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COVID-19

Business Owner's Guide

What you need to know

As of April 24, 2020

During this unprecedented time, business owners are grappling with uncertainty and have many questions. As the situation continues to evolve, the inundation of information is confusing as to what is important for the business today and into the future. This guide should help you understand the current landscape and provide considerations and recommendations to help make informed business decisions. Topics include: Business Interruption Insurance, Contracts, Economic Relief, Electronic Payments, Employment, Estate Planning, Immigration, Restructuring, and Tax.

Have you looked into business interruption insurance?

Task Force Experts:
Mark Cooper
Arthur Siegal

- ☐ Look at your existing insurance policies to determine if the policies include business interruption coverage that might help minimize financial consequences.
- ☐ Losses may be covered under three sections of a typical commercial property policy, which include:
  - If there is physical property damage to the insured property that interrupts the insured's business operations;
  - Under the contingent business interruption extension found in some policies;
  - Under the civil or military authority provision.
- ☐ Coverage options available may include:
  - Extending business interruption coverage for an additional premium.
  - Contingent business interruption coverage, for an additional premium, which applies when damage occurs to property owned by the insured's primary supplier, partner, or customer and affects the insured's ability to do business.
  - Civil authority coverage, which applies when an insured is unable to access its property as the result of a government order.
- ☐ Pay close attention to policy language to fully understand the coverage.
- ☐ Begin documenting losses to make a claim for coverage.
- ☐ Consult an expert before making a claim or filing a lawsuit.

Have you started reviewing your existing contracts?

Task Force Experts:
Arthur Siegal
Trey Brice
George Sumnik

- ☐ Check your contracts and look for force majeure provisions. No force majeure provision? Nonperformance may still be excused under the frustration of purpose or impossibility doctrines.
- ☐ Look at options to alleviate pressures to meet covenants under your financing arrangements.
- ☐ Negotiate with lenders, customers, suppliers, and landlords to extend or modify terms and defer performance dates. Be careful not to make lengthy commitments.
- ☐ For contracts currently being negotiated, reconsider drafting force majeure provisions.
- ☐ Reach out to a task force member if you receive a letter from an entity with whom you have a contract asserting that you are critical or essential and should continue to operate under a contract. There are a few key steps you need to take.

Are you in need of or currently considering financial assistance?

Task Force Experts:
[Eric Novetsky]
[Ian Evans]
[Aaron Sherbin]

Small Businesses

- Economic Injury Disaster Relief (EIDL) Loan Eligibility:
    - Funds appropriated by Congress were fully expended as of April 10, 2020. Legislators are currently negotiating the appropriation of additional funding to reopen the program.
    - Eligibility for EIDL now covers most businesses, cooperatives and ESOPs with 500 or fewer employees and individuals operating as a sole proprietorship, with or without employees, or as an independent contractor.
    - Low interest rate loans of up to $2 million with no payments for 12 months and up to 30-year terms.
    - Funds used for working capital purposes, including payment of fixed debts, payroll, and accounts payable.
- Paycheck Protection Program (PPP) Loans:
    - As of April 10, 2020, this program was fully subscribed and closed to new borrowers. Legislators are currently negotiating the appropriation of additional funding to reopen the program.
    - Only one low interest loan per business is permitted.
    - These are forgivable loans to most businesses with 500 employees or less.
    - Loan proceeds may be used to pay payroll costs, rent, utilities, and interest (not principal) on mortgages and other debts. No payments are required for 6 months (minimum) and up to 1 year (as determined by the SBA).
    - Loan amount is 2.5 times average monthly payroll costs, plus, if applicable, the outstanding balance of any SBA EIDL made between January 31, 2020 and April 3, 2020.
    - Loan obligations will be forgiven (i.e., canceled and not repaid) up to the sum expenses paid (noted above) by the borrower during the 8 weeks following origination. At least 75% of the amount forgiven must be attributable to payroll costs.
        - Although this forgiveness is excluded from income for federal income tax purposes, it may be subject to taxation by certain states.
    - Do you have affiliates? They can affect eligibility.
    - Eligibility determination is complicated. Reach out to one of our task force members prior to proceeding.
- Localized Relief in Michigan
    - The MEDC Program is providing $10 million in grants and $10 million in loans to small businesses.
    - Grant and loan qualifications and use criteria vary. Reach out to one of our task force experts prior to proceeding.
    - Michigan counties have since announced fiscal plans for assisting small businesses operating within their municipalities.

Mid-size companies

Title IV of the CARES Act allocates $500 billion in financial assistance (including loans, loan guarantees, and investments) to eligible businesses, states, and municipalities.

- Federal Reserve Direct Loans
    - Provides an alternative to mid-sized businesses that do not qualify for a Paycheck Protection Program (PPP) loan by providing banks and other lenders with funds to make direct loans to mid-sized profit and non-profit businesses with between 500 and 10,000 employees.

- Loans have an annualized interest rate of no greater than 2% and with no principal or interest due for at least 6 months (or longer, as determined by the Secretary of the Treasury).
- Forgiveness is not expressly prohibited and can be considered by the Secretary of the Treasury and the Federal Reserve.
- There are specific eligibility requirements that must be taken into consideration.

☐ Main Street Lending Programs
- Allows eligible banks to originate new Main Street loans and expand upon existing loans (new tranche).
- We await formal details; however, we have a brief summary of the terms including, but not limited to: the loans can be obtained in addition to PPP loans, eligible borrowers can have up to 10,000 employees or up to $2.5 billion in 2019 annual revenue, the loans are for 4 years with principal and interest deferred for 1 year, and interest rates are between 2.5% and 4%.
- There are attestations required that must be taken into consideration.

Are you processing or accepting electronic payments?

Task Force Experts:
Holli Targan
Nicole Meisner

ISOs, Payment Facilitators, Processors, and Sponsor Banks

☐ Review termination rights and implications under your contracts.
☐ Examine performance standards, including minimums, under your payment processing contracts.
☐ Analyze contractual and compliance obligations.
☐ Look for requirements to report changes to your financial condition or that of your merchants.
☐ Examine reserve account requirements - Increases may be required or advised.
☐ Reevaluate portfolio risk - Beware of changes that may require additional compliance obligations or notices.

Merchants

☐ Manage chargebacks and work with your customers proactively to resolve disputes.
☐ Review card brands' guidance for best practices handling consumer disputes and refunds.
☐ Review merchant agreements before changing the way in which customers' card payments are accepted. The change in transaction type could result in increased processing fees to account for increased risk in card-not-present transactions.

Are you aware of all of the employment changes?

Task Force Experts:
Nicole Foley
Patrice Arend

The Families First Coronavirus Response Act (FFCRA) requires covered employers to provide eligible employees with (1) Emergency Paid Sick Leave and (2) Expanded Family Medical Leave for a limited time for leaves of absence due to COVID-19. The FFCRA applies to leaves of absence taken between April 1, 2020 and December 31, 2020.

☐ Are you a covered employer?
- Yes, if you have less than 500 employees. The calculation of number of employees can be tricky and should not be assumed. We can help.

☐ Are you a small business with fewer than 50 employees?
- You may be exempt from compliance, depending on its impact on your business.

- Who is/is not an eligible employee?
  - An employee must be unable to work (or telework) due to a COVID-19 event. The reasons for leave are stated in the FFCRA and require a factual analysis.
  - An employee furloughed before COVID-19 is not eligible for paid leave under the FFCRA.
  - An employee furloughed while on paid leave under the FFCRA loses his/her eligibility if he/she would have been furloughed even if not on leave.
- How long is the leave of absence?
  - Employees unable to work because they are caring for a child whose school or daycare is closed are eligible for a total of 12 weeks of paid leave when emergency paid sick leave and expanded family medical leave are combined.
  - Employees taking a leave for any of the other COVID-19 related reasons are eligible for 10 days of paid sick leave. Employers should also determine whether any state statutes require additional paid leave.
  - Additionally, employees otherwise eligible for leave under the FMLA may be entitled to a leave of absence in accordance with that Federal statute.
- How much are employers required to pay?
  - If an employee takes leave to care for him/herself or under doctor's orders to isolate, then the employer must pay the employee 100% of his/her regular rate of pay, subject to the statute's caps.
  - If an employee takes leave to care for an individual other than him/herself or to care for a child due to the closure of a school or daycare, then the employer is only obligated to pay the employee 2/3 of the employee's regular rate of pay, subject to the statute's caps.
  - Employees cannot be forced to take employer paid time, such as vacation and sick time, before being allowed to use paid leave under the FFCRA.
- What type of documentation does an employee need to provide to obtain a leave of absence?
  - Similar to taking FMLA leave, employers can require employees to provide documentation to substantiate the need for leave. We can help you understand what you should ask for and any stipulations under Executive Orders.
- Employees who have exhausted leave under the FFCRA and any employer provided leave are eligible for unemployment insurance benefits from the state and supplemented by the federal government if they are unable to return to work.
- Have you posted a notice that explains the FFCRA's paid leave provisions?
  - The notice should be posted with other HR documents, uploaded to your intranet, or emailed to teleworking employees.
- Have you evaluated your eligibility for a credit against Social Security taxes for the amount of emergency paid sick leave and expanded family medical leave paid?
  - Employers should secure as much information from the employee as possible to substantiate the allowable tax credits available to employers under the FFCRA.

Additional Employment Considerations

- ☐ Can you discipline employees if absent?
  - Employers cannot discipline employees for being absent under COVID-19 circumstances.
- ☐ Thinking of furloughing a significant portion of your workforce or shutdown part of all job sites?
  - There could be potential WARN Act implications to consider. Consult with one of our task force experts before proceeding.
- ☐ Executive Orders and local ordinances contain requirements for employers including, but not limited to, screening employees, implementing social distancing, and cleaning protocols.

What estate planning steps should be taken now?

Task Force Experts:
Aaron Sherbin
Michael Weil

- ☐ Do you have an estate plan in place?
  - If so, make sure you and trusted family members know where your estate plan documents are. Have extra copies of your health care documents ready to take with you if you need to be admitted to the hospital. Also, review your plan to determine if it reflects your wishes. Consider updates in light of COVID-19.
  - If you do not, you should have one prepared that (i) provides for the disposition of your property, (ii) designates the persons who will handle your affairs and make decisions for you if you are deceased or disabled, (iii) avoids probate, (iv) designates a guardian and conservator for your minor children, and (v) minimizes or avoids estate taxes.
- ☐ In light of COVID-19, pay particular attention to your Durable Power of Attorney for Health Care, Do-Not-Resuscitate (DNR) Order, Living Will, and HIPAA Release. Consider including language (i) expressly authorizing your health care agent to communicate with health care providers by telephone, videoconferencing, and email, and (ii) addressing intubation.
- ☐ Do your children over the age of 18 have an estate plan?
  - At a minimum, your children should have documents in place appointing an agent to make financial decisions and medical decisions in the event they are unable to do so.
- ☐ What wealth transfer opportunities should you consider in the current economic and low interest rate environment?
  - Create a Grantor Retained Annuity Trust (GRAT).
  - Create a Charitable Lead Annuity Trust (CLAT).
  - Make a low interest loan to a family member or refinance a current loan to reduce the interest rate.
  - Make gifts to take advantage of the federal lifetime estate and gift tax exemption before it's reduced. A wealth transfer technique that works particularly well is a Spousal Lifetime Access Trust (SLAT).
- ☐ While we are currently subject to a "stay-at-home" order, there are still ways through videoconferencing and other electronic means to meet and review/discuss estate planning, prepare and review documents, and sign and witness documents. Do not let the current environment deter you from accomplishing this important goal!

Are you wondering how to handle immigration issues?

Task Force Experts:
Eli Maroko
Kreuza Gjezi
Ilene Zaitouna

- Determine whether you or your employees have travel or immigration problems or needs that require assistance.
  - Temporarily suspending some immigration into the US, by Presidential Executive Order, leaving you or others stranded, either inside or outside the US.
  - Events scheduled within upcoming months and uncertain whether travelers from outside the US will be permitted to attend (i.e., weddings, graduations, Board meetings).
- Know that government agency processing of immigration continues (Permanent Resident Green Cards, employment, and investment-based petitions, etc.) despite the temporary discontinuance of in-person appointments and interviews.

Are you considering restructuring due to the financial impact?

Task Force Expert:
Paul Hage

The CARES Act amends the newly enacted Small Business Reorganization Act of 2019 (the "SBRA").

- A streamlined and cost-effective process for small businesses to quickly reorganize in chapter 11.
- It increases the debt limit eligibility threshold for businesses filing for relief as a small business debtor from $2,725,625 to $7,500,000, which substantially increases the percentage of businesses that will be able to take advantage of the restructuring benefits afforded by the SBRA.
- Consult with our task force expert if you need help.

Are you aware of the material business tax provisions?

Task Force Experts:
Marko Belej
Bill Sider
Daniel Soleimani

- *Employment Tax Credits:* Provides a credit against payments of Social Security taxes (but not Medicare taxes) equal to 50% of the "qualified wages" paid by an "eligible employer."
  - An "eligible employer" is an employer (i) whose business operations were fully or partially suspended by a government-ordered COVID-19 shutdown or (ii) whose gross receipts for any calendar quarter are less than 50% of the gross receipts for the same quarter in the prior year.
  - For an employer with more than 100 full-time equivalent employees, "qualified wages" are only wages paid for services that are not being performed during the applicable period as a result of the shutdown.
  - For an employer with 100 or fewer full-time equivalent employees, "qualified wages" include all wages.
  - Qualified wages are limited to the first $10,000 of compensation paid to each employee after March 12, 2020 and before January 1, 2021 (i.e., the maximum credit per employee is $5,000).
  - A taxpayer that receives an SBA loan under the Act cannot also receive the credit. The credit is refundable.
  - Note that an employer may not also deduct wages for which it has taken a credit.
- *Employment Tax Deferral:* The due date for payments of Social Security taxes (but not Medicare taxes) otherwise due from March 27, 2020 through December 31, 2020 is extended as follows: 50% on December 31, 2021 and 50% on December 31, 2022.
  - An employer that has obtained a PPP loan may defer payments of Social Security taxes under this provision, but only until its lender issues a notice that the loan has been forgiven.

- *Net Operating Losses:* NOLs arising in 2018 - 2020 can be carried back for up to 5 years, and the use of NOL carrybacks and carryforwards in tax years beginning before January 1, 2021 is no longer limited to 80% of taxable income.
  - An amended return would need to be filed to apply NOLs against income in a prior tax year.
- *Expensing of Qualified Improvement Property:* "Qualified improvement property" (improvements to the interiors of nonresidential buildings) is now eligible for bonus depreciation.
- *Other Taxpayer-Friendly Revisions of the TCJA (Tax Cuts and Jobs Act):* Revises or repeals other revenue-raising provisions added by the TCJA in 2017:
  - Removes the excess business loss limitation added by the TCJA.
  - Under the TCJA, a taxpayer's deduction for business interest was limited to 30% of its taxable income. The Act increases this limitation to 50% (with adjustments) for tax years beginning in 2019 and 2020, and a taxpayer can elect to use its 2019 taxable income (which may be higher) for computing its 2020 limitation.
  - Under the TCJA, the corporate alternative minimum tax (AMT) was repealed, but corporate AMT credits were made available as refundable credits over several years, ending in 2021. The Act allows corporations to accelerate the recovery of these AMT credits.
- *Conversion to C Corporation to obtain Section 1202 exclusion:* If your business is currently taxed as a partnership or sole proprietorship and you expect an exit event after 5 years, consider converting to a C corporation, to exclude the gain from the exit under Code Section 1202.
  - The current depressed business values make this strategy more effective by increasing the amount of gain available for exclusion.
  - In addition, companies that were previously too big for Code Section 1202 (gross assets cannot exceed $50 million) may now qualify.
- *Harvesting of Losses:* Taxpayers who sell investments to trigger losses and reinvest the proceeds should be mindful of the wash sale rules.
  - Under the wash sale rules, if a person sells stock or securities and buys "substantially identical stock or securities" either 30 days before or after the sale, the loss from the sale will be disallowed.
  - Note that a sale of mutual fund interests and a reinvestment in a different mutual fund may skirt these rules.

For additional guidance, visit our COVID-19 Resource Center or reach out to one of our COVID-19 Task Force Experts listed above.

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The foregoing is not intended to be an exhaustive list, but rather an initial step to help businesses navigate and identify the myriad of legal issues. The current environment is changing fast, and we will continue to monitor it and provide updates. This is only a general summary and is being provided with the understanding that Jaffe Raitt Heuer & Weiss, P.C. is not rendering legal, tax or other professional advice, positions or opinions on specific facts or matters and, therefore, assumes no liability whatsoever in connection with its use.