

# WELCOME

Practical Solutions for Complex COVID Questions

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# Practical Solutions for Complex COVID-19 Questions

(July 9, 2020)

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## PPP Loan Updates

### CARES ACT

### FLEXIBILITY ACT

- Deferment of payroll taxes (6.2% of wages) incurred between March 27 and December 31, 2020
- Alternative Covered Period - 8 weeks expanded to 24 weeks

### **INTERIM RULE** - Addressing forgiveness

### **EXTENSION OF PPP LOAN PROGRAM** August 8

# What About Financing Issues?

## Loan provisions to consider

- Financial covenants - Can they be modified?
- Events of Default - Am I in default?

Possible modifications such as loan payment extensions, interest only payments, Forbearance Agreements that acknowledge defaults but give additional time in exchange for collateral or other consideration

**Business interruption insurance** - Has a physical loss occurred?  
Are there exclusions?



## Issues in Leases

### Review Contractual Provisions

**Force Majeure clause:** Will it apply? In re Hitz Restaurant Group

- \* Fact specific inquiry
- \* Elimination or delay in performance

Other typical clauses are not helpful

**Commercial Frustration:** Not reasonably foreseeable; value of performance is totally (or nearly totally) destroyed

### Take Away:

Short term workouts with repayment arrangements and increased reporting



## Let's Think Longer Term

Consider provisions in key contracts

- Default/force majeure/termination provisions
- Is there a notice obligation?

Don't forget terms and conditions of Suppliers/Vendors

Review accounts receivable

## Other Contract Issues

Exculpatory agreements/Liability Waivers in commercial (non-employment) setting

- \* Clear and unambiguous to ordinary persons
- \* If enforceable, applies to negligence, not willful and wanton conduct, reckless or intentional conduct, or gross negligence
- \* Won't prevent claims, but may provide a defense
- \* But - Public policy considerations

# On the Horizon

## Bankruptcy impact

Preference rules are slightly changed in all bankruptcy cases

Small Business Reorganization Act (SBRA)

- Eligibility expanded to include debt of up to \$7.5 million (from \$2.725 million)
- Eliminates some expensive procedures of Chapter 11 business reorganization, including Trustee's fees, creditor's committees, disclosure statements



# Back to Work Considerations

Recalling workers / Best Practices

Legal considerations:

- ADEA, IHRA - older workers
- ADA, IHRA, FMLA - workers with health concerns
- FFCRA
- Employer Policies & Benefits

Refusals to return to work

- OSHA & NLRA, unemployment



# Back to Work Considerations

## Testing, Surveys, Contact Tracing, Vaccines

- Best Practices?

## Adopting & Enforcing Precautions

- Face coverings/ masks
- Social distancing
- Sanitization

## Legal considerations:

- ADA, IHRA
- EEOC on antibody testing: just don't do it!



# Back to Work Considerations

An employee tests positive. Now what?

- Dealing with the affected worker
- Dealing with co-workers
- Workplace measures
- Have a plan!



# OSHA Reporting

When are employers required to report COVID cases? (revised by OSHA effective May 26)

Employers are responsible for recording cases of COVID-19, if:

1. The case is a confirmed case of COVID-19, as defined by the CDC;
2. The case is work-related as defined by 29 CFR § 1904.5 (see exceptions at <https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.5>); *and*
3. The case involves one or more of the general recording criteria, i.e., it results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, *or* loss of consciousness; *or* it involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not meet the first set of criteria.

# Workers Occupational Diseases Act

## Rebuttable presumption of COVID work-relatedness

(PA 101-0633, eff. June 5; amends 820 ILCS 310/1)

Applies to first responders and “front-line workers” including all workers for healthcare providers, including nursing homes and rehabilitation facilities and home care workers, and any individuals employed by essential businesses and operations as defined in the Governor’s Ex Order, as long as such individuals are required by their employment to encounter members of the general public or to work in employment locations of more than 15 employees.

- Applies to COVID diagnoses between March 9 and December 31, 2020.
- Does not apply to employees working from home.



# Workers Occupational Diseases Act

## Rebuttable presumption of work-relatedness

(PA 101-0633, June 5)

Rebuttable if:

- 1) The employee was working from home or on leave 14+ days before the illness;
- 2) The employer applying updated industry specific sanitization, social distancing, and health & safety practices based on CDC and IDPH guidelines, or otherwise used a combination of administrative controls, engineering controls or PPE to reduce transmission; or
- 3) The employee was exposed to COVID by an alternate source.

## Workers Occupational Diseases Act

The amended 820 ILCS 310/1 also states:

- (g)(5) “Under no circumstances shall any COVID-19 case increase or affect any employer's workers' compensation insurance experience rating or modification, but COVID-19 costs may be included in determining overall State loss costs.”
- (g)(11) An employer is entitled to a credit against any liability for temporary total disability due to an employee as a result of the employee contracting COVID-19 for (A) any sick leave benefits or extended salary benefits paid to the employee by the employer under Emergency Family Medical Leave Expansion Act, Emergency Paid Sick Leave Act of the Families First Coronavirus Response Act, or any other federal law, or (B) any other credit to which an employer is entitled under the Workers' Compensation Act.

# Wage & Hour Considerations

## Pay reductions & furloughs

Exempt workers must be paid their full salary in any week in which work is performed. Employers may require the use of vacation benefits but requiring time off without pay during a week in which work is performed is not allowed. A DOL Fact Sheet also suggests that employers may reduce salaries during a business or economic slowdown without affecting exempt status:

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs70.pdf>

... But at least one court has questioned this: *Alawar v. Trican Well Serv.*, 397 F. Supp. 873 (WD TX 2019).

Intermittent leave may impair exempt status unless it is paid or paid time off benefits are used. (Illinois has not adopted US DOL rules.)

# Wage & Hour Considerations

## Working from home:

Timekeeping - be prepared, communicate with employees, and track time accurately! For non-exempt employees, all time worked must be compensated. Exempt employees must be paid their full weekly salary if they perform any work in the workweek. Prohibit working “off the clock”.

Employee expenses - must be reimbursed under IWCPA.

Working from homes located in other states - may create obligations under those states’ laws.

# Benefit Plan relief measures

## Extension of Deadlines:

The “Outbreak Period” beginning March 1, 2020 and continuing until 60 days after the “announced end of the National Emergency or such other date announced by the IRS and DOL, shall be disregarded for purposes of:

- \* COBRA notice requirements and elections (which normally must be made with 60 days)
- \* Special enrollment periods after birth, adoption, marriage, loss of other coverage
- \* Appeals of denials

# Benefit Plan relief measures

## Retirement Plan Relief:

Under the CARES Act, certain qualified individuals may take coronavirus-related distributions up to \$100,000 between January 1 and December 30, 2020, without the distribution being subject to the 10% additional tax that generally applies to distributions made before age 59 ½. The coronavirus-related distribution can be included in income in equal installments over a 3-year period, or the individual has 3 years to repay the distribution to undo the tax consequences of the distribution.

Section 2202(b) of the CARES Act allow plans to suspend loan payments during period from March 27-December 31 and extend loan terms

## Other COVID issues

What other issues do businesses see?

QUESTIONS?



COMMENTS?





# Submit Questions Through the Chat

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