



Legal Issues Arising From COVID-19

Key Developments in Employment, Trade, Insurance, and the CARES Act

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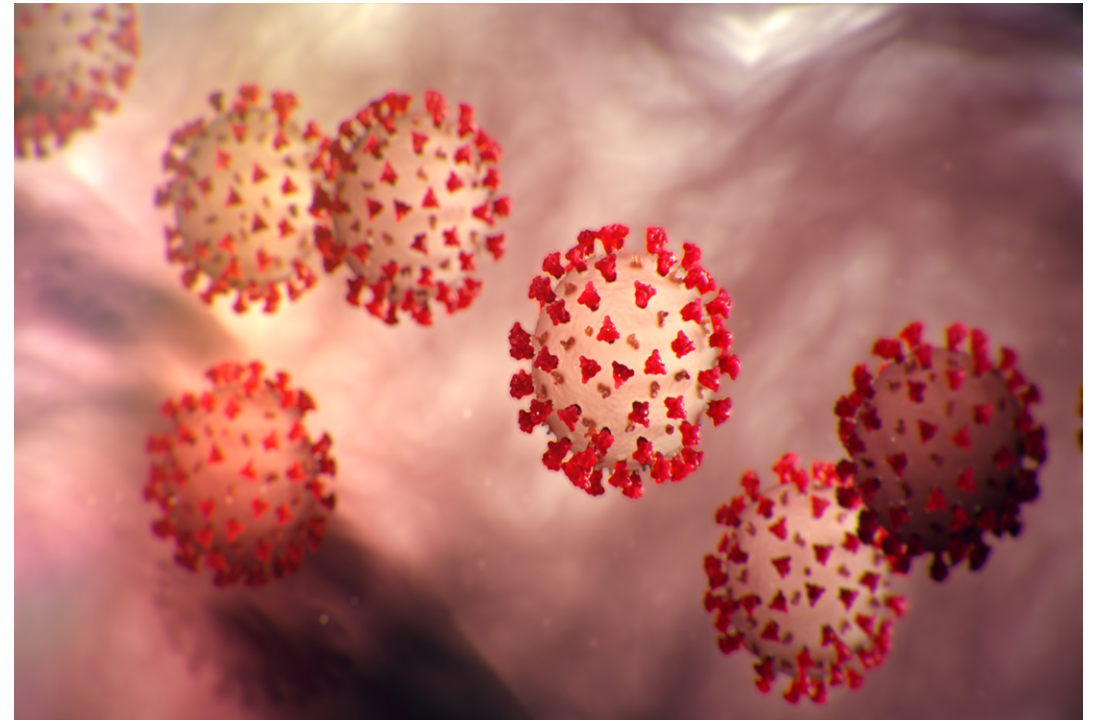
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Key Employment Developments

Families First Coronavirus Response Act (FFCRA)

- **Paid Emergency Family & Medical Leave**
 - 12 weeks of paid leave
 - if Ee needs to care for a child whose:
 - school or place of care is closed, or
 - paid child care provider is unavailable
 - First 10 days are unpaid
- **Emergency Paid Sick Leave**
 - Up to 80 hours of paid sick leave
 - If qualifying reasons related to COVID-19



FFCRA - 2

Emergency paid sick leave (cont'd)

COVID qualifying reasons are limited to where the Ee:

1. is subject to a quarantine or isolation order;
2. has been advised by a health care provider to self-quarantine;
3. is experiencing symptoms and seeking a medical diagnosis;
4. is caring for an individual who falls within (1) or (2);
5. is caring for a child whose
school or place of care is closed, or
child care provider is unavailable;
6. is experiencing any other substantially similar condition provided for in applicable law.

FFCRA - 3

- The paid leave provisions apply to employers with 499 or fewer employees
- Employees of affiliated entities are aggregated if they satisfy the FLSA's joint employer test or the FMLA's integrated employer test
- "Health Care Providers" may elect to be exempt from the paid leave requirements.
 - DOL guidance defines an exempt "health care provider" as "**anyone** employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity."
- Refundable payroll tax credits are available for 100 percent of the cost of paid leave.
 - payroll taxes available for retention include federal income taxes, and the employer and employee share of Social Security and Medicare taxes

The CARES Act

- **Unemployment insurance**
 - \$600 per week for 13 weeks, in addition to state benefits
- **Employee retention tax credit**
 - Applies to businesses and nonprofits that are fully or partially suspended due to government shut down orders.
 - Tax credit against quarterly employment taxes for 50% of compensation, including health benefits, (up to \$10,000 per employee) paid for each employee during the closure.
 - The credits apply to wages paid after March 12, 2020, and are reduced by the FFCRA payroll tax credits.
 - Employers that take covered loans under the Paycheck Protection Program are not eligible.

The WARN Act

- The federal WARN Act requires 60 days' notice prior to:
 - A facility closing impacting 50+ FTEs at one site;
 - A mass layoff impacting 500+ FTEs at a single site or 50 – 499 employees where the number of impacted employees constitutes 33% of the employer's total active workforce of FTEs at a single site;
 - A temporary layoff of 6 months or greater that meets the above criteria; or
 - A reduction in hours by 50% for 50+ workers for any 6 month period
- Some states have “mini WARN Acts” with more expansive or onerous restrictions.
- California has partially suspended enforcement of its WARN Act, but employers still must provide “as much notice as practicable” prior to covered closings or layoffs.

Key Trade Developments

Importing FDA-Regulated Products



The Role of FDA

- Wide-ranging regulatory jurisdiction over many products
- Regulatory controls determined by product identity
- Federal Food, Drug, and Cosmetic Act (FDCA) establishes all relevant definitions

What is the product's **“intended use”**?

Relevant FDCA Definitions

Drug

- Article **intended for** use in the diagnosis, cure, mitigation, treatment, or prevention of disease
- Article (other than food) **intended to** affect the structure or any function of the body

Device

- Instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent ... that is **intended for** use in the diagnosis, cure, mitigation, treatment, or prevention of disease or **intended to** affect the structure or any function of the body

Cosmetic

- Articles **intended to** be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied...for cleansing, beautifying, promoting attractiveness, or altering the appearance

Common Theme: Product's Intended Use

- Affects how product is regulated by FDA
- Can render a product a **drug or device**, independent of its ingredients/physical characteristics and regardless of whether or not person marketing considers the product to be a drug or device



“Intended Use” Defined

Objective intent of the persons legally responsible for the labeling of drugs

Intent is determined by such persons’ expressions or may be shown by the circumstances surrounding the distribution of the article

Import Requirements

A product's FDA regulatory classification also determines information that must be submitted to CBP

Failure to provide required information can lead to automatic detention, delays, refusals

Hand Sanitizer



Regulated as **over-the-counter drug**

- Applicable “monograph”
- OTC drug labeling requirements (e.g., “Drug Facts” panel)
- Drug cGMP standards
- Establishment registration and listing

Some standards have been temporarily relaxed via FDA “enforcement discretion” policies:

- Guidance for Industry: Temporary Policy for Preparation of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency (COVID-19)
- Policy for Temporary Compounding of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency
- Temporary Policy for Manufacture of Alcohol for Incorporation Into Alcohol-Based Hand Sanitizer Products During the Public Health Emergency (COVID-19) Guidance for Industry

Personal Protective Equipment

Goggles, gowns, gloves, face masks, N95 respirators

If intended for “medical use” generally regulated as medical device

Generally, most PPE must have FDA marketing authorization (a 510(k) clearance) or be classified as 510(k)-exempt

FDA Has Relaxed Certain Standards Temporarily

Emergency Use
Authorizations

FDA Enforcement
Discretion
Policies

Key Insurance Developments

Insurance Coverages



- Property Insurance
- Trade Credit
- Workers' Compensation
- General Liability
- Management Liability
- Environmental Liability
- Employment Practices Liability
- Professional Liability

Documenting a Business Interruption Claim

Background of the loss

Build a timeline: A summary of the key events / dates leading up to and following the loss.

Key events should include a description of the incident, narrative of events and key decisions made and when, general overview of the impact and changes to operations, and what is or will be done to minimize and address the loss.

Gather all actual Government/Executive /Other Authoritative Orders impacting operations.

Exclusion of Loss Due to Virus or Bacteria

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

* * *

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

CARES Act for Foreign Companies with US Subsidiaries

Section 1: Intro

- The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provides funding for American companies of various sizes.
- Our discussion today will be focused squarely on the “Paycheck Protection Program” or PPP, and our goal is to give you a better understanding of what it entails.
- The CARES Act also provides for other lending programs, such as the Main Street Program for bigger companies, recently announced by the Fed. However, the program does not explicitly address whether a US subsidiary of a foreign company is eligible to participate. Please stay tuned for the regulations to be published as Arent Fox will cover it once they are released.

Section 2: PPP purpose

Give short term cash flow
to keep businesses afloat
and employees paid.

Section 3: Eligibility Period

PPP loans must be made before June 30, 2020

First come First served basis

- As of April 15, 2020, it was expected that financing for the PPP would run out. The Senate has been in talks about providing additional funding for the PPP program.

Section 4: Eligible Companies

Small business concerns, 501(c)(3) nonprofits, 501(c)(19) veterans organizations, sole proprietors, independent contractors, and self-employed individuals

US subsidiaries of foreign companies will qualify BUT unless it is a hotel, franchise, or food business, affiliation rules will apply (discussed shortly).

Section 5: Size Restrictions + Affiliation Rules

500 or fewer employees (full or part time); OR

The applicable size standard for the business' industry as provided by the SBA, if higher than 500

- Note: SBA publishes applicable size standards for each industry, broken down by the North American Industry Classification System (NAICS) codes.

Affiliation: as a *general rule*, in order to determine whether size restrictions are met, employees of affiliates of an applicant are included

- Note: Entities are affiliates when one controls or has the power to directly/indirectly control the other, OR a third party or parties controls/has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

Affiliation Waiver solely for the accommodation and food service industries, and for franchises.

Section 6: Affiliation Rules Applied for US Subsidiaries of Foreign Companies

In calculating whether a US subsidiary has less than 500 employees, the employees of the parent and its subsidiaries worldwide must be counted in the employee count (this is true for US companies as well).

- Please note: Two law firms have taken the position that there is a good faith argument that the affiliation rules do not apply to foreign entities even though they apply to domestic entities. We do not agree. This position is based on taking one sentence in SBA guidance completely out of context. We do not think this is a good faith position.

So, if the US subsidiary is a hotel, franchise, or food business, the affiliation rules will be waived and each location with under 500 employees will be eligible for the PPP.

Section 7: Use of Funds

Payroll costs:

- Salaries, wages, vacation, parental, family, medical, or sick leave, severance, retirement benefits, state or local taxes assessed on compensation
- **Exception:** PPP loans cannot be used to pay that portion of salaries, if any, above \$100,000.

Insurance Premiums

Employee commissions and tips

Interest on mortgage obligations (not principal)

Rent (including rent under a lease)

Utilities

Interest on other debt incurred prior to obtaining the PPP (these are not forgiven)

Section 8: Forgiveness

Principal amounts on PPP loans for the first 8-weeks from when the loan is made will be forgiven IF appropriate documentation is submitted to show funds were expended for eligible uses.

- Such as: federal payroll tax filings, state income, payroll and unemployment insurance filings, cancelled checks or other documents verifying payment of mortgage interests, utilities, etc.
- Certify that such documents are true and correct, as well as amount to be forgiven

Amount of forgiveness is the sum of the following costs and payments made during the 8-week forgiveness period

- Payroll costs (excluding that portion of salaries above \$100,000)
- Interest on a covered mortgage obligation
- Covered rent obligations
- Covered utilities

Canceled indebtedness will not result in taxable income to the business.

Section 9: Forgiveness Continued - Factors that Reduce Forgiveness

The amount of forgiveness will be ratably reduced if the average number of full-time employees during the 8-week forgiveness period is less than the average number of full-time employees during either of the following period (employer gets to choose)

- February 15, 2019 through June 30, 2019
- January 1, 2020 through February 29, 2020

The amount of forgiveness will also be reduced by the amount of reduction in salary of any employee earning under \$100,000, to the extent that such reduction exceeds 25% of the employee's salary during the most recent full quarter preceding the forgiveness period

Section 10: Forgiveness Continued - Incentive to Rehire

Employers that rehire workers previously laid-off will not be penalized for having a reduced payroll at the beginning of the forgiveness period as long as it is “corrected” by June 30, 2020.

Section 11: Payment Deferral

Principal, interest, and fee balance may be deferred for at least 6 months and not more than a year

Section 12: Loan Terms

Maximum is 250% of business' average monthly payroll costs over the one year period before the loan is made, plus the amount of any COVID-19 Economic Injury Disaster Loan previously made to the business that is refinanced with the PPP Loan, not to exceed \$10 million.

Interest rate: 1%

Maximum maturity: 2 years

No prepayment penalty

Section 13: No Security, Certain Fees Waived, Nonrecourse to Owners

No collateral required

Normal personal guarantee requirement for SBA loans waived

SBA's guaranty fee and annual servicing fee waived

Business **MAY** access credit elsewhere

Loan is nonrecourse for business' shareholders, members and partners **if** proceeds are used for eligible purposes



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Section 14: For more in-depth look of the PPP

Summarizing the Paycheck Protection Program

MARCH 31, 2020 | [DAVID L. DUBROW](#), [RICHARD J. KRAININ](#), [JEANNETTE CARNEIRO MCLAUGHLIN](#), [TAL M. UNRAD](#), [JUSTIN A. GOLDBERG](#)

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Our Task Force has a summary of the Short-Term Working Capital Loans to Support Small Businesses and The Hospitality and Restaurant Sectors.

[Related Practices](#)

[Description and Purpose of Paycheck Protection Program](#)

Section 15: Stay tuned for Main Street Program regulations!

The Main Street Programs are for companies with employees up to 10,000 employees and less than \$2.5 billion in 2019 annual revenues.

Arent Fox will cover the Main Street Programs as regulations are issued and provide clarity on whether US subsidiaries of foreign companies are eligible for these programs.

Questions?



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