

Understanding Your Obligations under COVID-19 Business Relief Programs

(PART II)

Thursday, June 4, 2020, 3:30 – 5:00 p.m.

Presented by

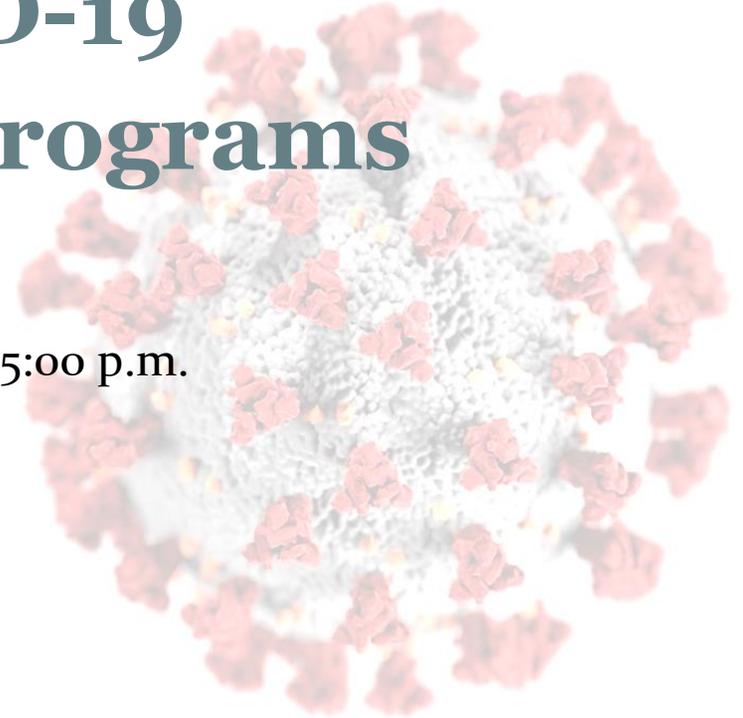
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On behalf of

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Agenda

Introduction – Part I

Overview of Pandemic Related Business Legal Issues

Category I: Financial Relief

Obligations under Federal Relief Programs

Obligations under State & Local Relief Programs

Unemployment

Introduction – Part II

Category II: Other Impacts on Business Operations

Contracting

Taxes

Insurance

Health and Safety

Families First Coronavirus Response Act

Personal Financial Relief

Conclusion

Contracting

Review Your Agreements

Check for *force majeure* / act of God / inability to perform-type provisions.

What specific events are covered? Typically narrowly construed and subject to interpretation as of time of drafting.

Force Majeure or Other Delay. Whenever a period of time is prescribed for action to be taken by any Party to this Agreement, no Party shall be liable or responsible for, and there shall be excluded from the computation of any such period of time the duration of any delays or any damages due to **strike, work stoppage, embargo, shortages of labor or materials, quarantine, epidemic, accident, power shortage or blackout, flood, fire, earthquake, act of God, riots, war, international or national hostilities or crisis, terrorist act, invasion, insurrection, governmental order or restrictions, or any other causes of any kind whatsoever** which are beyond the reasonable control of such Party. Whenever a Party's performance is dependent in any measure on the performance of another Party or third party that is not timely or that is otherwise delayed, the time for completion of the performance required of the dependent Party shall be extended for a period equal to the duration of such delay.

Force Majeure is a contractually created right, not statutory.

Events that are foreseeable should be addressed in the original agreement. Even events like global pandemics or mass civil unrest are no longer considered unforeseeable!

What other allowances for modifications in performance were addressed?

Causable relationship between the event and the default also may need to be established, *i.e.*, it is actually the virus itself that is prohibiting performance and making performance impossible, not just more difficult or costly.

Other Contractual Considerations:

- ▶ Common law defenses may also be asserted, such as complete frustration of purpose, constructive eviction, landlord/other party default (e.g., for not providing access to things needed for performance).
- ▶ Notice of hardship and then negotiate with other party re what adjustments they can agree on AS WELL AS what relief they have already received, e.g., commercial landlord with 25% of PPP funds available for mortgage and /or 3-month mortgage deferment should pass-on that relief to you as a tenant
- ▶ In DC, NO commercial evictions, but deferral or payment plan for RETAIL (not office) establishments extending 1 year after the pandemic emergency.
- ▶ In Maryland, also prohibiting commercial evictions and repossessions.
- ▶ Brace for delays, modifications or defaults by other parties or your subcontractors as well.
- ▶ Allocate risks and responsibilities, termination terms, payments, etc. under subsequently modified agreements—and those modifications should reflect the reality of business in today’s circumstances—**parties will largely sink or swim together.**

Government Contracting

If you are a federal government contractor, Agencies will be able to modify contract terms and reimburse contractors at a billing rate of up to 40 hours per week of any paid leave for employees or subcontractors who cannot perform work on site and cannot telework due to federal facilities closing because of COVID-19.

Also, if a situation occurs that prevents a small businesses from performing their contract, seek extensions or other modifications, being sure to document:

- Details of any modifications made, e.g., change in work location or hours, use of staffing or equipment with different qualifications/capabilities, and why such were necessary.
- A written agreement to such modifications.
- Record of indirect cost increases associated with continuing to perform such as site decontamination and the purchase of PPE.

Visit: www.sba.gov/sites/default/files/2020-04/Contracting-Guidance.pdf

Taxes

Payroll Tax Credit

Employee Retention Credit - refundable, 50% payroll tax credit for employers experiencing economic hardship covering up to \$10,000 per employee for wages and benefits from March 13, 2020, to December 31, 2020. See www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act.

Available to employers whose operations have been fully or partially suspended as a result of a government order limiting commerce, travel or group meetings.

Also provided to employers who have experienced a greater than 50 % reduction in quarterly receipts, measured on a year-over-year basis.

For employers with 100 or fewer full-time employees, all employee wages are eligible, regardless of whether an employee is furloughed.

Wages do not include those counted for payroll credits for required paid sick leave or required paid family leave, nor for wages counted for employer credit for paid family and medical leave (per IRC sec. 45S).

Delay of Payment of Employer Payroll Taxes

Allows taxpayers to defer paying the employer portion of certain payroll taxes through the end of 2020, with all 2020 deferred amounts due in 2 equal installments at the ends of 2021 and 2022.

Payroll taxes that can be deferred include the employer portion of FICA taxes, the employer and employee representative portion of Railroad Retirement taxes (that are attributable to the employer FICA rate), and half of SECA tax liability.

These credits and deferrals are NOT provided to employers receiving assistance through the Paycheck Protection Program.

Insurance

Contact your Insurance Agent to review your policy to understand precisely what you are and are not covered for in the event of an incident.

Types of Coverage (that you may or may not have):

- Commercial General Liability,
- Business Interruption, Event Cancellation
- Key Personnel
- Personal Property
- Plate Glass
- Rent

Coverage Issues:

- clean-up, decontamination, other pandemic/exposure related claims
- any exclusions to coverage and methods for calculating total losses such as time limits
- Make sure it covers the property you need it for
- Make sure it covers the events you need it for
- What's considered the actual length and extent of the suspension of operations and cost of losses or damage that will be covered?

Health and Safety

Centers for Disease Control (CDC) guidance for businesses and employees:

www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html

Occupational Safety and Health Administration (OSHA) - no specific OSHA standard addressing COVID-19, but existing OSHA and state standards apply to preventing virus exposure in the work place. Among the most relevant:

- OSHA's Personal Protective Equipment (PPE) standards require gloves, eye and face protection, and respiratory protection. See 29 CFR 1910.
- General Duty Clause requires employers to furnish “a place of employment... free from recognized hazards that are causing or are likely to cause death or serious physical harm.” See 29 USC 654(a)(1).
- Additional standards regarding things like record keeping and communication to workers of health risks related to hazardous chemicals that may be in cleaning agents used in workplace sanitation.

See www.osha.gov/SLTC/covid-19/.

Personal Economic Relief

Securing economic relief with your personal finances also reduces pressure and frees more funds for business expenses:

- ✓ Mortgage/HELOC deferrals
- ✓ Student loans
- ✓ Business Credit cards
- ✓ Car insurance reductions (per commercials)
- ✓ Car notes
- ✓ Ask – consumer debt, utilities, other

Families First Coronavirus Response Act



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

FAMILIES FIRST CORONAVIRUS RESPONSE ACT: EMPLOYER PAID LEAVE REQUIREMENTS

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. [1] The Department of Labor's (Department) Wage and Hour Division (WHD) administers and enforces the new law's paid leave requirements. These provisions will apply from the effective date through December 31, 2020.

Generally, the Act provides that covered employers must provide to **all employees**: [2]

- *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 because the employee is quarantined (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 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 a child (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.

A covered employer must provide to **employees that it has employed for at least 30 days**: [3]

- Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Covered Employers: The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. [4] Most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

See www.dol.gov/agencies/whd/ffcra.

Other FFCRA Provisions

Tax Credits: Reimbursement through tax credits for all qualifying wages paid under FFCRA. Credits also extend to amounts paid or incurred to maintain health insurance coverage.

Employer Notice: Employers must post in a conspicuous place on its premises a notice of FFCRA requirements.

Prohibitions: Employers may not discharge, discipline or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

Penalties and Enforcement: Employers violating the first two weeks' paid sick time or unlawful termination provisions will be subject to penalties and enforcement described in the Fair Labor Standards Act. (29 U.S.C. 216; 217). Employers violating provisions providing for up to an additional 10 weeks of paid leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act.

Conclusion

Law suits, government claims, auditing, reporting requirements and enforcement will follow the business relief you are receiving. So assume all expenditures and records will need to be justified at some point, even a few years from now, and **retain and safeguard them** accordingly.

In addition, be prepared to successfully conduct business in the post-pandemic era.

- ✓ Practice good record keeping and document management
- ✓ Manage personal finances too
- ✓ Talk to your accountant – more than once
- ✓ Negotiate new Agreements thoughtfully
- ✓ Track new pandemic-related legislation
- ✓ When in doubt, check with your Attorney
- ✓ Beef-up insurance coverage
- ✓ Keep everyone safe





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Angela is a native Washingtonian and holds Engineering and Juris Doctorate degrees from Howard University, both received *cum laude*. As Principal of A.S. Robinson Law she counsels small to medium growth-mode companies with matters such as contracts, trademarks, HR policy and business development with a focus on asset protection and limiting liability exposure. Angela has represented companies through various phases of civil litigation and administrative appeals in Maryland and the District of Columbia, as well as before the IRS and Maryland State Board of Contract Appeals. Angela also has served as a Hearing Examiner for DC's Child & Family Services Agency since 2012.