

GUIDANCE FOR COVID-19

Legal and Financing Considerations





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Introduction

- > The coronavirus pandemic is a business disruption that is both unprecedented and continually changing
- > To help you navigate this we will focus on:
 - > Employment / Human Capital Issues
 - > Financial Solutions
 - > Legal / Contractual Issues

Employment / Human Capital Issues

- > Limit non-essential travel
- > Build a system for employee reporting, with attention to employees' privacy rights and a plan for notifying other employees in the event a co-worker is confirmed to have COVID-19
- > Define standards for when employees are required to stay home / return; account for both direct (symptomatic / diagnosed) and ancillary (personal vulnerability, childcare /caring for sick family) absences
- > Review and adjust leave and pay policies; consider: employment agreements, leave and disability policies, exempt versus non-exempt
- > Review your work-from-home policies and infrastructure
- > Avoid discrimination and ensure compliance with state and federal laws (FLSA, FMLA, ADA, and state and local sick leave laws)

Emergency Family & Medical Leave Expansion Act

- > Applies to employers with less than 500 employees
 - > Excludes healthcare providers and emergency responders
- > Employers with less than 50 employees may request an exemption if the leave would jeopardize the viability of their business
- > Employees are eligible if they have worked for the company for 30 days or more before the first day of leave

Emergency Family & Medical Leave Expansion Act

- > Applies if an employee is unable to work or telework to care for a child if school or care provider is closed or unavailable due to a public emergency declared by a federal, state or local authority
- > 12 weeks job protected leave First 10 days may be unpaid (employees can opt to use PTO/vacation/sick leave during this 10 day period, including Emergency Paid Sick Leave as provided below)
- > After 10 days, employees are paid at 2/3 their regular rate of pay subject to the following caps (\$200/day or \$10k aggregate per employee)

Emergency Family & Medical Leave Expansion Act

Job Restoration

- > Employers with 25 or more employees will have the same obligation as traditional FMLA to restore an employee to the same or equivalent position following leave
- > Employers with less than 25 employees are excluded from this provision if the position is no longer available due to economic downturn or other circumstances caused by a public health emergency
- > Must make reasonable attempts to return the employee to an equivalent position and such effort must continue for up to a year following the leave

Emergency Paid Sick Leave Act

Effective April 2, 2020

- > Applies to employers with less than 500 employees
 - > exceptions for healthcare providers and emergency responders
- > Employers with less than 50 employees may be eligible for an exemption from paying sick leave to an employee who is caring for a child whose school or place of care has closed or whose childcare provider is unavailable because of COVID-19 if the leave would jeopardize the viability of their business

Emergency Paid Sick Leave Act

- > Employees are eligible no matter how long they have worked for the company
- > Eligible based on the following factors:
 - > Subject to a federal, state or local quarantine or isolation order related to COVID-19;
 - > Advised by a health care provider to self-quarantine due to COVID-19 concerns;
 - > Experiencing COVID-19 symptoms and seeking medical diagnosis;
 - > Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
 - > Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
 - > Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services

Emergency Paid Sick Leave Act Benefits

- > Benefits 80 hours of paid sick leave
- > For items 1, 2, and 3 above, paid at their regular rate of pay subject to cap of \$511/day or \$5,110 aggregate per employee (quarantined or diagnosed)
- > For items 4, 5, and 6 above, paid at 2/3 of employee's regular rate subject to cap of \$200/day or \$2,000 aggregate per employee (caring for others)
- > Paid leave will not carry over to the following year and can be in addition to other leaves provided by the employer

Emergency Paid Sick Leave Act Benefits

- > Sick leave ends the work shift immediately following the termination of the need for paid sick time
- > Employers cannot require employees to use other forms of paid leave before using paid sick leave under this new law
- > Employers are required to post a notice of this benefit as soon as it is developed by the Secretary of Labor
- > Prohibits retaliation against any employee who takes leave

Financial considerations related to COVID-19

- > Resolve potential trouble areas
- > Monitor liquidity and adjust borrowing and spending as appropriate
- > Proactively negotiate any problematic terms in your existing financial relationships
- > Determine the extent of your insurance coverage
 - > In particular, review your business interruption policy's language concerning public health crises, communicable diseases, and civil authority actions
 - > Even if your policy does not currently cover COVID-19-related losses, government authorities soon may force insurers to cover these losses

Financial considerations related to COVID-19

Subsidized Loan Programs

- > SBA Economic Injury Disaster Loan Program
 - > Working capital loans of up to \$2MM
 - > Minnesota was added to the covered states last week
 - > Early guidance from the SBA suggest that it will offer terms of a one year deferral on payments and thereafter a 3.75% interest rate and 30 year amortization
- > Minnesota Small Business Emergency Loan Program
 - > Loans between \$2,500 and \$35,000 at 0% interest and are up to 50% forgivable
 - > These emergency loans will help small businesses and independent contractors affected by the closures made earlier last week (restaurants and bars)

Legal and Contractual Issues

Force Majeure

- > Often written into contracts to account for such unexpected and uncontrollable business disruptions
- > Scope. Does the contract's *force majeure* provision cover disease outbreaks? Does the provision include an exhaustive list or may additional triggering events be considered?
- > Obligation to mitigate. Regardless of whether the *force majeure* provision is triggered, the parties may have an obligation to mitigate
- > Risk of repudiation. If one party attempts to avoid a contractual duty by invoking *force majeure*, the other party may have grounds to repudiate the whole agreement

Legal and Contractual Issues

Commercial Impracticability

- > In the absence of a Force Majeure provision, the doctrine of Commercial Impracticability may exempt performance of a contract under Minn. Stat. § 336.2-615 if:
 - > Performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order
 - > The seller notifies the buyer that there will be delay or nondelivery

Stay at Home / Shelter in Place Orders

- > By March 23, when all 15 current state orders take effect, more than 40% of the US population will be officially urged to stay home
- > Non-Essential businesses are ordered to shut down or operate only remotely
- > Categories and definitions of “essential” have varied but have generally included:
 - > Medical and pharmacy services
 - > Medical and vital manufacturing
 - > Financial Services
 - > Grocery and food delivery

Questions / Support

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