



# Legal Implications of COVID-19

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**SECTION I**

Business Law - Force Majeure & Insurance Coverage

**SECTION II**

Real Estate – Residential & Commercial Properties

**SECTION III**

Employment Law - Paid Sick Leave & Expanded Family and Medical Leave

**SECTION IV**

Paycheck Protection Program (PPP),  
Economic Injury Disaster Loan Program (EIDL) and  
Main Street Lending Program

## SECTION I

# Business Law - Force Majeure & Insurance Coverage

# Does COVID-19 excuse the company from performing its contract obligations or excuse its counterparties?

## Force Majeure

- An extraordinary event that prevent a party from fulfilling its contractual obligations.
- Applicability is contract-specific and there is a high bar for invocation.
- US courts will generally consider: (1) the **event qualifies** as force majeure under the contract; (2) the risk of nonperformance was **foreseeable** and able to be **mitigated**; and (3) performance is truly **impossible**.
- Is COVID-19 a force majeure event?
  - Enumerated in the clause (such as a pandemic, contagion, act of God).
  - Covered by general catchall wording.
- Review notice, force of law, forum selection and dispute resolution clauses under the contract.

# Does the company have insurance coverage for losses due to COVID-19?

## Available insurance:

- Business Interruption Insurance
- Supply Chain Insurance
- D&O, E&O, and other liability policies
- Comply with notice periods and other policy conditions (strict compliance).
- Document losses and take steps to mitigate loss or damages.

## • Evolving situation:

- Louisiana restaurant is suing its Business Interruption Policy carrier for losses incurred as a result of COVID-19 government mandated closures.
- Shareholder sued Norwegian cruise lines for false and misleading statements regarding COVID-19. D&O insurance would apply.

## SECTION II

# Real Estate – Residential and Commercial Properties

# Forbearance, Foreclosure and Eviction Moratorium

- Single Family mortgages:

- “. . . forbearance shall be granted for up to **180 days**, and shall be extended for an **additional 180 days** at the request of the borrower . . .”
- No fees, penalties or interest shall accrue on the borrower’s account.
- Attestation to a financial hardship caused by COVID-19 emergency is sufficient no documentation required to qualify for forbearance.
- Foreclosure moratorium for a period of **60 days**.

Title IV, Subtitle A, §4022 of the CARES ACT.

- Multifamily mortgages:

- Forbearance shall be granted for up to **90 days** (30 days + 2x 30 days extension).
- Multifamily borrower may not, for the duration of the forbearance evict or initiate an eviction for nonpayment of rent; or charge late fees or penalties.

Title IV, Subtitle A, §4023 of the CARES ACT.

- General Moratorium on Eviction Filings:

- **120-day moratorium** on residential evictions + **30-day notice requirement**.

Title IV, Subtitle A, §4024 of the CARES ACT.

**\* None of the above applies to Commercial Property**

# Practical Considerations for Landlords and Tenants of Commercial Property

- Considered sophisticated parties Commercial LLs and Tenants are generally excluded from Federal regulations and State Emergency Orders placing moratoriums on evictions.
- Landlord and Tenants that were able to draw down on their credit lines to insure liquidity have done so (or should do so asap).
- Landlords are entitled to rent payment and may seek guarantees to provide relief: financial information, gross sales for the proceeding year, 2021 plan.
- If pandemic continues longer than expected, Landlords and Tenants will have to carefully review their agreements and know their rights.
- Longer Term Policy Considerations: Pandemic Risk Insurance Act (PRIA) proposed by California Congresswoman Maxine Waters, similar to Terrorism Risk Insurance Act (TRIA).

## SECTION III

# Paid Sick Leave & Expanded Family and Medical Leave Act

# Family First Coronavirus Response Act (FFCRA)

- Emergency ***Paid Sick Leave*** Act
  - Requires employers to provide sick time, available for immediate use, to each employee who required such time for qualifying reasons associated with COVID-19.
  - Provides a refundable tax credit.
- Emergency ***Family and Medical Leave*** Expansion Act
  - Temporarily expands the provisions of the Federal Family Medical Leave Act (FMLA) to include “public health emergency leave.”
  - Provides a refundable tax credit.
- Package of ***Tax Credits***.
- Effective for covered employers on April 1, 2020 and sunsets Dec. 31, 2020.

# Counting employees for purposes of the 500-employee threshold

Employee count must be taken at the time of employee's leave, and include the following:

- Both full-time and part-time employees without respect to the number of hours the employee works.
- Employees currently on leave.
- Temporary employees who are jointly employed by you and another employer
- Day laborers supplied by a temporary agency (if there is a continuing employment relationship).

Independent contractors as not considered employees.

Employer does NOT count employees working outside the U.S.

Employees with fewer than 50 employees may be exempt from requirements to provide emergency paid sick leave and extended family medical leave if paying these wages would jeopardize the viability of the business as a going concern.

# Emergency Paid Sick Leave Act

- Employers must provide **up to 80 hours** (~2 weeks) of paid sick leave to eligible employees.
- Employee is eligible if unable to work or telework, because the employee:
  1. Subject to a federal, state or local quarantine, in isolation
  2. Has been advised to self-quarantine by a medical professional
  3. Is experiencing COVID-19 related symptoms
  4. Is caring for someone subject to an order described in (1) or (2)
  5. Is caring for his/her child whose school or place of care is closed due to COVID-19
  6. Is experiencing any other substantially-similar condition
- Calculations and caps for compensation vary dependent on the reason for leave, up to the maximum \$511 per day if the employee is directly impacted, and up to \$200 per day if it is for care provided to someone else. Aggregate caps exist, as well.
- Employers are required to post a notice of employee rights, which can be found online at [www.dol.gov/agencies/whd/pandemic](http://www.dol.gov/agencies/whd/pandemic) .

# Emergency Family and Medical Leave Expansion Act

- Employees must have been on payroll for the 30 days immediately preceding the qualified leave.
- Employee can take leave to care for a child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons.
- Up to 12 weeks of job-protected leave, with continuation of health insurance.
- Initial 2 weeks or 10 days not paid.
- Remaining 10 weeks paid at  $\frac{2}{3}$ <sup>rd</sup> the employee's regular rate of pay.

# Payroll Tax Credit

- Fully refundable tax credit equal to 100% of the wages paid pursuant to the paid sick leave and family leave provisions.

## *Sections 7001 and 7003 of the FFCRA*

- Tax credit is allowed against the employer portion of the Social Security tax rate of 6.2%, the Medicare rate of 1.45%, and the Federal Income Tax rate.
- If credit exceeds the employer's total liability in any calendar quarter, the excess is refundable to the employer.
- If an Employer receives tax credits for qualified leave wages, those wages are not eligible as “payroll costs” for purposes of receiving loan forgiveness under the Payment Protection Program.

## SECTION IV

Paycheck Protection Program (PPP),  
Economic Injury Disaster Loan Program (EIDL) and  
Main Street Lending Program

# Paycheck Protection Program (PPP)

- \$349 + \$320 billion toward job retention and certain other expenses.
- Up to 8 weeks of payroll costs including benefits.
- Payroll costs includes:
  - Payroll Expenses
  - Employee Salaries
  - Mortgage Interest
  - Rent and Utilities
  - Interest on debt incurred before 2/15/2020
- Funds are provided in the form of loans that will be **fully forgiven** when used for payroll costs. Not more than 25% of the forgiven amount may be for non-payroll costs.
- Payroll costs are capped at \$100,000 on an annualized basis for each employee. Subject to a \$10 million dollar cap.
- Must Keep Employees on Payroll – or Rehire Quickly.

# Paycheck Protection Loan

Eligibility: All businesses – including nonprofits, veteran organizations, tribal business concerns, **sole proprietorships, self-employed individuals,** and **independent contractors** – with **500 or fewer employees** can apply.

## Payment Terms:

- Term: 2 years
- Interest rate: 1.00% fixed rate
- Loan payments deferred for the first 6 months
- No prepayment penalties
- No collateral or personal guarantee requirement

Documentation Required: may vary depending on banking entity

- Organizations with employees:
  - Tax Form 940 from 2019
  - Tax form 941 or Payroll processor records for the period including Feb 15, 2020
- Sole Proprietors or Self-Employed
  - 1040 Schedule C for 2019 (or draft)
- Independent Contractors
  - Form 1099-MISC for 2019

# Emergency Economic Injury Disaster Loans (EIDL)

- EIDLs have been extended to COVID-19 affected businesses. Usually available for businesses that suffer substantial economic injury as a result of a natural disaster.
- Emergency Advance of up to \$10,000 (fully forgivable)
- You may use the \$10,000 loan advance for:
  - Providing paid sick leave to employees;
  - Maintaining payroll;
  - Meeting increased costs to obtain materials;
  - Making rent or mortgage payments; or
  - Repaying obligations that cannot be met due to revenue losses.
- Up to \$2 million loan amount
- With the exception to the EIDL Emergency Advance, an EIDL must be repaid.
- The interest rate for small businesses is 3.75 percent and the interest rate for non-profits is 2.75 percent for terms up to 30 years.

# Main Street Lending Program

- The Federal Reserve has announced that it will establish a Main Street Lending Program to support small and medium-sized businesses.
- Loan amounts: ***\$500,000 to \$200 million.***
- Eligibility:
  - Companies with ***less than 15,000 employees*** or ***annual revenue of up to \$5 billion*** are eligible.
  - Companies that have received PPP loans are permitted to borrow under the Main Street Lending Program, provided they are eligible.
- Payment Terms:
  - Term: 4 years at an interest rate.
  - Interest rate: LIBOR + 3%.
  - Loan payments deferred for one year.
- ***Not Guaranteed like the PPP.***
- The central bank will buy ***either 95% or 85% of every loan up to \$600 billion*** to ease the burden on banks balance sheets and incentivize lending.



# Q&A



Thank you for your attention!

## Contact Us

**Christie García**

*ONTIER Miami - Partner*

[chgarcia@ontier.net](mailto:chgarcia@ontier.net)

**Marta Corbí**

*ONTIER Miami - Country Manager*

[mcorbi@ontier.net](mailto:mcorbi@ontier.net)