

COVID-19 Pandemic and the Shifting Landscape for Employers and Employees

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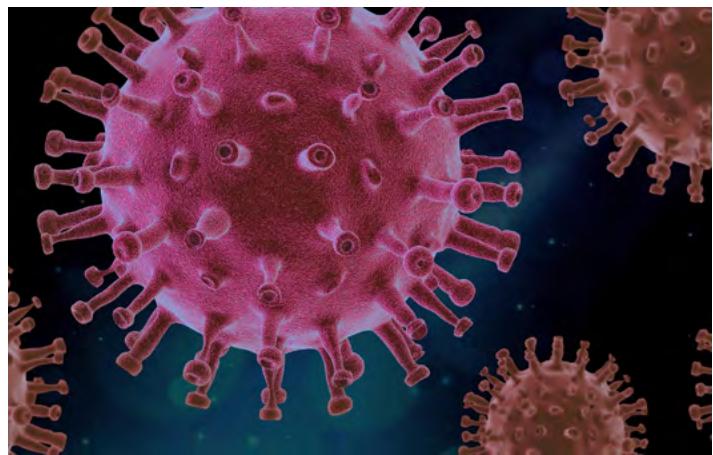
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Trying to stay ahead of the curve during the ongoing COVID-19 pandemic has been an unwelcome challenge from the perspective of navigating one's daily personal life. Concerns as to where to find toilet paper or which store has anti-bacterial soap or hand sanitizer were unlikely on anyone's list of everyday challenges before mid-February. During this historically tumultuous time, as an employer you are now being presented with a raft of unforeseen practical and legal business operational, financial and human resources issues that were unlikely the subject of any of your existing company policies.

Given how quickly COVID-19 related questions have arisen and corresponding answers evolve, it is important to stay up-to-date on the latest recommendations and guidelines issued by the CDC as well as federal, state and local public health officials. By way of example, weeks ago the CDC recommended not wearing a face mask unless you had been exposed to the virus. Now the CDC's recommendation is that individuals wear face masks when venturing out in public. As the experts discover more about the virus, it will become even more important to stay current on the latest public health guidelines.

As an aside, and on a hopeful note, at the outset of this pandemic a number of my clients were facing significant contractual liability issues in connection with long scheduled events and conferences at locations around the country and overseas. In the ensuing weeks, I have observed that a spirit of cooperation and partnership has developed in response to the needs of both parties to arrive at mutually acceptable solutions. The all-or-nothing option has for the most part been put on the shelf, at least for the time being. There appears to be a shared sense that we are all in this together and that we will all be experiencing some level of pain, so let's work through the problem and come up with an answer. I remain hopeful that this trend will continue, at least for the duration of this emergency.

Among the goals of this article is to identify some of the key pieces of federal legislation that have been enacted in response to the outbreak of COVID-19 for the purpose of mitigating economic losses by business owners. The information below represents only a very brief summary of some of the more important and potentially impactful laws enacted at the federal level. For more



complete information, you may wish to review the actual statutory provisions. Contact the federal agency charged with administering the program, and consult with your company's legal counsel.

CORONAVIRUS AID, RELIEF AND ECONOMIC SECURITY ACT (CARE)

In March, Congress passed and the President signed into law a \$2 trillion economic stimulus package entitled the Coronavirus Aid, Relief and Economic Security Act or CARE. The intent was to help offset the economic decline being experienced in the wake of COVID-19. This piece of legislation provides for a historic level of federal government funding to support businesses of all sizes, individuals and families. Its key components include approximately \$350 billion in loans for small businesses to help cover qualified payroll costs, rent, utilities, and interest on mortgage and other debt-related obligations. It also directs payments to families in the amount of \$1,200 per adult and \$500 per child for households making up to \$75,000, provides cash grants for airlines, and over \$130 billion to hospitals, health care systems and providers, as well as \$150 billion to state and local governments for use during this national emergency.

Among the Act's key components for small businesses is the Paycheck Protection Program (PPP). The primary purpose of this program is to help small business owners keep their employees paid and working during the crisis and to address essential overhead expenses. Any business, 501(c)(3) nonprofit organization, 501(c)(19) veterans' organization, or tribal business with under 500 employees, or under the SBA standard (if more than 500 employees) or under 500 employees per physical

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location for food service and accommodations businesses, is eligible to apply under the Act. The Program allows for "small business interruption" loans of up to 2.5 times the average monthly payroll of the applicant business, with a maximum of \$10 million. The loans may be used to cover payroll, benefits, as well as interest payments, rent and utilities. No personal guarantees are required and fees are waived.

If you use the loaned funds for anything other than payroll costs, mortgage interest, rent, and utilities over the 8-week period of the loan, you will owe that amount when the loan comes due. Additionally, the loan recipient will owe money if it fails to maintain its staff and payroll at the level in effect at the time of the loan's inception. For example, loan forgiveness will be reduced to the extent that 1) the loan recipient decreases its full-time employee count and/or 2) it decreases salaries and wages by more than 25% for any employee that made less than \$100,000 annualized in 2019. The employer has until June 30, 2020 to restore its full-time employment and salary levels for any changes made between February 15, 2020 and April 26, 2020. To secure loan forgiveness, you must submit a written request to the lender along with the required supporting documentation. The decision of the lender is required to be made within 60 days. All payments are deferred for six months, with the loan coming due in two years. Interest is at 1.0% fixed.

There is an application process that is required, which was opened as of April 3, 2020 for small businesses and sole proprietorships. Starting April 10th, independent contractors and self-employed individuals are able to apply. Application is made through any SBA lender or through any federally insured depository institution or federally insured credit union.

The application form is short and to the point. However, when completing the application, please be sure to carefully read the certifications you are required to make as the applicant. Be certain that you can in fact make each certification. For example, you must be able to certify the following: "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." The penalties for providing false or misleading information are criminal in nature and very severe. Also be sure to provide all documentation required as part of the submission in order to avoid delays in processing or the rejection of your application. If you have a question, contact the lender or the SBA.

I recommend that you visit the Small Business Administration website and carefully review the various assistance options and programs that may be available to your company during this protracted period of emergency. The PPP application can be found online at the Small Business Administration website.

ECONOMIC INJURY DISASTER LOAN

Administered by the SBA's Office of Disaster Assistance, the SBA is offering states low-interest federal disaster loans with the goal of providing working capital to small businesses sustaining economic losses in the wake of COVID-19. The loans offer up to \$2 million in assistance to address temporary loss of revenue by small businesses during this period of emergency. The loans may be used to cover fixed debts, payroll, accounts payable, and

other bills a business is unable to meet during the emergency. The interest rate is very favorable at 3.75% for small businesses and 2.75% for qualifying non-profit organizations. The loans can be scheduled out to thirty years, with the specific loan terms determined on a case-by-case basis.

ECONOMIC INJURY DISASTER ADVANCE LOAN

In response to the ongoing pandemic, small business owners in all U.S. states, territories and the District of Columbia are eligible to apply for an Economic Injury Disaster Loan advance of up to \$10,000. Again, a small business is defined as one having fewer than 500 employees (including sole proprietorships, independent contractors and self-employed persons), 501(c)(3) non-profit organizations and 501(c)(19) veterans organizations suffering from the economic effects of COVID-19. According to the SBA, the funds will be made available within days following submission of an approved application, with the amount of the loan advance not subject to repayment.

COVID-19 IMPACT ON EMPLOYERS AND EMPLOYEES

Changing direction from the economic assistance to small business discussed above, the subject of employer obligations and employee rights with respect to COVID-19 is changing by the day. Employers are being presented with workplace related issues that they likely had not considered before the pandemic. Let's talk about just a few of those. Remember, before undertaking any significant action with respect to your employees stemming from the current emergency, please be sure to consult with your company's employment counsel.

Employee Rights under the FFCRA

Under the recently enacted Families First Coronavirus Response Act (FFCRA), certain employers are required to provide their employees with paid sick leave and expanded family and medical leave for specific reasons related to COVID-19. These requirements are currently scheduled to remain in effect from April 1, 2020 to December 31, 2020.

Covered employers include those in the private sector with fewer than 500 employees, along with certain public sector employers. Employers falling within the FFCRA are required to provide their employees with up to two (2) weeks of fully or partially paid sick leave for COVID-19 related reasons which are specified in the FFCRA. An employee who has been employed for at least 30 days prior to his or her leave request may be eligible for up to an additional ten (10) weeks of partially paid expanded family and medical leave in the event the employee is caring for a child whose school or day-care is closed or whose child care provider is unavailable due to COVID-19 related reasons.

Under the FFCRA, an employee is entitled to take leave related to COVID-19 if the employee is unable to work, including the inability to work remotely, 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 related to COVID-19; 3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis, 4) is caring for an individual subject to a quarantine order or self-quarantine pursuant to a health care provider's advice; 5) is caring for his or her child whose school or day-care is closed or whose child care provider is unavailable

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due to COVID-19 related reasons; or 6) is experiencing any other substantially similar condition specified by the US Department of Health and Human Resources.

The Department of Labor Wage and Hour Division has produced an employee notice that covered employers are required to post in the workplace for its employees to review. The notice can be obtained from the Department of Labor website by searching "FFCRA poster."

COVID-19 Impact on Employers and the Workplace

In this final section, I'll try to address a couple of the key issues that have been raised by employment lawyers as they continue to assess the impact of COVID-19 on the duties and rights of both employers and employees.

Virtually every resource out there urges employers to communicate clearly with their employees about the employer's plans for addressing COVID-19 risks. While I assume that any employer reading this summary has already done so, it is very important to share with your employees the symptoms of COVID-19 based on the evolving guidance of public health officials and the CDC. For example, be sure to tell employees NOT to come to work if they have any of the identified symptoms; point employees to the CDC guidelines with respect to measures that employees can take to remain safe both at home and in the workplace, and help your employees identify those who may be at higher risk of contracting the virus. Advise them in no uncertain terms that they must remain at home if they evidence COVID-19 symptoms and that coming to work while showing symptoms may expose their fellow workers to the virus. In some jurisdictions this may be required by law. If the employee discloses that he or she is experiencing undiagnosed symptoms of COVID-19 or has been exposed to someone who has the virus, they should be sent home promptly. As an employer you should take appropriate steps to determine who they have been in close proximity to within the workplace over the previous 14 days and let these people know of the possible exposure. However, and this is very important, do NOT identify the employee to whom they may have been exposed due to confidentiality requirements imposed under federal law.

In such a case, the employer may wish to send the potentially exposed employees home for 14 days. For further information on assessing the risk to individuals in your workplace, please consult the CDC issued Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential COVID-19 Exposures.

Keep your employees informed of the health safety measures you are taking in the workplace and what is expected of them while at work with respect to the same. These may include, but not be limited to, increased workplace cleaning efforts on the part of the employer, particularly in areas of high density or high traffic; maintaining social distance (6 feet) and even increasing the space between workstations or desks; providing remote work options; use of face masks and/or gloves in the workplace; updating and enforcing visitor or invitee policies; and addressing all non-essential business travel. To help reduce liability exposure, business owners and employers should remain current and compliant with recommended preventative safety measures as they expand over the course of this pandemic.

With respect to routine or special cleaning in the workplace, the CDC has issued guidance in the form of Environmental Cleaning and Disinfection Recommendations, which you may consider reviewing to ensure that your efforts are maximizing the protection afforded to individuals in your workplace.

Regular communication and reinforcement of the above to your employees is a key component of your company's risk management and efforts to reduce potential liability.

Potential Liability to Customers

In some jurisdictions, business operators are subject to a duty to take reasonable measures to limit customer exposure to dangerous conditions. This duty of care generally requires the business owner to identify and take steps to eliminate dangerous or hazardous conditions that may exist and to maintain the business premises in a safe condition.

At present there is no specific heightened or enhanced duty on the part of a company to adhere to the CDC and public health department recommendations and guidelines. That said, best practice would suggest that the prudent business owner should indeed follow the same to reduce potential liability exposure. Among the recommended measures are:

1. Informing your employees how they can reduce the spread of the virus;
2. Using proper building ventilation, filtration and humidity control;
3. Following proper hand hygiene;
4. Following proper respiratory hygiene;
5. Providing tissues or hand wipes and a place to properly dispose of them;
6. Encouraging your employees and customers to remain at least six feet apart while on the premises;
7. Actively discourage handshaking;
8. Engage in regular cleaning and disinfection, particularly with respect to high contact surfaces, trash removal, restroom cleaning and disinfecting.

With the evolving health safety guidelines and precautions, shelter-in-place recommendations/orders, and social distancing of at least six feet being shared by the media 24/7, individuals who allege that they contracted COVID-19 in a particular location (i.e. your business premises) likely bear some level of responsibility. A customer who alleges that he or she contracted the virus on your premises may find it difficult to establish causation given the nature of COVID-19 and the inability to sufficiently identify where he or she may have contracted the virus.

If you have any questions about how best to enhance the safety of your business premises and thus better protect your employees and customers, please regularly review the CDC's and public health agency guidelines and recommendations to ensure you have the most current information. For more specific questions about your company's liability exposure and the duties you have as an employer to protect your employees and customers, please consult with experienced legal counsel.