COVID-19: BUSINESS & LEGAL CONSIDERATIONS
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Developing Workplace Policies and Procedures To Combat Coronavirus (COVID-19) – A Common Sense Approach
By: Keith C. Mier, Kara E. Shea, Robin Banck Taylor, Margaret H. Loveman and Jennifer Aaron Hataway

I. BACKGROUND AND GENERAL GUIDANCE
On January 31, 2020, Health and Human Services Secretary Alex M. Azar II declared a public health emergency (PHE) for the United States to aid the nation’s healthcare community in responding to COVID-19.[i] On March 11, WHO publicly characterized COVID-19 as a pandemic. On March 13, the President of the United States declared the COVID-19 outbreak a national emergency.[ii] There are now 1,629 confirmed cases in the United States including 41 deaths among 47 jurisdictions (46 States and the District of Columbia).[iii]

Employers are now recognizing that they have an obligation to take affirmative steps to address employee concerns and protect their workforce from spreading or contracting Coronavirus. Employers not only face an ethical imperative, but the Occupational Safety and Health Administration (“OSHA”) imposes a legal duty on employers to provide employees with a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”[iv] OSHA’s guidance has, in recent days, including updated requirements and recommendations for employers.[v]

The solution to preparing for the Coronavirus in your workplace is based in common-sense and should be treated just like any other important area of any business. Employers should develop a policy outlining the company’s plan to deal with an outbreak amongst its workforce and develop and implement clear and concise procedures for implementing the policy. The CDC provides employers with a common-sense list of recommended strategies to implement now:[vi]

Actively encourage sick employees to stay home:
• Employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F [37.8° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants). Employees should notify their supervisor and stay home if they are sick.
• Ensure that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.
• Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.
• Do not require a healthcare provider’s note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.
• Employers should maintain flexible policies that permit employees to stay home to care for a sick family member. Employers should be aware that more employees may need to stay at home to care for sick children or other sick family members than is usual.
Separate sick employees:
- CDC recommends that employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available).

Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees:
- Place posters that encourage staying home when sick, cough and sneeze etiquette, and hand hygiene at the entrance to your workplace and in other workplace areas where they are likely to be seen.
- Provide tissues and no-touch disposal receptacles for use by employees.
- Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60-95% alcohol, or wash their hands with soap and water for at least 20 seconds. Soap and water should be used preferentially if hands are visibly dirty.
- Provide soap and water and alcohol-based hand rubs in the workplace. Ensure that adequate supplies are maintained. Place hand rubs in multiple locations or in conference rooms to encourage hand hygiene.
- Visit the coughing and sneezing etiquette and clean hands web page for more information.

Perform routine environmental cleaning:
- Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label.
- No additional disinfection beyond routine cleaning is recommended at this time.
- Provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks) can be wiped down by employees before each use.

Advise employees before traveling to take certain steps:
- Check the CDC’s Traveler’s Health Notices for the latest guidance and recommendations for each country to which you will travel. Specific travel information for travelers going to and returning from China, and information for aircrew, can be found on the CDC website.
- Advise employees to check themselves for symptoms of acute respiratory illness before starting travel and notify their supervisor and stay home if they are sick.
- Ensure employees who become sick while traveling or on temporary assignment understand that they should notify their supervisor and should promptly call a healthcare provider for advice if needed.
- If outside the United States, sick employees should follow your company’s policy for obtaining medical care or contact a healthcare provider or overseas medical assistance company to assist them with finding an appropriate healthcare provider in that country. A U.S. consular officer can help locate healthcare services. However, U.S. embassies, consulates, and military facilities do not have the legal authority, capability, and resources to evacuate or give medicines, vaccines, or medical care to private U.S. citizens overseas.
**Additional Measures in Response to Currently Occurring Sporadic Importations of the COVID-19:**
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and refer to CDC guidance for how to conduct a risk assessment of their potential exposure.
- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

In addition to following the CDC’s recommendations, Employers should also be aware of the many potential pitfalls that can trip up employers when enacting protocols pertaining to contagious illness in the workplace, including state-specific employment laws, Equal Employment Opportunity Commission (EEOC) Rules and Regulations, and OSHA. In particular, employers should be mindful of issues arising under the ADA, such as maintaining confidentiality of health-related information, determining whether absences due to illness or quarantine are job-protected, deciding whether work-from-home arrangements or other accommodations are required, and deciding whether contagious illness may be considered a “direct threat” to workplace safety. While the EEOC has released helpful guidance on dealing with these issues, it is always best to consult counsel to obtain advice specific to your jurisdiction as well as to your unique operations and workforce.

That said, navigating the Family Medical Leave Act (FMLA) and the ADA can be difficult. During a pandemic health crisis, employers must respond quickly to a fluid landscape and adapt to the needs of their employees and business. Significantly, employers need to stay abreast of any legislation enacted in response to the current pandemic. For example, the “Families First Coronavirus Response Act,” (H.R. 6201), discussed below, is currently pending before the Senate, and if passed, will provide 12 weeks of job-protected paid Family and Medical Leave Act (FMLA) leave—of which the first 14 days may be unpaid—for employees of employers with fewer than 500 employees. At the time of publication, this legislation has not been enacted.

**II. AMERICANS WITH DISABILITIES ACT (ADA) AND FAMILY MEDICAL LEAVE ACT**

The FMLA and ADA apply to employees who need to be absent from work due to a COVID-19 illness or caring for family members who are impacted and employees who wish to return to work following illness or exposure. In addition, employers should evaluate any applicable state-specific laws similar to FMLA or ADA to ensure they do not contain different or additional requirements or provisions.

COVID-19 typically will not be considered a disability under the ADA as its symptoms are of short duration; however, complications from COVID-19 may qualify as an ADA disability. Regardless, the ADA regulates employers’ disability-related inquiries and medical examinations for all employees, including those who do not have ADA disabilities. Under the ADA, an employer must show the inquiry is job-related and consistent with business necessity or there is a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others.
The EEOC’s guidance indicates that the assessment by the CDC would provide the objective evidence needed for a disability-related injury or medical examination. Thus, given the CDC’s latest assessment of pandemic, if an employee’s situation meets the ADA’s “direct threat” standards, an employer can conduct a medical inquiry or require a return-to-work doctor’s note. For example, it would likely be permissible to conduct a medical inquiry where an employee who was previously diagnosed with, or in close contact with, an individual with COVID-19 wishes to return to work. Again, the EEOC provides the following guidance.

In addition, employees who are absent from the workplace due to a diagnosis of COVID-19 or employees who stay home to care for a family member with COVID-19 may be eligible for FMLA protected leave under some conditions. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons. This may include COVID-19 where complications arise that create a “serious health condition” as defined by the FMLA. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period. The Department of Labor (DOL) provides information regarding COVID-19 and the FMLA: https://www.dol.gov/agencies/whd/fmla/pandemic

However, if the employee’s symptoms and treatment for COVID-19 does not satisfy the regulatory definition of a “serious health condition,” employers should not count the absence against the employee’s 12 weeks of FMLA leave. For example, employees who do not seek health care treatment for symptoms related to COVID-19 will not qualify as a serious health condition simply because the employees will not have visited a doctor/healthcare provider for any treatment. In addition, absences for employees who want to prevent exposure to COVID-19 are not qualifying FMLA absences.

All employers should be mindful of the public health risks associated with COVID-19. Employers’ response should be based upon facts, proportionate to the actual risks, and should be mindful of the need to remain compliant with existing employment and labor laws and regulations.

III. EMPLOYEE TRAVEL, QUARANTINE AND PAID TIME OFF

Employers must also consider implementing procedures for employee travel and employee self-quarantine. The following are factors employers should consider:

- Employers should encourage employees to limit business travel to locations with widespread COVID-19 community transmission.
- Employers should consider implementing a self-quarantine policy. Request that any employee self-quarantine (remain at home) for 14 days if:
- The employee (or anyone in their household): 1) Has traveled since March 1 to another country that has been given a risk assessment of Level 2 or higher by the CDC; 2) Has been exposed to someone with a confirmed case of COVID-19; 3) Has traveled since March 1 to Westchester County, New York; Santa Clara County, CA; Seattle-King, Pierce or Snohomish Counties in Washington; or any other location with widespread COVID-19 community transmission; or 4) Has traveled since March 1 on a cruise ship.
• Encourage anyone traveling for business to consider, prior to their departure, putting measures in place to work from home should they need to be self-quarantined upon return.
• Employers should work to expand telework options for self-quarantined employees.
• Be flexible with leave policies and ensure the policies are up to date with public health guidelines.
• Employees affected by the self-quarantine restrictions should be allowed to use any accrued, but unused paid time off (PTO) during leave.

IV. FEDERAL LEGISLATION AND EMPLOYEE LEAVE
Last night, March 16, 2020, the U.S. House of Representatives unanimously passed a revised version of the COVID-19 response bill it originally passed 363-40 only a few days earlier.

H.R. 6201 or the Families First Coronavirus Response Act, speaks to five distinct areas of relief-1) Free Coronavirus Testing; 2) Food Assistance; 3) Medicaid FMAP rates; 4) Unemployment Aid; and 5) Paid Sick and Medical Leave.

Emergency Family Leave

Who Qualifies
The revised bill made significant changes to the paid sick and medical leave sections. As the bill currently reads, private-sector employers with fewer than 500 employees, and covered public-sector employers, must provide up to 12 weeks of job-protected FMLA leave for “a qualifying need related to a public health emergency.” Only employees who have been on the payroll for 30 calendar days are eligible for this leave. Businesses with less than 50 employees are exempt from the leave requirements if the leave would jeopardize their business. Employers can also exclude healthcare workers and first responders from the leave allowed under this bill.

The revised bill significantly limits the definition of “qualifying need” to situations where an employee is unable to work due to the need to care for a minor child if the minor child’s “school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

Employee Pay
The first 10 days of this emergency FMLA leave can be unpaid, but employers are required to pay employees for the remainder of the leave. Currently, the bill requires that the employee be paid for the number of hours the employee would otherwise be scheduled to work at a rate of two-thirds of the employee’s regular rate. The bill caps these payment to individual employees to no more than $200 per day and $10,000 in total. While an employee may elect to utilize vacation, sick, or other personal paid leave, an employee cannot be forced to use paid leave.

Job-Protection
Like regular FMLA leave, an employer must restore employees who utilize emergency FMLA leave to their prior positions or an equivalent position. This job protection, however, does not apply to employers with fewer than 25 employees, if the employee’s position no longer exists following leave due to economic conditions, or other operational changes caused by a public health emergency (e.g. COVID-19).
Paid Sick Leave

Who Qualifies
Private-sector employers with fewer than 500 employees, and covered public-sector employers, must provide 80 hours of paid sick time to an employee (of any tenure) who is unable to work (or telework) because: (1) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine because of COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to, or advised to, quarantine or isolate; (5) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Employers may elect to exclude healthcare providers or first responders from this paid leave. The Secretary of Labor is also granted authority to draft regulations which will exempt businesses with fewer than 50 employees if the requirements would jeopardize their business.

Limits on Pay
The bill places limits on this paid leave to $511 per day or $5,110 in the aggregate where leave is taken for reasons generally related to the employee’s health. The limits on pay are $200 per day and $2,000 in the aggregate where leave is generally related to the care of others, including childcare.

Anti-Retaliation
The bill prohibits an employer from retaliating against any employee who takes leave in accordance with the provisions of this bill. Failure to pay this sick leave will be a violation of the Fair Labor Standards Act similar to a failure to pay minimum wage.

Monetary Relief for Employers
Employers that are required to offer Emergency FMLA or paid sick leave will be eligible for refundable tax-credits. We also expect the Department of Treasury to take some other tax relief actions, as well as actions to allow small businesses to access funds to assist with cash flow problems.

Fluid Situation
We understand the fluidity of this bill which must be reconciled with the legislation the U.S. Senate is currently drafting. It must then be approved by both houses and sent to President Trump for signing. As Schoolhouse Rock taught us, while this is currently just a bill sitting here on Capitol Hill, we have confidence that some portions of this bill will be law soon. We are actively monitoring this legislation and will provide updates as they are released.

V. TELEWORK POLICIES
Before implementing a telework policy in response to COVID-19, an employer should consider the following issues:

- **Is the Employer Equipped To Offer Telework?**
  - Telework depends upon reliable and fast connections. A common reason for telework dissatisfaction is IT failure. An initial question to ask is whether an employer presently has the technology, equipment and capability to set up and support multiple employees working from remote locations, without risking the security of its network and confidential information. The IT department should be consulted to ensure that the employer has the technology and IT personnel to support a telework initiative.
• **Which Employees Will Be Eligible?**
  • Telework, as with all workplace policies, must be offered and administered in a manner which does not violate anti-discrimination laws. Not every employee’s job duties will be conducive to telework. If it is not possible to offer temporary telework to all employees, the employer should be mindful to avoid a claim that telework was offered to certain employees based upon a protected category such as sex, age, or race. An effective strategy for avoiding such a claim is to establish eligibility factors for telework based upon considerations such as job duties, department needs, rank, seniority, or other non-discriminatory factors.
  • Telework has long been considered a potential reasonable accommodation for individuals with disabilities under the Americans with Disabilities Act (ADA). Should an employee who has an underlying condition that qualifies as an ADA disability request telework as a “reasonable accommodation” out of concern that exposure to COVID-19 could adversely affect his or her disability, an employer give thoughtful consideration to the request. If an employer is allowing similarly situated employees to telework, it would be difficult to establish that allowing a disabled employee to do so would create an “undue burden.”

• **How Can An Employer Ensure Accountability?**
  • In any telework relationship, a certain level of trust is required. However, an employer should communicate its policy and expectations at the outset of the telework arrangement. An employer should set forth the expected hours of work, the form and frequency of any required reports or communication, and the level of productivity expected in a written agreement or acknowledgment signed by the employee. It is particularly important that FLSA non-exempt employees are instructed as to timekeeping procedure and reminded that they are to record every “hour worked.” If employees are allowed to use their personal devices to telework, the policy should address required security measures and any inspection rights the employer may have with regard to those devices. Finally, the policy should highlight the temporary nature of the telework assignment, making clear that the employer may require the employee to return to in-office work at any time and for any reason.

COVID-19 FAQ for Employers
By: Keith C. Mier, Kara E. Shea, Robin Banck Taylor, Margaret H. Loveman and Jennifer Aaron Hataway

COVID-19 is already impacting employers and that impact will be ongoing. As the situation regarding COVID-19 continues to evolve, we will continue monitor frequently asked questions and prepare our best answers with the information currently available. The situation will change based on the ongoing guidance from the CDC as well as advisories from federal, state, and local authorities. New laws may be enacted on the federal, state, and local level. We will continue to update this list of questions and supplement the answers as the situation continues to develop. Employers should also closely monitor the latest guidance from the CDC as well as other federal, state, and local regulatory authorities.

CAN I RESTRICT EMPLOYEE PERSONAL TRAVEL?
You generally cannot restrict personal travel by employees. However, to ensure a safe workplace, you can and should ask about employee personal travel and restrict employees from coming to work for a 14-day period if they have traveled to high-risk locations as designated by the CDC. Employees should be told ahead of time that if they travel to high-risk locations they may be required to self-quarantine when they return, and, if the employee has telework capability and authorization, should make appropriate arrangements to work from home before they depart for travel. You should closely monitor CDC announcements with respect to high-risk locations as the situation changes daily, and high-risk locations may include domestic as well as international travel. For travel advisories from the CDC, click here. For key employees who are needed during this time you can ask or require them to cancel vacations based on risk level or regardless of risk level, if you just need them to be at work (unless a contract or executive bargaining agreement says otherwise). For more information on this topic see sections I and III of our ‘Common Sense’ article.

CAN I REQUIRE EMPLOYEES TO COME TO WORK?
Employees who are sick with any symptoms listed by the CDC (fever with cough and/or shortness of breath) should be told to stay home and you should be vigilant in enforcement of that policy. If employees call in sick you can ask them about their symptoms to determine risk level, but you must keep this health information in confidence pursuant to ADA requirements. For further information on your obligations and applicable restrictions under the ADA, see sections I, II and III of our ‘Common Sense’ article.

Employees who have tested positive for COVID-19 or who have been in high-risk exposure situations (such as travel from high-risk locations or exposure to an individual known to have COVID-19) should not be permitted to come to work. Employees with underlying health conditions (such as autoimmune disease) which give them heightened susceptibility to or risk from COVID-19 may be qualified for leave, telework arrangements, or other accommodations pursuant to the Americans With Disabilities Act (ADA) and similar state and local laws and you should engage in an interactive process with those individuals subject to your usual ADA protocol. Other than as indicated above, yes, you can require employees to come to work and you do not have to authorize absences just because employees are uncomfortable or simply do not wish to come to work. For some employers, such as health care providers, emergency responders, and providers of essential public services, letting employees stay home may not be an option.
However, if you wish to or must require employees to continue to come to work, you must provide a safe workplace pursuant to OSHA and similar state laws. Standards continue to evolve for what it means to provide a “safe workplace” in this situation. Employers should follow all CDC recommendations in this regard including telling employees to wash hands frequently and practice social distancing, but these steps may not be sufficient to ensure workplace safety as the situation develops. Employers are encouraged to implement telework arrangements, expanded leave options, relaxed attendance policy protocols, staggered shifts or reduced hours options, and other methods of increasing social distancing in the workforce. Employers should review applicable OSHA guidance and monitor the CDC recommendations in this regard on a daily basis.

If your business is under a shutdown order from federal, state, or local authorities, you should not require employees to come to work.

**IF MY EMPLOYEE CANNOT COME TO WORK BECAUSE OF A SCHOOL CLOSURE, DO I HAVE TO GRANT LEAVE?**
Currently, unless state or local law in your area says otherwise, you can handle that situation under your current protocols. So, if you would ordinarily not grant an excused absence for this situation, you do not have to do so. However, there is pending federal legislation which may change this by providing job-protected leave for employees who are homebound due to school closures and other reasons not currently protected by law. This legislation may go into effect as early as this week. For more information on pending federal legislation, see sections I and IV of our ‘Common Sense’ article. You should also stay informed on state or local laws which may impact your obligations in this situation.

**CAN I REQUIRE EMPLOYEES WHO ARE SICK TO STAY HOME?**
Yes. You can and should require employees who test positive for COVID-19, who have been exposed to someone who has tested positive for COVID-19, and/or who are displaying symptoms consistent with COVID, to stay home from work, including 72 hours after they are symptom-free if they are sick. If you have not done so, you should issue an announcement regarding this protocol and let employees know they must stay home if they fall into these categories.

**DO I HAVE TO PAY EMPLOYEES WHO ARE STAYING HOME? CAN I REQUIRE THEM TO USE PTO?**
Currently, you can follow your current protocols with respect to how you handle employees who cannot come to work due to personal or family illness, school closures, or government-issued quarantine or closure orders, as well as employees who you have told not to come to work because they are in a high-risk category (based on travel history, symptoms of COVID-19, or exposure to COVID-19). So if you would normally require use of PTO or other accrued paid leave in those situations you may do so. If those situations would normally result in unpaid leave, either because you do not have a paid leave program, or because an employee has used all available paid leave, and subject to state and local paid leave laws and certain aspects of federal wage and hour law as explained further below, you may put employees on unpaid leave, for now.
That said, the CDC has recommended that employers be flexible with attendance and sick leave policies and have encouraged employers to permit telework as an option to the extent possible. Providing a telework option not only creates a safer workplace, it will permit your workforce to remain productive even if they cannot be at the office and will avoid depletion of paid leave banks. Some employers are getting creative, including temporarily increasing available PTO and allowing employees to have a negative PTO balance with the promise to pay the time back later.

Keep in mind that to the extent it becomes known among your workforce that there is a “penalty” for staying home, such as forced use of PTO or unpaid status, this will discourage employees from self-disclosing sickness and test results and will increase the likelihood they will come to work if sick, which could end up resulting in more employees getting sick and a worse situation for your business.

Finally, there is federal legislation pending that may change the game with respect to your obligation to pay employees who are missing work as a result of the COVID-19 pandemic. For further information, see sections I and IV of our ‘Common Sense’ article. Stay tuned.

**WHAT WAGE AND HOUR CONSIDERATIONS SHOULD I KEEP IN MIND IN THIS SITUATION?**

Under federal wage and hour law, if your non-exempt employees are not working you do not have to pay them. However, you should exercise caution with respect to employees whom you have classified as salaried exempt pursuant to the Fair Labor Standards Act (FLSA) or applicable state law. Generally, salaried employees must be paid their full salary for any day in which they do any work at all (including telework). If a salaried employee misses a full day of work, you may be able to dock salary but you should seek advice to make sure the deduction is permitted. Particularly when implementing company-wide policies that may impact large numbers or groups of salaried employees, you should get advice to make sure you are not violating the requirements of federal law with respect to maintaining a salaried basis of payment.

**CAN I TEMPORARILY CHANGE MY POLICIES TO ADDRESS THE COVID-19 PANDEMIC?**

Yes. You can enact changes on a temporary basis without creating ongoing entitlements. For instance, you may wish to change PTO eligibility requirements, expand telework options for positions or individuals who would not normally be available for telework, or temporarily waive certain aspects of your attendance policy (for instance, to avoid overburdening health care systems, the CDC recommends employers not require doctors’ notes to verify sickness or fitness for duty at this time). You can let your employees know that these protocols are temporary and may be modified or terminated at any time.

**WHAT SHOULD I BE THINKING ABOUT AS I RAMP UP TELEWORK OPTIONS?**

If you have not done so, you should immediately begin assessing telework capacity for positions where job duties would permit telework. While this is not mandatory for employers currently, the CDC recommends implementing telework options to facilitate social distancing. In addition, ramping up a telework protocol will put you in a much better position should mandatory closures impact your business.
Implementing a program or ramping up an existing program will be a team effort including your executive management and your IT and Human Resources personnel. You can and should think about expanding telework options even if you do not currently have a telework program and even if a particular position or individual would not normally be eligible for telework. If you do not have a written telework policy covering requirements for telework, such as actually working and being available and productive while teleworking, observing data security protocols, and acknowledging that telework is not a permanent entitlement, you should develop such a policy and have employees acknowledge receipt of the policy as they commence telework. For information on implementing a telework policy, see sections I and V of our ‘Common Sense’ article.

**DOES THE FMLA APPLY TO ABSENCES RELATED TO COVID-19?**

It depends. Absences not related to actual sickness of an employee or family member (for instance, such as related to a school closure or travel-based quarantine) would not be covered by the FMLA. In addition, medical experts and the CDC have indicated that individuals may have COVID-19 and experience only mild symptoms. Thus, just having COVID-19 or mild symptoms associated with COVID-19 would likely not qualify as a serious health condition under the FMLA. Conversely, if an employee is absent for these kinds of reasons, the time should not be counted against his or her annual FMLA leave allotment.

However, if any employee is experiencing more serious health issues and is under the care of a doctor, or if they are hospitalized, FMLA would apply, meaning the absences would be job-protected and FMLA protocols should be followed.

Pending federal legislation would expand the categories of job-protected leave, including providing job-protected leave for reasons that are not health-related, as well as expanding coverage to small businesses not currently covered by the FMLA. For more information, see sections I and IV of our ‘Common Sense’ article. Stay tuned.

**CAN I TAKE EMPLOYEES’ TEMPERATURES?**

Ordinarily, no, this would be a prohibited medical examination under the ADA. However, when a pandemic occurs, privacy restrictions of the ADA may be trumped by public safety concerns and workplace safety mandates issued by OSHA and other governmental authorities. Employers are urged to review the EEOC’s guidance on pandemics, which provides detailed information and examples regarding what kinds of examinations you may perform and what kinds of health-related questions you can ask of employees during a pandemic. However, please note that the wording of the guidance also indicates that community conditions in your area will determine whether or not there is a “direct threat” to workplace safety sufficient to permit inquiries and examinations otherwise prohibited under the ADA. In other words, the fact that a global pandemic and national state of emergency has been declared may not be sufficient to establish pandemic conditions in your community. This is one where you will want to want stay on top of the announcements from your state and local authorities.
As a practical matter, it may not be worth going in a legal grey area to take temperatures, since this may not be a very effective way of ensuring workplace safety. Fever will not always mean an employee has COVID-19, and also individuals may have COVID-19 without fever.

To the extent you conduct medical examinations or receive health information from employees, you must maintain this information in confidence in accordance with ADA protocols.

**WHAT DO I DO IF ONE OF MY EMPLOYEES TESTS POSITIVE FOR COVID-19?**
You must balance maintaining confidentiality of this information (as required by the ADA) with taking steps to ensure workplace safety. You should inform coworkers who are at risk (such as being in the same location as the impacted employee or who have likely engaged in close interactions with the impacted employee) regarding the positive test but without identifying the employee by name if you can possibly avoid doing so. Your workplace may need to be closed temporarily while you conduct deep cleaning. Every situation will be different and you should exercise your best judgment depending on the circumstances and seek advice if in doubt, with the utmost priority of keeping your employees safe.

**WILL THE PENDING FEDERAL LEGISLATION IMPACT MY BUSINESS?**
Yes, it probably will. Legislation expanding job protection and paid leave obligations for employers including small businesses has passed in the U.S. House of Representatives and awaiting a vote in the Senate. Some version of this legislation will likely be in place very shortly. For more information, see sections I and IV of our ‘Common Sense’ article.

Keith C. Mier  
(505) 545-6065  
Keith.Mier@butlersnow.com

Kara E. Shea  
(615) 651-6712  
Kara.She@butlersnow.com

Robin Banck Taylor  
(601) 985-4496  
Robin.Taylor@butlersnow.com

Margaret H. Loveman  
(205) 297-2241  
Margaret.Loveman@butlersnow.com

Jennifer Aaron Hataway  
(225) 325-8733  
Jennifer.Hataway@butlersnow.com
As concerns continue to be raised and addressed with respect to the Coronavirus, businesses should be alert to the real potential that they may face commercial challenges from potential disruptions related to its existence, spread and containment. Suppliers may delay delivery of products or raw materials or otherwise fail or be unable to perform contractual obligations or even try to charge higher prices. Your business, in turn, may have difficulty or be unable to meet contractual requirements based on such issues. Customers may be unreasonably demanding in the face of unexpected situations your business faces.

The guideline we suggest is simple: Be fair, but insist that the ones you deal with be fair with you.

Many of these business strains will be ironed out in the regular course of business. But, if you find your business faced with unreasonable situations you cannot tolerate, there are legal doctrines that can come into play in such situations, including contractual provisions (the oft-discussed force majeure clauses), and common law doctrines such as impossibility of performance or frustration of contract or other historic doctrines, as well as legal restrictions on price gouging. For example, if one of your suppliers claims that it cannot deliver necessary product to you on a timely basis and is relieved from performance due to certain specific effects of the coronavirus, you will want to examine the precise language of your contract and determine whether the supplier has a contractual basis to do so, whether any such rights have been properly invoked and the remedies available to you. On the other hand, if your business needs to suspend or delay shipments for similar reasons, you will want to be sure and comply with all of the terms of any force majeure clause in your relevant contract as to ensuring you have a qualifying event, provide proper notice and are aware of all potential consequences of invoking such a provision. In either case, should you not have a contract with a force majeure clause, you should examine all of your rights or obligations otherwise under the law.

Should your business experience any disruptions of such nature, it is critical to examine both your rights and your obligations under your existing contracts and under the law in general.
Practical Advice for Business: How to Deal with Coronavirus Impact on Commercial Transactions
By: Timothy S. Perry

Supply shortages, stressed customers, government actions, and other disruptions during the COVID-19 crisis are affecting you. Your suppliers may be failing to deliver goods and services to you as promised. You may find it increasingly hard to meet your own contracts with your customers.

Businesses are now sending notices claiming force majeure to excuse performance, or claiming impossibility, impracticability or legal frustration as reasons to excuse performance.

If you are considering sending such a notice or if you receive such a notice, here are some suggestions on how to proceed. Because in this event, your business is entering an area where legal advice is valuable. Contact us if you feel the complexity or amount at risk warrants it.

• First, look at your legal paperwork because force majeure depends on and varies widely with the contract language. The essence of force majeure is events that are beyond your control. Each circumstance needs a detailed look at the contract, lease, purchase order, or other legal paperwork.
  • What does the contract give as examples of force majeure?
    • “National Emergency”, “Government action”, or such may well be satisfied now by President Trump’s declaration of national emergency and various state decrees;
    • “Act of God” is more often thought of as physical damage from disasters or weather events but may be expanded given the magnitude of this pandemic so this reason needs careful analysis of the law;
    • “Health emergencies” or “epidemics” or “disease” all seem applicable given the World Health Organization’s determination that this is a “pandemic” and the multiple federal and state level disease-fighting actions
  • How does the claimed force majeure cause the inability or serious hindrance to perform, not just a more time-consuming or expensive performance?
  • What steps must the business take to mitigate the injury to the other party?
  • What notice must be provided and when?
• Second, keep records of how the force majeure impacts the business and the steps, such as searching for other sources of supply, you take to mitigate damage to you.
• Third, assess what the impact of a force majeure is under the contract. Sometimes it is just a delay in performance with a termination of the contract only in the event of a long delay.

Some states recognize defenses of impossibility, impracticability (UCC 2-615), or frustration. These defenses are different from force majeure and normally do not need to be mentioned in the contract to create a remedy. So especially if your contract is silent on force majeure, you’ll need guidance on how to show these defenses are available to your business, a question which will vary state by state.

Timothy S. Perry
(678) 515-5054
Tim.Perry@butlersnow.com
BACKGROUND INFORMATION:
On March 11, 2020, the World Health Organization declared COVID-19 (herein, the “Coronavirus”) a global pandemic as this novel coronavirus, which was unknown to world health officials just three (3) months ago, had rapidly spread to more than 121,000 people from Asia to the Middle East, Europe, and the United States. This past Friday, President Trump said he was declaring a national emergency – “two very big words” – to free up $50 billion in federal resources to combat the Coronavirus. Further, earlier today, Governor Jon Bel Edwards announced aggressive measures to curb the spread of the Coronavirus, further limiting the size of gatherings to fewer than fifty (50) people, closing casinos, bars, and movie theaters, and limiting restaurants to delivery, take-out, and drive-through orders only.

Already, the Coronavirus has had a nearly unprecedented effect on the global economy and the American way of life, and it is impossible to predict the extent of this disruption.

Butler Snow attorneys are advising clients on numerous legal issues relating to the Coronavirus and its consequences including, among others, the invocation and enforceability of force majeure provisions in contracts. While Butler Snow attorneys are well-versed in all states where our firm is present, this article is intended to address the interpretation of contractual force majeure provisions in Louisiana as well as the scheme for addressing “fortuitous events” in the Louisiana Civil Code.

CONTRACTUAL FORCE MAJEURE PROVISIONS IN LOUISIANA:
Generally speaking, force majeure provisions in a contract excuse a party’s nonperformance when an “act of God” or other extraordinary event prevents a party from fulfilling its contractual obligations.

As a matter of course, contractual force majeure provisions are enforced by Louisiana courts, which look to several elements when considering the applicability of a force majeure provision: (1) whether the event qualifies as a force majeure under the contract; (2) whether the risk of nonperformance was foreseeable and able to be mitigated; and (3) whether performance is impossible.

Louisiana courts primarily focus on whether the force majeure provision at issue encompasses the type of event a party to a contract claims is causing its nonperformance. At this juncture, a provision identifying “national emergency” or “government action” as an event constituting force majeure may well be satisfied by President Trump’s declaration of national emergency and recent measures decreed by Governor Jon Bel Edwards. Similarly, a provision identifying “health emergencies” or “epidemics” or “disease” appear to be implicated given the World Health Organization’s determination that this is a “pandemic,” and the disease-fighting actions of Louisiana’s state and local governments. However, even when a force majeure provision is triggered, such provisions are interpreted narrowly; that is, excusing performance only where performance is rendered impossible due to the event of force majeure.
FORTUITOUS EVENTS IN LOUISIANA:
If a contract subject to Louisiana law does not contain a force majeure provision or the contractual provision does not cover the Coronavirus, a party may nonetheless seek relief under the Louisiana Civil Code. Under Louisiana Civil Code articles 1873 to 1879, a buyer or seller is not liable for a breach caused by a “fortuitous event.” Louisiana courts have discussed fortuitous events as an “irresistible force” or “that which happens by a cause which we cannot resist.” Mark Investments, Inc. v. Motwane’s Am., Inc., 482 So. 2d 1187, 1189 (La. App. 4 Cir. 1986). This concept is analogous to the common law concept of impossibility. While there does not appear to be any Louisiana jurisprudence addressing whether an epidemic or pandemic constitutes a fortuitous event, Louisiana doctrine indicates that “[d]anger to the health or life of the obligor, rather than his actual illness, may be of such a nature as to incline a court to regard that danger as an insurmountable obstacle that makes performance practically impossible.” 5 La. Civ. L. Treatise, Law of Obligations, § 16.36 (2d ed.) (noting conclusion by French courts that epidemic of typhoid fever in a particular city was force majeure that prevented an actor from giving performance in that city).

Similar to the law in other states, price adjustments to a contract are not allowed, and a party cannot avoid liability if it guaranteed delivery or acceptance of delivery. Unlike courts in other states, however, Louisiana courts have the right to dissolve the contract or reduce the other party’s obligations proportionately. Louisiana courts determine contract dissolution on a case-by-case basis, but that remedy it is more likely when part performance is of no value to the other party or the remaining performance becomes impossible.

As a final note, Louisiana has not adopted the Uniform Commercial Code and, in turn, has not adopted the concept of “commercial impracticability” set forth in Section 2-615.

PROACTIVE STEPS:
It is not too soon for you to take the following proactive steps to mitigate your risk or maximize your rights, and prepare for interruption to your operations, or those of your suppliers, in connection with this outbreak:

1. Review your commercial contracts to assess what force majeure rights, remedies, and requirements may apply if your or your counterparty’s operations are disrupted;
2. Review the notice and response requirements in your commercial contracts to ensure timeliness, content, and proper delivery method of any invocation of, or response to, a force majeure notice;
3. Secure alternate supply streams in the event a supplier’s operations are impacted;
4. Obtain and retain as much information as possible about any potential force majeure claim;

Finally, even if your business is unable to avoid the need to declare force majeure, any attempt to mitigate your risk in advance will be material to whether a Louisiana court determines that you took reasonable steps to continue your contractual obligations and whether performance was, in fact, impossible.
COVID-19 and Product Liability: Current Trends and Future Implications
By: Kathleen Ingram Carrington

It has been four months since the world learned of coronavirus disease 2019 (“COVID-19”), the new strain of coronavirus causing respiratory infection in its victims. With nearly 154,000 confirmed cases and a current death toll exceeding 5,700,[1] the World Health Organization (“WHO”) has reluctantly declared COVID-19 a pandemic, in large part because of the numerous unknowns pertaining to transmission, protection, and treatment. Disease control organizations globally, including the Center for Disease Control (“CDC”) in the United States, are working tirelessly to learn more about COVID-19 so that individuals, communities, and businesses alike can best navigate this new and uncertain territory.

But new information cannot come soon enough, as COVID-19 is quickly making its mark on the economy. With communities on lockdown and bans placed on travel, many stocks and stock markets have entered bear market territory. As a result, not only must businesses focus on protecting the well-being of their employees, they must also focus on ensuring their continued viability. Businesses touching the products space are no exception—and many are at the forefront.

So how is COVID-19 affecting businesses operating in the products arena? And how can we expect it to impact these businesses in the future? As discussed more fully below, while some businesses should anticipate challenges accompanying uncertainty in meeting production and sales goals, others whose products are directly or tangentially related to the medical field should remain steadfast in following best practices and in-place protocols while satisfying increasing demand so as to avoid unnecessary risk down the road. Moreover, all products business should stay abreast of the most recent virus-related information, take preventative measures internally to protect both employees and consumers from contact-based transmission of the disease, and assess potential liabilities such as those arising from contract-based obligations.

The pharmaceutical product and medical device spaces are unsurprisingly seeing the most direct impact thus far, as concerns rise regarding possible supply shortages. Numerous active pharmaceutical ingredients (“API”), finished drugs, and essential medical devices are imported from China—where COVID-19 originated—and India, resulting in efforts by the U.S. Food and Drug Administration (“FDA”) to closely monitor America’s product supply.[2] Although shortages to date have been minimal,[3] India recently restricted the export of dozens of APIs “until further notice.”[4] In response, the federal government is advocating for a move away from importing pharmaceutical and other medical products. The New York Times recently reported an expected executive order “that would close loopholes allowing the government to purchase pharmaceuticals, face masks, ventilators and other medical products from foreign countries” with the intent to incentivize “companies to make their products in the United States, rather than China.”[5]

Along similar lines, although there is no known cure for COVID-19, certain drugs have been identified as useful in treating some of the damage caused by the virus, including an arthritis drug being used to treat lung damage.[6] As more currently-marketed products emerge as helpful in the treatment of COVID-19 symptoms and damage, we can expect supply and demand imbalances to increase.
Regrettably, but perhaps inevitably, some actors are attempting to profit from the heightened anxiety accompanying COVID-19, but their efforts are being quickly curtailed. For example, the FDA and the Federal Trade Commission ("FTC") are issuing warning letters to companies claiming to sell products that either cure or prevent COVID-19.[7] As FTC Chairman Joe Simmons stated, “[w]hat we don’t need in this situation are companies preying on consumers by promoting products with fraudulent prevention and treatment claims.”[8] Both organizations stand ready to “take enforcement actions against companies that continue to market this type of scam.”[9]

Amazon is doing its part on this front, not only precluding the sale of falsely advertised COVID-19 treatment products, but also stopping third-party sellers from price gouging on products like face masks and hand sanitizer.[10] Along these lines, manufacturers should ensure those in their distribution chains are following contractual price-setting terms in place for their products.

As we learn more about how COVID-19 is spread, company bottom lines may be impacted in more ways than one. While the CDC has determined the most common means of spreading the virus is person-to-person, it has not ruled out contact with contaminated surfaces and objects as a means of transmission, stating “[i]t may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes.”[11] Significantly, coronaviruses can live on surfaces for up to nine days.[12] Businesses in the distribution chain should consider what measures they can take to disinfect products and the shipping materials containing them, as well as to ensure the individuals handling them along the way are not infecting these surfaces. Being proactive in efforts to prevent contamination and transmission may aid in avoiding future liability claims based on viral transmission from contact with a contaminated product, notwithstanding the viability of any such claim.

Businesses should also take the time to review their distribution contracts and insurance contracts as it relates to fulfillment obligations and supply/demand changes, as forced closures and quarantined employees may impact what they are capable of accomplishing. Future bans or limitations placed on imports and exports could impact product completion and distribution. And as more communities self-protect with quarantines and travel restrictions, businesses may experience sales fluctuations based on the types of products they make, distribute, and sell.

As to product liability concerns specifically, businesses that are either manufacturing products in the pharmaceutical and medical device/supply sector or that are tangentially connected to prevention, containment, or treatment efforts (e.g. manufacturers of latex gloves and face masks) should take care to ensure they are using reasonable care and following in-place protocols during the manufacturing process, notwithstanding increased demands. A disregard for standard protocols such as quality control measures can create unnecessary exposure and invite avoidable claims.

In sum, “[t]his is an emerging, rapidly evolving situation”[13] with an inherently unpredictable future landscape. Most businesses in the products space should plan for challenges arising from an economic downturn that could be exacerbated by uncertainty in how to contain the spread of COVID-19.[14] Staying informed, taking internal prevention measures, and assessing potential liabilities are some of the proactive steps that companies can take as we all work to navigate these unchartered waters.


[3] See id. (noting one human drug manufacturer notified it of a shortage caused by “an issue with manufacturing of an active pharmaceutical ingredient used in the drug” in a COVID-19-affected location)


[8] Id.

[9] Id.


When it comes to COVID-19, clients are interested in not only protecting their employees, but also have concerns about how to handle business disruptions. When it comes to protecting their workforce, most employers want to know how much they can inquire about an employee’s health and whether they can require an employee to stay home. Another concern is whether an employer can require an employee that recently visited an affected region to stay home for a period of time. Based upon guidance from the Equal Opportunity Employment Council, an employer may send employees home if they display symptoms of illness during seasonal influenza or similar illnesses like COVID-19. Employers are also permitted to ask an employee if they are experiencing COVID-19 symptoms when they make a determination on whether to send an employee home or allow one to return to work. It is also reasonable for employers to require an employee that recently traveled to a COVID-19 affected area to stay home for several days until it is clear they are not experiencing symptoms of illness.

Common sense is an employer’s best defense to protecting its workforce. Appoint an employee(s) to be the point person for receiving and disseminating workplace information regarding COVID-19. Emphasize the importance of staying home when an employee feels ill. Employees who come in close contact with someone infected with COVID-19 should be encouraged to notify their supervisor for a risk assessment. Be flexible with leave policies and ensure they are up to date with public health guidelines. If possible, encourage employees to stay home when they are ill by offering a limited number of paid days off work or other incentive. Provide soap, sanitation wipes, and hand sanitizer for employees to use in the workplace. Clean all surfaces touched in the workplace daily.

When it comes to commercial issues, businesses may face incoming or outgoing delivery delays, higher prices, and other supply chain issues. Businesses may in turn have difficulty meeting their own contractual requirements or ensuring that their vendors and others meet their contractual obligations to the client. Businesses should be understanding and fair in these instances. In such situations, businesses should carefully examine their applicable contracts for proper and available remedies and/or to ensure that they meet all of their obligations in such situations including complying with any applicable notice provisions. Businesses may also question the safety of products coming from China. When presented with such questions, we have advised that the latest CDC information provide that there is no evidence that COVID-19 can be transmitted via imported goods, but that they should refer to the CDC for more or changing information.
**Miss. State Board of Medical Licensure Issues Telehealth Waivers to Combat COVID-19**

*By: Mark W. Garriga*

The Mississippi State Board of Medical Licensure issued a proclamation on Sunday, March 15, announcing measures to combat the spread of the novel coronavirus.

The proclamation is based on Governor Reeves’ emergency proclamation, which allows for the temporary suspension or modification of any rule or regulation put in place by a state agency. Specifically, the Board of Licensure’s proclamation recognizes the increased burden many patients face in order to receive medical care. As such, the Board has chosen to institute the following changes to the state’s telehealth policy:

- Providers are encouraged to utilize telemedicine for treating patients to avoid unnecessary clinic visits, travel, and possible exposure.
- Waiver of the requirement that the physician “personally examine patients prior to the issuance of a prescription or order the administration of medication, including controlled substances.” However, physicians must still “conduct an evaluation of the patient’s current condition and document the appropriate medical indication for the prescription.”
- Allowing out-of-state physicians to utilize telehealth modalities in Mississippi without being licensed in the state, provided the physician holds an unrestricted license in the state in which the physician practices and currently is not under investigation or subject to a disciplinary proceeding.” See the Emergency Licensure form here.
- Controlled substance prescriptions still require physicians to review the Prescription Monitoring Program website first, but the requirement of a urine drug screen (otherwise required as part of a treatment plan for treatment of chronic/non-terminal pain – Rule 1.7) is not required.

All other regulations are to remain in effect.

Click here to view the proclamation.

Click here to view the Emergency Licensure form.

Mark W. Garriga
(601) 985-4506
Mark.Garriga@butlersnow.com
Congress Still Working to Finalize the Proposed COVID-19 Bill
By: Margaret H. Loveman

Last night, March 16, 2020, the U.S. House of Representatives unanimously passed a revised version of the COVID-19 response bill it originally passed 363-40 only a few days earlier.

H.R. 6201 or the Families First Coronavirus Response Act, speaks to five distinct areas of relief-1) Free Coronavirus Testing; 2) Food Assistance; 3) Medicaid FMAP rates; 4) Unemployment Aid; and 5) Paid Sick and Medical Leave.

EMERGENCY FAMILY LEAVE

Who Qualifies
The revised bill made significant changes to the paid sick and medical leave sections. As the bill currently reads, private-sector employers with fewer than 500 employees, and covered public-sector employers, must provide up to 12 weeks of job-protected FMLA leave for “a qualifying need related to a public health emergency.” Only employees who have been on the payroll for 30 calendar days are eligible for this leave. Businesses with less than 50 employees are exempt from the leave requirements if the leave would jeopardize their business. Employers can also exclude healthcare workers and first responders from the leave allowed under this bill.

The revised bill significantly limits the definition of “qualifying need” to situations where an employee is unable to work due to the need to care for a minor child if the minor child’s “school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

Employee Pay
The first 10 days of this emergency FMLA leave can be unpaid, but employers are required to pay employees for the remainder of the leave. Currently, the bill requires that the employee be paid for the number of hours the employee would otherwise be scheduled to work at a rate of two-thirds of the employee’s regular rate. The bill caps these payment to individual employees to no more than $200 per day and $10,000 in total. While an employee may elect to utilize vacation, sick, or other personal paid leave, an employee cannot be forced to use paid leave.

Job-Protection
Like regular FMLA leave, an employer must restore employees who utilize emergency FMLA leave to their prior positions or an equivalent position. This job protection, however, does not apply to employers with fewer than 25 employees, if the employee’s position no longer exists following leave due to economic conditions, or other operational changes caused by a public health emergency (e.g. COVID-19).
PAID SICK LEAVE

Who Qualifies
Private-sector employers with fewer than 500 employees, and covered public-sector employers, must provide 80 hours of paid sick time to an employee (of any tenure) who is unable to work (or telework) because: (1) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine because of COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to, or advised to, quarantine or isolate; (5) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Employers may elect to exclude healthcare providers or first responders from this paid leave. The Secretary of Labor is also granted authority to draft regulations which will exempt businesses with fewer than 50 employees if the requirements would jeopardize their business.

Limits on Pay
The bill places limits on this paid leave to $511 per day or $5,110 in the aggregate where leave is taken for reasons generally related to the employee’s health. The limits on pay are $200 per day and $2,000 in the aggregate where leave is generally related to the care of others, including childcare.

Anti-Retaliation
The bill prohibits an employer from retaliating against any employee who takes leave in accordance with the provisions of this bill. Failure to pay this sick leave will be a violation of the Fair Labor Standards Act similar to a failure to pay minimum wage.

MONETARY RELIEF FOR EMPLOYERS
Employers that are required to offer Emergency FMLA or paid sick leave will be eligible for refundable tax-credits. We also expect the Department of Treasury to take some other tax relief actions, as well as actions to allow small businesses to access funds to assist with cash flow problems.

FLUID SITUATION
We understand the fluidity of this bill which must be reconciled with the legislation the U.S. Senate is currently drafting. It must then be approved by both houses and sent to President Trump for signing. As Schoolhouse Rock taught us, while this is currently just a bill sitting here on Capitol Hill, we have confidence that some portions of this bill will be law soon. We are actively monitoring this legislation and will provide updates as they are released.

Margaret H. Loveman
(205) 297-2241
Margaret.Loveman@butlersnow.com
COVID-19 Has Businesses Examining Their Insurance Policies for “Business Income”/“Civil Authority” Coverage
By: Robert (“Bob”) M. Frey

When the Governor of Louisiana issued a COVID-19 proclamation postponing or cancelling certain gatherings of 250 or more people, the owners of the Oceana Grill, a restaurant in the heart of the French Quarter, filed a lawsuit that will be of interest to many businesses.

The suit names the Governor and the State, and seeks a declaratory judgment as to the scope of the proclamation, but in addition it names Certain Underwriters at Lloyds. This part of the suit seeks a judicial declaration that the “all risk” Lloyds policy provides [1] coverage to Plaintiffs for any future civil authority shutdowns of restaurants in the New Orleans area due to physical loss from Coronavirus contamination and that the policy provides [2] business income coverage in the event that the coronavirus has contaminated the insured premises.

Business Income Coverage

The Oceana Grill suit didn’t quote or attach the Lloyds’ policy, but we can get an idea of the issues by taking a look at the typical “Business Income and Extra Expense” policy, which may contain an insuring clause along these lines:

We will pay for the actual loss of Business Income [and certain “Extra Expenses”] you sustain due to the necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations.

The Oceana Grill suit asserts that premises contaminated by the virus have suffered “direct physical loss.”

Civil Authority coverage

The Oceana Grill suit references “civil authority” coverage. Oversimplifying, this pays the same things -- lost “Business Income” and incurred “Extra Expense” – but the trigger, instead of “direct physical loss” at the insured premises, is damage to property near the insured property that causes the civil authorities to bar access to the insured property:

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the insured property.
1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Virus exclusion

Again, the Oceana Grill suit didn’t quote or attach the Lloyds’ policy, but it did allege that the policy has no exclusion for “virus or global pandemic,” and excludes losses “due to biological materials” “only in connection with terrorism or malicious use. . . .” Some policies have much broader exclusions; one, for example, excludes all losses attributable to

Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

What’s next

Policies differ, of course, but insureds with these and similar policy provisions will be studying them closely in the days and weeks to come.