavirus pandemic count as *force majeure*?

While a health crisis is not typically included expressly in a *force majeure* clause, for some companies the coronavirus epidemic may qualify due to the rapid spread of the virus and associated worldwide labor shortages, factory closures and significant supply chain disruptions. Even if a contract does not include an explicit *force majeure* exception for pandemics, these clauses may be applied to an array of unusual and extreme circumstances and it is certainly within a business's right to turn to the legal system for assistance during these arduous times.

Does *force majeure* go beyond commodity markets?

Force majeure clauses can be applied to almost any business situation. The havoc wrought by the coronavirus, for example, extends beyond goods and materials and most definitely affects services and events as well. Whether it be the cancellation of an event, loss of attendance or disruption to other services provided, a legal team can help you determine how to proceed in a way that minimizes losses and provides solutions that work for all interested parties.

What if I receive a *force majeure* notice?

The COVID-19 disruption has launched nearly every business into uncharted territory. If you are concerned with invoking the *force majeure* clauses in your contracts, it is likely that your contractual counterparties are considering doing the same. In the event that you receive a *force majeure* notice, the basic principle is to consider whether the disruption caused by COVID-19 fits within the express language of the *force majeure* clause, whether there are steps the counterparty could have taken to mitigate the disruption and whether the counterparty provided adequate notice. It is also worth noting that if you provide a *force majeure* notice to your counterparty in order to excuse your non-performance, that may provide grounds for your counterparty to claim the same defense to its own non-performance.

What if a contract does not contain a *force majeure* clause?

A *force majeure* provision is a contractual device used to protect parties from unusual circumstances that are beyond their control. There are, however, common law doctrines that may apply to the same effect under similar circumstances, and these doctrines might provide protection even in the absence of a *force majeure* clause.

The Uniform Commercial Code ("UCC") provides standard rules that apply to sales of goods. Under the UCC, a seller of goods may be excused from performance under certain circumstances. Circumstances where this doctrine might be invoked during the current crisis are outlined below.

- If the seller must suspend operations due to a governmental regulation or order, it may be excused pursuant to UCC § 2-615.

- Similarly, if certain contingencies occur that render the seller's performance impracticable due to unforeseen events beyond its control, its obligations may be excused pursuant to UCC § 2-615.

Note that, under each of these circumstances, the customer may terminate or modify the contract by agreeing to take any allocation of production and deliveries available by the supplier pursuant to UCC § 2-616. In addition, a seller also has an obligation under the UCC to equitably allocate production and deliveries if the impracticability allows for partial performance.

There are common law and equitable principles that may similarly apply to the sale of services. These are state-specific and would require a detailed analysis of the common law and equitable principles applicable in the subject jurisdiction.

How can business owners chart this unprecedented territory?

Beyond taking basic steps to alleviate the effect of coronavirus on their day-to-day dealings, there are several actions business owners can take to ensure that they stay ahead of the unknown. These are highly fact-driven inquiries and depend upon the specific language of the contract at issue.

- Review your contract and determine what provisions it makes regarding delayed performance due to *force majeure*.
- Provide timely notice of a *force majeure* event.
- Seek to mitigate or avoid the *force majeure* event if at all possible.
- Document everything.
- Prepare for potential litigation.
- If possible, update *force majeure* clauses to include phrasing that allows for modern risks.
- When signing new contracts, consider explicitly stating that the parties are unaware of any potential *force majeure* events (see UCC § 2-615).
- If signing new contracts in the coming days and weeks, consider adding language allowing for each party to take reasonable measures to suspend or slow down operations as necessary to protect the health of its employees and comply with legal requirements implemented to confront the COVID-19 pandemic.

As always, Dickinson Wright attorneys stand ready and available to answer any questions and assuage any legal concerns as the coronavirus pandemic continues to evolve. Please don't hesitate to reach out to us today.

[1]https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/world-map.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Flocations-confirmed-cases.html (accesses March 25, 2020).

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CLIENT ALERT

THE FEDERAL GOVERNMENT ANNOUNCED NEW MEASURES TO ASSIST SENIORS DURING THE COVID-19 PANDEMIC

by Michael B. Miller, Wendy G. Hulton, and Carly J. Walter

On May 12, 2020, the federal government announced additional measures to help Canadian seniors and provide them with greater financial security during the COVID-19 emergency.

These new measures include:

- Providing $2.5 billion in additional financial support for a one-time tax-free payment of $300 for seniors eligible for the Old Age Security (OAS) pension, with an additional $200 for seniors eligible for the Guaranteed Income Supplement (GIS). This measure would give a total of $500 to individuals who are eligible to receive both the OAS and the GIS, to help cover increased costs caused by COVID-19.

- Expanding the New Horizons for Seniors Program with an additional investment of $20 million to support organizations that offer community-based projects that reduce isolation, improve the quality of life for seniors, and help them maintain a social support network.

- Temporarily extending GIS and Allowance payments if seniors' 2019 income information has not been assessed. This will ensure that the most vulnerable seniors continue to receive their benefits when they need them the most. To avoid an interruption in benefits, seniors are encouraged to submit their 2019 income information as soon as possible and no later than October 1, 2020.

The additional funding is on top of other supports for seniors, including an increase in the GST credits for low-income seniors, and $350 million for charities that serve our most vulnerable, such as the United Way.

Learn more about resources available for senior citizens in Canada by reading our COVID-19 Guide for Seniors.

Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

THE UNITED STATES ISSUES 90 DAY CUSTOMS DUTIES DEFERRAL FOR COMPANIES EXPERIENCING SIGNIFICANT FINANCIAL HARDSHIP DUE TO COVID-19

by Dan Ujczo and Bruce Thelen

The United States has imposed a 90 day deferral for the deposit of customs of duties due March 1 – April 30, 2020 for companies experiencing significant financial hardship as a result of COVID-19. The deferral is temporary and limited to general customs duties. The deferral does not apply to special tariff measures such as the "steel and aluminum tariffs" (Section 232) and the "China tariffs" (Section 301).

The April 18, 2020 "Executive Order on National Emergency Authority to Temporarily Extend Deadlines for Certain Estimated Payments" (available at https://www.whitehouse.gov/presidential-actions/executive-order-national-emergency-authority-temporarily-extend-deadlines-certain-estimated-payments/) and the April 19, 2020 "Temporary Final Rule issued by U.S. Customs and Border Protection (US-CBP) and the Secretary of Treasury" (available at https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/Temporary-Postponement-of-Payment-Period_for-DTF-20-4-2020-1.pdf), establishes the following eligibility requirements, procedures, and restrictions:

1. **Significant Financial Hardship:** A company seeking the deferral must demonstrate that its "operation must be fully or partially suspended during March or April 2020 due to orders from a competent governmental authority limiting commerce, travel, or group meetings because of COVID-19, and as a result of such suspension, the gross receipts of such importer for March 13–31, 2020 or April 2020 are less than 60 percent of the gross receipts for the comparable period in 2019." The company need not file additional documentation with US-CBP to be eligible for this relief "but must maintain documentation as part of its books and records establishing that it meets the requirements for relief."

2. **Deferral of Payments and Interest for March and April 2020:** The relief is a deferral as opposed to a suspension, meaning that the customs duties will need to be paid at least 90 days from the required date of deposit. The process "temporarily postpones the deadline for importers of record to deposit certain estimated duties, taxes, and fees that they would ordinarily be obligated to pay as of the date of entry, or withdrawal from warehouse, for consumption, for merchandise entered in March or April 2020, for a period of 90 days from the date that the deposit would otherwise have been due but for this emergency action." In addition, no interest that would otherwise accrue upon such estimated duties, taxes, and fees will accrue during the 90-day postponement period.

3. **No Refunds if Previously Deposited:** The temporary postponement does not permit the return of any deposits of estimated duties, taxes, and/or fees that have been paid. As most companies pay the deposits within 10 days of entry, the most likely benefit will be for those deposits due in April 2020.

4. **Does Not Apply to Special or Extraordinary Tariff Measures:** This temporary postponement also does not apply to any entry, or withdrawal from warehouse, for consumption, or any deposit of estimated duties, taxes, or fees for the entry, or withdrawal from warehouse, for consumption, where the entry summary includes any merchandise subject to one or more of the following:

   a. AD/CVD—antidumping duties (assessed pursuant to 19 U.S.C. 1673 et seq.) and countervailing duties (assessed pursuant to 19 U.S.C. 1671 et seq.)
   b. National Security Tariffs (e.g., steel and aluminum tariffs)—duties assessed pursuant to Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862)
   c. Safeguards—duties assessed pursuant to Section 201 of the Trade Act of 1974 (19 U.S.C. 2251 et seq.)
   d. "China Tariffs"—duties assessed pursuant to Section 301 of the Trade Act of 1974 (19 U.S.C. 2411 et seq.)

5. **Does Not Apply to Any Other Debts and Payments Due to US-CBP:** The temporary postponement does not apply to deadlines for the payment of other debts to US-CBP, including but not limited to deadlines for the payment of bills for duties, taxes, fees, and interest determined to be due upon liquidation or reliquidation, deadlines for the payment of fees authorized pursuant to 19 U.S.C. 58c (except for merchandise processing fees and dutiable mail fees), or deadlines for the payment of any penalty or liquidated damages.

The intent of the duty deferral is to provide companies with liquidity during the initial phases of COVID-19 while maintaining the strong enforcement policies regarding China and other countries. Given the eligibility requirements, durational elements, and exclusions, companies seeking to utilize the deferral should exercise caution and consult counsel as needed. Additionally, companies may desire to develop a whole-of-supply chain strategy as other counties (e.g., Canada) have implemented similar customs duty deferral policies. Dickinson Wright is available to assist on all customs matters in order to ensure business recovery, resumption, and resiliency.

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Family Focus

THE VIRUS AND VIRTUAL PARENTING

Posted by **Stuart Scott** | Apr 24, 2020

The Coronavirus has affected the lives of virtually every routine social interaction. Millions have lost jobs or are facing an uncertain financial future.

The virus's ravages have also spread into the family law arena. Long-standing custody agreements are suddenly unraveling and, simultaneously, many of the courts are not open to address the new and unforeseen issues that the pandemic presents.

A shared custody arrangement may now violate local ordinances, administrative mandates or even state stay-at-home orders put into effect in an effort to control the Coronavirus spread. In some areas of the country, parents may find that courts are entering orders requiring children to stay with the primary residential parent if there is a city or state stay-at-home mandate. Even without such orders, parents may find it easier to not send children back and forth frequently between homes and are looking to other ways to virtually parent. Others may actually be on the front-lines and are concerned about possible exposure to the coronavirus and so are agreeable to reduced parenting time.

So what should a parent do in order to makeup for loss parenting time? Some options include the following:

- First, a parent who has the coronavirus or suspects they have the coronavirus needs to take all possible precautions to avoid spreading it to their child.
- Second, don't despair! Arrangements to "make up" for lost time can be made after the temporary limitations on parenting time are lifted. Cooperating parents may agree to make up provisions in advance.
- Use technology liberally! Numerous technologies are available for many. There are a great number of options which offer the ability to interact with children whether one sees them in person or not.
- Online cooking together can be a wonderful experience where both you and your child are, simultaneously but in different locations, preparing a shared recipe together. Pick a fun recipe to make together and set a time to do so!
- Don't forget the schoolwork! Whether present or not, a parent can work with the child on fun and interesting educational activities. There are an abundance of free, online educational games and activities for children. There are also some inexpensive services such as at Adventure Academy that charge a nominal monthly fee and which will also communicate with your child's teachers about online activities and opportunities. Even if you are not with the child, you may be able to join your child virtually to take a number of school-related remote courses/activities which help educate your child.
- There are a number of programs that have sprung up which can be played remotely including via a phone app or on a laptop. A parent and a child or children can set a schedule which includes

specific times to play games together, read books, sing songs and interact with one another, all virtually.

- If you have a phone and a laptop on both ends, FaceTime calling a child and then joining together in a game or activity may be an option. There are a plethora of online opportunities along these lines. Kidsworldfun has online games. Myfreezoo offers numerous options as do switchzoo, verywellfamily, funbrain, and hangrybynature, along with many others
- Attend a remote third party function with your child. Many zoos and aquariums are now offering remote tours/visitations without charge. You can literally join your child to see all sorts of mammals, fish and creatures of interest all over the world.

Understand that it's okay to parent away from a child during these uncertain times. This does not prohibit a parent from interacting with the child regularly, and it may actually offer opportunities for one to spend *more* time and have *more* interaction with their child, albeit remotely, than a parent does otherwise in person as part of their parenting plan.

About the Author:

Stuart Scott is a litigation attorney with over 25 years of experience. He has tried hundreds of cases in both state and federal court. Some of his noteworthy victories have been featured in local, state and national publications. Stuart is also listed as a Tennessee Supreme Court Rule 31 Family Law Mediator. Stuart focuses his primary area of practice on family law. He represents people going through divorce and focuses his efforts on providing his legal services and advice to his clients in this area. Mr. Scott may be reached in our Nashville office at 615-620-1710.

TO DISCLOSE OR NOT TO DISCLOSE: WHY BUSINESSES SHOULD NOT STAY SILENT AMID COVID-19

by Michael N. Feder and Caleb Green

As of publication, the coronavirus disease 2019 (COVID-19 or the "coronavirus") has evolved into a global pandemic, affecting more than 180 countries and exceeding 1.2 million confirmed cases worldwide. Businesses are not immune to the novel effects of the coronavirus and must take reasonable steps to communicate and ensure the safety of its employees, patrons, and third parties. While companies are making employment and corporate decisions amid the COVID-19 emergency, they should also be mindful of complying with federal and state laws by adopting measures that provide timely and reasonable disclosures related to the coronavirus.

THE DUTY TO COMMUNICATE

Companies should be vigilant in ensuring reasonable disclosures and communications are disseminated to employees and third parties regarding risks related to the exposure or transmission of COVID-19. As an employer, companies have obligations under state and federal law to ensure the safety and health of all their employees. For example, under the Occupational Safety and Health Act ("OSHA"), employers are obligated to provide employees with a safe workplace "free from recognized hazards" that could cause serious physical harm or death.

Businesses also have an obligation to inform third parties and patrons of any hazards on the premises. Some courts have emphasized that we have an overriding policy of preventing the spread of viruses and diseases, and therefore have imposed a duty of care on those who have reason to know that others may be exposed to an infectious disease or virus. *John B. v. Superior Court*, 38 Cal. 4th 1177 (2006). In a recent lawsuit filed against Princess Cruise Lines, passengers aboard the Grand Princess cruise ship in February 2020 accused Princess Cruise Lines of breaching its duty to communicate by knowingly permitting individuals infected with the coronavirus to board the cruise ship and failing to adequately warn other passengers about the infected passengers or the risk of being exposed to COVID-19. *Weissberger v. Princess Cruise Lines*, 2:20-cv-02267-RGK-SK, (C.D. March 3, 2020).

In short, businesses can expose themselves to liability by failing to provide reasonable warnings and notice concerning the risk of exposure to coronavirus. To reduce these risks during this pandemic, a business should take reasonable steps to disclose and provide adequate warnings of COVID-19 related risks and hazards on its premises and within the workplace.

WHAT SHOULD COMPANIES DISCLOSE?

When determining the degree and scope of disclosures related to COVID-19, a company should consider the guidelines and directives issued by federal and state governments, as well as local health officials. For example, the Center for Disease Prevention and Control ("CDC"), the leading authority amid the coronavirus pandemic, has published an Interim Guidance for Businesses and Employers ("Interim Guidance") which cautions companies to use stated guidance to determine the risk of the coronavirus. The Interim Guidance document further provides that if an employee is confirmed to have the coronavirus, "employers should inform fellow employees of the possible exposure to COVID-19." The communication should inform them, without identifying the person by name, that an employee has been exhibiting symptoms of the coronavirus and that a positive diagnosis is possible. If the individual later tests positive for the coronavirus, companies should again inform its employees, and otherwise follow the disclosure requirements outlined by the CDC and other federal and state laws, including OSHA. In the same fashion, businesses should communicate with customers, clients, and vendors to let them know about a suspected or confirmed case. In addition, businesses should consider easing any concerns by assuring everyone of their compliance with recommended safety measures, sanitization methods, and social distancing practices.

CONCLUSION

Throughout the COVID-19 emergency, companies have to communicate and provide reasonable warnings concerning coronavirus related hazards within the workplace or on the premises. Given the unprecedented nature of the COVID-19 outbreak, the scope and extent of these disclosures are evolving and changing. To ensure compliance, businesses should consult with legal counsel to design compliant disclosures and communications to their employees, patrons, and third parties.

Dickinson Wright's attorneys have considerable experience in assisting companies in complying with the various requirements of state, federal, and local laws. The firm remains committed to helping our clients navigate this unprecedented time and remains fully available to provide any assistance that may be required.

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[1] Businesses should not disclose the identity of a quarantined or infected employee because of confidentiality requirements under federal law, such as the Americans with Disabilities Act ("ADA"), the Health Insurance Portability and Accountability Act ("HIPAA"), and other privacy laws.

TRADEMARK APPLICATIONS COVERING COVID-19 RELATED GOODS AND SERVICES CAN SKIP THE LINE

by Flavia Campbell

Following last month's launch of a program to expedite examination of patent applications related to prevention or treatment of COVID-19, as of June 16, 2020, the U.S. Patent and Trademark Office started also prioritizing the examination of trademark applications that cover goods and services that help prevent, diagnose, treat, or cure COVID-19.

To qualify for this benefit, the application must cover one or more of the following qualifying COVID-19 medical goods or services:

- Pharmaceutical products or medical devices such as diagnostic tests, ventilators, and personal protective equipment, including surgical masks, face shields, gowns, and gloves, that are intended to prevent, diagnose, treat or cure COVID-19 and are subject to approval by the U.S. Food and Drug Administration (FDA); and
- Medical services or medical research services for the prevention, diagnosis, treatment of, or cure for COVID-19.

The FDA approvals referred to above may include, without limitation, applications for Investigational New Drug (IND), Investigational Device Exemption (IDE), New Drug Application (NDA), Biologics License Application (BLA), Premarket Approval (PMA), or an Emergency Use Authorization (EUA).

In order to request prioritized treatment, applicants must first file the application and then file a petition to the Director requesting that the initial examination of the application be advanced. The petition must include a statement of facts, supported by an affidavit or declaration under 37 CFR§ 2.20, listing the applicant's COVID-19 related goods and services and an explanation of why they qualify for prioritized examination, and they must identify the section of the Code of Federal Regulations (CFR) that regulates the goods and services. As an additional bonus, the USPTO is waiving the fee it normally charges for such petitions.

If the petition to the Director is granted, the application will be immediately assigned to an examining attorney for review, which, according to the USPTO, expedites examination by approximately two months. Following examination, approved applications are published for opposition purposes and third parties still have the usual 30-day window to file oppositions or extensions of time to oppose.

If you have developed a product or service that is related to the prevention, diagnosis, or treatment of COVID-19, our trademark lawyers will be happy to assist you with the application process for a trademark registration and expedited examination. The Dickinson Wright team is also able to guide you through the registration process with the FDA and advise on whether patent protection is also available for your product.

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Tax Blog

TREASURY SECRETARY ANNOUNCES EXTENSION OF TIME TO MAKE TAX PAYMENTS

Posted by Julie Rhoades | Mar 18, 2020

In response to the COVID-19 pandemic, on March 17, 2020, Treasury Secretary Steven Mnuchin stated at a press conference that individuals and corporations may delay certain tax payments without interest and penalties. Individuals may defer tax payments up to $1 million for 90 days, and corporations may defer tax payments up to $10 million for 90 days. As of the time of writing this tax alert, no official written guidance has been released regarding this relief for taxpayers.

The Treasury Secretary did not extend the tax filing due date for individuals which is generally April 15. However, individuals may get an automatic extension to file until October 15 by filing IRS Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Returns.

Please contact Julie Rhoades in our Detroit office at (313) 223-3570.

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All Things HR

UPDATE ON CORONAVIRUS: TRAVEL RESTRICTIONS AND QUARANTINE NOW EXTENDED TO CERTAIN TRAVELERS FROM IRAN

Posted by **Elise Levasseur** | Mar 9, 2020

The Department of Homeland Security ("DHS") has expanded its travel ban concerning the Coronavirus Disease 2019 (COVID-19) to bar certain foreign national travelers who have been physically present in Iran within the last 14 days from entering the U.S. The expanded ban took effect on March 2, 2020. The travel ban does not apply to U.S. Citizens or Lawful Permanent Residents as well as a number of other exempt individuals such as crew members, diplomats and certain relatives of U.S. citizens or lawful permanent residents. The inclusion of foreign travelers from Iran follows a Presidential Proclamation to ban certain foreign nationals traveling from China from entering the U.S. effective February 2, 2020, if the travel to China occurred within the last 14 days as well as to impose certain quarantine restrictions on exempt travelers.

Foreign national travelers from Iran will be treated much the same way as travelers from China in accordance with a Presidential Proclamation of January 31, 2020. On February 2, 2020, the Acting DHS Secretary Chad F. Wolf directed that all flights from China and all passengers who have traveled to China within the last 14 days to be re-routed through 14 U.S. airports. At these 14 airports, DHS has established enhanced screening procedures and the capacity to quarantine passengers, if needed.

Exempt travelers who have been in Hubei province in China within 14 days of their return will be subject to up to 14 days of mandatory quarantine to ensure they are provided proper medical care and health screening. Exempt travelers who have been in other areas of mainland China within 14 days of their return will undergo proactive entry health screening and up to 14 days of self-quarantine with health monitoring to ensure they have not contracted the virus and do not pose a public health risk. Generally, foreign national travelers (other than immediate family of U.S. citizens, permanent residents, and flight crew) who have traveled in China within 14 days of their arrival will be denied entry into the United States, which includes non-immigrants.

With regard to travelers from China:

- Exempt air travelers should be aware that if they have been to China in the last 14 days, they will be routed through one of fourteen airports to undergo enhanced health screenings.
- Any individual traveling from China who has either been in Hubei Province or other areas of the mainland and is showing symptoms associated with the virus will be screened and subject to mandatory quarantine by medical professionals at a nearby facility.
- If a traveler who spent time in China, but outside the Hubei province, is re-routed through one of the fourteen airports and shows no symptoms following a health screening, they will be re-booked to their destination and asked to "self-quarantine" at their homes.

Exempt travelers who traveled to Iran will now be subject to the same type of quarantine restrictions as those exempt individuals who traveled to China.

About the Author:

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CORONAVIRUS (COVID-19) PRECAUTIONS FOR EMPLOYERS

High Deductible Health Plans and Expenses related to COVID-19

HEALTHCARE BLOG

UPDATE ON RAPIDLY CHANGING TELEHEALTH DEVELOPMENTS

by Rose J. Willis and Kimberly J. Ruppel

Telehealth is particularly well suited for initial screening of patients and providing quicker and safer access to providers during the COVID-19 pandemic. Telehealth includes, for example, the use of real-time video interaction, "store and forward" technology, remote patient monitoring or online chat groups and internet sites. The use of telehealth technology for providing health care services implicates various laws, regulations, licensing, and payor billing and reimbursement rules. However, recent announcements and orders surrounding telehealth have relaxed many of these requirements during this public health emergency, as follows:

Waiver of Certain Telehealth Restrictions. As of March 6, 2020, certain telehealth restrictions for Medicare beneficiaries will be lifted. Policymakers intended to create broader access to care for seniors in particular during this health crisis. Highlights of the new rules include:

- Telehealth services will now be paid under the Physician Fee Schedule at the same amount as in-person services;
- Medicare coinsurance and deductible still apply for these services. However, healthcare providers are allowed to reduce or waive cost-sharing for telehealth visits paid by federal healthcare programs;
- Medicare will make payment for professional services furnished to beneficiaries in all areas of the country in all settings, including a beneficiaries' home. This removes the requirement for a beneficiary to travel to a physician's office, skilled nursing facility or hospital for a telemedicine visit;
- These rules apply for new or established patients. To the extent the new waiver rules require an established provider-patient relationship, HHS will not conduct audits to ensure a prior relationship existed for claims submitted during this public health emergency.

OCR HIPAA Discretion. The Office of Civil Rights has informed the industry that with respect to telehealth it will not impose penalties for noncompliance with HIPAA regulations during the COVID-19 public health emergency so long as the provider acts in good faith in its use of telehealth technology. This is not just with respect to use of telehealth for diagnosis and treatment of COVID-19, rather it applies to any telehealth service, including, for example, treatment of a sprained ankle, dental consultation or psychological evaluation. Best practices for providers to demonstrate good faith so as not to inadvertently fall out of compliance during this period include:

- Using non-public facing audio or video communication products. Examples of this type of technology include Apple FaceTime, Facebook Messenger video chat, Google Hangouts video or Skype;
- Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications.
- Examples of public-facing technology identified by the OCR that would not fall within the good-faith exception include Facebook Live, Twitch and TikTok, and similar video communication applications that are public-facing.
- Entering into a Business Associate Agreement with a technology vendor used to provide telehealth. The following vendors represent they provide HIPAA-compliant video communication products and that they will enter into a HIPAA BAA (these BAA's have not been reviewed by OCR and the OCR does not endorse them): Skype for Business, Updox, VSee, Zoom for Healthcare, Doxy.me, Google and G Suite Hangouts Meet.

Elimination of In-Person Exam For Telehealth Prescription of Controlled Substances. Prior to the outbreak of COVID-19, controlled substances generally could not be prescribed via telehealth without a provider conducting an in-person examination of the patient. The Secretary of Health and Human Services and the DEA Administrator confirmed the public health emergency exception to that rule is now in effect. Accordingly, schedule II – V controlled substance prescriptions may be issued without an in-person exam so long as the following requirements are met:

- The prescribing provider is appropriately licensed to practice medicine and prescribe controlled substances;
- A valid prescription is issued for a legitimate medical purpose in the ordinary course of practice; and
- A telehealth evaluation is conducted using an audio-visual, real-time, two-way interactive communication system.

Provided the above criteria is satisfied, a provider may issue a prescription for a controlled substance using any of the currently available methods set forth by the DEA during this time of public health emergency.

This means a prescription may be issued: (1) electronically for schedule II – V medications; (2) by calling in an emergency schedule II medication to a pharmacy; or (3) by calling in a schedule III – V medication to a pharmacy.

Free or Reduced Cost Sharing Amounts for Telehealth Services. Ordinarily, routine reductions or waivers of costs owed by beneficiaries, such as coinsurance and deductibles, implicate the federal anti-kickback statute and other regulatory schemes.

However, during the current public health emergency, the OIG will not consider reduced charges or free telehealth services, standing alone, as an inducement or likely to influence future referrals which might otherwise result in fines or other penalties.

This means that so long as a provider complies with otherwise applicable coverage and payment rules relating to telehealth, the provider is permitted to reduce or completely waive a patient's coinsurance or deductibles for telehealth services without fear of penalty from the OIG

under the federal anti-kickback or other applicable federal statutes. It is important to note this unique permission is only relevant up to June 17, 2020, or the length of this public health emergency (whichever is shorter), unless extended by the OIG.

Conclusion

Social distancing and telehealth go hand in hand. Now is the time for healthcare providers and payors to encourage their patients, insureds, and beneficiaries to make use of this valuable tool where available. Relaxation of a number of telehealth rules and restrictions allow patients to receive easier access to healthcare during this public health emergency. The changes being made to telehealth rules during this emergency period may be the start of a longer-term telehealth focus.

For assistance in remaining compliant and up-to-date with the rapidly changing state and federal rules on telehealth or implementing a telehealth program with your business, reach out to your Dickinson Wright healthcare law attorney.

Kimberly Ruppel is a co-chair of Dickinson Wright, PLLC's Telehealth Task Force of the firm's Health Care Law Group. She has over 20 years' experience as a commercial litigator who represents healthcare providers, insurers and benefit plans in matters related to healthcare litigation, licensing and regulatory disputes, governmental fraud and abuse investigations, HIPAA compliance, ERISA and insurance claims, and coverage and fiduciary disputes in state and federal courts.

Rose Willis is the chair of Dickinson Wright, PLLC's Health Care Law Group, and co-chair of the firm's Telehealth Task Force. Her practice focuses on advising healthcare providers and suppliers on regulatory and transactional matters.

CLIENT ALERT

UPDATE -- SBA ADDS GUIDANCE REGARDING NECESSITY CERTIFICATION UNDER THE PAYCHECK PROTECTION PROGRAM

by J. Troy Terakedis, M. Katherine VanderVeen and Peter J. Kulick

On April 23, 2020, the Small Business Administration ("SBA") issued additional guidance (in an update to its previously published FAQs, a current version of which can be found **here**) regarding whether businesses owned by large companies qualify for a Paycheck Protection Program ("PPP") loan under Section 1102 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").

Specifically, the SBA has indicated that in addition to reviewing other applicable eligibility requirements and rules, a borrower must assess their economic need for the PPP loan under the standard established by the CARES Act and the PPP regulations that existed at the time of loan application.

As part of the PPP loan application process, borrowers are required to make certain certifications, including certifying in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

The SBA, in the newly added question #31 of the FAQs, expands on this necessity certification by providing that a borrower must take into account (1) their current business activity, and (2) their ability to access other sources of liquidity sufficient to support the borrower's ongoing operations in a way that does not have a significant detriment to their business; notwithstanding the carve-out created by the CARES Act that a borrower not be required to show they are unable to obtain credit elsewhere in order to be eligible for a PPP loan ("no-credit-elsewhere" is an eligibility requirement for other SBA loans). The new FAQ goes on to state, by way of example, that it is unlikely that a public company with substantial market value and access to capital markets would be able to make the aforementioned certification in good faith.

A borrower that applied for a PPP loan prior to the addition of the new FAQ (April 23, 2020) will be deemed to have made the required necessity certification in good faith, despite such certification not being accurate in light of the additional SBA guidance, if the borrower returns all PPP loan proceeds it received in full by May 7, 2020.

While the example in the new FAQ is directed at public companies, the general guidance set forth in the new FAQ is applicable to all borrowers (including private companies). As such, all borrowers should evaluate their necessity certification based on this new guidance to determine whether they meet the standards as set forth in the new FAQ and whether such loan proceeds should be returned.

Importantly, making any knowingly false statement in the PPP loan application (which includes the certifications) could subject the borrower (and/or person making such statements) to criminal punishment including imprisonment and substantial fines.

In any event, it is recommended that all borrowers take steps to adequately document that the PPP loan was necessary to support their ongoing operations given economic uncertainty as well as that the borrower did not have access to liquidity (beyond the PPP loan) to support such operations in a way that would not be significantly detrimental to the borrower's business.

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UPDATE: TO DISCLOSE OR NOT TO DISCLOSE: WHY BUSINESSES SHOULD NOT STAY SILENT AMID COVID-19

by Caleb L. Green and Michael N. Feder

This is an important update to Dickinson Wright's April 8, 2020 Client Alert entitled To Disclose or Not to Disclose: Why Businesses Should Not Stay Silent Amid COVID-19, which discusses the obligations of employers to warn and notify employees concerning the risk of exposure to the coronavirus in the workplace.

In our previous Client Alert, we discussed that companies should vigilantly ensure reasonably disclosure and communicate risks related to the exposure or transmission of COVID-19 to employees and third parties. As an employer, companies have obligations under state and federal law to ensure the safety and health of all their employees by following best practices recommended by the Center for Disease Control ("CDC"), the Occupational Safety and Health Act ("OSHA"), among others.

NEW GOVERNMENT AGENCY AND HEALTH DISTRICT DISCLOSURE REQUIREMENTS

As policymakers continue to grapple with the ongoing spread of COVID-19, some local government agencies and health districts have adopted new requirements directly relating to employer disclosures for confirmed cases of COVID-19 in the workplace. Accordingly, employers should also keep state and local disclosure requirements in mind as they may differ from the CDC's recommendations and guidance.

Notably, while the CDC recommends informing every employee of confirmed COVID-19 cases in the workplace, some jurisdictions do not require employers to make COVID-19 exposure disclosures to all employees. For example, as of publication, in Southern Nevada, the Southern Nevada Health District ("SNHD") does not require employers to disclose confirmed COVID-19 cases in the workplace because SNHD's contact tracing protocols include a notification process. Namely, when an employee tests positive for COVID-19, SNHD initiates contact tracing protocols to identify any other employees who may have come into close contact with the infected employee. Once identified, SNHD notifies the at-risk employees of the confirmed case and potential exposure to the virus.

Although some jurisdictions do not require employers to disclose confirmed cases of COVID-19 in the workplace, the current CDC guidance recommends that employers notify employees of potential exposure in the workplace. Per the CDC's Interim Guidelines, following a confirmed COVID-19 case, employers should notify all employees who work in the location or area where the employee works of the situation. The communication should be shared without identifying the employee or revealing any employee confidential information and should comply with federal laws, including the Americans with Disabilities Act ("ADA"), the Health Insurance Portability and Accountability Act ("HIPAA"), and other privacy laws. In the same fashion, businesses should communicate with customers, clients, and vendors to let them know about a confirmed case.

CONCLUSION & RECOMMENDATION

As discussed in our previous Client Alert, employers have a duty to communicate when they have reason to know that other employees may be exposed to an infectious disease or virus. As a result, employers should understand and implement the disclosure requirements established by their governing health districts and local governments. However, in jurisdictions where local government and health districts have not set forth any guidance or disclosure requirements, employers should adopt and practice CDC guidelines. Finally, employers should consult with an attorney to determine the legal risks and potential liability underlying the decision to disclose or not to disclose to employees.

Dickinson Wright's attorneys are uniquely positioned throughout our eighteen law offices and have considerable experience in assisting companies in complying with the various requirements of state, federal, and local laws. The firm remains committed to helping our clients navigate this unprecedented time and remains fully available to provide any assistance that may be required.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of significant developments in the field of cross border law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered here.

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UPDATED INFORMATION REGARDING THE $200 MILLION IN FUNDING AVAILABLE FOR SMALL BUSINESSES THROUGH NEW TENNESSEE BUSINESS RELIEF PROGRAM

by Kevin W. DeHart and Ralph Levy, Jr.

On June 15, 2020, we advised you about the recently announced Tennessee Business Relief Program ("TBRP") in which $200 Million will be distributed to small businesses that have suffered losses due to COVID 19. Since then, the Tennessee Department of Revenue ("TDOR") has continued to provide additional guidance and details about administration of the TBRP. Most recently, the TDOR provided more details including information as to business relief payment amounts, eligibility notices and permitted payment uses.

According to the TDOR, eligibility notifications were first sent to businesses beginning the last week of June. Once notified, businesses will visit a designated website and be prompted to complete an online pre-award certification form in order to verify their eligibility criteria and agree to the program's payment guidelines. In order to expedite the payment process, businesses with an email address associated with their Tennessee Taxpayer Access Point account will be notified of eligibility through e-mail. Remaining businesses will be notified of eligibility by letter. In addition, businesses owners who do not have online access will be asked to complete a paper certification form which may lead to a delay in receiving relief funds. Once the pre-award certification form has been completed and a business' eligibility is confirmed, the confirmation number must be noted when finalizing the submission for relief. Afterward, the TDOR will issue a business relief payment. The TDOR anticipates that payments under the program will begin during the first week of July. As stated in our original article, business relief payment amounts will be based on the annual gross sales of the business. For example, an eligible business with annual sales of over $500,000 but less than $1,000,000 can anticipate it will be eligible for $10,000 of relief under the program.

The TDOR has stated that any funds received from the TBRP should be used to respond to the financial disruption resulting from COVID-19 and its effects on each individual business. Since the funds must not be used for payment of tax liabilities to a government agency, the TBRP website also contains information as to the permitted uses and the need for businesses to keep records regarding how the funds are spent in order to track the TBRP payments. By accepting funds, the TDOR has stated that businesses acknowledge and agree that they are subject to potential audit or other verification by the State of Tennessee concerning the qualification for and use of the TBRP payments. Funds are subject to recapture by the State of Tennessee if payment and use requirements are not met.

If your business has been negatively impacted by the COVID-19 pandemic and you have questions about the TBRP, Dickinson Wright attorneys are here to help. For more information, call Ralph Z. Levy Jr., Esq., at 615-620-173, or Kevin W. DeHart, Esq., at 615-780-1115, in the Nashville, TN office.

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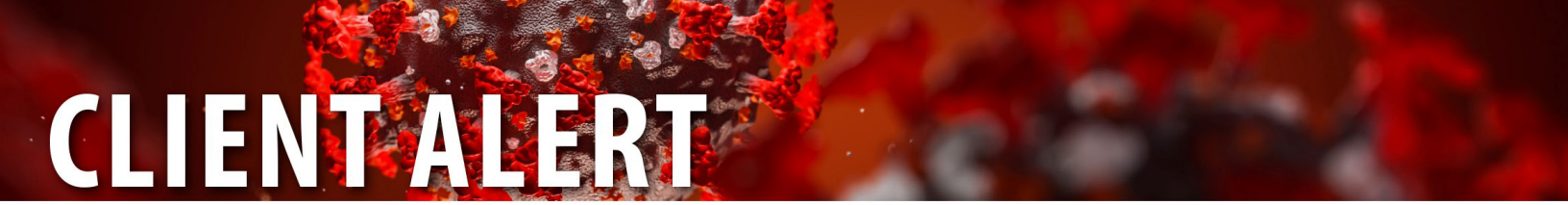

DICKINSON WRIGHT

CONGRESS PASSES THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT ("CARES ACT")

By Charles R. Spies, Katherine N. Reynolds, Angelina Irvine, J. Troy Terakedis, Peter J. Kulick, Daniel D. Ujczo

President Trump signed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") on March 27, 2020, marking the largest economic recovery package in U.S. history. The $2.2 Trillion rescue legislation provides $150 billion for hospitals and other health care providers, direct payments and expanded unemployment compensation provisions to U.S. workers and families, and approximately $850 billion dollars in loans and grants to major industries and small businesses.

The following provides a summary of some of the key stimulus pieces of the legislation contained in the nearly 900-page Act to assist all companies seeking financial relief from the myriad challenges arising from the COVID-19 pandemic. Dickinson Wright attorneys are available to provide on-the-ground counsel in Washington, D.C., U.S. state capitols, and Canada's provinces to navigate the network of federal/state/provincial recovery programs and prepare for business resumption.

Highlights:

- $500 billion to Treasury Department designated for business loans for businesses impacted by COVID-19
  - $367 billion specifically designed for small-businesses; however, any business whose "primary purpose" is lobbying or engaging in political activity are not eligible for these loans
  - $46 billion for airline industry ($25 billion for passenger airlines, $4 billion for cargo, $17 billion for companies deemed important for national security)
  - For Business Loans—established a separate Inspector General within the Treasury Department that oversees how funds are being disbursed; adds to five-member Congressional panel to review actions of the Treasury Department; not available to businesses owned by the President, VP, Members of Congress, or Executive Brach heads from receiving Treasury loans and investments.
- $150 billion for state and local governments to address spending shortages related to COVID-19 pandemic.
  - Provides $150 billion to states, territories, local and tribal governments to use for expenditures incurred due to the public health emergency with respect to COVID-19 in the face of revenue declines, allocated by population proportions.
  - Distribution is based on population. No state shall receive a payment for fiscal year 2020 that is less than $1.25 billion.
  - 45% of a state's funds are set aside for local governments, with populations that exceed 500,000, with certified requests to the U.S. secretary of Treasury.
  - $3 billion set aside for District of Columbia, Puerto Rico, Virgin Islands, Guam, Northern Mariana Islands and American Samoa.
  - $8 billion for tribal governments.
  - Funds can be used for costs that: 1) are necessary expenditures incurred due to COVID-19; 2) were not accounted for in the budget most recently approved as of the date of enactment; 3) were incurred during the period that begins March 1, 2020, and ends Dec. 30, 2020.

Small Business Loans under the Paycheck Protection Program:

- Government guarantee of loans for Payment Protection Program under Section 7(a) of the Small Business Act increased to 100 percent through December 31, 2020.
  - After December 31, 2020, government loan guarantees will return to 75 percent for loans over $150,000 and 85 percent for loans equal to or less than $150,000
- Expands the organizations eligible for small business loans under the Payment Protection Program. Eligible borrowers may not employ more than 500 employees (unless provided otherwise by the SBA for an industry) and includes not only small businesses, but also:
  - 501(c)(3) exempt organizations
  - 501(c)(19) veteran's organization
  - Tribal businesses described in Section 31(b)(2)(C) of the Small Business Act
  - Businesses with more than one physical location where each location has fewer than or equal to 500 employees may also qualify as eligible borrowers if the business concern is assigned a North American Industry Classification System Code beginning with 72 at the time the loan is disbursed
- Current SBA affiliation rules apply to eligible non-profit organizations.
- Waives affiliation rules for hospital and restaurant industry businesses, franchises approved on the Franchise Directory, and businesses receiving financing through the Small Business Investment Company program.
- Allows the SBA to guarantee loans under the Payment Protection Program for the period beginning on February 15 through June 30, 2020.
- Maximum loan amount is increased from $5,000,000 to $10,000,000 through December 31, 2020.
  - The maximum loan amount is capped at the lesser of $10,000,000 or a figure determined by applying a formula based on "payroll costs"
  - Generally, the payroll cost formula is based on the average monthly payments by a borrower for "payroll costs" incurred during the 1-year period prior to loan disbursement multiplied by 2.5
- Proceeds of the loan may be used for:
  - "Payroll costs," which includes
    - Employee salaries, wages, commissions, or similar compensation
    - Payment of cash tip or equivalent
    - Paid vacation, parental, family, sick or medical leave
    - Separation payments
    - Payments required for the provision of group health benefits
    - Retirement benefits, or
    - State or local taxes assessed on compensation of employees
  - Insurance premiums
  - Mortgage, rent, and utility payments
- Provides delegated authority to lenders participating in the Payment Protection Program to make borrower eligibility and creditworthiness determinations, rather than the SBA.
- Repayment ability is not taken into lending decision. Rather, lenders must determine whether the business was operational on February 15, 2020, and had employees for whom it paid wages and payroll taxes, or had paid independent contractors.
- Borrowers cannot receive assistance under the Paycheck Protection Program (PPP) loan and an economic injury disaster loan (EIDL) for the same purpose.
  - Borrowers with EIDL loans unrelated to COVID-19 can still apply for a PPP loan, and have an option to refinance the EIDL loan into the PPP loan
- Fees and other requirements waived include:
  - Borrower and lender fees are waived

- Credit elsewhere test is waived
- Collateral and personal guarantee requirements are waived
- No borrower pre-payment fees

- Maximum interest rate of 4 percent
- Loan forgiveness:
  - Borrower is eligible for loan forgiveness in the amount used for payroll costs, interest payments on a pre-existing mortgage, rent payments on a pre-existing lease, and utility payments during the 8-week period after the loan's origination
    - Eligible payroll costs do not include compensation above $100,000
  - Amounts forgiven cannot exceed principal amount of the loan
  - Amount forgiven will be reduced proportionally by any reduction in employees retained compared to the prior year, and further reduced by a reduction in pay to any employee below 25 percent of their prior year compensation
  - Employers who re-hire any employees laid off due to COVID-19 will be not be penalized
  - Amount of loan forgiven is excluded from gross income for federal income tax purposes

Emergency EIDL Grants

- Eligibility expanded to include:
  - With fewer than 500 employees:
    - Tribal businesses
    - Co-Ops
    - ESOPs
  - Sole proprietors
  - Independent contractors
  - Private non-profits
- For EIDL loans related to COVID-19 before December 31, 2020:
  - Personal guarantees waived on advances and loans below $200,000
  - 1-year in business requirement waived
  - Credit elsewhere requirement waived
- Approval can be based solely on applicant's credit score or other method for determining ability to repay.
- **Emergency Grant** – Eligible entity can request advance on a loan up to $10,000 to be distributed within 3 days.
  - Advance payment can be used for:
    - Providing paid sick leave to employees
    - Maintaining payroll
    - Meeting increased costs to obtain materials
    - Making rent or mortgage payments
    - Repaying obligations that cannot be met due to revenue losses

Unemployment Insurance Provisions

- Temporary **Pandemic Unemployment Assistance** program through December 31, 2020, for those not traditionally eligible for unemployment, including:
  - Self-employed
  - Independent contractors
  - Workers with limited work history
- Provides payment to states to reimburse the following entities for **half of the costs of unemployment benefits incurred through December 31, 2020**:
  - Non-profits
  - Government agencies
  - Indian tribes
- Additional **$600 per week** for each unemployment recipient for **up to 4 months.**
- Funding to pay cost of 1st week of unemployment benefits for states that choose to pay recipients immediately instead of waiting one week before the individual is eligible.
- Additional 1**3 weeks** of unemployment benefits through December 31, 2020.
  - Financing for **Short-Time Compensation Payments**
  - For states that already have programs, funding to pay **100 percent** of the costs incurred in "short-time compensation" programs through December 31, 2020, where employers reduce employee hours instead of laying off employees and the employees with reduced hours receive a pro-rated unemployment benefit
  - For states that begin programs now, funding to pay **50 percent** of the costs
    - **$100M** in grants to states that enact short-time compensation programs

2020 Recovery Rebates for Individuals

- U.S. residents with adjusted gross income up to $75,000 ($150,000 married) are eligible for the full recovery rebate payment of $1,200 ($2,400 taxpayers filing as married).
  - Taxpayers may receive an additional payment of $500 per child
  - Rebate amount is phased-out for taxpayers with adjusted gross income exceeding $75,000 (or $150,000 filing as married); the rebate program is reduced by $5 for each $100 that a taxpayer's income exceeds the phase-out threshold
  - Rebate amount is completely phased-out for: (1) single filers with adjusted gross income exceeding $99,000; (2) $146,500 for head of household filers with one child; and (3) $198,000 for joint filers with no children; a higher phase-out dollar figure applies to families with more than one child
  - Money is expected to go out by April 6

Retirement Funds

Ten percent early withdrawal penalty for retirement account distributions up to $100,000 is waived for COVID-19 related distributions on or after January 1, 2020.

- The distributions will be subject to tax over 3 years
- Taxpayer can re-contribute within 3 years without regard to that year's contribution cap
- COVID-19 related distributions:
  - The distributee is diagnosed with COVID-19
  - His or her spouse or dependent is diagnosed with COVID-19
  - He or she experiences adverse financial consequences as a result of being:
    - furloughed,
    - quarantined,
    - laid off,
    - reduced work hours,
    - unable to work due to child care issues related to COVID-19, or
    - his or her own business closure or hours reduction due to COVID-19.

Employer Payments of Student Loans

Employers can provide employees with a student loan repayment benefit tax-free. The employer can contribute up to $5,250 annually toward an employee's student loans with the payment being excluded from the employee's income. This applies to any student loan payments made by an employer, on an employee's behalf, after date of enactment until January 1, 2021.

Employee Retention Credit

- The CARES Act offers a tax credit equal to 50 percent of "qualified wages" paid or incurred to each employee from March 13 to December 31, 2020. The credit is further limited to $10,000 of qualified wages.
- To be eligible for the employee retention credit, the employer must be engaged in a trade or business during the 2020 calendar year and either:
  (1) had its operations fully or partially suspended by an order of a governmental authority; or
  (2) had its gross receipts decline by more than 50 percent as compared to the same quarter in the prior year
- "Qualified wages" are determined based on the number of full-time employees.
  - For employers with more than 100 full-time employees, qualified wages only include amounts paid to employees that are not providing services due to a shutdown order of a governmental authority
  - For employers with 100 or fewer full-time employees, all employee wages qualify for the employee retention credit, regardless of whether the employer is open for business or subject to a shutdown order of a governmental authority

Deferral of Employer Payroll Taxes

The CARES Act permits employers to defer payment of the 6.2 percent excise tax on wages paid by an employer. The tax can be paid over a 2 year period; with half required to be paid by December 31, 2021, and the other half by December 31, 2022.

The deferral of payroll taxes is not available to a person that has a Paycheck Protection Program loan forgiven under the CARES Act.

FFCRA

Paid Leave for Rehired Employees
- An employee who was laid off on March 1, 2020 or later can have access to EFMLEA benefits if rehired.

Advance Refunding of Credits
- Employers can receive an advance tax credit instead of being reimbursed on the back end.

Business Tax Provisions

- The Tax Cuts and Jobs Act of 2017 ("2017 Tax Act") limited the ability to use net operating losses ("NOL"). The CARES Act temporarily eliminates the limitations on the use of NOLs. Under the CARES Act a taxpayer is permitted to carryback NOLs which arise in a tax year beginning in 2018, 2019, or 2020, for five years. The Act further allows a taxpayer to fully offset taxable income with NOLs for tax year beginning before January 1, 2021.
- The 2017 Tax Act limited the amount of business interest which a taxpayer may deduct. Prior to enactment of the 2017 Tax Act, business interest was fully deductible for federal income tax law purposes. The 2017 Tax Act generally limited the deduction for business interest to 30 percent of the taxpayer's "adjusted taxable income." The CARES Act temporarily increases the limitation on the deductibility of business interest to 50 percent of the taxpayer's adjusted taxable income for tax years beginning in 2019 or 2020.

Trade/Tariffs

A number of industry associations urged the U.S. Congress to delay the proposed June 1, 2020, implementation of the United States-Mexico-Canada Agreement (USMCA), as well as offer a three (3) to six (6) month delay on tariff payments arising from Section 301 (China) and Section 232 (steel and aluminum). These measures did not make it into the final bill and the White House has expressly rejected the idea of tariff payment delays.

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DW-China Update (30th Edition)
迪克森律所中国团队简报（第三十期）

USTR Considers Removing Additional Duties from Medical-Care Products from Section 301 Tariffs to Address the Covid-19 Outbreak.
美国贸易代表办公室考虑取消在301条款下部分医疗用品的额外关税以应对新冠疫情的爆发

Due to the outbreak of Covid-19 across the United States, health-related products, such as ventilators, oxygen masks, etc. are in urgent need. The United States government has prioritized health considerations and is taking actions to ensure that critical medicines and other essential medical products are in sufficient supply to support the national fight against the coronavirus pandemic.

由于新冠疫情在美国各地的爆发，人们迫切需要医疗防护用品，例如呼吸机，氧气面罩等。美国政府已将公共安全健康列为优先考虑的事项，并正在采取行动，以确保有足够的关键药物和其他基本医疗产品来支持全国的抗疫。

In our previous Update, we suggested that President Trump jump-start the economy by reconsidering his 301 Trade policy directed as China, especially in light of the fact that many of the sorely needed supplies are currently manufactured in China. While other trade organizations, such as the National Retail Federation have now made similar suggestions, the President has not indicate any intention to re-think his strategy in any ways that might gain attention.

在之前一期的简报中，我们建议特朗普总统通过重新考虑针对中国采取的301条款贸易政策来推动经济，特别是考虑到目前许多急需的供应品都在中国生产这一事实。尽管其他贸易组织，例如全国零售联合会，现在也提出了类似的建议，但总统尚未表示打算以任何可能引起关注的方式重新考虑其战略。

Nonetheless, the Administration has more discretely taken actions to test the waters on some part of this approach. On Friday, the U.S. Customs and Border Protection issued a notice that it "will approve on a case by case basis additional days for payment of estimated duties, taxes and fees due to the emergency" (that being the COVID-19 response). This partial tariff relief sparked outrage from traditional trade advocates, like the American Iron and Steel Institute. Next, perhaps even more significantly, the Administration, through the Office of the U.S. Trade Representative (USTR), in consultation with the Department of Health and Human Services (HHS), has prioritized the review of exclusion requests related to medical-care products in order to facilitate the U.S. response to COVID-19, and granted approximately 200 separate exclusions on March 10, 2020, March 16, 2020, and March 17, 2020. The exclusions covered personal protective equipment products and other medical-care related products, which are classified under the third and fourth list of Section 301 tariffs.

尽管如此，美国政府已经采取了一些关税方面的行动，来测试这种做法的效果。上周五，美国海关与边境保护局发布通知，称其"因紧急状况, 逐个批准延长支付关税、税款和费用的天数" (这里的紧急状况指的是为了应对新冠疫情)。该关税举措引发了美国钢铁协会等传统贸易倡导者的愤怒。紧接着，或许更为重要的，美国政府通过美国贸易代表办公室，与美国卫生及公共服务部协商之后，已将与医疗保健产品有关的关税豁免申请的审查作为优先考虑，以便于美国应对新冠疫情，并在2020年3月10日，2020年3月16日和2020年3月17日批准了大约200个产品的关税豁免申请。这些批准的豁免申请包括了属于301条款关税下的第三和第四个清单中个人防护产品和其他医疗相关产品。

This week, USTR is taking further action to respond to the COVID-19 outbreak and it is now considering removing Section 301 duties from additional medical-care products from China. USTR's action covers medical-related products that are currently subject to any of the tranches of the Section 301 tariffs. While quietly introduced, this shift is significant and means that even if a company's previously submitted exclusion request is pending or was even already denied, the company may still be eligible to submit a new request for exclusion. Submissions are limited to comments on products subject to the Section 301 tariff actions and relevant to the medical response to the coronavirus.

为了继续应对新冠疫情，本周美国贸易代表办公室采取进一步行动，继续考虑取消部分从中国进口的医疗产品的301条款关税。美国贸易代表办公室的此次行动涵盖了301条款所有清单下与医疗相关的产品。尽管这一行动未被广泛报道，但意义重大，这意味着即使公司先前提交的关税豁免申请处于待处理状态甚至已被拒绝，该公司仍可能有资格提交新的关税豁免申请。此轮关税豁免申请仅限于在301条款关税清单下且与应对新冠病毒相关医疗的产品。

Specifically, USTR has opened a public docket through www.regulations.gov and invited interested parties to submit comments with respect to whether a particular product covered in any of the Section 301 tariff tranches is needed to respond to the COVID-19 outbreak. If your product is directly used to treat COVID-19 or to limit the outbreak, and/or is used in the production of needed-medical-care products, and it is currently subject to a Section 301 tariffs, you may request USTR to consider a tariff exclusion for your product.

具体来说，美国贸易代表办公室已在www.regulations.gov上建立了一个公共在线页面，并邀请利益相关方就属于301条款关税清单中任何一项产品是否可以用于应对疫情发表意见。如果贵公司的产品能够直接用于治疗新冠病毒或用于控制疫情暴发，和/或能够用于生产所需的医疗产品，并且目前在301条款关税清单下，则可以要求美国贸易办公室考虑豁免该产品的关税。

The docket for submitting a comment for product exclusion will remain open until **June 25, 2020** and it may be extended as appropriate, according to USTR. USTR will review comments on a rolling basis.

提交产品关税豁免申请的在线网页将在2020年6月25日之前保持开放，且美国贸易代表办公室可能会适当延长该截止日期。美国贸易代表办公室将滚动审查所提交的评论。

If you believe that your products relate to medical response to the COVID-19 and you would like to find out if it is eligible for a tariff exclusion under USTR's current action, please contact us immediately to get started.

如果您认为贵司的产品与应对新冠疫情有关，且您希望了解贵司产品是否可以在美国贸易代表办公室此次行动下申请关税豁免，请立即联系我们。

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US-China Trade Alert (28th Edition)

美中贸易实时更新(第28期)

IS NOW THE TIME TO PICK UP THE PLOWSHARE: Personal reflections on Covid-19 and the Trade Peace

是时候重拾犁头：对新冠疫情和贸易和平的个人思考

As markets in the United States tremble with anxiety, oil prices tumble, and the World's economy is seemingly paralyzed by the continued threat of the Covid-19 outbreak – doing more damage to world economies than the Trade War of 2018-2019 ever did – the US and China may be well served by taking this opportunity to work together in stemming the tide of the current health and economic crisis. For two years, the US policy towards China has been to attack the largest trading relationship in the world by levying increasingly more harmful tariffs. In turn, China has returned volley with its own retaliatory tariffs on US goods. This economic chess match left everyone in its wake reeling from uncertainty and shook the global order to its core, including the World Trade Organization (WTO). Now, the Covid-19 outbreak portends to worsen the global economic situation. The United Nations Conference on Trade and Development predicts that world growth this year will be below 2.5%, a recessionary threshold.

随着美国市场因焦虑而引发的震荡，油价暴跌，世界经济似乎因新冠疫情将持续扩散的威胁而面临瘫痪，此次疫情对世界经济造成的损失与2018至2019年的贸易战相比更大。倘若美中借此机会共同努力遏制当前健康和经济危机所引发的浪潮，两国可能都会受益匪浅。近两年来，美国对华政策一直是通过征收越来越多的有害关税来攻击世界上最大的贸易关系。同时中国也对美国商品施加报复性关税进行了反击。这场经济国际象棋对抗赛让所有人都被不确定性所困扰，并动摇了包括世界贸易组织在内的全球秩序的核心。目前，新冠疫情的扩散预示着全球经济的衰退。联合国贸易和发展会议预测，今年世界经济增长率将低于2.5%，这是一个象征经济衰退的门槛。

One continuing remnant from the Trade War is the heavy air of distrust that remains prevalent between China and the US. Recent accusations on both sides over Covid-19 have only fueled mistrust, and focused more on what separates us than joins us – economically, socially, and culturally.

贸易战遗留下来的一个持续存在的问题是，中美之间仍然普遍存在不信任的情绪。双方最近对新冠疫情的相互指控，只会加剧人们之间的这种不信任感，并使得大家更加关注于在经济，社会和文化上离间而不是团结两国关系的领域。

Today, however, as Covid-19 makes its way from China to the United States, as well as Europe, other parts of Asia, and more than 109 countries or territories in less than four months, we are witnessing just how interconnected we have become. As the World Health Organization formally declares this crisis a pandemic and attempts to amass a global response, the US and China are only one step removed from 2 years of a Trade War that still ripples through international trade circles. When January emerged, the future was bright for a better trading relationship, but with the emerging health crisis emanating from China, commitments made in the historic Phase 1 Trade Agreement have become impossible without structural changes. Today, old stereotypes, agendas and accusations are again fueling what separates us.

然而目前随着新冠病毒疫情在不到四个月的时间里从中国到达美国，欧洲，亚洲其他地区以及109多个国家或地区，我们正见证着全世界之间的联系变得如此紧密。当世界卫生组织正式将这场危机定性为全球性疫情并试图在全球范围内采取疫情应对措施，美中两国距结束这场两年来仍在国际贸易圈中蔓延的贸易战仅一步之遥。新年的到来曾使中美贸易关系改善的前景变得光明，但伴随中国出现的公共健康危机，使得其在具有历史意义的第一阶段贸易协定中的做出承诺在没有结构性改革之前成为不可能。两国之间对彼此的刻板印象、争议话题和相互指责再次加剧了两国之间的分歧。

As the Trump administration urges and cajoles the financial and market playmakers in the US to starve off a possible recession and pushes for traditional stimulus approaches (cuts to interest rates, payroll taxes and the like), President Trump has yet to re-think his position on tariffs vis a vis China. Remember, it was not too distant in the past when the markets jumped dramatically at the slightest swift of good news over the Trade War.

特朗普政府正敦促并说服美国金融和市场组织者避开可能的经济衰退，并提出推动传统的经济刺激方案(削减利率，工资税等)，但特朗普尚未重新考虑其在关税问题上对中国的立场。请记住，在不久的过去当贸易战中传来一丝好消息时，市场便会大幅上涨。

What would such a move to suspend or even cut tariffs do today to encourage the markets, and throttle the engine of production in the US and China? As China dramatically needs an economic shot in the arm now (if for no other reason than to prevent dumping in Q3), what would a true détente on the trade front do to simulate the economy in the US, drive the markets back and perhaps more importantly, send a true message to China that we are all in this global crisis together? Think of the possibilities that such a noble gesture might engender globally, even if the US would be a direct beneficiary. Could trust be regained? Could we begin to realize that we have the same goals, which include bringing our children into a better, safer world?

设想如今降低甚至取消关税将会对鼓励市场并控制美中两国的生产力起到何种作用。由于中国目前急需经济反弹的强心针 (目的为了防止第三季度的倾销)，如果两国在贸易方面达成真正的缓和，或许更为重要的是, 如果美国向中国传达一条真诚的信息，表明我们将共同应对这场全球危机，会对激励美国经济，推动市场回升起到何种作用。即使美国将成为这些举措的直接受益者，不妨想象一下这种充满善意的高贵姿态可能对全球产生的影响。我们是否能重拾信任？我们是否能开始意识到两国之间有着相同的目标，从而把我们的下一代带入一个更加美好，更加安全的世界？

Within the last few days, the USTR, at the President's direction, took action to reduce tariffs on certain goods from China (namely, cleansing wipes, specimen containers, exam gloves, medical gowns and the like). Done to little fanfare, this act demonstrates really how inter-dependent we are – even reliant on each other for the little necessities of mutual survival. Perhaps now is the time to go further and truly deal with the trade conflict to keep commerce moving and the exchange of solutions unimpeded. Just perhaps: "*they shall beat their swords into plowshares*."

就在几天前，美国贸易代表在特朗普总统的指示下，开始着手降低对部分来自中国的商品关税(例如，清洁湿巾，采样容器，医用手套，防护服等类似产品)。尽管媒体没有大张旗鼓进行报道，这一举动真正表明了两国之间是如何相互帮助，甚至相互依靠对方以求生存。也许现在是时候进一步采取切实行动解决贸易冲突，以保持经济发展，确保解决方案交换不受阻碍。或许这也印证了中国的一句古话, 是时候让我们 "*铸剑为犁*"。

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USPTO PANDEMIC RESPONSE

by Joseph Pytel and Marc Hansen

Like many public and private enterprises, the USPTO has had to make changes in light of the COVID-19 pandemic. It is likely that, in future pandemics, the USPTO would take similar steps.

KEY TAKEAWAYS

- The CARES Act has granted the USPTO Director the ability to extend deadlines.
- Thirty-day extensions will be granted in certain proceedings where a due date was between, and inclusive of, March 27, 2020, through April 30, 2020, ***and a statement is filed indicating that the delay in filing or payment was due to the COVID-19 outbreak.***
- The USPTO is waiving petition fees for the revival of abandoned applications, or terminated or limited reexamination prosecution on the basis of unintentional delay for where ***a statement is filed indicating that the delay in filing the reply required to the outstanding Office communication was because the practitioner, applicant, or at least one inventor, was personally affected by the Coronavirus outbreak such that they were unable to file a timely reply.***
- USPTO offices are closed to the public, but the USPTO continues to operate.
- USPTO events are subject to cancellation, postponement, or changed to video or teleconference only.

CARES ACT GRANTS USPTO DIRECTOR ABILITY TO EXTEND DEADLINES

Congress has passed the Coronavirus Aid, Relief, and Economic Security ("CARES ") Act, which grants the Director of the USPTO discretion to "toll, waive, adjust, or modify" any timing deadline established under 35 U.S.C (patent law), the Trademark Act, and any timing regulations established based on those laws for the duration of the coronavirus pandemic.

Sec. 12004.

a. In General—During the emergency period described in subsection (e), the Director may toll, waive, adjust, or modify, any timing deadline established by title 35, United States Code, the Trademark Act, section 18 of the Leahy-Smith America Invents Act (35 U.S.C. 321 note), or regulations promulgated thereunder, in effect during such period, if the Director determines that the emergency related to such period—

    1. materially affects the functioning of the Patent and Trademark Office;
    2. prejudices the rights of applicants, registrants, patent owners, or others appearing before the Office; or
    3. prevents applicants, registrants, patent owners, or others appearing before the Office from filing a document or fee with the Office.

As discussed below, the Director has acted to grant extensions under this authority.

30-DAY EXTENSIONS TO BE GRANTED FOR DELAY DUE TO COVID-19 IN CERTAIN PROCEEDINGS

The due date for any of the following patent proceedings ***that was due between, and inclusive of,*** March 27, 2020, through April 30, 2020, will be extended 30 days from the initial date it was due, ***provided that the filing is accompanied by a statement that the delay in filing or payment was due to the COVID-19 outbreak.*** The notice XXXXXX

i. reply to an Office notice issued during pre-examination processing (for example, a Notice of Omitted Items, Notice to File Corrected Application Papers, Notice of Incomplete Application, Notice to Comply with Nucleotide Sequence Requirements, Notice to File Missing Parts of Application, and Notification of Missing Requirements) ***by a small or micro entity***;
ii. reply to an Office notice or action issued during examination (for example, ***an Office Action*** (Either Final or Non-Final) and Notice of Non-Compliant Amendment) or patent publication processing (for example, a Notice to File Corrected Application Papers issued by the Office of Data Management);
iii. ***issue fee***;
iv. notice of appeal under 35 U.S.C. § 134 and 37 C.F.R. § 41.31;
v. appeal brief under 37 C.F.R. § 41.37;
vi. reply brief under 37 C.F.R. § 41.41;
vii. appeal forwarding fee under 37 C.F.R. § 41.45;
viii. request for an oral hearing before the Patent Trial and Appeal Board (PTAB) under 37 C.F.R. § 41.47;
ix. response to a substitute examiner's answer under 37 C.F.R. § 41.50(a)(2);
x. amendment when reopening prosecution in response to, or request for rehearing of, a PTAB decision designated as including a new ground of rejection under 37 C.F.R. § 41.50(b);
xi. ***maintenance fee***, filed by ***a small or micro entity***; or
xii. request for rehearing of a PTAB decision under 37 C.F.R. § 41.52.

A delay is "due to the COVID-19 outbreak" if a practitioner, applicant, patent owner, petitioner, third party requester, inventor, or other person associated with the filing or fee was personally affected by the COVID-19 outbreak, including, without limitation, through *office closures, cash flow interruptions, inaccessibility of files or other materials, travel delays, personal or family illness*, or similar circumstances, such that the outbreak *materially interfered with timely filing or payment*.

Further, relief is offered before the PTAB. Upon *a request to the USPTO affirming that a filing due between, and inclusive of, March 27, 2020, through April 30, 2020, was or may be delayed due to the COVID-19 outbreak as defined above*, a 30-day extension of time will be provided for the following:

i. a request for rehearing of a PTAB decision under 37 C.F.R. §§ 41.125(c), 41.127(d), or 42.71(d);
ii. a petition to the Chief Judge under 37 C.F.R. § 41.3; or
iii. a patent owner preliminary response in a trial proceeding under 37 C.F.R. §§ 42.107 or 42.207, or any related responsive filings.
    - In the event that the USPTO extends a deadline for a patent owner's preliminary response, or any related responsive filings under subsection (2)(a)(iii), the PTAB may also extend the deadlines provided in 35 U.S.C. §§ ~14(b) and 324(c).

For all other situations before the PTAB, a request for an extension of time where the COVID-19 outbreak has prevented or interfered with a filing before the PTAB can be made by contacting the PTAB.

For further details relating to patent proceedings, click here.

Similarly, the due date for any of the following trademark proceedings ***that was due between, and inclusive of***, March 27, 2020, through April 30, 2020, will be extended 30 days from the initial date it was due, ***provided that the filing is accompanied by a statement that the delay in filing or payment was due to the COVID-19 outbreak***.

iv. ***response to an Office action***, including a notice of appeal from a final refusal, under 15 U.S.C. §1062(b) and 37 C.F.R. §§ 2.62(a) and 2.141(a);
v. statement of use or request for extension of time to file a statement of use under 15 U.S.C. § 1051(d) and 37 C.F.R. §§ 2.88(a) and 2.89(a);
vi. notice of opposition or request for extension of time to file a notice of opposition under 15 U.S.C. § 1063(a) and 37 C.F.R. §§ 2.l0l(c) and § 2.102(a);
vii. priority filing basis under 15 U.S.C. § 1126(d)(l) and 37 C.F.R. § 2.34(a)(4)(i);
viii. priority filing basis under 15 U.S.C. § 1141g and 37 C.F.R. § 7.27(c);
ix. transformation of an extension of protection to the United States into a U.S. application under 15 U.S.C. § 1141j(c) and 37 C.F.R. § 7.31(a);
x. affidavit of use or excusable nonuse under 15 U.S.C. § 1058(a) and 37 C.F.R. § 2.160(a);
xi. renewal application under 15 U.S.C. § 1059(a) and 37 C.F.R. § 2.182; or
xii. affidavit of use or excusable nonuse under 15 U.S.C. § l 14lk(a) and 37 C.F.R. § 7.36(b).

For Trademark Trials and Appeals Board (TTAB) proceedings not covered by the above and where the COVID-19 outbreak has prevented or interfered with a filing before the TTAB, a request (in ex parte appeals) or motion (for trial cases) for an extension or reopening of time, as appropriate, can be made.

For further details relating to trademark proceedings, click here.

Again, as a reminder, in all cases ***a statement must be filed stating that the delay in filing or payment was due to the COVID-19 outbreak and the due date must be between, and inclusive of, March 27, 2020, through April 30, 2020*** in order to receive the extension.

USPTO WAIVING PETITION FEES FOR REVIVAL OF ABANDONED APPLICATION, OR TERMINATED OR LIMITED REEXAMINATION PROSECUTION

Included are fees for petitions to revive patent applications with a petition under 37 CFR 1.137(a) (revival of abandoned application, or terminated or limited reexamination prosecution on the basis of unintentional delay). In order to qualify for the fee waiver, the petition under 37 CPR 1.137(a) must include a statement "that the delay in filing the reply required to the outstanding Office communication was because the practitioner, applicant, or at least one inventor, was personally affected by the Coronavirus outbreak such that they were unable to file a timely reply." The USPTO recommends including a copy of this notice with the petition.

Further included are fees for petitions to revive the abandoned trademark applications or reinstate the canceled/expired registration due to an inability to timely respond to a trademark-related Office communication as a result of the effects of the Coronavirus outbreak.

Waivers and extensions of dates or requirements set by statute are not being granted, and the dates and requirements set by statute remain unchanged.

For further details, follow this link.

ORIGINAL HANDWRITTEN SIGNATURE REQUIREMENT WAIVED

The following correspondence must be submitted with an original handwritten signature personally signed in permanent dark ink or its equivalent:

1. Correspondence requiring a person's signature and relating to registration to practice before the Patent and Trademark Office in patent cases, enrollment and disciplinary investigations, or disciplinary proceedings; and
2. Payments by credit cards where the payment is not being made via the Office's electronic filing systems.

37 CFR 1.4(e)(1) and (2) are the only places where original handwritten, ink signatures are required, and will likely impact a limited number of practitioners.

Interviews, oral hearings, and in-person meetings are now to be conducted remotely by video or telephone.

USPTO OFFICES ARE CLOSED TO THE PUBLIC AS OF MARCH 16, 2020.

USPTO offices remain open to "employees, contractors, and those with access badges." USPTO operations are expected to continue without interruption until further notice.

USPTO EVENTS

A number of USPTO events have been cancelled, postponed, or changed to video or teleconference only. For further information see: https://www.uspto.gov/about-us/events.

Sources and further information:
https://www.congress.gov/bill/116th-congress/house-bill/748/text
https://www.uspto.gov/sites/default/files/documents/Patents%20CARES%20Act.pdf
https://www.uspto.gov/sites/default/files/documents/TM-Notice-CARES-Act.pdf
https://www.uspto.gov/coronavirus
https://www.uspto.gov/sites/default/files/documents/coronavirus_relief_ognotice_03162020.pdf
https://www.uspto.gov/about-us/events

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CLIENT ALERT

VIRTUAL WITNESSING OF WILLS AND POAS DURING COVID-19

by Jennifer C. Leve, Sahar Cadili, and Carly J. Walter

On April 7, 2020, the Ontario government made an order under the *Emergency Management and Civil Protection Act* which temporarily amends the provincial legislation governing the execution of wills and powers of attorney. The emergency order permits the virtual witnessing of wills and powers of attorney over audio-visual communication technology for the duration of the state of emergency.

WHY DO YOU NEED TO THINK ABOUT YOUR WILL AND POWER OF ATTORNEY NOW?

The severity and uncertainty of circumstances surrounding the COVID-19 pandemic highlight the necessity of proper estate planning. Testators should take the time to ensure that their estate planning documents are up to date. This includes a careful review of the will, including the named estate trustee(s), whether sufficient alternate estate trustee(s) are named, and any specific gifts made under the will. It is also important to ensure that powers of attorney for property and personal care are in place for individuals who fall into high-risk categories given the unpredictability and rapid escalation of the disease. A list of assets and debts or any matters requiring financial management would also be very helpful to any estate trustee or power of attorney for property.

WHAT DOES THE EMERGENCY ORDER CHANGE?

Until now, wills and powers of attorney were only legally valid if they were signed in the physical presence of two witnesses who both sign the documents as witnesses in the presence of the testator. Ontario courts have no authority to validate a will or power of attorney that fails to comply with legislative formalities, which poses a problem when mandatory physical distancing makes the onerous formalities inadvisable and/or impossible during the COVID-19 pandemic.

Pursuant to the emergency order, witnessing requirements may be satisfied by "audio-visual communication technology," with the additional requirement that at least one of the witnesses is a "licensee" under the *Law Society Act* (i.e. a lawyer or paralegal) at the time of signing.

WHAT RISKS MAY RESULT DURING VIRTUAL SIGNING?

There are potential risks that arise when the requirement for in-person witnessing is relaxed. Of course, contact by video is less reliable than in-person contact. Lawyers and paralegals need to remain vigilant given the higher chance that the testator has capacity issues, is subject to improper or undue influence, or that an incorrect version of the will or power of attorney is signed inadvertently. In addition, there may be privacy issues that come into play with meetings that take place on public video-conferencing platforms. Moreover, the fact that the testator acknowledges his or her signature while the will or power of attorney is in the hands of a witness could increase the potential for fraud and forgery.

WHAT RESTRICTIONS REMAIN INTACT?

The efforts to support testators who are self-isolating fall short of what some consider adequate; several arduous obstacles remain. The emergency order does not permit wills and powers of attorney to be signed by electronic means (such as DocuSign). In addition, wills and powers of attorney cannot be signed in counterparts or by separate signature pages since there is only one valid original document. This may cause significant delay as the documents must be couriered from the testator to each witness, and multiple video conferences will ensue. Other legislative formalities, such as the general requirement that neither witness can be a beneficiary or the spouse of a beneficiary, continue to be required.

WHAT WILL THIS PROCESS LOOK LIKE?

A lawyer or paralegal will prepare the will or power of attorney under the normal course, but shall amend the "attestation clause" of each such document reference the circumstances (i.e. the video witnessing). The lawyer or paralegal should review the completed documents with the client and ensure that the testator understands and appreciates the contents of the documents, that the documents reflect their wishes, is under no undue influence and that no suspicious circumstances surround the completion of these documents.

The lawyer or paralegal may act as a witness for the execution of the documents and will ensure that a second witness is able to join the video conference in real time.

After the testator has signed the documents during a real time audio-visual conference with both witnesses, the signed documents could be couriered by the testator to one of the witnesses who would sign the documents in the virtual presence of the testator and the other witness, followed by the same process for the second witness to sign the documents.

Although there is no conclusive answer as to how the document should be dated given the novel situation in which the document may be signed by the testator and witnesses on different days, the Ontario legal community is of the view that the "date" of the documents is the date of execution, or in other words, the date that the last of the three parties signs them.

The witnesses should also each sign an Affidavit of Execution that has been drafted to describe the unique circumstances of the video will witnessing. The witness may sign such an affidavit in front of a commissioner of oaths virtually, although the lawyer or paralegal who acted as a witness should not be the commissioner of either affidavit.

HOW WE CAN HELP

We remain committed to paying attention to the changing circumstances and assisting you with your planning needs. Contact a Dickinson Wright LLP team member to discuss your current financial situation and see what is the best option for you.

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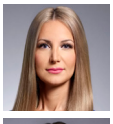

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CLIENT ALERT

WANTED IN CANADA: MANUFACTURERS AND SUPPLIERS TO ADDRESS COVID-19

by Matthew Powell, Wendy G. Hulton, and Jacky Cheung

The COVID-19 outbreak has led to a strain on the national supply of medical supplies, equipment, and services. In light of this, both the Government of Canada and provincial governments are calling on manufacturers and suppliers for immediate assistance.

These calls to action are excellent opportunities for businesses looking for ways to help fight the pandemic and for helping to mitigate the economic effects of the downturn.

GOVERNMENT OF CANADA'S CALL TO ACTION

Businesses are being asked to reach out immediately if they:

- Manufacture in Canada and/or have ready access to necessary inputs through their supply chain;
- Have equipment or facilities that can be quickly retooled to meet medical needs, including for supplying PPE (Personal Protective Equipment), sanitizers, wipes, ventilators, and other medical equipment and supplies;
- Have skilled workers who are able to respond and work in the current circumstances; or
- Can provide other assistance in the form of food services, nursing, IT support services, and security guard services.

This call to action is not limited to Canadian businesses.

The complete list of products and services that the Government of Canada is calling for, as well as the relevant regulatory requirements pertaining to the products and services, can be found here.

GOVERNMENT OF ONTARIO'S CALL TO ACTION

Businesses are being asked to reach out immediately if they can provide medical supplies, such as ventilators, masks, sanitization, swabs, and gloves.

The complete list of products the Government of Ontario is calling for can be found here.

In order to encourage businesses to take action, the Government of Ontario has also created the Ontario Together Fund. The Fund has been allocated $50 million to assist companies with retooling and otherwise building capacity to produce medical supplies and equipment for hospitals, longterm care homes, and other critical public services.

Other provinces, such as British Columbia and Manitoba, are making similar requests.

HEALTH CANADA'S REGULATORY AUTHORIZATIONS FOR PPE

Health Canada – the department responsible for Canada's federal health policy – has now enacted a number of temporary measures for quickly evaluating the effectiveness, quality, and safety of new products.

Suppliers and importers are being encouraged under these exceptional circumstances to apply for authorizations to sell and import COVID-19 medical devices which have already been authorized by foreign regulatory authorities, despite not meeting all of Health Canada's regulatory requirements. We have been assisting many of our clients with efforts to pivot to respond to the ever-growing demand for PPE.

Health Canada will also expedite the review and issuance of Medical Device Establishment Licenses for businesses who are requesting to manufacture, import or distribute Class I medical devices, such as gowns, masks, and face shields in relation to COVID-19.

Having recognized that some businesses are well-positioned to provide 3D-printed medical supplies, Health Canada has also published guidance with respect to 3D printed PPE.

HAND SANITIZERS

Health Canada has created a streamlined process for businesses intending to manufacture or distribute alcohol-based hand sanitizers. Interested businesses will need to apply for a product and/or site license, depending on whether the business currently manufactures, imports, or packages such products and whether it intends to manufacture and/or distribute alcohol-based sanitizers.

PERSONAL CARE PRODUCTS

The COVID-19 pandemic has also created a significant demand for household cleaning products which are regulated under the Canada Consumer Product Safety Act ("CCPSA") as well as personal care products such as hand soaps and body soaps which are regulated as cosmetics under the Food and Drugs Act (FDA). To address this demand, Health Canada has issued an interim policy to facilitate access to these products. The interim policy includes forgoing some Canadian labelling requirements such as bilingual labelling.

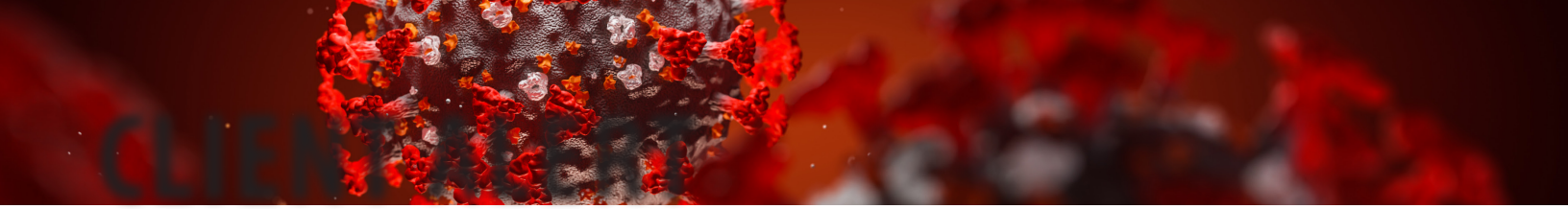
INFORMATION FOR IMPORTERS

The Canada Border Services Agency ("CBSA") has temporarily allowed for the relief of duty and taxes for goods required for the COVID-19 emergency and imported on behalf of the federal, provincial, or municipal entities.

As explained in Customs Notice 20-08 dated April 6, 2020, eligible goods include those imported by, or on behalf of, public or private care residences such as nursing homes, retirement homes, and shelters.

Customs Notice 20-12 dated March 31, 2020, can assist importers with tariff classification of medical supplies.

Suppliers looking to import products from the United States should also be mindful of any export restrictions on medical supplies or equipment. For more information, Dickinson Wright's overview of the American Coronavirus Aid, Relief and Economic Security (CARES) Act can be found here.



INTELLECTUAL PROPERTY CONSIDERATIONS

Having recognized that some businesses may respond to the calls to action by copying existing products, on March 25, 2020, Canada's Parliament added health emergency compulsory patent licensing legislation to the *Canadian Patent Act*. Dickinson Wright's overview of the new provisions can be found here.

We encourage anyone providing products or services for addressing the COVID-19 emergency to contact us for guidance on the process by which compulsory licenses can be secured and for guidance on determining who may eventually be responsible for paying royalties under a license.

Businesses should be aware that the compulsory patent licensing legislation applies only to the licensing of Canadian patents. It does not apply to the licensing of trademarks, industrial designs, copyrights, or trade secrets. Navigating differences between different types of intellectual property can be a challenge, and we encourage anyone intending to copy others' products or services, or even intending to create new ones, to contact us for guidance. We have been assisting numerous clients with intellectual property considerations as they have been pivoting their businesses to respond to the pandemic.

We encourage anyone who is developing their own new products or services in the fight against COVID-19 to contact us for guidance on simple things that can be done now so that the intellectual property can enjoy protection once things are back to normal.

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Health Law Blog

WHAT HEALTH CARE PROVIDERS AND SUPPLIERS NEED TO KNOW ABOUT THE NEW PAYCHECK PROTECTION PROGRAM UNDER THE CARES ACT

Posted by Health Law Team | Apr 2, 2020

The CARES Act establishes a new loan program for small businesses during the period starting on March 1, 2020, and ending on December 31, 2020, and in certain situations forgiveness of such loan, which many health care providers and suppliers should review. Known as "7(a) Paycheck Protection Program loans" ("PPP Loans"), businesses in the health care industry having 500 or fewer employees or otherwise meet the Small Business Administration ("SBA") small business size standards are eligible for a PPP loan administered by the Small Business Administration. PPP loans can also be applied for by individuals who operate a sole proprietorship, are independent contractors, and are eligibly self-employed. Health care providers and suppliers remaining open due to their essential nature during this uncertain economic period must become aware of this loan program and associated requirements of the SBA.

PPP Loans may be used to pay a number of business expenses, as follows:

- payroll support, including paid sick, medical, or family leave, and costs related to the continuation of group health care benefits during those periods of leave;
- employee salaries
- interest on mortgage payments;
- rent (including rent under a lease agreement);
- utilities; and
- interest on any other debt obligations that were incurred before the covered period.

The maximum amount of a PPP Loan is calculated by determining your average total monthly payments for payroll costs incurred during the 1 year period before the date on which the loan is made, and multiplying that number by 2.5. The cap on a PPP Loan is $10,000,000. The CARES Act requires lenders to defer all payments under PPP Loans for a period of "not more than 1 year."

In order to qualify for a PPP Loan, an eligible business must have been in operation on February 15, 2020, and either had employees it paid salaries and payroll taxes or paid independent contractors reported on a Form 1099-MISC. Additionally, applicants must also certify in good faith that (1) the need of the loan is due to the uncertainty of current economic conditions and is necessary to support ongoing operations; (2) the funds will be used only for the allowable uses; (3) the applicant does not have another pending application under this program for the same purpose; and (4) the applicant has not received a loan under this program for the same purpose and duplicative amounts. Applicants are not permitted to have multiple applications with multiple SBA lenders under this program. Additionally, receipt of a loan under this program prohibits receipt of the Employee Retention Credit for Employers

PPL Loans made to the business during the period starting March 1, 2020, and ending on June 30, 2020 shall be forgiven and treated as canceled debt (not included in gross income) to the extent funds are sepnt on cover payroll costs, and most mortgage interest, rent, and utility costs over the 8-week period after the loan is made. For purposes of calculated total loan forgiveness, "payroll costs" do not include:

- compensation of an individual employee in excess of $16,666 during such period;
- qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act; or
- qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act.

However, the amount of the PPP Loan forgiveness will be reduced in the following situations:

- If the business reduces employees during the period, the forgiven amount will be reduced by a percentage equal to the difference obtained from subtracting the amount calculated as follows, from 1: Divide your average number of full-time equivalent employees per month employed by the business for the 8 weeks beginning on the loan originationd by either the average number of full-time equivalent employees per month employed by the business during the period beginning on February 15, 2019 and ending on June 30, 2019, or the average number of full-time equivalent employees per month employed by the business from January 1, 2020 to February 29, 2020. The average number of full-time equivalent employees is determined by calculating the average number of employees for each pay period falling within the month.
- If the business reduces employee compensation during the period, the forgiven amount will be reduced by the amount of any reduction in excess of 25 percent of compensation in the most recent full quarter in which the employee was paid in compensation during the covered period of any employee who was compensated..

Additional benefits of this program are that an applicant does not have to be unable to obtain credit elsewhere to qualify, nor does there need to be a personal guaranty or collateral for the loan. There also is no prepayment penalty for these loans and the interest rate cannot be more than 4 percent. Actual interest rates will be determined by the lender.

Special Note on Affiliations with Larger Enterprises. If your business is affiliated with a larger enterprise, such as in the case of a "friendly" professional corporation to a larger management organization, the number of employees in your business may be aggregated with the number of employees in the affiliated entity or entities when determining eligibility for a small business loan. Businesses are considered by the SBA to be affiliated for purposes of the loan program when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

In determining whether affiliation exists, the SBA will consider the totality of the circumstances and may find affiliation even though no single factor is sufficient to constitute affiliation. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

Therefore, if your business entity is managed by a larger organization, the extent of the manager's control over your business activities will be important to understand prior to certifying as a small business. For example, if the management organization has unfettered ability to force the owners of the managed business to sell their equity interests, it is likely the SBA would consider the entities affiliated for purposes of the 7(a) loan program. Additionally, if another company (such as a management organization) has the power to appoint a majority of the directors of a managed business, then the entities may be considered affiliated by the SBA. It is important to analyze this prior to submitting a small business loan application since a misrepresentation on the application could result in civil or criminal penalties.

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ENERGY & SUSTAINABILITY

WHAT TO EXPECT WHEN YOU'RE EXPECTING THE EXPANDED PJM MINIMUM OFFER PRICE RULE

by Madeline Fleisher

On December 19, 2019, the Federal Energy Regulatory Commission (FERC) disrupted the holiday season for many in the U.S. energy sector by issuing an order requiring PJM Interconnection (PJM) to amend its Minimum Offer Price Rule (MOPR) to expand restrictions on the participation of all state-subsidized resources in the PJM capacity market. With PJM's March 18, 2020 filing in compliance with that order now on the books at FERC, the real implications of that MOPR order are becoming more clear.[1]

The MOPR was originally established in 2007, setting a floor price for resources bidding into PJM's capacity market to prevent them from deliberately underbidding to artificially suppress capacity prices, but has historically been applied only to new natural gas generation. FERC's expansion of the MOPR to apply to all resources receiving state subsidies means that a whole new set of market participants may be subject to minimum price floors in bidding into PJM's capacity auctions, including new resources in vertically integrated states, energy efficiency and demand response resources supported by state or utility programs, and of course solar, wind, nuclear, hydro, biomass, and other "carbon-free" resources subsidized at the state or local level.

There are a range of views on whether FERC's order constitutes a needed return to market principles, an attempt to undermine states' authority over generation resources in the United States' federalized system of government, or simply yet another new set of rules to adapt to in today's ever-evolving energy landscape. But whatever your position on the merits, the "expanded MOPR" will be here soon, with PJM's March 18 compliance tariff filing now subject to review and approval by FERC. That means a big question going forward will be: how is this going to work, both for capacity market participants and those who want to procure clean energy? Below are some initial observations.

Who's in and who's out: FERC directed PJM to apply default minimum price floors under the MOPR to almost any "state-subsidized" resources bidding into the capacity auction, and PJM accordingly seeks to apply a broad definition of state subsidy encompassing any:

> direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is as a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (1) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce; or (2) will support the construction, development, or operation of a new or existing Capacity Resource; or (3) could have the effect of allowing the unit to clear in any PJM capacity auction.

PJM's compliance tariff does adopt the main exceptions to this definition that were sanctioned by FERC's order: (1) local industrial development or siting incentives, where those are not specific to a particular type of resource; and (2) revenues or other benefits under federally mandated regulatory programs such as the Public Utility Regulatory Policies Act (PURPA) or the Clean Air Act's Cross-State Air Pollution Rule.

Additionally, PJM offers up-front clarification that certain other state and local programs will not constitute triggering subsidies. PJM's tariff explicitly exempts three major types of potential "state subsidies":

- The Regional Greenhouse Gas Initiative (RGGI) or any other regional program that may indirectly benefit certain resources by imposing a charge on their competitors (in the case of RGGI, a cap on CO_2 emissions that results in compliance costs for fossil-powered resources to the benefit of carbon-free generation);
- Any state-directed default service procurement plan competitively procured without regard to resource fuel type; and
- Any capacity revenues that a resource receives through participating in a load-serving entity's Fixed Resource Requirement (FRR) Alternative plan, consistent with FERC's assertion in its December 19 order that the FRR option under PJM's existing tariff should remain for load-serving entities to formulate their own resource adequacy plans for capacity procurement outside the PJM capacity market.[2]

Finally, consistent with FERC's order, PJM's filing establishes a "competitive exemption" for resources that forgo a state subsidy in favor of entering into voluntary, arm's-length bilateral transactions. Although the details remain to be finalized, PJM represents that it will update its existing Generation Attribute Tracking System (GATS) for tracking environmental attributes to ensure that renewable energy credits (RECs) from resources electing the competitive exemption can be used only for voluntary obligations, not for compliance with state renewable portfolio standards.

For new resources, this limited set of clarifications provides more certainty with respect to a mechanism for private, voluntary REC transactions as well as some major state programs such as RGGI, PURPA Qualifying Facility rates, and of course the FRR option that some states within PJM are considering now. That certainty may encourage a transition to a voluntary transaction paradigm wherever that is viable. Meanwhile, state and local activity may trend toward the channels excluded from the definition of "state subsidy" where such approaches are feasible and fit with the state's or locality's energy policy goals, especially preferences for clean energy.

In the meantime, PJM has left a number of open-ended questions as to what constitutes a "state subsidy" outside these limited bright lines. For example, for jurisdictions with community choice aggregation, will revenues or other support from aggregation entities be considered action by a "political subdivision" of a state or "an electric cooperative formed pursuant to state law," or simply the equivalent of a voluntary market choice by the participating retail electricity customers? Will resource procurements that are not explicitly fuel-specific be considered a subsidy if they inherently favor the economics of non-fossil fuel resources, such as a long-term 15- or 20-year procurement where a renewable resource may be able to win out

[1] https://pjm.com/directory/etariff/FercDockets/4443/20200318-er18-1314-003.pdf.

[2] The proposed state subsidy definition also excludes benefits resulting from projects under PJM's Regional Transmission Expansion Plan, and revenues from a Self-Supply Entity's arm's length contract with a resource where the contract is less than one year or the result of a competitive process that was not fuel-specific or purposefully used to support uneconomic capacity resources.

with a low fixed price? What are the limits on governmental incentives for local energy development before they will no longer be considered exempt generic industrial development or siting support? Is offering a renewable resource through a utility's voluntary "green tariff" enough to constitute an actionable subsidy?

Market watchers may know more in the next few months since PJM's compliance filing states that it intends to work with the Independent Market Monitor to prepare a guidance document with a non-exhaustive list of "state subsidy" programs to provide additional information on where the MOPR lines will be drawn. But while that document will provide some answers, they will not necessarily be final ones, and PJM also declined to include in its tariff filing any defined process for a resource to get an up-front determination of its status under the MOPR or to challenge PJM's determination if it disagrees. Overall, this will undoubtedly be the first step in a longer journey toward resolving the remaining uncertainties regarding the new state and local policy regime shaped by the expanded MOPR.

For existing resources, these definitional questions will be of much less importance. In recognition of the fact that significant investments had been made in state-subsidized resources well before anyone contemplated such major changes to the MOPR, FERC categorically exempted existing self-supply resources (i.e., existing resources in vertically integrated jurisdictions); existing renewable resources participating in state renewable portfolio standard programs; existing demand response and energy efficiency resources; and existing energy storage resources. PJM plans to prepare specific lists of all of the existing resources that qualify for these categorical exemptions, so that the resource owners may either confirm the determination or seek further remedies if they disagree.[3] Thus, existing resources should generally have certainty prior to the next capacity auction as to whether they will escape triggering the MOPR.

The MOPR Math: Ultimately, the impacts of the MOPR may depend less on who it applies to than on the math of what minimum floor price it sets for a given resource. If that price floor is too high, it may fall above the ultimate "clearing price" in a given auction – which means that resource will not clear and will not receive any capacity revenues for the relevant PJM delivery year. As a reference point, here are the historical clearing prices in PJM's Base Residual Auction (BRA), the main capacity auction held three years in advance of a capacity delivery year, across the Regional Transmission Organization (RTO), over the last five years – noting that these exclude constrained areas of PJM subject to local capacity shortages where prices are therefore higher[4]:

Delivery Year	BRA RTO Clearing Price
2017/2018	$120.00
2018/2019	$164.77
2019/2020	$100.00
2020/2021	$76.53
2021/2022	$140.00

PJM's compliance filing provides initial default prices for the various types of new and existing resources that may be subject to the MOPR (although those will be adjusted through PJM's ongoing quadrennial review process and as other relevant variables change). Fortunately for some of these resources, it looks like the relevant "MOPR math" may well work out in their favor.

For new generation resources, PJM's proposed tariff includes gross "Cost of New Entry" (CONE) prices that will be netted against projected energy and ancillary services revenues for the resource to produce a "net CONE" price to serve as the applicable minimum offer price floor. For generation resources, those range from $271 for tracking solar resources up to $2,000 for nuclear resources. PJM's filing also offers illustrative net CONE values for each of those resources using its chosen methodology for calculating energy and ancillary services revenues:

	Illustrative Default MOPR Floor Offer Prices		
Planned Resource Type	Gross CONE (Cost of New Entry) $/MW-day (Nameplate)	Estimated Average Zonal E&AS Revenue Offset $/MW-day (Nameplate)	Illustrative MOPR Floor Offer Prices net of E&AS Revenues $/ICAP MW-day
Nuclear	$2,000	$517	$1,483
Coal	$1,068	$43	$1,025
Combined Cycle	$320	$168	$152
Combustion Turbine	$294	$48	$246
Solar PV (Tracking)	$290	$185	$175
Solar PV (Fixed)	$271	$117	$367
Onshore Wind	$420	$240	$1,023
Offshore Wind	$1,155	$337	$3,146
Battery Energy Storage	$532	$116	$1,040
Demand Response (Generation-backed)	$254	$0	$254

Although these net prices are still generally above the historic PJM BRA clearing prices, two further considerations could affect outcomes for specific resources – especially those such as tracking solar PV that may be within striking distance.

First, PJM's filing preserves its "unit-specific" exemption from the MOPR, now retitled the "resource-specific" exemption, which allows any resource subject to the MOPR to avoid application of the default floor price and instead have a minimum bid price set based on a review of its actual costs, projected asset life, and other information supported by sufficient justifications. Especially to the extent PJM's default CONE calculations involve outdated or simply

[3]The question of which resources are "existing" does become more complicated for demand-side resources involving aggregated customer sites. PJM proposes that for demand response, commercial/industrial resources will be tracked based on customer locations that have participated as demand response in prior capacity auctions while residential demand response will be considered "existing" based on an amount of previously cleared MW alone without regard to specific customer identity. Similarly, for energy efficiency the "existing" determination will track the amount of MW previously cleared or measured in the PJM post-installation verification process.
[4]This caveat is important because some areas of PJM, such as COMED and EMAAC, have historically been "constrained" across multiple years, resulting in higher localized clearing prices.

incorrect assumptions, this avenue may allow resources to show that they can bid at a cost-based price low enough for them to clear in the capacity auction, regardless of any state subsidy. For example, a longer asset life than assumed by PJM could result in more favorable energy and ancillary services revenue calculations to offset the gross CONE.

Second, as noted above, some areas of PJM have transmission constraints that result in localized capacity clearing prices higher than the overall RTO clearing price. Those constrained areas have had clearing prices reaching above $200 in recent years.[5] Accordingly, some resources located in constrained areas may be able to clear even at the default net CONE price.

For demand-side resources – load-backed demand response and energy efficiency – the main thing to know about PJM's proposed methodology for setting cost-based net CONE floors is that it produces very different results. PJM's initial proposed offer floors for those resources reach $66.81 at the highest, making them likely to clear a BRA even under the expanded MOPR.

Once a resource subject to the MOPR manages to clear an auction and become an "existing resource" subject to a minimum price floor based on a net Avoidable Cost Rate (ACR), MOPR may become a non-issue – except for nuclear. For all resources other than nuclear, PJM's gross ACR values are $80 or below, and the illustrative net ACRs based on those values range from $0 to $37. Single-unit nuclear resources are the outlier, with an illustrative net ACR of $210, and thus may face more difficulty even if any such nuclear unit overcomes the hurdles to clearing an auction as a new resource.

Next steps: PJM has requested that FERC set a public comment period of at least 35 days on its compliance tariff filing, i.e., no sooner than April 22, 2020. FERC's review of the filing, although almost certain to be handled quickly to allow for resumption of capacity auctions as soon as possible, will likely not conclude until late spring or early summer at best. In the meantime, PJM will be continuing its stakeholder engagement to develop guidance on some remaining areas of ambiguity as discussed above.

PJM is targeting completion of the outstanding 2022/2023 BRA approximately 6 ½ months after FERC's acceptance of its compliance filing, or at the latest by March 31, 2020, if a state requests the additional time to explore implementation of an FRR Alternative plan. After the 2022/2023 BRA, PJM plans to hold successive BRAs every six months thereafter through the 2025/2026 BRA, in order to get back on track to its three-year forward auction schedule. Accordingly, within the next 18 months, the picture may be a lot clearer as PJM makes its way toward "the new normal" under the expanded MOPR.

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[5]PJM, 2021/2022 RPM Base Residual Auction Results, https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx; PJM, 2020/2021 RPM Base Residual Auction Results, https://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2020-2021-base-residual-auction-report.ashx.

CANADIAN IP

CIPO PANDEMIC RESPONSE: FINAL DEADLINE EXTENSION ENDS AUGUST 21, 2020*

by Matthew D. Powell

The Canadian Intellectual Property Office (CIPO) has now updated its Service and Website Interruptions page to inform the public of a new, and final, deadline extension in response to the ongoing health crisis.

DEADLINE EXTENSION

In response to the ongoing health crisis, CIPO had extended certain deadlines falling between March 16, 2020 and August 7, 2020 to August 10, 2020. These extensions had been implemented successively as CIPO monitored the health crisis.

The CIPO has now announced that they will no longer be implementing successive extensions and that the final extension ends on **August 21, 2020.**

We recommend that, where possible, clients should aim to meet the original deadlines. However, please contact us promptly if there has been a missed deadline, or if you have any questions or concerns at all about deadlines and how these changes might affect your applications, so that we can assist.

*This is an update to our previous alerts on this topic, which are found here:

- CIPO Pandemic Response: Update July 6, 2020
- CIPO Pandemic Response: Update June 15, 2020
- CIPO Pandemic Response: Update June 1, 2020
- CIPO Pandemic Response: Update May 15, 2020
- CIPO Pandemic Response: Update April 28, 2020
- CIPO Pandemic Response and Canada's New Compulsory Patent Licensing Provisions

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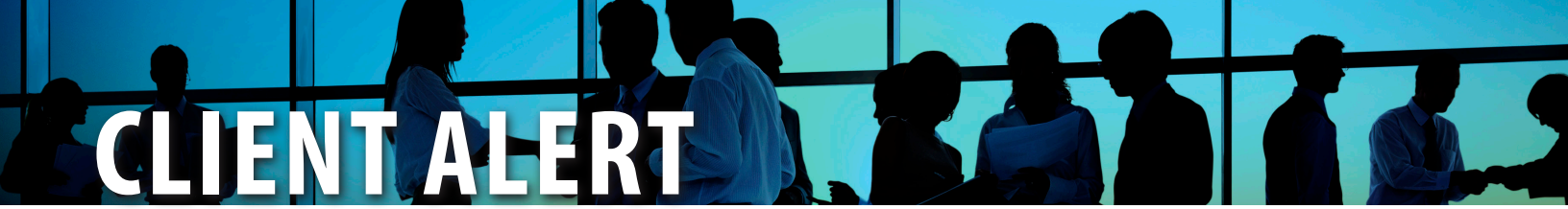
Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.



Educators Still Required to Comply With New Title IX Regulations by August 14, 2020

By Aimee R. Gibbs, Adam J. Schira and Chelsea L. Canaday

On August 14, 2020, the U.S. Department of Education's new Title IX regulations become effective. These regulations govern how education programs that receive federal funding must respond to sex discrimination, including sexual harassment. The regulations set forth specific minimum responsibilities and requirements that apply to kindergarten through 12th grade.

Not all of the requirements are new; however, certain provisions may seem new to K–12 districts/schools because this is the first time many requirements are explicitly stated in the regulations. As a result, K–12 districts/schools will need to review their current policies and make substantial changes regarding how they prevent, respond to, investigate, and address sexual harassment.

Several states have filed injunctive lawsuits in an attempt to postpone the effective date of these new regulations due to the COVID-19 pandemic and in light of all of the extra work administrators and teachers are currently undertaking to address health and safety response plans, as well as to develop, update, and implement virtual education programs. To date, the courts have not granted such relief. Therefore, as K-12 districts/schools struggle with reopening or continuing online learning during the pandemic, they must also comply with the new Title IX requirements, including but not limited to, designating certain Title IX staff positions, developing policies, responding to and investigating complaints, and implementing and posting training — all by August 14, 2020. We provide a brief overview of the key areas to be updated below.

DESIGNATION OBLIGATIONS

Before the changes, districts/schools were already required to have a "Title IX Coordinator" lead compliance efforts. Now the regulations require districts/schools to designate additional positions, including investigators (if different from the Title IX Coordinator) and two levels of decision-makers —one for an initial determination of a sexual harassment complaint and one for appeal. The regulations specify decision-makers cannot be the same person as the Title IX Coordinator or an investigator.

RESPONSE OBLIGATIONS

A K–12 district/school must investigate when any employee has "actual knowledge" or notice of sexual harassment or allegations of sexual harassment. While many states already have mandatory reporting statutes for districts/schools, the new Title IX regulations essentially make reporting a federal requirement. Of note, the regulations define "sexual harassment" to include conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct; unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the education program or activity; and sexual assault, dating violence, domestic violence, or stalking.

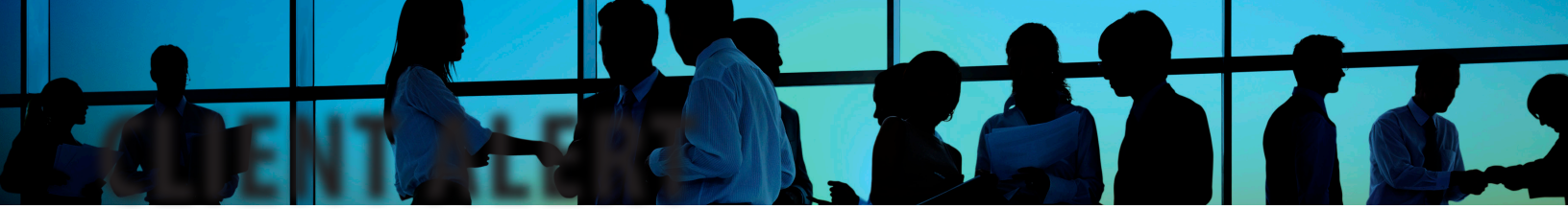
Once a district or school's response obligations are triggered, the Title IX Coordinator must promptly contact the complainant to explain the process for filing a formal complaint. The new regulations also require districts to offer supportive measures — including counseling, contact restrictions, and modification of class schedules — to complainants of sexual harassment.

GRIEVANCE PROCESS REQUIREMENTS

Districts/Schools must follow a detailed and timely grievance process for sexual harassment complaints before imposing any discipline or non-supportive measures against the accused. However, districts/schools may place accused non-student employees on administrative leave while a grievance process is pending, or remove students on an emergency basis subject to certain parameters.

The new sexual harassment grievance process provides for substantial rights for the complainant and the accused, including but not limited to: explicit notice of the allegations; opportunities to respond; the ability to review evidence and the investigative report; the aid of an advisor throughout the proceedings, who may be, but is not required to be, an attorney; and the chance to submit questions to the other party or witnesses.

K-12 districts/schools can decide to hold hearings, though they are not required. Ultimately, a decision-maker must issue a written determination of responsibility on the sexual harassment complaint, and either party may appeal to a separate decision-maker on certain bases. If the decision-maker issues a determination of responsibility for sexual harassment, the district/school must provide remedies to a complainant.



INVESTIGATIVE REQUIREMENTS

During the investigation of a sexual harassment complaint, the Title IX Coordinator (or investigator if different) has enumerated responsibilities to provide the parties equal opportunity to present witnesses and other evidence, a notice of any interviews and time to prepare, and the ability to inspect and review evidence. The investigator must also maintain the proper burden of proof and create an investigative report that fairly summarizes the relevant evidence.

TRAINING REQUIREMENTS

Before the changes, Title IX already required districts to train certain personnel on the law. The new regulations, however, identify new training topics for certain designated personnel, including on the regulation's new definition of sexual harassment and how to serve impartially.

Moreover, districts/schools must now train decision-makers on how to conduct live hearings (if the K–12 district/school chooses to have live hearings) and how to review the evidence — including what questions and evidence are relevant — as well as train investigators on how to create an investigative report that fairly summarizes relevant evidence. Districts/Schools must also make all training materials publicly available by posting them on their website.

NOTIFICATION REQUIREMENTS

Districts/Schools must notify applicants for admission and employment, students, parents or legal guardians of students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the district/school, of Title IX Coordinator contact information, including email, and of the fact that it does not discriminate on the basis of sex in its education program or activity—posting this information on its website and in each student handbook or catalog. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless inapplicable) and employment, and that inquiries about the application of Title IX may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

Districts/Schools must also provide the aforementioned individuals with notice of the district/school's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the district/school will respond.

RECORDKEEPING REQUIREMENTS

Each sexual harassment complaint also now includes the requirement to maintain specific records for a period of seven years, such as records pertaining to the investigation, any appeal, any resolution, and all materials used to train those involved.

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Tax Blog

IRS GRANTS RELIEF FOR 2020 RMDS

Posted by Tara Halbert | Aug 10, 2020

The IRS recently granted additional relief for retirement account owners due to Covid-19. Generally, when a person attains age 72 (previously age 70 ½) that person is required to begin taking required minimum distributions ("RMDs") from their retirement account each year based on their life expectancy. Individuals with inherited IRAs are required to take annual RMDs regardless of their age.

The CARES Act, enacted earlier this year, provides a waiver of RMDs for defined contribution plans (such as 401(k) and 403(b) plans) and IRAs for 2020. Instead of being required to take an RMD in 2020, an account owner can leave the RMD amount in the account, thereby avoiding taxable income and earning additional tax-deferred growth. Additionally, the IRS recently expanded this relief in Notice 2020-51 by allowing an account owner who has already taken an RMD in 2020 to repay those funds to the retirement account and avoid recognizing such income. An account owner has until August 31, 2020 to make the repayment.

This is an excellent planning opportunity for those who were required to take an RMD in 2020 but are in a high income tax bracket and do not need the funds this year. Not only can the funds be reinvested in the retirement account to continue to grow, the taxpayer can avoid the income tax consequences of a required RMD.

For more information, please contact Tara Halbert in the Lexington, Kentucky office at 859-899-8711.

Disclaimer

STATE DEPARTMENT EXPANDS NATIONAL INTEREST EXCEPTIONS FOR NONIMMIGRANTS SUBJECT TO PRESIDENTIAL PROCLAMATION 10052

Posted by **Kathleen Campbell Walker** | Aug 14, 2020

As employers continue to try to find ways for essential nonimmigrants and their dependents to be issued H-1B, H-2B, L-1, and J-1 (intern, trainee, teacher, camp counselor, au pair, or summer work travel program) visas subject to Presidential Proclamation 10052 (Proclamation 10052), on August 12, the State Department updated its list of examples (August 12 NIE) for qualification of the national interest exceptions (NIE) from Proclamation 10052. Please refer to my earlier article outlining the provisions of Proclamation 10052. The nonimmigrant issuance restrictions in Proclamation 10052 are separate from the geographic Presidential Proclamations requiring presence for 14 days in a country not subject to the geographic proclamations. This article will primarily address the L-1 and H-1B categories addressed in the August 12 NIE posting.

What nonimmigrant visa categories are subject to the suspension imposed by Proclamation 10052?

Applicants for H-1B, H-2B, and L-1 visas; J-1 visa applicants participating in the intern, trainee, teacher, camp counselor, au pair, or summer work travel programs; and any spouses or children of covered applicants applying for H-4, L-2, or J-2 visas.

When did Proclamation 10052 as to certain nonimmigrant visa categories become effective and when will its restrictions end?

Proclamation 10052 became effective at 12:01 am (ET) on June 24, 2020 and remains in effect through December 31, 2020, unless extended or terminated by the President.

Does Proclamation 10052 apply to visa issuances and admission to the U.S. at a port of entry?

Yes. Customs and Border Protection (CBP) officers have indicated that if the State Department's consular officials issue a visa in one of the listed categories affected by Proclamation 10052, they will admit the visa holder assuming he or she is otherwise eligible for admission to the U.S. Note, however, that for those already holding a qualifying visa for admission in a Proclamation 10052 category, CBP may require prior notification for admission of the individual using an NIE. This process is not uniform.

How does a visa applicant apply for Proclamation 10052 NIE?

Since the Department of State (DOS) suspended most nonimmigrant and immigrant visa services back in March of 2020, all visa applicants are still subject to post by post availability of consular services, including appointments.

Until DOS resumes full consular services, applicants needing an NIE may not be processed for a visa appointment interview, unless they are eligible for an NIE. The August 12 NIE posting states that those who believe that they qualify for an NIE may request a visa appointment and a decision "will be made at the time of interview as to whether the traveler has established that they are eligible for a visa pursuant to an exception." Of course, the availability of appointments is still subject to staffing and COVID-19 related concerns. Currently, the process to request an NIE first involves a request for an emergency appointment and each post uses its own protocol.

If the principal is not subject to Proclamation 10052, may his or her dependents be admitted to the U.S.?

If an H-1B, H-2B, L-1, or J-1 non-immigrant is not subject to Proclamation 10052, then neither that individual nor the individual's spouse or children will be prevented from obtaining a visa due to the Proclamation.

If the principal is subject to Proclamation 10052, may his or her dependents be admitted to the U.S. if the principal is approved for an NIE?

NIEs are available for those who will accompany or follow to join a principal applicant, who is a *spouse or parent and who has been granted a national interest exception to P.P. 10052*.

What L-1A visa applicants may qualify for an NIE? (excerpts from August 12 NIE)

- Travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit. This includes those traveling to alleviate effects of the COVID-19 pandemic that may be a secondary effect of the pandemic.
- Travel based on a request from a U.S. government agency or entity to meet critical foreign policy objectives or satisfy treaty or contractual obligations. An example of this would be supporting U.S. military base construction or IT infrastructure.
- Travel by applicants seeking to resume ongoing employment in the U.S. in the same position with the same employer and visa classification. Forcing employers to replace employees in this situation may cause undue financial hardship.
- Travel by a senior level executive or manager filling a critical business need of an employer meeting a critical infrastructure need. Critical infrastructure sectors include chemical, communications, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear reactors, transportation, and water systems. An L-1A applicant falls into this category when at least two of the following three indicators are present AND the L-1A applicant is not seeking to establish a new office in the U.S.:

1. Will be a senior-level executive or manager;
2. Has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship; or
3. Will fill a critical business need for a company meeting a critical infrastructure need.

L-1A applicants seeking to establish a new office in the U.S. likely do NOT fall into this category, unless two of the three criteria are met AND the new office will employ, directly or indirectly, five or more U.S. workers.

What L-1B visa applicants may qualify for an NIE? (excerpts from August 12 NIE)

- Travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit. This includes those traveling to alleviate effects of the COVID-19 pandemic that may be a secondary effect of the pandemic.
- Travel based on a request from a U.S. government agency or entity to meet critical foreign policy objectives or satisfy treaty or contractual obligations. An example of this would be supporting U.S. military base construction or IT infrastructure.

- Travel by applicants seeking to resume ongoing employment in the U.S. in the same position with the same employer and visa classification. Forcing employers to replace employees in this situation may cause undue financial hardship.

- Travel as a technical expert or specialist meeting a critical infrastructure need. The consular officer may determine that an L-1B applicant falls into this category, if all three of the following indicators are present:

1. The applicant's proposed job duties and specialized knowledge indicate the individual will provide significant and unique contributions to the petitioning company;
2. The applicant's specialized knowledge is specifically related to a critical infrastructure need; AND
3. The applicant has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship.

What H-1B applicants may qualify for an NIE? (excerpts from August 12 NIE)

- For travel as a public health or healthcare professional, or researcher to alleviate the effects of the COVID-19 pandemic, or to conduct ongoing medical research in an area with a substantial public health benefit (e.g. cancer or communicable disease research). This includes those traveling to alleviate effects of the COVID-19 pandemic that may be a secondary effect of the pandemic (e.g., travel by a public health or healthcare professional, or researcher in an area of public health or healthcare that is not directly related to COVID-19, but which has been adversely impacted by the COVID-19 pandemic).

- Travel supported by a request from a U.S. government agency or entity to meet critical U.S. foreign policy objectives or to satisfy treaty or contractual obligations. This would include individuals, identified by the Department of Defense or another U.S. government agency, performing research, providing IT support/services, or engaging other similar projects essential to a U.S. government agency.
- Travel by applicants seeking to resume ongoing employment in the U.S. in the same position with the same employer and visa classification. Forcing employers to replace employees in this situation may cause financial hardship. *Consular officers can refer to Part II, Question 2 of the approved Form I-129 to determine if the applicant is continuing in "previously approved employment without change with the same employer."*
- Travel by technical specialists, senior level managers, and other workers whose travel is necessary to facilitate the immediate and continued economic recovery of the U.S. Consular officers may determine that an H-1B applicant falls into this category when at least two of the following five indicators are present:

1. The petitioning employer has a continued need for the services or labor to be performed by the H-1B nonimmigrant in the U.S. Labor Condition Applications (LCAs) approved by DOL during or after July 2020 are more likely to account for the effects of the COVID-19 pandemic on the U.S. labor market and the petitioner's business; therefore, this indicator is only present for cases with an LCA approved during or after July 2020 as there is an indication that the petitioner still has a need for the H-1B worker. For LCAs approved by DOL before July 2020, this indicator is only met if the consular officer is able to determine from the visa application the continuing need of petitioned workers with the U.S. employer. Regardless of when the LCA was approved, if an applicant is currently performing or is able to perform the essential functions of the position for the prospective employer remotely from outside the U.S., then this indicator is not present.
2. The applicant's proposed job duties or position within the petitioning company indicate the individual will provide significant and unique contributions to an employer meeting a critical infrastructure need.Critical infrastructure sectors are chemical, communications, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare and public health, information technology, nuclear reactors, transportation, and water systems. Employment in a critical infrastructure sector alone is not sufficient; the consular officers must establish that the applicant holds one of the two types of positions noted below:) Senior level placement within the petitioning organization or job duties reflecting performance of functions that are both unique and vital to the management and success of the overall business enterprise;

OR

b.) The applicant's proposed job duties and specialized qualifications indicate the individual will provide significant and unique contributions to the petitioning company.

3. The wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage rate by at least 15 percent (see Part F, Questions 10 and 11 of the LCA) by at least 15 percent. When an H-1B applicant will receive a wage that meaningfully exceeds the prevailing wage, it suggests that the employee fills an important business need where an American worker is not available.
4. The H-1B applicant's education, training and/or experience demonstrate unusual expertise in the specialty occupation in which the applicant will be employed. For example, an H-1B applicant with a doctorate or professional degree, or many years of relevant work experience, may have such advanced expertise in the relevant occupation as to make it more likely that he or she will perform critically important work for the petitioning employer.
5. Denial of the visa pursuant to P.P. 10052 will cause financial hardship to the U.S. employer. The following examples, to be assessed based on information from the visa application, are illustrative of what may constitute a financial hardship for an employer if a visa is denied: the employer's inability to meet financial or contractual obligations; the employer's inability to continue its business; or a delay or other impediment to the employer's ability to return to its pre-COVID-19 level of operations.

About the Author:

Kathleen Campbell Walker is a member of Dickinson Wright PLLC and serves as a co-chair of the Immigration Practice Group. She is a former national president and general counsel of the American Immigration Lawyers Association (AILA) and is Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. She serves on the AILA Board of Governors. In 2014, she received the AILA Founder's Award, which is awarded from time to time to the person or entity, who has had the most substantial impact on the field of immigration law or policy in the preceding period (established 1950). She has testified several times before Congress on matters of immigration policy and border security.

THE OIG'S FAQS RELATED TO COVID-19

by Jeremy Belanger and Ralph Levy, Jr.

The Office of the Inspector General ("OIG") for the Department of Health and Human Services ("HHS") has developed a process for interested parties to obtain regulatory compliance guidance from the OIG prior to pursuing arrangements related to COVID-19. The OIG has dubbed this process *FAQs–Application of OIG's Administrative Enforcement Authorities to Arrangements Directly Connected to the Coronavirus Disease 2019 (COVID-19) Public Health Emergency.*[1] Parties looking to engage in conduct which could implicate the Federal Anti-kickback Statute[2] or the Civil Monetary Penalties Beneficiary Inducement provision ("Beneficiary Inducement CMP")[3] can obtain guidance from the OIG on whether the proposed arrangement would pose a risk under either or both statutes by submitting a description of the proposed arrangement to the OIG via email: OIGComplianceSuggestions@oig.hhs.gov.

BACKGROUND

The Federal Anti-Kickback Statute prohibits the knowing and willful solicitation, receipt, offer, or payment of "any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind" in return for referring a patient for any item or service paid for in whole or in part by a federal health care program (e.g., Medicare, Medicaid, Tricare, etc.).[4] The Anti-Kickback Statute requires the "ill intent" to pay or receive remuneration in return for a referral; however, the Anti-Kickback Statute is violated if even one purpose of the remuneration was or is to induce a referral, even if there are other valid reasons, including medical necessity, for the referral.[5]

The Anti-Kickback Statute has certain statutory exceptions and regulatory exceptions, which are known as "safe harbors." An arrangement that meets the strict requirements of a regulatory safe harbor is automatically protected. However, because there has to be ill intent, failure to meet the requirements of a safe harbor does not make an arrangement illegal, but it does lose the automatic protection granted by the safe harbor.

The Beneficiary Inducement CMP prohibits the offer or transfer of remuneration to any person that receives Medicare or Medicaid when the person making the offer knows or should know the offer is likely to influence the patient to order or receive an item or service from a particular provider, practitioner, or supplier.[6] Unlike the Anti-Kickback Statute, the Beneficiary Inducement CMP is a civil law, not a criminal one, so it does not require the "ill-intent" to pay or receive a kickback. However, the Beneficiary Inducement CMP requires "knowledge" that the offer or transfer of the remuneration would influence the beneficiary. Also, like the Anti-Kickback Statute, the Beneficiary Inducement CMP contains certain statutory and regulatory exceptions which, if met. would protect the arrangement. However, failure to meet an exception does not create liability if the offeror can show that it did not know and should not have known the offer would induce a beneficiary in making his or her choice.

Because both the Anti-Kickback Statute and the Beneficiary Inducement CMP require either intent or knowledge before they are violated, in the past interested parties could submit their proposed arrangement to the OIG for an "Advisory Opinion," which would evaluate it and determine whether the arrangement met a safe harbor or, if it did not, whether it posed a low risk under those statutes such that the OIG would not impose any penalties or sanctions, so long as the parties continued to adhere to the circumstances in the request for the Advisory Opinion.

Recognizing the cost and length of time it may take to obtain an Advisory Opinion and the need for regulatory flexibility and quick guidance, in light of the COVID-19 pandemic, the OIG has developed the FAQ process to offer timely compliance guidance. This process supplements the Advisory Opinion process by allowing parties to obtain guidance from the OIG; however, it does not supplant the Advisory Opinion process nor does it offer the protections of the Advisory Opinion process. The FAQ process offers only regulatory guidance; this guidance is not binding.

THE OIG FAQS

In order to submit a request for an arrangement related to COVID-19, a party needs to send an email to OIGComplianceSuggestions@oig.hhs.gov with sufficient information to permit OIG to know the identity of the parties, the key terms of the arrangement, and how it relates to COVID-19. Some of the more recent FAQs have discussed are: (1) provision of free COVID-19 antibody tests to beneficiaries receiving other services; (2) paying a pharmacy a fee for operating a COVID-19 test collection site; and (3) providing free transportation to and from an office for patients when the patient's usual office is closed. It is important to note that not all arrangements have to be directly related to COVID-19 services or treatments. Questions concerning new arrangements related to COVID-19, such as free transportation for patients due to closures or loss of income, would also be considered. Because this is a voluntary process on behalf of OIG, there is no guarantee OIG will respond to a specific request or when an answer will be given.

This FAQ process has several drawbacks. First, the informal guidance provided is not binding on the OIG, HHS, or any other agency. Second, OIG will not provide an opinion as to whether the conduct complies with any other federal, state, or local statute, rule, regulation, ordinance, or other law, including the False Claims Act or the Stark Law, or rules related to billing, claims submission, cost reporting, or related conduct. Finally, the informal guidance will only be in effect during the term of public health declaration of an emergency by the Secretary of HHS. Any favorable opinion given would end once the declaration is lifted.

The OIG FAQs will be a useful tool as providers continue to assess and respond to the COVID-19 pandemic. However, even with this guidance, the best protection for health care providers will be to work with experienced and responsible counsel to assess the legal compliance of their arrangements. Dickinson Wright PLLC's health care attorneys are uniquely prepared to advise and counsel health care providers on their health care arrangements.

ABOUT THE AUTHORS

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1. https://oig.hhs.gov/coronavirus/authorities-faq.asp (last visited August 17, 2020).
2. 42 U.S.C. § 1320a-7b(b).
3. 42 U.S.C. § 1320a-7a(a)(5).
4. 42 U.S.C. § 1320a-7b(b).
5. *See United States v. Greber*, 760 F.2d 68, 72 (3d Cir.1985).
6. 42 U.S.C. § 1320a-7a(a)(5).

CANADIAN IP

CIPO PANDEMIC RESPONSE: NEW DEADLINE EXTENSION IS AUGUST 28, 2020*

by Matthew D. Powell

The Canadian Intellectual Property Office (CIPO) has now updated its Service and Website Interruptions page to inform the public of a new final deadline extension in response to the ongoing health crisis.

DEADLINE EXTENSION

In response to the ongoing health crisis, CIPO had provided extensions for certain deadlines falling after March 16, 2020 to August 21, 2020. These extensions had been implemented successively as CIPO monitored the health crisis. The last extension to August 21, 2020 had been announced by CIPO as its "final" such extension. However, almost immediately after making this announcement, CIPO announced yet a further extension was being implemented. This was being done to provide relief in view of the anticipated online and facsimile service interruptions occurring between August 21 to August 23 due to maintenance.

To account for these service interruptions, the CIPO has now announced that the extension will continue through to **August 28, 2020**. Furthermore, we have noted that CIPO has not characterized this additional deadline extension as final, so it is possible that CIPO will consider offering additional extensions.

We recommend that, where possible, clients should aim to meet the original deadlines. However, please contact us promptly if there has been a missed deadline, or if you have any questions or concerns at all about deadlines and how these changes might affect your applications, so that we can assist.

*This is an update to our previous alerts on this topic, which are found here:

- CIPO Pandemic Response: Final Deadline Extension Ends August 21, 2020
- CIPO Pandemic Response: Update July 6, 2020
- CIPO Pandemic Response: Update June 15, 2020
- CIPO Pandemic Response: Update June 1, 2020
- CIPO Pandemic Response: Update May 15, 2020
- CIPO Pandemic Response: Update April 28, 2020
- CIPO Pandemic Response and Canada's New Compulsory Patent Licensing Provisions

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

Immigration Insights and Issues (III)

USCIS ACCOMMODATION ON I-9 COMPLETION DUE TO ITS INABILITY TO ISSUE TIMELY EAD CARDS

Posted by Elise Levasseur | Aug 26, 2020

On August 20, 2020, United States Citizenship and Immigration Services ("USCIS") announced that due to Covid-19 and because of its long delays in producing Employment Authorization Documents, Form I-766 ("EAD") cards, that it would permit employees to present a Form I-797, Notice of Action, Approval Notice to prove work authorization for their Form I-9, Employment Eligibility Verification rather than requiring the actual valid plastic Form I-766, EAD card. If the employee presents a valid I-797 Notice of Action approval for employment authorization, the employer must accept the approval notice for Form I-9, Employment Eligibility Verification as a List C document (Item #7 under List C) to establish employment authorization through December 1, 2020. USCIS further advises that the I-797, Notice of Action, Approval Notice only provides evidence of employment authorization. It does not provide evidence of identity, for List B or A purposes on Form I-9. Additionally, the ameliorating provision only applies to Form I-797 Notice of Action, Approval Notices with a validity date on or after December 1, 2019 and through and including notices dated August 20, 2020. Foreign national employees are only able to use such dated approval notices (December 1, 2019 through to August 20, 2020) until December 1, 2020 after which time, the employer must reverify the employee's employment authorization on Form I-9.

Under current employment verification rules, an original EAD card is required, when selected to be presented by an employee for List A purposes. Currently, many foreign nationals are unable to demonstrate that they have employment authorization and have been either unable to start working in a position, or they have been unable to continue to work in a particular position. On July 9, the *Washington Post* reported that USCIS shut down the printing of permanent resident cards and EADs due to financial concerns. This special accommodation is because of a temporary restraining order issued by the U.S. District Court class action lawsuit filed in the Southern District of Ohio *(Subramanya v. USCIS)* against the USCIS for its long delays in producing EAD cards.

It is important to remember that the I-797, Notice of Action, Approval Notice option for Form I-9 List C completion applies only to EADs approved from December 1, 2019 to and including August 20, 2020. It is also critical to understand that after December 1, 2020, employers must reverify employment authorization using a document chosen by the employee, other than the I-797, Notice of Action, Approval Notice. So, employers must set up a reminder to ask the employee for new documentation. The new documentation would need to be an employment authorization document from List A or from List C to reverify employment authorization on Form I-9. Under USCIS regulations, an employer cannot specify a specific document such as an EAD Card, but in all likelihood, certain foreign national employees will need to produce the EAD Card, Form I-766, to reverify employment authorization on or before December 1, 2020, unless this modification is extended by USCIS.

About the Author:

Elise S. Levasseur is a Member in Dickinson Wright's Troy office where she practices in the area of immigration. She can be reached at 248-433-7520 or elevasseur@dickinsonwright.com and you can visit her bio here.

Tax Blog

AUGUST 31 DEADLINE LOOMING FOR CORONAVIRUS RELATED RETURN OF REQUIRED MINIMUM DISTRIBUTIONS

Posted by Henry Grix | Aug 27, 2020

The IRS this week issued Information Release 2020-187 to remind IRA owners and beneficiaries, as well as participants in workplace retirement arrangements, that they have until August 31 to return required minimum distributions ("RMDs")received earlier this year and, thereby, avoid paying income tax on the distribution in 2020. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), enacted on March 27, 2020, provides that RMDs need not be made during 2020. A taxpayer who returns an unwanted RMD by August 31 can avoid paying income tax on that distribution, allowing the returned funds to be invested tax-free for another year. This opportunity applies to IRA owners and beneficiaries, including beneficiaries of "inherited" IRAs.

The CARES Act also expanded the ability of certain retirees and certain beneficiaries to withdraw or borrow from retirement arrangements under favorable terms.

For more information, please contact Henry Grix at hgrix@dickinsonwright.com or review the IRS website questions and answers at https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers

Disclaimer

All Things HR

THE HIDDEN COST OF TERMINATING 20% OR MORE OF YOUR EMPLOYEES – PARTIAL TERMINATION OF THE RETIREMENT PLAN

Posted by Deborah Grace | Sep 25, 2020

With the delay in re-opening businesses, some companies are finding that they need to terminate employees who had been placed initially on furlough or a reduced-hours assignment. When analyzing the costs that will be incurred due to these terminations, companies that sponsor 401(k) plans or other qualified retirement plans should determine if the partial termination rule will apply to the plan and, if it does, what will be the financial impact to the company.

Partial Termination Rule

To be qualified, a retirement plan must provide that upon a partial termination the accounts of all affected employees are fully vested. In Revenue Ruling 2007-43, the IRS noted that a 20% or greater employee turnover rate during an applicable period creates a presumption of a partial termination. Generally, the applicable period is a plan year, but it could be a longer period if there are a series of related events, such as a plant closing where employees are terminated in stages over a period longer than a plan year. If a partial termination occurs, any employee who is terminated during the applicable period, including a voluntary termination, must be fully vested in his or her account.

Calculation of the Turnover Rate

The turnover rate is determined by dividing the number of participating employees who had an employer-initiated severance from employment during the applicable period by the sum of all of the participating employees at the start of the applicable period plus the employees who became participants during the applicable period. Both vested and non-vested participating employees are taken into consideration, along with employees who are eligible to make salary deferrals to the 401(k) plan but have never chosen to contribute. An employee's severance from employment is employer-initiated even if caused by an event outside of the employer's control, such as severance due to the pandemic. In FAQ-15 of its CARES Act guidance, the IRS indicated that an employee who was terminated because of COVID-19 and is rehired before the end of 2020 is not treated as having an employer-initiated severance from employment.

Planning Considerations

Since an employer may use the full plan year to determine if there has been a partial termination, it may find that after the end of the plan year there are terminated employees to which the retirement plan owes amounts previously forfeited plus earnings since the date of distribution. Locating terminated employees to make a second distribution is time consuming. If the plan imposes a distribution fee, the company may want to have its recordkeeper waive the fee for the second distribution. If the company has been using

forfeitures during the plan year to offset company matching contributions, the company may need to make a special contribution to reinstate these forfeitures.

The 20% turnover rate established by the IRS guidance is a rebuttable presumption. Employers that traditionally have high employee turnover may be able to demonstrate that a 20% or greater turnover is routine.

Employers that are thinking about keeping furloughed employees in a non-active status and without employer subsidized health care so to avoid a partial termination will want to consider the Affordable Care Act implications that are discussed here.

About the Author

Deborah L. Grace is a Member in Dickinson Wright's Troy office where she advises HR professionals, CFOs, and private equity firms on all matters relating to employee benefits law, including designing and administering 401(k) retirement plans and welfare benefit plans. Deb can be reached at 248-433-7217 or dgrace@dickinsonwright.com and you can visit her bio here.

Behavioral Health Care Law Blog

SEPTEMBER 2020 ARIZONA BEHAVIORAL HEALTH LEGAL UPDATES

Posted by **Behavioral Health Law Team** | **Sep 29, 2020**

(1) *Clayton v. Hon. Kenworthy et al*.

This month, the Arizona Court of Appeals issued its opinion in *Clayton v. Hon. Kenworthy et al*., regarding an unrecorded Rule 35, Ariz. R. Civ. P. neuropsychological examination.

Background

In *Clayton*, the mother of a six-year-old child who suffers from bilateral hearing loss and cerebral palsy, among other disabilities, sued her son's doctors and hospital for medical malpractice on her son's behalf for negligently delivering him and causing his disabilities. The defendants requested a Rule 35 neuropsychological examination of the child to determine his current and future cognitive abilities. Mother agreed to the examination on the condition that she be present to observe the examination through one-way glass or have the examination video-recorded through a small recording device. The defendants objected to any form of observation or recording on the basis that any presence (physical or electronic) of a third party—e.g. the mother—would interfere with the examination. *Opinion*, at ¶¶ 3-4. The trial court agreed with defendants and denied plaintiff's request to have mother observe the examination or record it. Plaintiffs sought special action relief.

Before the Court of Appeals

In the special action briefing, Mother did not argue that she should have been permitted to observe the examination behind one-way glass (and the Court of Appeals noted that it could not have found the trial court abused its discretion on this issue because it heard evidence supporting its ruling). However, she did argue that the trial court abused its discretion by completely prohibiting the recording of the examination. The Court of Appeals agreed. *Opinion*, at ¶¶ 10-11.

The Court of Appeals reasoned:

"The first part of Rule 35(c)(2)(A) gives the examinee the right to have the examination recorded. The second part then grants the court the power to "*limit*" the recording "using the least restrictive means possible[,]" not to prohibit it. Had the drafters intended the court's power to be absolute, they would have expressly said so. As such, the authority to "limit" the recording does not empower the court to prohibit recording completely. The trial court thus erred in ordering [the child] to undergo an unrecorded examination." *Opinion*, at ¶ 11.

Takeaway

In short, the takeaway is that when a neuropsychological examination is conducted at the request of the opposing party, Rule 35 "unambiguously creates a right for the examinee to have his or her examination recorded." *Opinion*, at ¶ 12.

You can read the opinion in full here: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2020/SA%2020-0086%20Clayton%20v.%20Hon.%20Kenworthy.pdf

(2) Administrative Order No. 2020-152 (Replacing Administrative Orders No. 2020-66 and 2020-118)

Short Story

Due to COVID-19 concerns, fiduciaries serving as guardians or agents under powers of attorney who are obligated to visit their wards pursuant to ACJA §§ 3-303(D)(3)(c) and 7-202(J)(4) may comply with those visitation requirements via (in descending order of preference) live video conferencing; telephone calls; interviews with third party experts such as medical providers; or interviews with care providers. If any other method is used to fulfill the visitation requirements, the licensed fiduciary must fully document why such visitation method was used and how it was accomplished.

The Details

On September 24th, Arizona Supreme Court Chief Justice Robert Brutinel issued Administrative Order No. 2020-152 regarding licensed fiduciaries' obligations to visit wards in the midst of COVID-19. Pursuant to ACJA §§ 3-303(D)(3)(c) and 7-202(J)(4), a licensed fiduciary serving as a guardian or agent under a power of attorney must make periodic visits to the ward. Because COVID-19 has created situations in which licensed fiduciaries cannot or for health reasons should not comply with the visitation requirements, the Court recognized the necessity of granting immediate authority for licensed fiduciaries to comply with visitation requirements as follows:

- Whenever possible the licensed fiduciary must comply with the visitation requirement presently set forth in ACJA §§ 3-303(D)(3)(c) and 7-202(J)(4). Upon good cause, the licensed fiduciary may use an alternative means of visitation in descending order of preference:
  - Live video conferencing
  - Telephone calls
  - Interviews with third party experts such as medical providers; or
  - Interviews with care providers.
- If a method other than the visitation requirements presently set forth in ACJA §§ 3-303(D)(3)(c) and 7-202(J)(4) is utilized, the licensed fiduciary must fully document:
  - The steps taken to comply with ACJA §§ 3-303(D)(3)(c) and 7-202(J)(4)
  - The reasons the present code could not be complied with, and
  - The appropriateness of the alternative method of visitation.

The order expires on December 31, 2020.

You can read the administrative order in full here:

http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-152.pdf?ver=2020-09-24-142205-530

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All Things HR

I-9 COVID EMPLOYMENT VERIFICATION COMPLIANCE: ICE ANNOUNCES CONTINUANCE OF I-9 COMPLIANCE FLEXIBILITY

Posted by Elise Levasseur | Oct 1, 2020

On September 14, 2020, U.S. Immigration and Customs Enforcement (ICE) announced an extension of its flexibility provisions related to Form I-9 compliance, which ICE granted earlier this year. The extended flexibility requirements are intended to address situations in which employers' entire operations are being conducted remotely due to Covid-19 concerns. The Department of Homeland Security (DHS) will extend the flexibility policy for an additional 60 days. The new expiration date of ICE flexibility accommodations is November 19, 2020.

Previously on March 19, 2020, due to precautions being taken by employers and employees associated with COVID-19, DHS announced that it would exercise prosecutorial discretion related to physical presence requirements normally required for completion of Employment Eligibility Verification (Form I-9) under section 274A of the Immigration and Nationality Act. Under normal rules, an employee must appear in person with original employment authorization and identify documents and an employer or an employer's representative must review the original documents in person in the presence of the employee. This policy only applies to employers and workplaces that are operating remotely. According to ICE, if there are employees physically present at a work location, *no exceptions* are being implemented at this time for in-person verification of identity and employment eligibility documentation.

DHS further announced that it will continue to monitor the ongoing national emergency and provide updated guidance as needed. Ignorance of changing policies is not an excuse for non-compliance with Form I-9 completion requirements. Under the new directive, ICE states that employers are required to monitor DHS and ICE websites for additional updates on when the flexibility extension will be terminated, and when the physical presence requirements for completion Forms I-9 will resume.

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UPDATED: CERB REPLACEMENT BILL IS APPROVED BY HOUSE OF COMMONS

by Jennifer C. Leve and Carly J. Walter

Early morning on September 30, 2020, the House of Commons unanimously passed legislation authorizing new benefits for Canadian workers impacted by the COVID-19 pandemic. The federal government's latest COVID-19 legislation (Bill C-4) will expand paid benefits for Canadians who are vulnerable due to the COVID-19 pandemic. The bill will now need to be passed by the Senate.

The legislation is comprised of three new COVID-19 benefits which are designed to replace the now-defunct Canadian Emergency Response Benefit (CERB): (1) the Canadian Recovery Benefit (CRB); (2) the Canada Recovery Sickness Benefit (CRSB); and (3) the Canada Recovery Caregiving Benefit (CRCB).

CANADIAN RECOVERY BENEFIT (CRB)

The $500 per week CRB is intended for CERB recipients who do not qualify for employment insurance, among them the self-employed, gig, or contract workers. Eligible recipients for this CRB must be looking for work and have stopped working or had their income reduced by 50 percent due to COVID-19. In addition, an applicant must have earned a minimum of $5,000 in 2019, in 2020, or in the 12 months preceding their first application for the CRB; either from employment, EI, maternity, or parental benefits or from Quebec Parental Insurance Plan (QPIP) benefits.

CANADA RECOVERY SICKNESS BENEFIT (CRSB)

The CRSB provides $500 per week for up to two weeks. The paid sick leave benefit will be available to Canadians who have or might have contracted COVID-19, but also to Canadians who have underlying conditions or other illnesses such as respiratory conditions, the flu, or the common cold, which may make them more susceptible to COVID-19. Canadians who have isolated themselves due to COVID-19 at the advice of their employer or a medical professional will also be eligible.

CANADA RECOVERY CAREGIVING BENEFIT (CRCB)

The CRCB is intended to help Canadians who must stay home to care for someone because of the closure of care facilities, schools, or daycares. This benefit provides $500 per week for up to 26 weeks per household; with only one adult per household able to make a claim under the program at a time.

TRANSITION FROM CERB

While the majority of CERB recipients are transitioned onto an employment insurance program, the government determined that expediency was necessary when setting up the benefits provided for in Bill C-4. These new benefits will ensure that there will be no time period where eligible Canadians will be left without financial support. The bill must be passed by the Senate before the programs can be implemented.

UPDATE - 10/5/20

The Senate approved the bill C-4 on Friday, October 2 and the bill received royal assent shortly thereafter. After the House of Commons unanimously passed the bill last week, it was briefly blocked on the Senate floor when certain senators voiced complaints about the lack of time to review the bill due to the necessity for a speedy approval due to the impending end of CERB benefits.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

Tax Blog

IRS ANNOUNCES NO INFORMATION RETURNS TO BE FILED FOR PPP LOAN FORGIVENESS

Posted by Troy Terakedis | Oct 5, 2020

Under the Paycheck Protection Program ("PPP") established by the CARES Act, a borrower is eligible for forgiveness of all or a portion of the principal amount of a loan made in accordance with the PPP if certain conditions are satisfied ("qualifying forgiveness"). While the Internal Revenue Code generally requires a borrower to include the amount of any loan forgiveness in gross income, the amount of any such "qualifying forgiveness" is excluded from gross income pursuant to the provisions of the PPP.

Typically, a lender that discharges at least $600 of indebtedness of a borrower is required to file a Form 1099-C (Cancellation of Debt) with the IRS as well as furnish a payee statement to a borrower whose loan has been discharged.

However, the IRS recently announced that lenders should not file a Form 1099-C (Cancellation of Debt) nor furnish a payee statement to the borrower to report the amount of any "qualifying forgiveness" with respect to a loan made under the PPP (see Announcement 2020-12, 2020-41 IRB). The IRS was concerned that the filing of such information returns could result in the inadvertent issuance of IRS notices for underreporting to borrowers for amounts of "qualifying forgiveness", and that the furnishing of such payee statements to a borrower "could cause confusion" (presumably in connection with whether such amounts should be included in the borrower's gross income).

For more information, please contact Troy Terakedis in our Columbus, Ohio office at 614-619-2203 or any other attorney in our Tax Practice Group.

$50 MILLION IN FUNDING AVAILABLE FOR SMALL BUSINESSES IN TENNESSEE THROUGH SUPPLEMENTAL EMPLOYER RECOVERY GRANT PROGRAM

by Kevin DeHart and Ralph Levy

Tennessee Governor Bill Lee recently announced that the Supplemental Employer Recovery Grant ("SERG") program will distribute $50 million in federal Coronavirus Relief Funds through the Tennessee Department of Revenue ("TDOR") to help Tennessee small businesses cover eligible direct expenses or costs incurred as a result of business interruptions due to the COVID-19 pandemic. The SERG program will distribute funds directly to small businesses that qualify based on a first-come, first-served basis.

Eligibility

For a business to be eligible under the SERG program, the business must:

- as of August 31, 2020, be a Domestic Business in the State of Tennessee or a business formed in another state that primarily operates in Tennessee with at least one physical location in Tennessee;
- not be a subsidiary of a business with consolidated annual revenues (receipts) in excess of $10 million;
- as of August 31, 2020, were registered with the Tennessee Secretary of State, were registered with the TDOR or, for an unincorporated business such as a sole proprietorship or a disregarded entity for federal tax purposes, have filed a federal Schedule C for that business with the individual owner's IRS Form 1040;
- have been operational since April 1, 2020, with the exception of temporary closures due to COVID-19 and be able to provide documentation that shows the business has been in operation for that time period;
- provide proof of economic hardship due to COVID-19 related interruption of business ("Business Interruption Costs") or have incurred eligible direct business expenses related to COVID-19 ("COVID-Related Expenses");
- have not engaged in any illegal activity in violation of local, state or federal laws or regulations, with federal compliance taking precedence over local or state compliance;
- not exist for the purpose of advancing partisan or other political activities, such as direct lobbying of federal or state officials;
- be a for-profit entity or a not-for-profit entity that operates under either Internal Revenue Code Section 501(c)(3) or 501(c)(19) (Note: for purposes of the SERG program, not-for-profit entities formed under Internal Revenue Code Section 501(c)(3) or 501(c)(19) must calculate annual revenues in accordance with the instructions for IRS Form 990 line 12); and
- have not already received an award under the SERG Program.

The following businesses are not eligible to request or receive business relief assistance:

- Lending and investment institutions;
- Insurance companies;
- Racetracks or gambling facilities;
- Businesses owned by State of Tennessee employees or their family members living within the household;
- Businesses engaged in any illegal activity per local, state or federal regulations, with federal regulations taking precedence over local or state regulations;
- Businesses that did have continuous operations during the last six (6) months;
- As of August 31, 2020, businesses that were not registered with the Tennessee Secretary of State or the TDOR or as to which if unincorporated, their owners did not file a federal Schedule C with their IRS Form 1040; and
- Businesses with no activity in the state of Tennessee.

Losses and Expenses That Are Covered by SERG

Although businesses cannot receive funds for both Business Interruption Costs and COVID-Related Expenses, they can claim the greater of either item up to the maximum allowable amount of $30,000. COVID-Related Expenses include costs incurred by a business to meet public health requirements or recommendations enacted, adopted, required, or issued by the Tennessee Department of Health, the Centers for Disease Control, state or federal regulatory authorities, and/or local, state or federal executive authorities due to COVID-19, including any costs incurred:

- to create social distancing measures;
- to clean or disinfect areas due to COVID-19;
- for personal protective equipment for employees or customers;
- for contactless equipment ;
- for equipment, items or other expenses to screen employees or customers to ensure they are not positive for COVID-19;
- for equipment or items designed to track employees or customers who have tested positive for COVID-19;
- necessary re-opening expenses; and
- expenses to facilitate teleworking.

In addition, a business may seek recovery of Business Interruption Costs to reduce the financial impact that COVID-19 had on its net income. To be eligible under this category, a business will need to show that its net income for the four-month period of May 1, 2020 through August 31, 2020 was less than its net income for that same period in 2019. To calculate a "loss" and qualifying "business interruption" under this program, the business must establish that it incurred a loss in net income during that period from 2019 to 2020.

Expenses that can be taken into account in determining Business Interruption Costs incurred by a business during the eligible four-month period may include:

- mortgage interest;
- payroll expenses;
- rent or lease or payment for real or personal property used for business purposes;
- utility payments for business properties; and
- cost of critical business operations.

Businesses that otherwise meet the SERG program criteria are still eligible under this new program even if they already received a payment from the Tennessee Small Business Relief Program so long as the same expenses during May 1, 2020, through August 31, 2020 have not been reimbursed to the business under any other federal program.

Application Process

Applications for participation in the SERG program opened on October 7, 2020 and are available through an online application portal that will remain open until December 29, 2020, or until the program's funds are exhausted. Once started, applications cannot be saved and businesses should have the following documents available to complete the application:

- Copy of most recently filed IRS Tax Return (1040 with Sch C, 1120, 1120S, 1065, 990);
- Completed IRS Form W-9 providing identifying information required for payment;
- Bank Statements for the period May 1 to August 31, 2019, and May 1 to August 31, 2020 ("Expense Period");
- Current and prior year Balance Sheet and Income Statement for the Expense Period;
- Supporting documentation for eligible direct expenses and other business interruption expenses as requested (invoices, canceled checks, proof of receipt, etc.);
- Ownership documents (Charter, Articles of Organization, Operating Agreements, Partnership Agreements, etc.); and
- Proof of diversity business enterprise eligibility (disability documentation, long-form birth certificate, etc.) if applicable to the business.

While no documentation is required to apply for the SERG program, once an application has been accepted and the applicant is given access to the online TN CAMS, the applicant will be required to submit all of the documents listed above to support the application as part of the reimbursement process before payment can be processed. According to SERG guidelines, businesses will have from the earlier of ten (10) business days from receipt of notification that access to the TN CAMS system has been granted or until 5 PM CST on December 29, 2020, to submit a Request For Funding ("RFF") with required supporting documentation in order to receive payment. While not explicitly stated, it is presumed that failure to provide the required documentation in the applicable timeframe would necessitate an applicant restarting the application process.

Payments

As stated above, SERG awards are based on Business Interruption Costs or COVID-Related Expenses, whichever are greater, and applicants will be required to submit supporting documentation for costs associated with responses to the COVID-19 emergency or supporting documentation to prove business disruption. While there is $50 million in available funds, individual awards are capped at $30,000 and a business can determine the amount to which it is entitled through the online portal provided by the State of Tennessee. A single exception to the per business payment cap is that businesses located in low to moderate income census tracts, opportunity zones, or promise zones (which are all more fully defined in the SERG guidelines) will receive an additional $500 over and above the maximum allowable expenses.

Of the $50 million in available funds, 10% of the total has been specifically reserved for grants to eligible diversity business enterprises classified as a Minority Business Enterprise, Women Business Enterprise or Service – Disabled Veteran Business Enterprises and Enterprise owned by Disabled Persons (all of which are more fully defined in the SERG guidelines). Both the 90% of the SERG program funds that are available to non-diversity businesses and the remaining 10% of the funds that are specifically reserved for eligible diversity business are available on a first-come, first-served basis until all funds are depleted.

Payments under the SERG program will be made on a reimbursement basis. Once applicants are notified that funds have been allocated, they will receive access to the Tennessee Cares Act Management System ("CAMS") to submit a RFF for the estimated benefit calculated on the application and associated documentation. Upon review and approval of each RFF, checks will be mailed to the recipient's address as submitted on the application.

There are some restrictions on how a recipient business can use the funds received from the SERG program. Any funds received from the SERG Program should be used to respond to the financial disruption resulting from COVID-19 and its effects on the individual business. Funds must not be used for payment of tax liabilities to a government agency and for at least five years, businesses must also keep records regarding how the funds are spent. By accepting funds, businesses acknowledge and agree that they are subject to potential audit or other verification by the State of Tennessee concerning their qualification for and use of these funds. Funds are subject to recapture by the State of Tennessee if the above requirements are not met.

If your business has been negatively impacted by the COVID-19 pandemic and you have questions about the SERG program, Dickinson Wright attorneys are here to help.

For more information, call Ralph Z. Levy Jr., Esq., at 615-620-173, or Kevin W. DeHart, Esq., at 615-780-1115, both of whom practice in the Firm's Nashville, TN office.

SBA GUIDANCE ON PPP BORROWERS: TRANSFERS OF EQUITY AND ASSETS

by Amy M. Kwiatkowski, J. Troy Terakedis, and M. Katherine VanderVeen

On Friday, October 2, 2020, the Small Business Administration ("SBA") issued a Procedural Notice setting out the required procedures for companies pursuing certain equity or asset purchases or sales, or other transfers, who have also received Paycheck Protection Program ("PPP") funds. The Procedural Notice provides new guidance on the following previously ambiguous issues for PPP borrowers:

- For purposes of PPP loans, the SBA considers a transaction to result in a "change of ownership" when:
  - at least 20% of the common stock or other ownership interest of a PPP borrower is sold or transferred, whether in one or more transactions, and including to an affiliate or an existing owner of the PPP borrower;
  - a PPP borrower sells or otherwise transfers at least 50% of its assets (measured by fair market value), whether in one or more transactions; or
  - a PPP borrower is merged with or into another entity.

- There are different approval and escrow requirements depending on (1) where the PPP borrower is in the loan payment and/or loan forgiveness process, and (2) the type of "change of ownership" that is contemplated. If SBA approval is required, that approval can take up to 60 days from the date the SBA receives all required documentation.
  - In any transaction resulting in a "change of ownership," the PPP borrower must, prior to the closing of such transaction:
    - Notify the PPP lender of the transaction in writing, and
    - Provide PPP lender with copies of the proposed transaction documents
  - PPP lender or SBA approval IS NOT required for the following "change of ownership" transactions:
    - The PPP borrower has repaid the PPP note in full prior to the closing of the transaction, OR
    - The PPP borrower has completed the loan forgiveness process in accordance with PPP requirements AND (1) SBA has remitted the forgiveness amount to the PPP lender to satisfy the PPP note in full, OR (2) the PPP borrower has repaid any remaining balance on the PPP note
  - PPP lender approval IS required for the following "change of ownership" transactions:
    - In an equity sale or other transfer transaction:
      - Equity sale or other transfer of ownership in PPP borrower of 50% or less of the equity in the PPP borrower, OR
      - PPP borrower submits forgiveness application reflecting the use of ALL of the PPP loan proceeds AND PPP lender controls an escrow account holding funds equal to the outstanding balance of the PPP loan
    - In an asset sale transaction:
      - PPP borrower submits forgiveness application reflecting the use of ALL of the PPP loan proceeds AND PPP lender controls an escrow account holding funds equal to the outstanding balance of the PPP loan
    - In either case, the PPP borrower must request and receive PPP lender approval prior to the closing of the contemplated transaction.
  - SBA approval IS required for the following "change of ownership" transactions:
    - Any transaction that does not fall into the above (for example, (i) an equity sale transaction involving the sale of greater than 50% of the equity of the PPP borrower or (ii) an asset sale transaction involving the sale of greater than 50% of the assets of the PPP borrower, in each case where the PPP loan proceeds have not been used in full, forgiveness has not yet been applied for, and/or the outstanding amount of the PPP loan cannot be satisfied in full or deposited into escrow)
    - The PPP borrower must request approval from the PPP lender, and the PPP lender must request and receive approval from the SBA prior to the closing of the transaction. In connection with the foregoing, the PPP lender is required to submit certain information, including why the PPP note cannot be satisfied in full or why an escrow account cannot be established, in a request to the SBA to approve the "change of ownership" contemplated by the PPP borrower. SBA APPROVAL CAN TAKE UP TO 60 DAYS.
    - Note: SBA approval of a "change of ownership" involving the sale of 50% or more of the assets of the PPP borrower is subject to the purchaser assuming all of the PPP borrower's PPP obligations; notwithstanding the assumption, the PPP borrower still remains liable for all requirements under the PPP loan (for example, documentation requirements, reporting covenants, repayment).

- Even if a transaction does not amount to a "change of ownership," the PPP borrower still must report ***any*** sale or other transfer of equity or merger of the PPP borrower to the PPP lender, and the PPP lender must then report such change to the SBA.

- A buyer that is a PPP borrower is not precluded from engaging in a "change of ownership" transaction with a seller that is a PPP borrower (and therefore acquiring the seller's PPP loan), but certain segregation and delineation of use of PPP loan proceeds must be adhered to.

- PPP borrowers should keep in mind that regardless of any "change of ownership" transaction, the PPP borrower remains responsible for the performance of all obligations under the PPP loan, the certifications made in connection with the PPP loan application (including the certification of economic necessity), and compliance with all other applicable PPP requirements.

- PPP borrowers need to contact their PPP lender well in advance of any "change of ownership" transaction closing if PPP lender or SBA approval of the transaction is needed. The approval process will take time and cannot be waived.

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GOVERNOR WHITMER SIGNS COVID-19 LEGISLATION APPLICABLE TO ALL EMPLOYERS

by Angelina R. Delmastro, Christina K. McDonald, and David R. Deromedi

In the aftermath of the Michigan Supreme Court's recent ruling that Governor Whitmer did not have legal authority to issue her Executive Orders, the Michigan Legislature and the Governor's office have reached an agreement on legislation that covers some areas which were subject to those Orders.

On October 22, 2020, the Governor approved three important pieces of COVID-19 Legislation. As COVID-19 cases are rising again while we head into typical flu season, all three work together to set certain standards for employers and employees in managing workplace COVID-19 matters.

HB 6030 (PUBLIC ACT 236 OF 2020)

House Bill 6030 creates a new act – the COVID-19 Response and Reopening Liability Assurance Act – "to provide minimum requirements for tort claims alleging exposure to COVID-19; establishing liability standards for claims alleging exposure to COVID-19; and precluding liability if conduct complies with regulations or orders."

Principally, the law provides that any person who complies with all federal, state, and local rules, regulations, executive orders, and agency orders related to COVID-19 is immune from liability for a claim for damages allegedly caused by COVID-19 exposure or potential exposure. Thankfully, an "isolated, de minimis deviation from strict compliance" that is not related to the alleged injuries will not defeat this immunity.

HB 6031 (PUBLIC ACT 237 OF 2020)

HB 6031 applies the immunity of House Bill 6030 to the employment setting. It grants employers immunity for an employee's employment-related COVID-19 exposure if the employer was following the law. More specifically, this law provides that an employer is not liable for an employee's COVID-19 exposure if, at the time of the exposure, the employer was complying with all federal, state, and local statutes, rules, and regulations, executive orders, and agency orders related to COVID-19. For example, on October 14, 2020, MIOSHA issued emergency COVID-19 rules for all employers with which employers need to comply. As with HB 6030, the law also provides that "an isolated, de minimis deviation from strict compliance" that is unrelated to the employee's exposure will not destroy an employer's immunity. This law does not create or ratify any claims or causes of action, and it does not eliminate any causation or proximate cause elements of a claim or cause of action. Finally, this law does not change the application and coverage of Michigan worker's compensation laws. The law applies retroactively to exposures that have occurred since March 1, 2020.

We continue to emphasize the importance for all Michigan employers, regardless of the size of the workforce, to implement and follow a COVID-19 preparedness plan which includes specific protocols for performing work safely, avoiding and minimizing exposure to COVID-19, and handling presumed and actual COVID-19 cases.

HB 6032 (PUBLIC ACT 238 OF 2020)

House Bill 6032 contains significant prohibitions and protections for both employers and employees. This law takes immediate effect, and is retroactive back to March 1, 2020.

Most importantly, it orders that **employees who test positive for COVID-19 or display the principal symptoms of COVID-19 shall not report to work** until **all** of the following **3** conditions are met:

- **24 hours** have passed since the fever has stopped without the use of fever-reducing medications (if the employee has a fever); and
- **10 days** have passed since either of the following, whichever is later:
  - The date the employee's symptoms first appeared or
  - The date the employee tested positive for COVID-19; and
- The employee's **principal symptoms of COVID-19 have improved**

The law also orders that an employee who has been in **close contact with someone who tests positive for COVID-19 or displays the principal symptoms of COVID-19 shall not report to work** until **1** of the following conditions are met:

- **14 days** have passed since the employee last had close contact with the person; or
- The person with whom the employee had close contact receives a **medical determination that they did not have COVID-19** at the time of the close contact

This section regarding close contact does not apply to health care professionals, first responders, CPS employees, and workers at health care facilities, correctional facilities, child caring institutions, and adult foster care facilities.

The conditions identified in HB 6032 for employees who have, or have been exposed to others with, COVID-19 symptoms are taken directly from guidance published by the Centers for Disease Control and Prevention.

Over the past several months, both employers and their employees have worked to identify and implement best practices with respect to symptom tracking, notification and leave from work, and testing. Everyone agrees they want to keep their workers, vendors, customers, and clients safe. This legislation provides direction and clarity for employers and employees alike.

To strengthen compliance with these stay-home mandates, the law prohibits employers from discharging, disciplining, or retaliating against an employee who:

- Complies with the stay-home mandates, including where an employee displays the principal symptoms of COVID-19 but later tests negative
- Opposes a violation of this law
- Reports health violations related to COVID-19

However, this anti-retaliation provision does not apply to an employee who displays the principal symptoms of COVID-19 but fails to make reasonable efforts to schedule a COVID-19 test within 3 days of their employer requesting that they get tested.

Some definitions are important to understanding this law. "Employer" is defined very broadly: "a person or a state or local governmental entity that employs 1 or more individuals." Under this definition, this law almost certainly applies to every single Michigan employer.

Another important definition is "close contact," which means being within approximately six feet of someone for 15 minutes or more.

The law also tasks the director or chief medical executive of the Michigan Department of Health and Human Services with defining "principal symptoms of COVID-19," but also provides a 2-part definition in the absence of a definition from MDHHS:

- 1 or more of the following symptoms, where they are not explained by a known medical or physical condition (in other words, they are atypical for the individual):
  - Fever
  - Shortness of breath
  - Uncontrolled cough

- 2 or more of these symptoms, where they are not explained by a known medical or physical condition:
  - Abdominal pain
  - Diarrhea
  - Loss of taste or smell
  - Muscle aches
  - Severe headache
  - Sore throat
  - Vomiting

For many employers, these new laws will confirm the policies and practices they have already adopted and are using the manage the workforce in the face of this pandemic. They undoubtedly help clarify everyone's responsibilities in the workplace. Employers will need to continue to monitor and ensure that they are complying with all federal and state rules, regulations, and agency orders. For those employers who have not developed such policies and practices, it is now time to take this action to achieve compliance and to obtain the benefits of immunity from COVID-19 exposure claims.

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Immigration Insights and Issues (III)

CORPORATE RESTRUCTURING AND ITS POTENTIAL IMPACT ON H-1B WORKERS

Posted by Alexandra Crandall | Nov 2, 2020

Facing the financial distress caused by the COVID-19 pandemic, many companies may be contemplating corporate restructuring. With all of the considerations surrounding a corporate merger, acquisition, or spin-off, often the last item on an executive's mind is the impact of corporate restructuring on its foreign national workforce. While business motives may be at the forefront of the practical considerations in finalizing a precarious deal, corporate counsel should be sure to consult with immigration counsel in advance of any corporate change in order to preserve the immigration status of H-1B workers.

Before taking any immigration action to preserve the H-1B status of its workers in light of anticipated corporate restructuring, legal counsel for the company should first ask two questions:

1. **Will the deal close?** At the outset, it is important to note that the mere announcement of a corporate restructuring has no legal effect on foreign national employees. It is not until the deal actually closes that the company will need to take any action.

2. **Has the employer changed?** Not all corporate reorganizations require action to maintain the immigration status of H-1B workers. A simple name change or ownership change should not require any action at all.[1]

If the answer to both of the above questions is yes, then additional analysis is required to determine whether any immigration action is required.

Is the New Employing Entity a "Successor in Interest"?

If the employer is "different," then the next question that legal counsel for the company should ask is whether the new employer is a "successor in interest." The new employer is a "successor in interest" where "a new corporate entity succeeds to the interest and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner." [2]

If the New Employing Entity is a "Successor in Interest," No Amended H-1B Petition is Required.

If the new employer is indeed a "successor in interest," then the employer is not required to file an amended H-1B petition. This is true whether the corporate restructuring took the form of a merger, acquisition, consolidation, spin-off, or any other entity reorganization, even if there is a change in the employer's federal tax identification number.[3]

Rather than filing new H-1B petitions and accompanying Labor Condition Applications ("LCAs") after the corporate restructuring, the regulations require the employer to place a

document in the required public access file acknowledging the new employing entity.[4] The document must state:

- the affected LCA number and its date of certification;
- a description of the new employing entity's wage system applicable to the employee;
- the federal employer identification number (FEIN) of the new employing entity; and
- a sworn statement by an authorized representative of the new employing entity expressly acknowledging the entity's "assumption of all obligations, liabilities and undertakings arising from or under attestations made" in the certified LCA.[5]

The authorized representative must explicitly agree to maintain a copy of the statement in the public access file and make the document available to the Department of Labor or any member of the public upon request. The document should be placed in the public access file **before** the corporate reorganization is finalized.

What Happens When the New Employing Entity Seeks to Extend its H-1B Workers' Status?

The new employing entity must file new LCAs and H-1B petitions when it hires any new H-1B nonimmigrants or seeks extensions of H-1B workers who were hired prior to the corporate restructuring.[6]

About the Author:

Alexandra Crandall is an attorney at Dickinson Wright in Phoenix. She practices business immigration, successfully assisting employers with the preparation of immigrant and non-immigrant petitions to maintain their foreign national workforce. Prior to joining the firm, Ms. Crandall served as a Judicial Law Clerk to the Honorable Jennifer B. Campbell at the Arizona Court of Appeals.

[1] See, letter from Efren Hernandez III, Acting Director, Business and Trade Services, HQ 70/6.2.8 (June 7, 2001), AILA Doc. No. 01062832 (Posted June 28, 2001) referring to 8 CFR §214.2(h)(2)(i)(E).

[2] INA § 214(c)(10); 8 U.S.C. § 1184(c)(10).

[3] 20 CFR § 655.730(e)(1).

[4] 20 CFR § 655.730(e)(1) ("Where an employer corporation changes its corporate structure as the result of an acquisition, merger, "spin-off," or other such action, the new employing entity is not required to file new LCAs and H-1B petitions with respect to the H-1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the [FEIN]) . . . .").

[5] 20 CFR § 655.730(e)(1)(i)–(iv).

[6] 20 CFR § 655.730(e)(2).

Tax Blog

ARE MY EMPLOYEES TELECOMMUTING RIGHT INTO A NEW STATE INCOME TAX LIABILITY?

Posted by Peter Kulick | Nov 2, 2020

A phenomenon of the ongoing COVID-19 healthcare pandemic is the exponential expansion of telecommuting. Whether stemming from an epiphany or simply the opportunity to escape to a more appealing place to live, many members of the workforce have opted to relocate. In many instances, relocation has meant crossing state borders, all the while continuing to work for the same employer. While the relocation may be temporary, it can have significant tax consequences — notably creating a nexus in a new taxing jurisdiction.

Physical presence of an employee in a state can create the requisite nexus to cause the employer to be subject to state corporate income taxes. An employer offering workforce flexibility can come back with a tax bite. In light of this quandary, several states have issued guidance — both formal and informal — addressing the nexus question.

The states which have issued guidance have typically taken the position that the state will not assert income tax nexus if the employee telecommuting is only due to COVID-19 healthcare pandemic. States indicating that corporate nexus will not be asserted due to COVID-19 include Arizona, California, Georgia, Indiana, Massachusetts, Maryland, Minnesota, New Jersey, Pennsylvania, and South Carolina.

Other states, such as Michigan, have affirmatively stated it will not waive nexus requirements due to COVID-19 related telecommuting. Yet other states have not issued any guidance. This latter category of states includes Florida, Illinois, New York, Tennessee, and Virginia.

For further information, please contact Peter Kulick in our Lansing, Michigan office at 517-487-4729 or any other attorney in our Tax Practice Group.

All Things HR

2020 USCIS I-9 GUIDANCE ROUND-UP

Posted by Suzanne Sukkar | Nov 5, 2020

As a result of the ongoing COVID-19 global pandemic, employees continue to work from home in record numbers, and employers continue to scramble to adjust their business operations and employee relations policies to accommodate the so-called “new normal”. Following-up on our earlier news about the US Department of Homeland Security’s (DHS) odd relaxation of certain Form I-9 rules, we felt this would be a good time to remind companies of several other aspects of previously routine I-9 compliance, which have been impacted during this unprecedented year.

To that end, here below are some of the more noteworthy I-9 developments, which companies should be monitoring closely:

- Given the shock of what was happening in mid-March, the year started out with a fairly modest, temporary grace period for employers to complete in-person I-9 document reviews for new hires. All other I-9 rules and requirements remained in force, despite the rapidly changing work landscape. If you are not yet familiar with the accommodations given to employers in late-March, you can review them here. After several extensions, those rules are still active today (albeit set to expire on November 19th). However, note carefully the very limited definition of what constitutes a business “operating remotely”.
- In a similar vein, the US Citizenship & Immigration Services (USCIS) confirmed in March that its E-Verify system for I-9 quality control would continue operating largely unchanged, but with a few extended deadlines for employers to perform certain actions in the system. Given the number of human resource managers already working remotely, and the fact that E-Verify is entirely a web-based online system, this did not seem to be a major problem for employers, assuming they could juggle the more tricky I-9 creation rules at the time of hire.
- Throughout the summer, the DHS continued to almost reluctantly extend the grace periods for employers to perform in-person interactions with new employees completing their I-9s. It also provided some more specific guidance for particular challenges which were vexing employers struggling to maintain I-9 compliance. Those included what to do when a new employee’s identity document has expired, but the relevant state agency issuing the renewal/replacement was indefinitely shuttered; and, much to the relief of understandably confused human resource professionals, some real-world, practical examples for how employers should annotate their I-9s, when using all of these new, temporary policies.
- Most recently, the USCIS launched a public information campaign last month reminding employers how to properly handle what are called “Tentative Nonconfirmations” (or TNCs) generated from its E-Verify system. TNCs generally happen when there is a data mismatch between the USCIS’ records and the information an employer enters into E-Verify from its I-9 form. TNCs can be an innocuous as a name typo error, or can signal a serious problem with the employee’s US work authorization. Handling TNC situations correctly can often be tricky, to avoid accidentally harming a lawful US worker, or carelessly not following-up on a potential lack of lawful status to employ somebody.

Dickinson Wright is committed to helping companies and busy human resource professionals to remain vigilantly compliant with all US immigration rules and obligations. Please feel free to contact us at any time about the I-9 developments above, or in connection with any other needs you have for your foreign worker populations.

About the Author:

Suzanne K. Sukkar is a Member in Dickinson Wright's Ann Arbor office, where she assists clients in all aspects of business immigration law and compliance. Suzanne can be reached at 734-623-1694 or ssukkar@dickinsonwright.com, and you can visit her bio here.

NEVADA REMAINS OPEN WHILE PAUSING MEASURES TO EXPAND REOPENING: EMERGENCY DIRECTIVE 35 REVIVES SANITIZATION AND SOCIAL DISTANCING REQUIREMENTS

by Gregory R. Gemignani and Caleb Green

Nearly nine months after Governor Sisolak entered the Declaration of State of Emergency due to the COVID-19 pandemic, Nevada, like the rest of the nation, is still grappling with the impact of the coronavirus. After a series of measures that relaxed social distancing requirements in an effort to return the state back to normal operations, Nevada is temporarily increasing safety measures once again. Previously, on September 30, 2020, the Governor issued Nevada Emergency Directive 33 ("Directive 33"), which significantly expanded public gathering limits and permitted large mass gatherings under certain circumstances. However, in response to changes in the number of positive cases throughout the United States, the state of Nevada is reviving certain social distancing requirements.

On November 24, 2020, Nevada Governor Steve Sisolak released Nevada Emergency Directive 035 ("Directive 35"), which expands occupancy limits and existing restrictions to combat the coronavirus's rapid transmission throughout the state. Directive 35, effective as of November 24, 2020, will remain in place for at least three weeks, at which time the Governor stated that he would reevaluate the statewide transmission statistics and decide to extend the Directive or enact more restrictive protocols.

NEVADA EMERGENCY DIRECTIVE 035

In summary, Directive 35 provides the following:

- Expands the existing mask mandate and requires residents and visitors to wear a mask covering at all times when around people not within their immediate household, including private and residential gatherings.
- Food and dining establishments must limit seating to no more than four persons per table.
- Food and dining establishments must require seating via reservations only.
- Limits the following venues and establishments to gatherings no large than 25% of the fire code occupancy or 50 people, whichever is less:
  - Public Social Gatherings
  - Gaming Establishments
  - Gym, Fitness, Martial Arts, Dance Studios, and similar establishments
  - Arcades, Racetracks, Bowling Alleys, Mini Golf, Amusement & Theme Parks, and similar venues
  - Libraries, museums, art galleries, aquariums, and zoos
- Restricts private residential gatherings to 10 or fewer people from no more than two households.
- This Directive does not change the occupancy limits as set forth in Directive 33 for the following venues and establishments:
  - Offices
  - Indoor Malls
  - Cannabis establishments
  - Hair Salons, Barbershops, Nail salons & Businesses that provide Aesthetic Skin Services
  - Spas, Massage Therapy & Massage Establishments
  - Body Art or Piercing Establishments
  - Community & Recreational Centers, including public pools
- Requires cancellation of all youth and adult sports tournaments previously permitted under Directive 34.

DEFINITION OF GATHERINGS

Consistent with Directive 033, the Directive defines the term "gathering" broadly defining it as "an activity that draws persons to (1) the same space, (2) at the same time, (3) for the same purpose, and (4) for the same duration of time." Such boundaries are characterized by rigid wall structures, separate ownership or property interest, separate ventilation systems, or sufficient distance between adjacent occupied spaces that precludes the intermingling of users in a manner that exceeds the gathering limits as set forth in Directive 35.

Public gathering restrictions apply to, but are not limited to, the following: places of worship, indoor movie theaters, live theater performances, casino showrooms, event venues, trade shows, conferences, conventions, professional seminars, milestone events, weddings, funerals, and similar gathering activities.

ADDITIONAL RESTRICTIONS

Directive 35 also strengthens the existing mask mandate that was introduced through Directive 24. Specifically, Directive 35 requires patrons of food and dining establishments to wear face coverings at all times, except when actively eating. Likewise, gyms, fitness facilities, and related businesses must require all employees, trainers, instructors, and patrons to wear face coverings at all times.

While retail stores and grocery stores will see no change in occupancy limits, the Directive requires that they install "counters" at all public entrances to monitor capacity limits if the establishments contain over 50,000 square feet of publicly accessible retail floor area. Retail establishments are still required to post health screening signage at all public entrances, as provided in Directive 33, and are encouraged to conduct temperature screenings before allowing patrons entry.

In addition, all businesses and gathering venues must post signs at public entrances identifying their COVID-19 capacity limitations imposed by Directives 33 or Directive 35. Lastly, day/night clubs, brothels, and adult establishments must remain closed.

Dickinson Wright's attorneys have considerable experience assisting companies in complying with the various requirements of state, federal, and local laws. The firm remains committed to helping our clients navigate this unprecedented time and remains fully available to provide any assistance that may be required. Our Government Affairs team is dedicated to keeping you informed of pertinent information as we continue facing the novel coronavirus.

ABOUT THE AUTHORS

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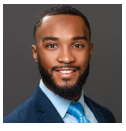

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CHANGES TO THE RULES OF CIVIL PROCEDURE: EMBRACING CHANGES FROM COVID-19 TO BEGIN MODERNIZING LITIGATION IN ONTARIO

by Mark S. Shapiro, Joshua Suttner, and Alyssandra A. Antonangeli

COVID-19 required Ontario Courts to adopt temporary measures to quickly modernize the court system. This included implementing virtual hearings, piloting the new CaseLines online platform, and permitting service by email.

On November 30, 2020, the Attorney General of Ontario announced changes to *the Rules of Civil Procedure (the "Rules")* effective January 1, 2021. These long-overdue changes implemented many of the temporary measures which the Court put in place for COVID-19. The new *Rules* are a strong step toward modernizing courts in Ontario and making the justice system more accessible by providing electronic options for various aspects of court proceedings.

The changes will permanently allow parties to attend court, commission affidavits, and serve and file documents virtually. These changes are a strong step forward in getting the Superior Court system caught up to the technological and practical realities with which we have been living for quite some time.

For clients reading this, there is one important takeaway: **These changes will reduce legal fees and related costs.**

Here are some highlights of the latest amendments to the *Rules*:

- Videoconference Hearings are the New Normal – Due to COVID-19, hearings have been successfully conducted by video conference for months. With these changes to the *Rules*, videoconference hearings should become the predominant way to conduct hearings, pre-trials, case conferences, and any other step for which there is no good case for an in-person hearing. The *Rules* will now impose cost consequences for any party who objects to a virtual hearing without good reason. Perhaps the most significant benefit of going virtual is that hearings will become less expensive for clients. That is, virtual hearings will result in fewer travel fees passed on to clients, including long-distance travel to regional courthouses and travel fees from the office to the courthouse. Additionally, a client whose matter is, for instance, number nine on the docket will no longer have to pay to have counsel sit through the first eight matters waiting for the client's matter to be called.

- In 2021, Email Finally Becomes the Gold Standard – The changes to the *Rules* allow for service of documents (other than originating documents) by email and allows court staff to communicate and send certified court documents by email.
  - » This change could mean the end of printing and binding multiple copies of the same document, with specific front and back coloured pages, leaving them at reception or the mailroom for a process server to pick up and physically delivering them to another law firm down the street.
  - » Orders and Judgments can now be issued and entered electronically, which means counsel does not have to wait for a physical copy to be retrieved by a process server at the counter.

- The Fax Machine Industry Suffered a Devastating Blow – The option in the *Rules* to serve documents by fax was one of the last places of refuge for the ancient technology. The new *Rules* delete all references to faxing documents and its removal may save law firms tens, if not hundreds of dollars, for maintaining fax numbers and subscriptions to digital fax services.

- Virtual Commissioning Is Here to Stay - In-person commissioning of affidavits is no longer required. The *Rules* now recognize that this authentication process can be achieved without the commissioner and deponent being in the physical presence of each other, in accordance with the *Commissioners for Taking Affidavits Act*. Remote commissioning offers the same level of authenticity without the need to travel to meet the deponent or arrange a meeting at the lawyer's office.

There is still some way to go before the Superior Court system is fully modernized. These changes are a good start and show a willingness to adapt rather than continue doing things one way because that's how they have always been done.

Below is a complete list of the upcoming changes. The text of the amendments to the *Rules* can be found at O. Reg. 689/20: Rules of Civil Procedure.

Rules 1.08 and 1.08.1 are revoked:

- The new rule 1.08 allows a party seeking a hearing or other step in a proceeding to specify the method of the hearing or step. The method can be in person, by telephone conference, or by video conference. Case conferences will be held by phone unless the court specifies otherwise. Rule 1.08 does not apply to proceedings in the Court of Appeal.

- Objections to the proposed method must be delivered within a specified timeframe. These objections are dealt with through a case conference. If no objection is filed, parties are deemed to have agreed to the proposed method, unless the court directs otherwise.

- At the case conference dealing with the objection, the court decides the mode of the hearing or step by taking into consideration factors such as availability of telephone or video conference facilities, the ability to make findings about a witness' credibility, and the balance of convenience between the parties.

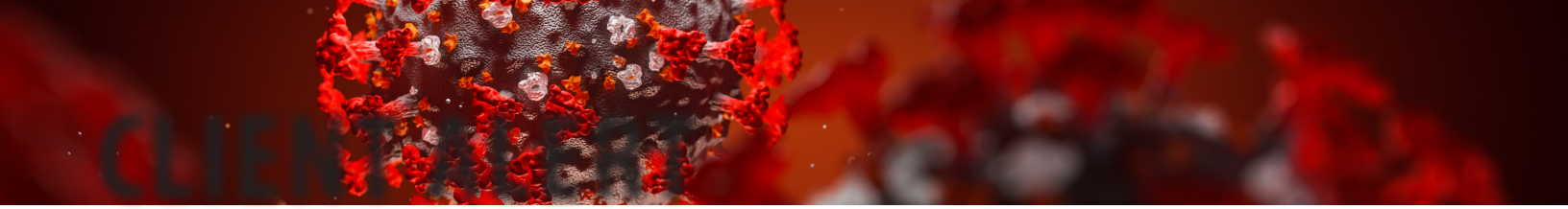
- The new subrule 57.01 (1) provides that cost consequences may be incurred if a party unreasonably objects to a proceeding by telephone or video conference.

- Rule 1.08 applies with modifications to mediations and oral examinations for discovery.

Rule 4.01 is revoked:

- The new rule 4.01 indicates that the text and character standards for paper documents apply to electronic documents.

- The new rule 4.01.1 permits electronic signatures on documents to be signed by the court, a registrar, a judge, or an officer.



Clauses 4.02 (3) (f)-(h) are amended:
- The new clauses remove any reference to fax numbers.

Rule 4.03 is revoked:
- The new subrule 4.03 (2) allows the registrar to provide a certified copy of court documents in electronic format. The printed version of the electronic certified copy satisfies the requirement to provide the document to another person in paper format.

Subrule 4.05 (1.1) is revoked:
- The new subrule permits any document to be issued electronically. The date of electronic issuance is the date indicated on the document by the registrar or authorized software.

Rule 4.05.3 is amended:
- The new rule adds specifications about submitting documents to the court through CaseLines, the authorized case management software. Submitting documents to CaseLines does not amount to filing or service under the rules.

Clause 4.06 (1) (e) is amended:
- The clause now allows for the electronic commissioning of affidavits.

Rule 4.09 is amended:
- The rule adds that transcripts are to be provided in electronic format unless the court orders otherwise. This does not apply to proceedings in the Court of Appeal.

Rule 4.12 is added:
- The rule allows the court or registrar to provide documents and to communicate by email.

Subclauses 16.01 (4) (b) (iv) and 16.05 (1) (f) are amended:
- The service of documents, other than originating processes, can now be served by email without the need for the parties' consent or a court order.

- Subrule 16.09 (6) is revoked and no longer requires parties to prove service by email with a certificate of service.

Rule 16.06.2 is added:
- The rule provides details on when service of a document by courier becomes effective.

Subrule 37.12.1 (4) is amended:
- The subrule allows a moving party to propose that a motion be heard in writing without the attendance of parties, even if the issues of fact and law are complex.

Clause 51.01 (c) is amended:
- The clause no longer defines the authenticity of a document by reference to a copy of a telegram. The clause adds that a copy of an email is an authentic document.

Rule 59.02 is revoked:
- Subrule (2) indicates that if an endorsement of an order is made on a separate document, that document may be in electronic format.

Subrules 59.03 (1) and (3) are revoked:
- The new subrules make changes to the preparation and form of an order.

Rule 59.04 is revoked:
- The new rule allows for the electronic issuance of orders. An issued order can be provided by email, through CaseLines, or by pickup.

Rule 59.05 is revoked:
- The new rule makes changes to how orders are entered and filed. The register must enter the issued order by saving a copy of it in electronic format.

Rule 61.03 is amended:
- The new subrules (2.1) and (3.1) require that if filing is done electronically, only one copy of a motion record, factum, or transcript needs to be filed.

General changes:
- Several subrules in rules 16, 37, and 38, which deal with service and delivery by fax, are amended or revoked. See: 16.05 (1) (d), 16.05 (3), 16.05 (3.2), 16.06.1 (1) (a), 37.10.1 (1) (b), 37.10.1 (2) (b), 37.10.1 (3) (b), 38.09.1 (1) (c), 38.09.1 (3) (b).

- Several subrules are amended to remove reference to the "place" of hearing of motions, removing the assumption that hearings will occur in certain locations. See: 37.15 (1), 38.11 (2) (b), 60.17 (b), 62.01 (6).

- Several rules no longer assume that participation in person is required. See: 37.03, 38.03 (1.1), 50.05 (1), 50.13 (2), 54.05 (2), 76.05 (2).

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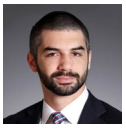

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

All Things HR

CAN EMPLOYERS MAKE EMPLOYEES GET THE COVID-19 VACCINE?

Posted by Sara Jodka | Dec 9, 2020

With two COVID-19 vaccines set to receive federal approval in the United States in the upcoming weeks, the next question is whether employers can make employees receive the vaccine.

The short answer is…yes. And while the typical lawyer answer to any question is "it depends," that concise "yes" does come with a few caveats. So, let's go through them.

First, it is also worth noting that under the federal Occupational Safety and Health Act (OSHA) and many state laws, employers are obligated to provide a workplace free from serious recognized hazards. This means that employers have the right to establish legitimate health and safety standards and polices so long as they are job-related and consistent with business necessity. As such, a policy requiring vaccinations will depend heavily on the employer's industry and physical location. Accordingly, courts in a number of jurisdictions have held that these workers can be required to receive vaccinations, such as rubella or flu vaccinations, as long as the requirement is job-related and consistent with business necessity. This is especially true in the healthcare context.

Second, even if an employer can require a vaccination due to a demonstrated legitimate health and safety requirement, we've learned from the flu vaccine that the Equal Employment Opportunity Commission (EEOC), which enforces the federal Americans with Disabilities Act (ADA), which protects employees from disability discrimination, and Title VII of the Civil Rights Act of 1964, as amended (Title VII), which protects employees from religious discrimination, has been clear that employers are already allowed to require employees to be vaccinated. However, workers who have a medical reason not to get the vaccine may request a medical exemption under the ADA and workers who have a sincere religious belief that taking the vaccine would violate their religious beliefs may request a religious exemption under Title VII.

For example, persons with certain health-related conditions, such as severe allergies to ingredients in the flu vaccine or disorders such as Guillain-Barré Syndrome, should not be vaccinated for the flu. Further, the EEOC advised that employers should accommodate pregnant employees' requests not to be vaccinated.

Notably, not all health conditions are ADA-qualifying. In *Hustvet v. Allina Health Systems,* the Eighth Circuit held that an employer could terminate a healthcare worker after she refused to receive immunizations for measles, mumps, and rubella because of her alleged chemical sensitivities and/or allergies because there was not enough evidence that the employee's alleged condition was actually a qualifying disability under the ADA. Because the vaccination requirement was job related and consistent with business necessity, however, the court ruled in favor of the employer.

In the religious accommodation context, in 2012 in *Chenzira v. Cincinnati Children's Hospital Medical Center*, the Southern District Court of Ohio concluded that veganism qualifies as a sincerely held religious belief exempting an employee from having to receive the flu vaccine, which was produced from chicken products. The employer had discounted the employee's request for exemption as a dietary preference or philosophical ideation rather than a sincerely held religious belief, but the court disagreed.

When an employer does receive an exemption request, whether due to disability or religious-related reasons, an employer must engage in an interactive process with the employee to determine if it can provide the employee with a reasonable accommodation that does not pose an undue hardship for the employer. The standard for what constitutes an undue hardship is different under the ADA and Title VII, with the disability accommodation being less strict. In any event, if an employee qualifies for an exemption under either the ADA or Title VII, the employer may have to provide the employee a reasonable accommodation to allow the employee to continue to work with vaccinated individuals, such as working remotely.

Although the EEOC could update its guidance materials, which it has done since the pandemic, it has not address the COVID-19 vaccine and its impact on workforces.

As for employer liability, should any employees develop any side effects from any required vaccine, those claims would likely be considered injuries obtained during the course and scope of employment and subject to review through each individual state's workers' compensation systems.

So, there you have it. Employers can legally require employees get the COVID-19 vaccine, subject to the reasonable accommodation protections for medical conditions under the ADA and religious accommodation exemption under Title VII. Bear in mind that the requirements to trigger these exceptions have been difficult for employees to meet in the case law. Lastly, just because an employer *can require* an employee to have the COVID-19 vaccination, it does not mean that an employer *should require*, and the EEOC has further recommended that employees consider encouraging employees to get vaccines rather than require them. However, given the scope of COVID-19 and the significant loss of life, it will be interesting to see how employers and the EEOC respond.

About the Author: Sara H. Jodka (Member, Columbus), is a member of Dickinson Wright's Labor and Employment Practice Department and may be reached at 614-744-2943 or sjodka@dickinsonwright.com.

Immigration Insights and Issues (III)

IMMIGRATION 2021: A NEW ADMINISTRATION, A NEW BEGINNING?

Posted by Suzanne Sukkar | Dec 14, 2020

For the last 4 years, U.S. immigration law and policy has been in the spotlight with numerous Presidential Proclamations, Executive Orders, and rapid policy changes as well as regulations, which have resulted in a long-lasting ripple effect on U.S. employers and its foreign workforce. These changes have resulted in numerous challenges in court through litigation. What can employers and foreign workers expect under the new Biden Administration starting in January 2021?

One of 2020's biggest challenges faced by employers sponsoring foreign workers has been the immigrant and nonimmigrant presidential proclamations suspending visa processing at U.S. consular post abroad. Presidential Proclamation 10014 and 10052, "Suspending Entry of Immigrants and Nonimmigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak," resulted in an H-1B, H-2B, J-1, and L visa ban which remains in effect until December 31, 2020. See our blog post, Nonimmigrant and Immigrant Visa Processing Halted by Presidential Proclamation – Effective June 24 for Certain Nonimmigrants. As December 31 is fast approaching which is the date these proclamations expire, the million-dollar question is whether the Trump Administration will extend these proclamations or simply let them expire. Bets are on, and it could go either way, but if the proclamations are extended by President Trump, then we have to wait for action by President-Elect Biden. If extended, we anticipate that the proclamations will be rescinded after President-Elect Biden takes office in January 2021. The backlogs created by these proclamations will take consular officers many months to address even if rescinded early in the Biden Administration. For the proactive foreign worker, who has booked a visa appointment in early January, they should not expect the ongoing cancellations of appointments by consular posts to end due to staffing and backlog challenges.

Another proclamation based in both the employer and foreign traveler's side has been the health-related travel restrictions issued through another round of Presidential Proclamations. See our blog post, ESTA Cancellation Risks and the Schengen Travel Presidential Proclamation.

Country	Effective Date	Proclamation Number
People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau	February 2, 2020 5 pm EDT	9984 – 85 *Fed. Reg.* 6709
Islamic Republic of Iran	March 2, 2020 5 pm EDT	9992 - 85 *Fed. Reg.* 12855
Schengen Area[5]	March 13, 2020 11:59 pm EDT	9993 – 85 F*ed. Reg.* 15045
United Kingdom and Ireland[6]	March 16, 2020 11:59 pm EDT	9996 – 85 *Fed. Reg.* 15431
Federative Republic of Brazil	May 26, 2020 11:59 pm EDT (originally May 24, 2020)	10041 – 85 *Fed. Reg. 31933*
Brazil Amendment	May 26, 2020[7] 11:59 pm EDT	*10041 - 85 Fed. Reg.* 32291

As noted in the chart above, since March 13, 2020, travel has been suspended for foreign nationals physically present in a European Schengen Area country, for 14 days preceding their attempted entry into the U.S., with some exceptions. Foreign workers, who had to return to the U.S., were forced to take an expensive detour by traveling to another country without any travel restrictions to remain for 14 days, and then seek entry into the U.S. The alternative has been seeking a National Interest Exception (NIE) from the U.S. Embassy or Consulate abroad or from Customs and Border Protection (CBP) in limited cases. See our blog post, State Department Expands National Interest Exceptions for Nonimmigrants Subject to Presidential Proclamation 10052. However, satisfying the criteria has proven to be difficult resulting in foreign travelers waiting abroad for unpredictable periods. These health-related travel restriction proclamations do not have a set expiration date. However, this one is tricky and what happens next is not clear. COVID-19 numbers are increasing and stay-at-home orders are coming back. As such, it is possible that the health-related travel restrictions remain in place until COVID-19 vaccines are widely available to the public. On the other hand, while President Trump and President-Elect Biden have polar opposite views on immigration, President Trump could rescind this proclamation before leaving office to force President-Elect Biden to make a difficult political and health-related decision.

We do know that President-Elect Biden has signaled his intent to rescind the Muslim travel ban in his first 100 days in office.

With an immigration friendly Biden Administration, we expect a rapid reversal of many detrimental policies from a humanitarian perspective, such as the Trump Administration's policy of separating immigrant children from their parents at the U.S./Mexican border. Changes as to increasing the numbers of work-based immigrant visas or reducing delays and bureaucratic hoops for STEM graduates, for example, will depend on congressional cooperation. The Georgia senate race will be a key issue to watch.

It will take time for changes to take effect, but employers should expect relief soon.

About the Author:

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All Things HR

IT'S OFFICIAL, THE FFCRA EXPIRES THIS YEAR. TAX CREDITS AVAILABLE TO EMPLOYERS THAT VOLUNTARILY PROVIDE PAID LEAVE FOR COVID-19 ABSENCES

Posted by Sara Jodka | Dec 23, 2020

There were rumors that with the new stimulus deal that Congress would extend FFCRA leave, but that turned out to be fake news. Upon reviewing House Speaker Pelosi's press release discussing the stimulus deal it became clear that no, the FFCRA would not be extended to provide employees guaranteed paid leave benefits for COVID-19 qualifying absences but rather that there would be tax credits available to employers that voluntarily offered paid sick leave benefits to employees based on the FFCRA's original framework. Specifically, the press release provided:

The agreement provides a tax credit to support employers offering paid sick leave, based on the Families First framework.

While you can read the full 5,593-page stimulus package here, what this appears to mean is that mandated FFCRA paid leave expires December 31, 2020. Come January 1, 2021, covered employers, *i.e.,* those employers with under 500 employees, may continue to provide emergency paid sick leave or emergency paid FMLA Leave under the FFCRA and take the tax credit associated with those payments for leave taken through March 31, 2021.

It does not appear that this grants employers the ability to take the tax credit for paid leave that goes beyond what an employee would be entitled to under the original FFCRA. Rather, it merely allows employers to continue allowing employees to exhaust any FFCRA leave they would have been entitled to through March 31, 2021. In other words, this does not give employees additional paid leave. It just allows them to use FFCRA until March 31, 2021 instead of December 31, 2020.

It also does not require covered employers to grant employees additional paid leave, meaning covered employers are free to extinguish all paid leave entitlements under the FFCRA at the end of this year.

One thing that is not yet clear is whether the emergency paid leave under the FMLA extension resets to allow employees an additional 12 weeks paid leave to care for a child if the child's school is closed due to COVID-19 related conditions in the event the employer's FMLA policy resets every calendar year. Given the tone of Speaker Pelosi's press release, it would seem that the new leave is not available and that only traditional, unpaid FMLA leave would reset. However allowing employees with remaining emergency FMLA leave to use up any remaining emergency FMLA time through March 31, 2021, instead of December 31, 2020, would have the effect of providing employees and employers who agree to allow it with an extension to take emergency FMLA leave. Hopefully the Department of Labor and/or the IRS will provide some guidance in the next couple of weeks on this issue to clarify this and other issues for employers.

Note that a number of states (specifically, Colorado, New Jersey, Oregon, and Washington D.C.) and local governments (specifically, California cities Emeryville, Long Beach, Los Angeles, Oakland, Sacramento, San Diego, San Francisco, San Jose, San Mateo, and Santa Rosa) passed their own COVID-19 leave laws in response to the pandemic so employers will need to review those laws, and whether they will be extended or not, in order to fully understand their rights and obligations to employees.

About the Author: Sara H. Jodka (Member, Columbus) is a member of the firm’s labor and employment department and can be reached at 614-744-2943 or by email at sjodka@dickinsonwright.com.

Health Law Blog

EEOC CONFIRMS EMPLOYERS CAN MANDATE EMPLOYEES HAVE THE COVID-19 VACCINE…WITH RESTRICTIONS

Posted by Sara Jodka | Dec 18, 2020

With the roll-out of the COVID-19 vaccine for mass consumption, we hypothesized in our piece titled "Can Employers Make Employees Get the COVID-19 Vaccine," that employers would be able to require employees to get the vaccine subject to limited restrictions. We further noted that our guess was based on the Equal Opportunity Employment Commission's (EEOC) guidance in regards to the flu vaccine and that the federal agency that has enforcement powers over federal discrimination laws had not yet weighed in on the COVID-19 vaccine specifically.

Well, on December 16, 2020, the EEOC weighed in with its guidance "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (the Guidance) and confirmed that our hypothesis nailed it! In fact, the Guidance does not even specially address the question as to whether employers can mandate employees have the vaccine, rather, the Guidance jumps right in assuming employers already knew they could have mandatory vaccine policies and goes into the limited restrictions as to when an employer may have to pause and engage the employee in interactive discussion regarding the employee's medical, religious or other reasons for not wanting the vaccine.

Specially, Section K of the guidance discussion "Vaccinations" and provides a handful of helpful Q&As that succinctly guide employers. Here are the highlights arranged by applicable law consideration:

ADA and The Civil Rights Act of 1964 Regarding Mandatory Vaccinations

How should an employer respond to an employee who indicates the employee is unable to receive the vaccine because of a disability?

The ADA allows employers to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." When dealing with a vaccine, which screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Employers must then individualized assessment of four factors in determining whether a direct threat exists: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct

threat. If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.

How should an employer respond to an employee who indicates the employee is unable to receive the vaccine because of a sincerely held religious practice or belief?

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII. "Undue hardship" under Title VII, means having more than a *de minimis* cost or burden on the employer. Further, if an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

The ADA allows employers to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." When dealing with a vaccine, which screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Employers must then individualized assessment of four factors in determining whether a direct threat exists: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.

What should the employer do if it cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of disability or religious belief?

If an employee cannot get vaccinated because of a disability or religious belief and there is no reasonable accommodation possible, then the employer to exclude the employee from the workplace. This does not mean the employee is terminated; it means employers need to review the matter and ensure it is complying with all applicable laws. Some may allow termination. Some may require unpaid leave or other accommodations.

Americans with Disability Act (ADA)

Is the vaccine a "medical examination" under the ADA?

No because the employer is not seeking information about an individual's impairment or current health status, which is the case in the event of a drug test, x-ray, CAT scan, etc.

What does this mean for employers? It means that if an employee has a vaccine, even if the employer mandates it, the employer is not required to pay for it if the employer would in the event it was classified as a "medical examination". Employers should be careful when asking employees any pre-screening vaccination questions, however, because

those could elicit information about an employee's disability that might trigger application of the ADA.

What should an employer be sure a third party asked to administer the vaccine do in terms of pre-screening questions to ensure there is no medical reason that would prevent the employee from receiving the vaccine to ensure the ADA is not violated?

The issue here is the type of information related to an employee's disability that might be elicited through certain pre-screening questions. As such, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.

Is asking or requiring an employee prove they had the vaccine a "disability-related inquiry"?

No. The employer asking for proof of vaccination is unlikely to elicit information about an employee's disability.

Title II of the Genetic Information Nondiscrimination Act (GINA) and Vaccinations

Is GINA triggered when an employer administers the vaccine to an employee or requires an employee proof of vacation? What about pre-vaccination screening?

No. Administering a to employees or requiring employees to provide proof that they have received a vaccination does not implicate GINA because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of "genetic information" as defined by the statute.

Pre-screening is likely to elicit information about a disability and could trigger GINA so employers should be careful when asking such questions.

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Immigration Insights and Issues (III)

COVID-19 TRAVEL RESTRICTIONS SHELF LIFE UPDATE (THROUGH JAN. 1, 2020)

Posted by Kathleen Campbell Walker | Dec 30, 2020

On December 31, 2020, President Trump extended Proclamations 10014 and 10052 noted in this article until March 31, 2021 with a requirement to review the proclamations for modifications every 30 days by the Secretaries of Homeland Security, State, and Labor. In the proclamation issued on December 31, 2020, President Trump continued to invoke economic conditions in the United States (U.S.) as a basis for the extension of the proclamations even with the, "marked," decline of the U.S. unemployment rate in November of 2020 from its April 2020 high. Thus, President-Elect Biden has additional decisions to make regarding this particular legacy from the Trump administration when he assumes office on January 20, 2021.

As we finally approach the end of this horrific 2020 year, there are a number of potential developments to consider as to the variety of travel related restrictions imposed by presidential proclamation during 2020. In addition, on December 28, we have new restrictions being imposed by the ever-mutating COVID-19 virus from the Center for Disease Control (CDC), which may be applied more broadly in 2021.

1. **December 28 Travel Restrictions to the United States (U.S.) from the U.K.**
   Order Effective Date – December 28, 2020 at 12:01 am GMT.
   Scope – Air passengers from the United Kingdom (U.K.)[1] to the U.S., including U.S. citizens and legal permanent residents. It does NOT apply to those with layovers of less than 24 hours in the U.K.
   Requirements to Board Airline –

   - Passengers are required to get a viral test (NAAT or antigen test) as to current COVID-19 infection within (no more than) three days before the flight from the U.K. to the U.S. departs.
   - Passengers must provide written documentation of their negative qualifying laboratory test result (hard copy or electronic) to the airline. In addition, every passenger 2 years of age an older must also provide an attestation form as to testing. (attestation – Attachment A) A parent or legal guardian must attest on behalf of a passenger aged 2 to 17 years. As to passengers unable to attest on their own behalf due to a physical or mental impairment, an authorized individual may provide the attestation. A failure to comply with this requirement or providing false or misleading information may subject the passenger to criminal penalties.[2]
   - Airlines must confirm the negative test result for all passengers aged 2 years and older before they board and if a passenger declines to take a test, the airline MUST DENY boarding to the passenger. If any airline fails to comply with this order, they may be subject to criminal penalties.

CDC recommendations on arrival – Travelers should be tested 3 to 5 days after travel AND stay home or otherwise self-quarantine for 7 days after travel even if the COVID-19 test is negative. In addition, travelers must remember to follow state and local travel requirements.

CDC recommendations for those recently recovered from COVID-19 – The CDC does not recommend getting tested again in the three months after a positive viral test, as long as you do not have symptoms of COVID-19. If you have had a positive viral test in the past 3 months, and you have met the criteria to end isolation, travel with a copy of your test results and a letter from your doctor or health department that states you have been cleared for travel.

So how long does it take to get a qualifying test result in the U.K.? The National Health Service (NHS) of the U.K. does not provide free COVID-19 test for those desiring to travel internationally. When NHS provides a free PCR test, the result can be issued on a next day basis, but it may take up to 3 days. British Airlines has a web page devoted to COVID-19 test sites and home testing options for fees ranging from approximately 93 to 200 pounds sterling.

Why is this information so important regarding travel to the U.S. in the future?

As we progress toward the new Biden administration on January 20, 2021, we may see modifications on international travel restrictions based on COVID-19 currently in place with a negative test requirement as outlined above concerning the new U.K. restrictions.

2. **What about the COVID-19 based travel bans, which have no expiration date at present?**
   The chart below lists the current travel bans to the U.S. in place when the traveler has been present in the locations noted in the fourteen-day period before traveling to the U.S. These proclamations have no end date until the President makes a determination to terminate them. Certainly, President Biden will have a difficult choice to reverse these health based presidential proclamations, if COVID-19 fatalities and cases from these countries continue to escalate. Of course, the U.K. and Ireland were listed previously. With the mutation of COVID-19 in the U.K. and the announcement outlined above, it is certainly possible in the future that the U.S. may apply the approach described above to the U.K. as to negative COVID-19 tests to the other countries listed. If so, the availability of reliable COVID-19 testing options with quick turnarounds for results will be critical for international travel from these locations. Please refer to this earlier article regarding those, who are exempt from these travel restrictions.

Country	Effective Date	Proclamation Number
People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau	February 2, 2020 5 pm EDT	9984 – 85 *Fed. Reg.* 6709
Islamic Republic of Iran	March 2, 2020 5 pm EDT	9992 – 85 *Fed. Reg.* 12855
Schengen Area[3]	March 13, 2020 11:59 pm EDT	9993 – 85 F*ed. Reg.* 15045
United Kingdom and Ireland[4]	March 16, 2020 11:59 pm EDT	9996 – 85 *Fed. Reg.* 15431
Federative Republic of Brazil	May 26, 2020 11:59 pm EDT (originally May 24, 2020)	10041 – 85 *Fed. Reg. 31933*
Brazil Amendment	May 26, 2020[5] 11:59 pm EDT	*10041 – 85 Fed. Reg.* 32291

3. **When do the current essential travel land border restrictions expire for the U.S./Canadian and Mexican borders?**
   At present, the essential travel restrictions at the Canadian and Mexican land borders remain in effect until 11:59 EST on January 21, 2021. Any extension of these restrictions will be subject to COVID-19 developments.

4. **What about the immigrant and nonimmigrant visa proclamations (e.g. 10014 and 10052), which are set to expire on December 31, 2020?**
   We know that on October 1, 2020, the federal district court decision in *National Association of Manufacturers v. Department of Homeland Security (NAM)* enjoined the government from enforcing section 2 of presidential proclamation 10052 against named plaintiffs and members of the plaintiff associations, including future members of these associations. The named plaintiffs included: the National Association of Manufacturers, the U.S. Chamber of Commerce, the National Retail Federation, TechNet, and Intrax, Inc. In his decision in this case, Judge White held that presidential proclamation 10052 was beyond the President's lawful authority under Immigration and Nationality Act, as amended (INA) §212(f) because: (1) the President's foreign affairs powers **are limited in the context of a purely domestic decision**; and (2) the Proclamation unlawfully eviscerates portions of the INA. In addition, Judge White found that U.S. Department of Homeland Security (DHS) did not establish that the President or any federal agency had conducted any evaluation regarding the actual effect of presidential proclamation 10052's ban on the issuance of certain nonimmigrant visas upon the domestic U.S. economy.So, as to the future of these presidential proclamations, which were both based on domestic economic impact, they …. might die a regular death this year. The Biden Administration has expressed, however, that it will work with Congress in its first 100 days to increase the number of permanent, work-based immigration visas that are responsive to "… macroeconomic conditions. For example, mechanisms would be put in place to temporarily reduce the number of visas during times of high U.S. unemployment.." In addition, the Biden Administration plan notes that it will rescind the Muslim travel ban in the first 100 days.

   So, if the Biden Administration takes the *NAM* court ruling to heart, you would expect that Proclamations 10014 and 10052 might not be extended, since they are tied to a domestic policy action. Based on the expressed desire to reduce visa availability during times of economic hardship, however, we will have to wait and see if President Biden takes a page from the Trump administration and continues these economy based Proclamations. Even if these presidential proclamations are not extended, the Department of State is still in recovery mode from the closing of consular posts due to COVID-19 and the availability of immigrant and nonimmigrant visa appointments globally continues to be affected negatively for an unpredictable time in the future.

ABOUT THE AUTHOR

Kathleen Campbell Walker is a member of Dickinson Wright PLLC and serves as a co-chair of the Immigration Practice Group. She is a former national president and general counsel of the American Immigration Lawyers Association (AILA) and is Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. She serves on the AILA Board of Governors. In 2014, she received the AILA Founder's Award, which is awarded from time to time to the person or entity, who has had the most substantial impact on the field of immigration law or policy in the preceding period (established 1950). She has testified several times before Congress on matters of immigration policy and border security.

[1]United Kingdom means the United Kingdom of Great Britain and Northern Ireland, commonly known as the United Kingdom and consisting of England, Scotland, Wales, and Northern Ireland.

[2] Failure to provide this attestation, or submitting false or misleading information, could result in delay of travel, denial of boarding, denial of boarding on future travel, or put the passenger or other individuals at risk of harm, including serious bodily injury or death. Any passenger who fails to comply with these requirements may be subject to criminal penalties under, among others, 42 U.S.C. § 271 and 42C.F.R. § 71.2, in conjunction with 18 U.S.C. §§ 3559 and 3571. Willfully providing false or misleading information may lead to criminal fines and imprisonment under, among others, 18 U.S.C. § 1001.

[3] The Schengen Area comprises 26 European states: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

[4] The proclamation did not apply to overseas territories of the United Kingdom outside of Europe.

[5] Section 5 is amended to read as follows: “Sec. 5. Effective Date. This proclamation is effective at 11:59 p.m. eastern daylight time on May 26, 2020. This proclamation does not apply to persons aboard a flight scheduled to arrive in the United States that departed prior to 11:59 p.m. eastern daylight time on May 26, 2020.”

All Things HR

THE DEPARTMENT OF LABOR CEMENTS TELEHEALTH VISITS FOR FMLA PURPOSES AS THE NEW NORMAL

Posted by Sara Jodka | Jan 4, 2021

Given the huge uptick in telemedicine as a result of the COVID-19 pandemic, the Department of Labor (DOL) issued guidance (Field Assistance Bulletin No. 2020-8) that makes it clear to employers that an employee's telehealth visit to a provider can be used to support the employee's need for FMLA leave.

The guidance comes on six months after the DOL's Wage and Hour Division's (WHD) first addressed the issue in its updated FAQs in June 2020 (specifically FAQ #12), wherein it provided that "Until December 31, 2020, the WHD will consider telemedicine visits to be in-person visits …, for purposes of establishing a serious health condition under the FMLA. To be considered an in-person visit, the telemedicine visit must include an examination, evaluations, or treatment by a health care provider; be performed by video conference; and be permitted and accepted by state licensing authorities."

Before the DOL issued the FAQs, one way an employer could qualify a "serious medical condition" under the FMLA was to visit a healthcare provider within seven days of the employee's first day of inability/incapacity to work. The pandemic, however, put a pin in many in-person visits, necessitating a workable (*i.e.,* remote) solution for patients and providers alike, which in turn led to an extension of the in-person requirement to allow for telemedicine and a spike in telehealth visits.

The DOL's new guidance makes the June temporary acknowledgment of telehealth visits as FMLA-qualifying permanent.

Turning to the elements for a qualifying telehealth visit, to be FMLA-qualifying, the DOL's guidance clarified that the visit must include all the following:

1. An exam, evaluation, or treatment by an FMLA-qualifying healthcare provider;
2. Pass muster and be accepted by the respective state licensing authorities; and
3. Be by video conference (so not just audio, telephone call, text message, etc.).

In line with the FMLA's notice requirement for employers, the DOL also made clear that in the new age of remote work, an employer could fulfill its FMLA notice obligation by posting on its internal or external website, although employers must ensure that each employee has been told how they can access the policy.

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CAN A PURCHASER VOID A CONTRACT BASED ON THE COVID-19 PANDEMIC?

by Brian N. Radnoff, Mordy Mednick, and Alyssandra A. Antonangeli

The COVID-19 pandemic has caused a severe economic dislocation and altered the way many businesses operate. In some cases, parties have entered into deals to purchase businesses that have dramatically changed due to the pandemic. Can a purchaser rely on the fact that a business is materially different due to the pandemic in order to avoid its contractual obligations?

The Ontario Superior Court of Justice recently dealt with this situation in *Fairstone Financial Holdings Inc. v Duo Bank of Canada*.[1] A purchaser entered into an agreement of purchase and sale with a vendor to buy the vendor's business. Prior to the closing date, the purchaser informed the vendor that it would not close the transaction because the pandemic constituted a material adverse effect ("**MAE**") under the purchase agreement. Alternatively, the purchaser argued that the pandemic led the vendor to act contrary to the ordinary course of business, as required by the agreement.

The vendor brought an application for specific performance of the agreement. For the reasons set out below, the vendor was successful on the application and the purchaser was ordered to complete the transaction.

MAE clauses protect a purchaser from acquiring a business that is materially different at closing from what it was when the contract was entered into. These clauses require the vendor to agree that no MAE will occur between the date of the agreement and closing. To qualify as an MAE, three elements must be established: (a) an unknown event; (b) a threat to overall earnings potential; and (c) durational significance. In *Fairstone*, the Court held that the pandemic met each of these elements. However, the analysis did not end there. As is common with MAE clauses, parties agree to certain exceptions that will not qualify as an MAE. If these exceptions apply, the purchaser will not be able to rely on a breach of the MAE clause to void the contract. This is what happened in *Fairstone*.

The Court in *Fairstone* concluded that the Pandemic fell within the MAE exceptions in the agreement. The parties agreed that worldwide, national, provincial, or local "emergencies" would not constitute an MAE. The purchaser argued that the Pandemic constituted an MAE because "pandemic" was not specifically listed as an exception in the provision. The Court disagreed and interpreted the word "emergencies" broadly to encompass the Pandemic as an exception to an MAE. The Court held that this interpretation is consistent with how MAE clauses allocate systemic risks to the purchaser and company-specific risks to the seller.

Additionally, the purchaser argued that the vendor had changed the nature of its business in response to the pandemic. Instead of a branch-based system, which the purchaser thought it was buying, it was now buying an online system, for which the purchaser claimed it never bargained. Parties use ordinary course provisions to ensure the vendor's conduct is consistent between the time the agreement of purchase and sale is signed and the closing date of the agreement. In *Fairstone*, the Court held that it is part of the ordinary course for a business to encounter recessions and act in response to them. The fact that the vendor changed its business to online as opposed to branch-based did not change the purchaser's obligation to accept the systemic risks associated with buying a business. Had there been specific clauses negotiated between the parties that referenced certain parameters within which the vendor's business had to operate, the Court likely would have concluded differently.

As a result, based on this decision, parties considering buying a business, or those that have already bought a business and are attempting to avoid the transaction on the basis of the pandemic, should consider the following:

- If the contract includes broad exceptions in the MAE clause, such as for "emergencies", the Court will likely interpret the Pandemic as falling within the exception, even if the word "pandemic" is not specifically mentioned. This means the Pandemic may not be considered an MAE and may not be relied upon to avoid the transaction.
- If the contract does not include specific language that allows one to avoid the transaction if an economic downturn occurs between signing the agreement and closing, it is likely the purchaser will have to accept these systemic risks that are part of owning a business.
- If the contract does not require the vendor to act within specific parameters between signing the agreement and closing, the purchaser cannot rely on a breach of a general ordinary course covenant unless the vendor engaged in conduct that led to fundamental modifications of the business.

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Please Note: These materials do not constitute legal or medical advice.
Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

[1] 2020 ONSC 7397 [*Fairstone*].

UPDATE ON ONTARIO'S SECOND STATE OF EMERGENCY ORDER – NEW RESTRICTIONS IN ONTARIO IN THE FIGHT AGAINST COVID-19 – EFFECTIVE JANUARY 14, 2021

by Wendy G. Hulton and Jacky Cheung

On January 12, 2021, the Government of Ontario declared a second provincial emergency (the "**Declaration**") which introduces additional restrictions in an attempt to combat the spread of COVID-19, including:

- A limit of 5 people in outdoor organized public and social gatherings;
- All individuals must wear masks or face coverings inside businesses or organizations that are open; masks and face coverings are recommended outdoors when you cannot physically distance more than 2 metres;
- All nonessential stores, including hardware stores, alcohol retailers, and other stores offering curbside pickup or delivery may only be open between the hours of 7 AM–8 PM; these restrictions do not apply to stores that sell food, pharmacies, gas stations, convenience stores, and restaurants for takeout or delivery;
- Items may only be provided for curbside pickup if the patron ordered the item before arriving at the business premises;
- Any stores that are permitted to be open must comply with physical distancing and face-covering rules;
- Nonessential construction is further restricted, including below-grade construction. However, some construction activities are permitted, including land surveying and demolition services;
- No in-class instruction until Feb. 10 at the earliest for the following public health units: Windsor-Essex, Peel Region, Toronto, York Region, and Hamilton;
- All businesses must ensure any employee who can work remotely do so, unless, for example, the nature of their work requires them to be on-site at the workplace; and
- Everyone is required to remain at home with exceptions for essential purposes, such as going to the grocery store or pharmacy, accessing health services, for exercise or for essential work.

These measures will come into effect between Tuesday, January 12 and Thursday, January 14, 2021. The stay-at-home order will come into effect at 12:01 AM on Thursday, January 14, 2021. These measures will remain in place until at least February 11, 2021.

A copy of the Ontario Government's full press release can be found here.

Have questions about these new restrictions? Dickinson Wright LLP is here to help.

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Please Note: These materials do not constitute legal or medical advice. Government initiatives, announcements, and regulations in response to the COVID-19 situation continue to evolve and change frequently.

NEW STIMULUS BILL CREATES SMALL CLAIMS COPYRIGHT COURT

by Andrea L. Arndt and Caleb L. Green

On December 27, 2020, President Trump signed the highly anticipated COVID-19 stimulus relief and government-funding bill. The second stimulus package is omnibus legislation spanning over 5,500 pages, and includes several provisions that will influence the intellectual property legal landscape. In this article, we will take a brief look at the Copyright Alternative in Small-Claims Enforcement Act (the "CASE Act").

The CASE Act revises the Copyright Act, 17 U.S.C. §§ 101 et seq., and creates a cost-effective alternative venue for copyright owners to enforce their rights without having to file lawsuits in federal court. Specifically, the CASE Act establishes a Copyright Claims Board within the U.S. Copyright Office that may adjudicate small claims of copyright infringement using streamlined procedures and award-limited remedies, including no more than $30,000 in total damages. A summary of the CASE Act provisions is provided below:

Creation of the Copyright Claims Board

The CASE Act establishes a Copyright Claims Board (the "CCB" or the "Board"), an alternative forum to federal courts, wherein parties may voluntarily adjudicate small copyright infringement claims. The Board will be comprised of a panel of three claims officers, rather than a judge, who will conduct proceedings and issue decisions with factual findings and legal conclusions to resolve copyright disputes. These officers will have the power to conduct hearings, manage discovery, and award monetary damages as well as other relief. Unlike copyright lawsuits in federal court, participation in CCB proceedings is discretionary, and parties may opt-out and instead choose to proceed in the traditional federal court forum.

However, proceedings before the Board come with one major catch. Parties that decide to resolve their disputes before the Board will waive their right to a jury trial and traditional motion practice.

Copyright Claims Board Procedures and Remedies

General Remedies and Provisions

In stark contrast to federal court, where parties may seek sizeable monetary relief through actual or statutory damages, the CASE Act limits the Board's options for monetary damages. Specifically, the Board may not award more than $15,000 in statutory damages per copyright-protected work. Additionally, the Board cannot award more than $30,000 in total actual or statutory damages. The Board lacks jurisdiction to consider claims alleging willful infringement, as well. Likewise, the Board may only award a maximum of $5,000 in attorney's fees in cases of bad faith, unless a party presents extraordinary circumstances.

Despite the difference between the CBB and federal court, copyright registration remains a pre-requisite to bringing a copyright dispute before the Board. The parties asserting infringement claims must have at least filed a copyright application with the U.S. Copyright Office, and the Board cannot render a decision unless and until the Copyright. Office issues a copyright registration.

Remedies to Combat Copyright Trolls

The CASE Act also grants the Board unique authority to prevent aggressive litigators and opportunists—also known as "copyright trolls"—from abusing the small claims tribunal. Specifically, the CASE Act empowers the Board to preclude any party who pursues a claim or defense in bad faith from initiating a claim before the Board for twelve months. As an added layer of protection against copyright trolls and frivolous claims, the CASE Act also grants the Register of Copyrights the power to limit the number of proceedings a claimant may initiate in any given year.

Choice of Law and Non-Binding Decisions

While the Register of Copyrights may issue regulations governing many Board procedures, the CASE Act affirmatively prescribes choice-of-law principles. Board proceedings are subject to the federal jurisdiction in which the action could have been brought if filed in federal court. Additionally, Board decisions carry no precedential value and may not be relied upon in other legal or Board proceedings.

Limited Appellate Process

Parties may seek limited review of Board decisions. After the Board issues its written decision in a matter, a party may submit to the Board a written request for reconsideration or petition the Register of Copyrights to review the Board decision under an abuse of discretion standard of review. A party can appeal a Board decision to a federal court only if: (1) the Board's determination was the result of fraud, misrepresentation, or other misconduct; (2) the Board exceeded its authority or failed to render a final determination; or (3) the Board's determination was based on a default or failure to prosecute due to excusable neglect.

Conclusion

In summary, the ultimate purpose of the CASE Act is to give copyright owners a practical and affordable means to enforce their intellectual property rights (e.g., their copyrights) through the creation of a small claims board at the U.S. Copyright Office. Because the CASE Act grants the Register of Copyrights broad authority to carve out the procedural regulations of the Board, it remains to be seen if copyright owners will make use of the small claim tribunal instead of the federal court forum and exactly how copyright claims will proceed through Board proceedings. Nevertheless, it is clear that the CASE Act creates a more affordable mechanism for copyright owners to enforce their rights, and therefore, will likely result in an increased number of copyright claims.

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AN EXCEPTION TO THE RULE: NEW PROVISIONS REGARDING WHERE PERSONAL PROPERTY IS TO BE ASSESSED THIS TAX SEASON IN MICHIGAN

by Robert F. Rhoades

When preparing 2021 personal property statements, PA 352 of 2020 provides an exception to the general rule that personal property is to be assessed where it was located on tax day.

Persons owning taxable personal property (generally businesses) are required to file personal property statements annually in each city and township in which they own personal property. The statements report the original cost by year of acquisition and the local assessor uses that information to determine the personal property assessment for the year. The pandemic raised the issue of whether personal property regularly in one city, but located in other locations due solely to the pandemic, should be reported and assessed in the usual location or the location in which the property was located on tax day (12-31-2020).

On December 30, 2020, the Legislature answered that question by creating an exception to the general rule by which the property should be reported and assessed in the "ordinary location" (where the property would have been but for the pandemic) and not in the alternate location (the location to which the property was moved but for the pandemic). The new legislation reads as follows:

Sec. 14a. Notwithstanding any provision of this act to the contrary, including any provision to the contrary in section 13(1) or 14(1), for the 2021 tax year only, personal property, including exempt personal property, that is located on tax day in an alternate location due to the COVID-19 pandemic must not be assessed in that alternate location but instead must be assessed in its ordinary location. As used in this section:

- *a. "Alternate location" means the geographic area of a local tax collecting unit in this state that is not the ordinary location of an item of personal property but is the location to which the property was moved due to the COVID-19 pandemic.*
- *b. "Exempt personal property" means personal property exempt from the collection of taxes under this act, including personal property exempt under sections 7 to 7ww and sections 9 to 9o.*
- *c. "Ordinary location" means the geographic area of a local tax collecting unit in this state where an item of personal property would have been located for its primary use but for the need to move it to an alternate location due to the COVID-19 pandemic. For purposes of this subdivision, evidence of the ordinary location of personal property includes, but is not limited to, either or both of the following:*
  - *i. A business location of the owner or other person beneficially entitled to the property or in possession of it, as described in section 13(1), where the property usually is deployed under conditions unaffected by the COVID-19 pandemic.*
  - *ii. If the property was located in the geographic area of a local tax collecting unit in this state on December 31, 2019, that location.*
- *d. "Tax day" means that term as described in section 2(2).*

This act is ordered to take immediate effect.

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DW-CHINA TRADE UPDATE (36TH EDITION)
迪克森律所中国团队简报（第三十六期）
by Mark Heusel and Hezi Wang

CONGRESS RESTRICTS CHINESE-OWNED US COMPANIES IN SECOND PPP LOAN PROGRAM
美国国会第二轮薪资保障计划限制在美中资公司

Last spring, as COVID began to threaten U.S. businesses, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which authorized the U.S. Small Business Administration (the "SBA") to offer a Paycheck Protection Program (the "PPP") providing loans to help businesses keep their workforce employed during the COVID-19 crisis. While confusion caused many Chinese-owned U.S. subsidiaries to abandon this loan program, many others benefited from the PPP and continued to employ their U.S. workers.

去年春季，随着新冠病毒疫情开始威胁美国企业，美国国会颁布了《冠状病毒援助，救济和经济安全法案》，该法案授权美国小企业管理局提供薪资保障计划，该计划提供贷款，以帮助企业在新冠病毒疫情危机期间继续保持其雇员。虽然当时不少中资企业因为不了解法案的具体规定而放弃申请这一贷款计划，但是仍有许多中资公司从该贷款计划中获益并继续雇佣其美国雇员。

On December 27, 2020, President Trump signed the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the "Economic Aid Act") into law providing continued assistance to individuals and businesses that have been financially impacted by the ongoing pandemic. Section 311 of the Economic Aid Act added a new temporary section 7(a)(37) to the Small Business Act (15 U.S.C. 636(a)(37)) authorizing the SBA to guarantee Paycheck Protection Program Second Draw Loans (the "Second Draw PPP Program") for qualifying businesses.

2020年12月27日，美国总统特朗普签署了《对受重创小企业，非营利组织和场所经济援助法案》（以下简称"《经济援助法案》"），向因新冠病毒疫情遭受持续经济影响的个人和企业提供持续的援助。《经济援助法案》的第311条在《小企业法案》中添增加了临时的第7款 (a)(37)条，授权美国小企业管理局继续为符合标准的企业提供薪资保障计划下的第二轮贷款。

On January 5, 2021, the SBA released initial guidance for the authorized Second Draw PPP Program. Interim Final Rule 2021-0002 details the terms of the Second Draw PPP Loans, as amended. In enacting the Economic Aid Act, Congress made the eligibility requirements for Second Draw PPP Loans **narrower** than the eligibility requirements for First Draw PPP Loans. The Economic Aid Act generally provides that a borrower is eligible for a Second Draw PPP Loan *only if* it has 300 or fewer employees (including employees of the applicant's foreign affiliates) and experienced a revenue reduction of 25 percent or more in 2020 relative to 2019. In addition, the Economic Aid Act provides that a Second Draw PPP Loan may only be made to an eligible borrower that (i) has received a First Draw PPP Loan, and (ii) has used, or will use, the full amount of the First Draw PPP Loan on or before the expected date on which the Second Draw PPP Loan is disbursed to the borrower.

2021年1月5日，美国小企业局发布了其授权的第二轮薪资保障计划贷款的初步指南。《临时最终规则2021–0002》详细介绍了经修订的第二轮薪资保障计划贷款。在制定《经济援助法案》之时，与第一轮薪资保障计划贷款的资格要求相比，国会**收紧了**第二轮薪资保障计划贷款的资格要求。《经济援助法案》规定借款实体只有在满足以下条件之后才能有资格申请第二轮薪资保障计划贷款：借款实体雇员人数少于300人（包括借款申请实体境外关联公司的雇员），2020年收入相对于2019年减少幅度在百分之二十五或以上。此外，《经济援助法案》规定，第二轮薪资保障计划贷款只能提供给符合条件的贷款实体：（i）已获得第一轮薪资保障计划贷款，（ii）在第二轮薪资保障计划贷款发放之前，已使用或将全部使用完毕第一轮薪资保障计划贷款下的全部贷款金额。

Even if an applicant meets the eligibility requirements, however, Congress included restrictions on this second loan program for Chinese-owned companies. Specifically, pursuant to Paragraph 7(a)(37)(A)(iv)(III)(cc), an applicant is not eligible[1] for a Second Draw PPP Loan, if the applicant is:

即使借款实体符合上述所有要求，国会也在第二轮薪资保障计划贷款针对中资公司做出了限制。具体来说，根据《小企业法案》第7条 (a)(37)(A)(iv)(III)(cc) 节规定, 如果借款实体符合以下条件，则不具备获得第二轮薪资保障计划贷款的资格：

any business concern or entity:

任何企业或实体：

1. for which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or as capital or profit interest in a limited liability company or partnership; or

   根据中华人民共和国或香港特别行政区的法律下成立或组织，或在中华人民共和国或香港特别行政区有重要业务的实体，直接或间接持有该企业或超过百分之二十的经济利益，包括有限责任公司或合伙企业下的股权或资本或利润权益；或

2. that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China.

   有中国公民作为企业董事会的成员。

[1] *A complete list of Excluded Entities can be found at section 7(a)(37)(A)(vi)(III) of the Small Business Act.*
一份完整的不符合资格要求的实体清单可以在《小企业法案》第7条（a)(37)(A)(iv)(III)节下找到。

Specifically, "equity interest" means:

具体来说，"权益" 指的是:

A. a share in an entity, without regard to whether the share is transferable or classified as stock or anything similar;

实体中的股份，无论该股份是否可以转让或归类为股票或类似股票；

B. a capital or profit interest in a limited liability company or partnership; or

有限责任公司或合伙企业的资本或利润权益；或

C. a warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share or interest described in (A) or (B), respectively.

一个认股权证或权利，但是不具有上述(A) 或 (B)中转换，购买，出售或认购股权或权益的权力

These restrictive and enhanced eligibility requirements were not part of the First Draw PPP Loan and neither Congress nor the President specifically excluded Chinese-owned companies from the First Draw PPP Loan. The First Draw PPP Loan application form instead only asked applicants to verify that the individuals on their payroll are U.S. citizens or permanent U.S. residents. While the First Draw PPP Loan also asked for the identities of significant shareholders of the borrower entity, this request appears largely aimed at ensuring that borrowers were eligible to participate in SBA-administered programs. With its new China-focused restrictions, the rules of the road are decidedly different in the Second Draw PPP Loan. While the legislation and rules are poorly written, it is reasonable to assume that otherwise eligible U.S. subsidiaries of a Chinese parent company are likely not eligible for the Second Draw PPP Program if its Chinese parent company owns more than 20 percent equity interest in the U.S. subsidiary or the board of directors of the U.S. subsidiary consists of a member who is a Chinese resident.

这些限制性和加强性的资格要求并不是第一轮薪资保障计划贷款的一部分。无论国会或总统都没有明确将中资公司排除在第一轮薪资保障计划贷款的资格之外。第一轮薪资保障计划贷款仅仅要求借款申请实体确认其工资表上的个人员工为美籍公民或美国永久居民。虽然第一轮薪资保障计划贷款也要求借款实体主要股东的身份，但这个要求似乎主要是为了确保借款实体有资格参加美国小企业局所组织的项目。当前由于针对中国的新的限制，第二轮薪资保障计划贷款的决策规定显然与先前有所不同。尽管立法和相关规定中的文字并不清晰，但是我们可以合理的推定，符合第一轮薪资保障计划贷款的中资公司，如果其中国母公司拥有该中资公司超过百分之二十的股份或董事会中有中国籍的成员，将没有资格获得第二轮薪资保障计划贷款。

If you have any questions or would like us to look further into your company's eligibility of the Second Draw PPP Program, please do not hesitate to contact us. The last day to apply for a loan under the Second Draw PPP Program is **March 31, 2021**.

如果您有任何问题或希望我们进一步协助您研究您的公司是否符合获得第二轮薪资保障计划贷款的资格，请随时与我们联系。第二轮薪资保障计划贷款的申请截止时间为**2021年3月31日**。

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