



Hot Topics Arising from the Coronavirus (COVID-19) Pandemic Impacting the Construction Industry

David Gobeo, West Palm Beach

Amy Turci, Jacksonville

» Tuesday, April 14, 2020

Presenters:



David Gobeo

Partner

West Palm Beach Office

561.345.7512

dgobeo@fordharrison.com



Amy Turci

Partner

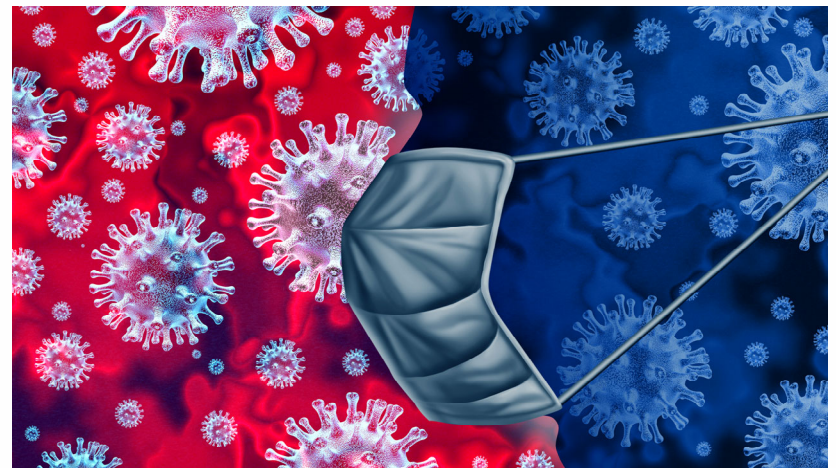
Jacksonville Office

904.357.2004

aturci@fordharrison.com

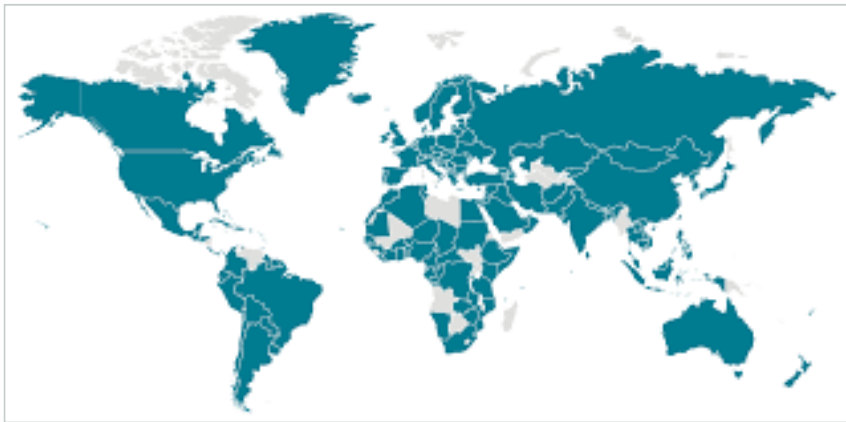
Agenda

- Background – Current status of COVID-19
- Families First Coronavirus Response Act
- The CARES Act
- Employment-related issues during the pandemic
- Q&A

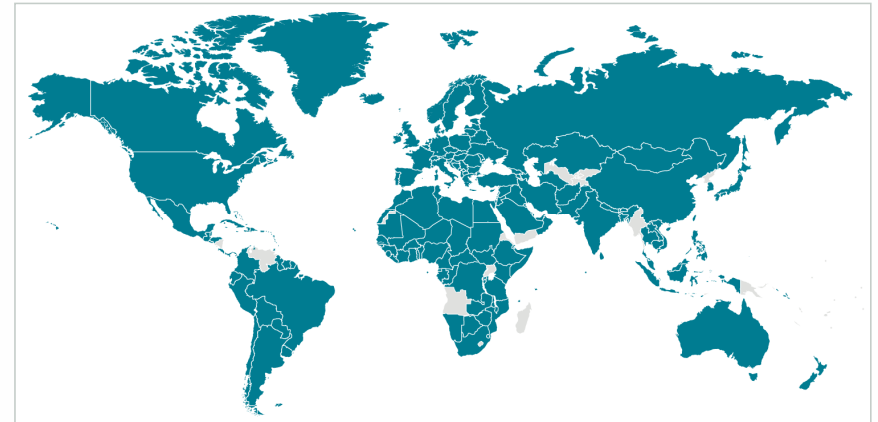


Coronavirus (COVID-19) Comparison – One Week Ago vs. Today

- 1,498,000 Cases
- 89,732 deaths

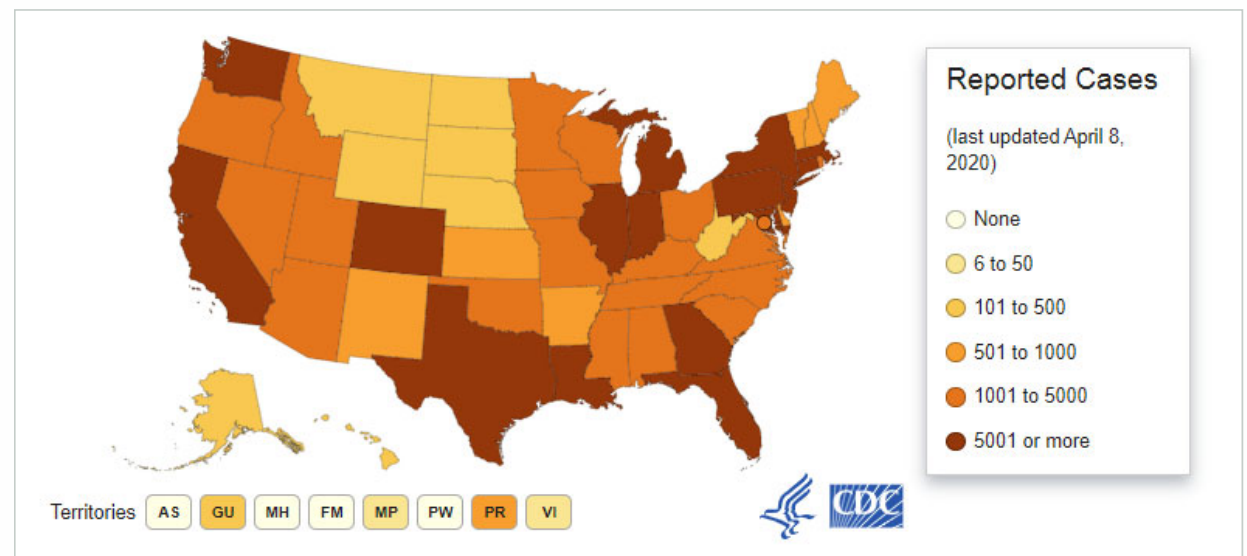


- 1,930,780 Cases
- 120,863 deaths



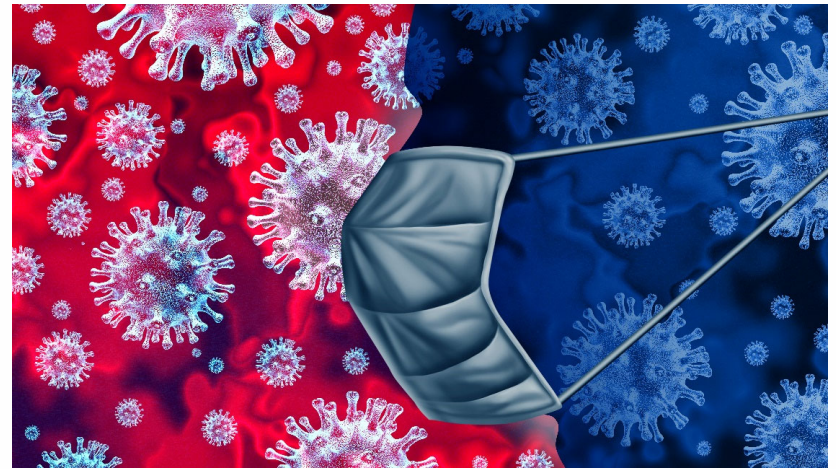
Coronavirus (COVID-19)

- In the U.S. (as of April 14, 2020 @ 11:00 AM)
- Cases – 587,357 (435,167 one week ago)
- Deaths - 23,649 (14,788 one week ago)



FFCRA

Families First Coronavirus Response Act



Paid Sick Leave

- The Emergency Paid Sick Leave Act (the paid leave provision) requires private employers who employ **fewer than 500 employees** (and government employers) to provide paid sick time to employees ***to the extent that the employee is unable to work (or telework)*** because of certain COVID-19 related reasons.
- Effective Date: **4/1/2020**
- All employees no matter how long employed.
- Exception: Employers of health care providers or emergency responders may elect not to provide this leave to those employees.

Paid Sick Leave

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 due to concerns related to 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 a quarantine or isolation order or has been advised by a health care provider to self-quarantine.
5. The employee is caring for a son or daughter because the child's school or place of care has been closed or the child's childcare is unavailable due to COVID 19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of the HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Paid Sick Leave

- **80 hours** (or PT equivalent)
- What if employee hours vary from week to week?
- If time off is taken for self-care, employees must be compensated at the higher of (1) the employee's regular rate of pay, (2) federal minimum wage, or (3) the local minimum wage.
- If time off is taken to care for someone else or a child who is not in school, employees must be compensated at 2/3rd of their regular rate of pay.
- **Capped** at \$511 per day or \$5,110 total for 1-3 and \$200/day or \$2,000 total per employee for 4-6;
- There is no carryover from year to year for this paid sick time. Right to pay ends on 12/31/2020
- Employers cannot require an employee to find a replacement before allowing the employee to take this paid sick time.

Paid Sick Leave

- An employee may first use the paid sick time before other leave
- An employer **may not require** an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time.
- Failure to provide leave is an FLSA violation
 - Fines, imprisonment up to 6 months
 - Amount of leave not paid
 - Liquidated damages for willful violations
 - Attorneys' fees
 - Collective Actions????
- Retaliation prohibited
 - Cannot discharge, discipline or in any other manner discrimination against an employee who takes leave or who files a complaint
 - If an employer willfully retaliates, it is an FLSA violation (see above)

FMLA Amendments – Paid EFMLA

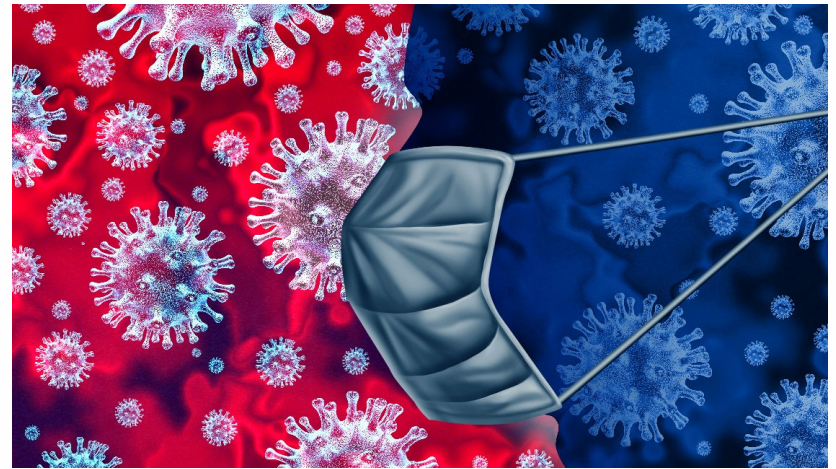
- Employers who have fewer than 500 employees
- Employees who have worked 30 days or more
 - Includes part-timers
- Exception: Employers of health care providers or emergency responders may elect not to provide this leave to those employees. **See previous broad definition**
- 12 weeks total (**10 of them partially paid**)
- For school and childcare-related COVID-19 absences but if employee cannot work or telework
- First 10 days can be unpaid but employee can use any other available paid time off (including paid sick leave) that they have
- 2/3rd of employee's regular pay (at minimum) * hours worked
- Employees should provide notice *if* reasonably practicable
- Caps: Paid EFMLA may not exceed \$200 per day and \$10,000 in the aggregate.
- Effective **April 1, 2020**

FMLA Amendments – Paid EFMLA

- Intermittent Leave
 - Only by agreement of the employer
- Job Restoration
 - FMLA's standard job restoration requirements will apply to employers with 25 or more employees.
 - For employers who employ fewer than 25 employees, job restoration is not required if all the following conditions are met:
 - The employee takes EFMLA
 - The position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave
 - The employer makes reasonable efforts to restore the employee to an equivalent position
 - If no equivalent positions are available at the time the employee tries to return from leave, the employer must attempt to contact the employee if an equivalent position becomes available in the next year.

CARES Act

Unemployment Insurance Provisions



Existing Unemployment Benefits Basics

- All states follow the same guidelines established by federal law.
- However, **each state administers a separate unemployment insurance programs**, which dictate (among other things):
 - Eligibility levels
 - Benefit amounts
 - Duration of benefits
 - Whether benefits are charged to employer accounts
- *Usually*, UI is **not** available for individuals that are self-employed, unable to work, quit, were fired for misconduct, or refused to accept a job without a good reason.

March 12, 2020: DOL Encourages UI Flexibilities Related to COVID-19



U.S. DEPARTMENT OF LABOR

News Release

U.S. DEPARTMENT OF LABOR ANNOUNCES NEW GUIDANCE ON UNEMPLOYMENT INSURANCE FLEXIBILITIES DURING COVID-19 OUTBREAK

WASHINGTON, DC – Following President Donald J. Trump's swift action to protect the American workforce from exposure to COVID-19 – also known as novel coronavirus – the U.S. Department of Labor today announced new guidance outlining flexibilities that states have in administering their unemployment insurance (UI) programs to assist Americans affected by the COVID-19 outbreak.

https://wdr.doleta.gov/directives/attach/UIPL/UIPL_10-20.pdf

CARES Act – Unemployment Insurance Provisions

- The CARES Act establishes three core programs.
- The CARES Act requires each state to enter into an agreement with the federal government.
- Whether a state has entered into an agreement is triggering event for some provisions.

Federal Pandemic Unemployment Compensation (FPUC)

- *Statutory Section:* Section 2104
- *Who is Eligible:* Individuals who, as determined by the applicable state unemployment agency, meet that state's criteria to receive UI benefits.
- *Benefit Provided:* The law provides an increase of a flat payment of \$600 per week to the amount regularly available for unemployment under state law.
- *Additional Criteria that Must be Met to Receive PUC:* None
- *Time Period for Increased Compensation:* This increase applies to weeks of unemployment beginning after the state agrees to participate in the program through July 31, 2020 (approximately four months).

Pandemic Unemployment Assistance (PUA)

- *Statutory Section:* Section 2102
- *Who is Eligible:* Individuals who are not usually eligible for unemployment benefits, including those who are furloughed or out of work as a direct result of COVID-19, self-employed and independent contractors, and **those who have exhausted all rights to regular or extended UI benefits under state or federal law.**
 - *Excluded from Eligibility:* Individuals who have the ability to telework with pay and those who are receiving paid sick leave or other paid benefits (even if they otherwise satisfy the criteria described below to receive assistance under the new law) are expressly excluded from coverage.
- *Benefit Provided:* The PUA will equal the minimum weekly benefit amount described in the Stafford Act Disaster Unemployment Assistance (DUA) program, which is the model for the PUA program (CFR 625.6 of Title 20), **plus** the \$600 per week federally funded supplement (similar to that provided to UI recipients under the PUC).
- *Additional Criteria that must be Met to Receive the PUA:* Applicants for PUA must provide self-certification that they are (1) partially or fully unemployed or (2) unable and unavailable to work because of one of the reasons listed on the next slide

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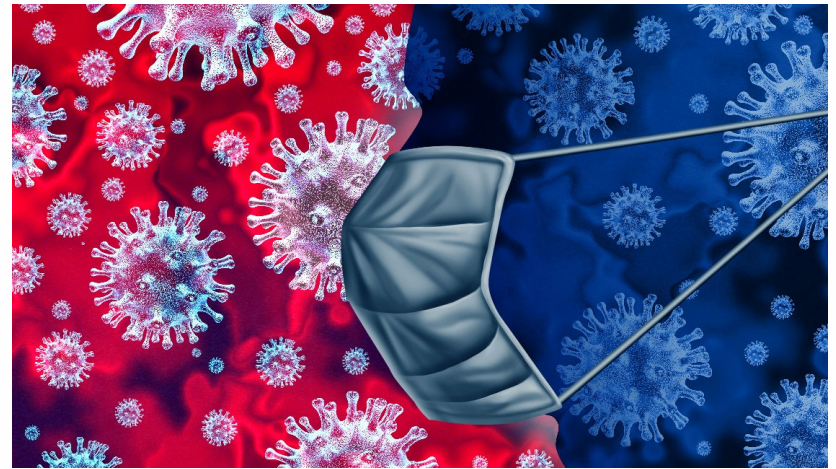
1. the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 2. a member of the individual's household has been diagnosed with COVID-19;
 3. the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;
 4. a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
 5. the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
 6. the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 7. the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
 8. the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
 9. the individual has to quit his or her job as a direct result of COVID-19;
 10. the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or
 11. the individual meets other criteria established by the Secretary of Labor.
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Pandemic Emergency Unemployment Compensation (PEUC)

- *Statutory Section:* Section 2107
- *Who is Eligible:* UI recipients who exhaust all of their regular state UI benefits, which range from as few as 12 weeks to a maximum of 26 weeks depending on the state
- *Benefit Provided:* Additional 13 weeks of state UI benefits
- *Additional Criteria that Must be Met to Receive PEUC:* Individuals must have exhausted their regular state UI benefits and be actively engaged in searching for work
- *Time Period for Extended Benefits:* The benefits extension is available through December 31, 2020, unless otherwise extended.

CARES Act

Paycheck Protection Program



Loan Eligibility – Size Requirements

- You are eligible for the Paycheck Protection Program (“PPP”) if you are a small business with fewer than 500 employees.
- Generally, affiliates are combined for purposes of determining number of employees. Entities are affiliates of one another when one controls or has the power to control the other or a third party controls or has the power to control both.
- Normal affiliation rules do not apply if operating as a franchise that is assigned a franchise identifier code by the Small Business Act (“SBA”) or assigned a North American Classification System (“NAICS”) code beginning with 72 (accommodation and food industries).
- Businesses that employ less than 500 employees per location are also eligible if assigned a NAICS code beginning with 72.

Loan Eligibility – Certification and Other Requirements

Must make good faith certification that:

- (1) the uncertainty of current economic conditions makes necessary the loan request to support ongoing operations;
 - (2) funds will be used to retain workers and maintain payroll or make mortgage payments, lease payment and utility payments; and
 - (3) no application pending for duplicative loan, and no other applications made for same loan between 2/15/2020 and 12/31/2020.
- Collateral Requirement? None
 - Economic Hardship Requirement? None
 - Lost Revenue Requirement? None
 - Personal guarantee requirement? None
 - Use Requirement: Anti-Fraud provision

Determining Loan Amount

- The maximum loan amount shall be the lesser of \$10mm or:
 - (a) the product obtained by multiplying the average total monthly payment by the applicant for payroll costs incurred during the 1 year period before the date on which the loan is made by 2.5; or
 - (b) the product obtained by multiplying the average total monthly payment by the applicant for payroll costs incurred from January 1, 2020 through February 29, 2020 by 2.5 (if not in business during the period from February 15, 2019 through June 30, 2019); and
 - Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL loan (because the advance does not have to be repaid).
- “Payroll costs” **include**: (a) salary/wages, commission, cash tips; (b) allowance for dismissal or separation; (c) vacation, sick, family, or parental leave; (d) payments for group health benefits, retirement benefits; and (e) state/local taxes on compensation of employees.
- “Payroll costs” **exclude**: (a) compensation of an individual employee in excess of an annual salary of \$100,000 as prorated from February 15, to June 30, 2020; (b) federal taxes; (c) compensation of an employee whose principal place of business is outside the United States; and (d) sick or family leave wages under the Families First Coronavirus Response Act.

Uses of the Loan

- The loan may be used for:
 - Payroll Costs (at least 75 percent of loan proceeds)
 - Costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums
 - Employee salaries, commissions, or similar compensations
 - Payments of interest on any mortgage obligation (does not include principal)
 - Rent (including rent under a lease agreement)
 - Utilities
 - Interest on any other debt obligations that were incurred before issuance of the loan
 - Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020 you can apply for a PPP loan. If it was not used for payroll costs, it does not affect your eligibility for a PPP loan. If it was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

Loan Forgiveness – What May be Forgiven

Loans taken under the PPP may be forgiven—in whole or in part—if used for purposes authorized by the CARES Act.

- Amounts eligible for forgiveness are equal to the sum of:
 - Payroll costs
 - “Payroll costs” are the same as those defined in the PPP for the purpose of calculating the maximum loan amounts
 - Interest on covered mortgage obligations
 - Covered rent obligations
 - Covered utility payments
 - “Covered” mortgages, rent, and utilities are those incurred prior to February 15, 2020
 - That are paid during the covered period, which is the 8-week period beginning on the date of the loan.

Loan Forgiveness – How Does It Work

A borrower may not have the entirety of its loan forgiven if:

1. Improper Use: Loan proceeds are used for other than payroll costs or covered mortgage interest, rent, and/or utilities paid during the covered period; and/or
2. Failure to Maintain Headcount and Wage/Salary Levels.
 - A. Headcount: The amount eligible for forgiveness will be reduced if the borrower decreases its full-time employee headcount
 - The reduction amount is calculated as follows:
 - Average monthly payroll costs is MULTIPLIED BY –
 - Average number of full-time employees during the covered period DIVIDED BY (a) the average number of full-time employees per month from February 15, 2019 to June 30, 2019 OR (b) the average number of full-time employees per month from January 1, 2020 to February 29, 2020.)
 - Calculation differs slightly for seasonal employers and employers who were not in business between February 15, 2019 and June 30, 2019.

Loan Forgiveness – How Does It Work (cont.)

2. Failure to Maintain Headcount and Wage/Salary Levels (Cont.)

B. Wages/Salaries: The amount eligible for forgiveness will also be reduced if the borrower decreases total salaries and wages of employees (who made less than \$100,000) during the loan period in excess of 25% the total wages the employee was paid in the most recent full quarter in which the employee was employed before the covered period.

- Example

- Employee earns \$15,000 in last quarter (\$5,000 per month)
- 25% of \$15,000 equals \$3,750, which is maximum amount of permitted reduction
- Employee would earn \$10,000 during 8 week loan, but \$6,250 with permissible reduction

Loan Forgiveness – The Exemption

BUT, a borrower may be able to eliminate any reductions based on decreased headcount or decreased payroll levels.

1. Reductions in headcount will not decrease the loan forgiveness amount where:
 - There is a reduction in full-time equivalent employees as compared to headcount on February 15, 2020;
 - The reduction takes place between February 15, 2020 and April 26, 2020 (30 days after the date of enactment); and
 - No later than June 30, 2020, the borrower eliminates the reduction.

Loan Forgiveness – The Exemption (Cont.)

2. Reductions in salary/wage levels will not decrease the loan forgiveness amount where:
- There is a reduction in salary or wages of 1 or more employees (who were not paid over \$100,000 in 2019) as compared to February 15, 2020;
 - The reduction takes place between February 15, 2020 and April 26, 2020; and
 - No later than June 30, 2020, the borrower eliminates that reduction

What Happens to Unforgiven Amounts

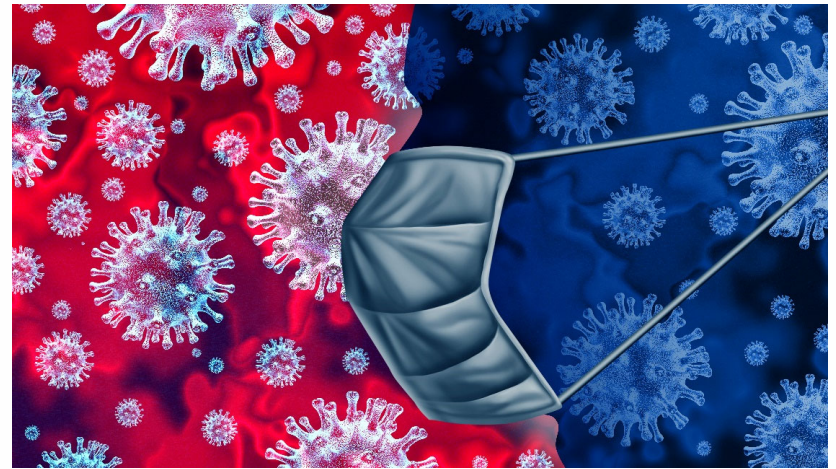
- 1 Percent fixed interest rate
- Deferment of payment for 6 months following the date of the disbursement of the loan
- Interest will continue to accrue during the 6 month deferment
- Loan is due 2 years from issuance
- You can pay earlier than 2 years – there is no prepayment penalty

Employee Retention Tax Credit

- The CARES Act also provides an employee retention tax credit for eligible employers
 - Refundable tax credit equal to half of the wages paid to employees between March 12, 2020 and January 1, 2021 up to \$10,000 per employee per year.
 - The credit is applied to employer social security taxes.
- Eligible employers are employers that were doing business in 2020 which, in any quarter
 - Fully or partially suspended business due to COVID-19; or
 - Suffered a significant decline in gross receipts in a period beginning with the first quarter on December 31, 2019, for which gross receipts for the quarter are less than 50% of gross receipts for the same quarter in the prior year.
- For an employer that has more than 100 employees, the tax credit applies to wages paid to employees who are not working. For smaller employers, the credit applies to compensation paid to both non-working and working employees (including, for example, those whose schedules are reduced).

CARES Act

Economic Stabilization Act



Coronavirus Economic Stabilization Act

- Allocates \$454 billion to the U.S. Treasury's Exchange Stabilization Fund.
- Loans to eligible “midsized” businesses with 500 to 10,000 employees.
- Unlike PPP loans, no part of these loans is forgivable.
- Must be an air carrier or a “United States business” that has not received other loans or guarantees under the CARES Act.
- However, a borrower companies must certify that it is created or organized in the United States or under the laws of the United States, and has significant operations in and a majority of its employees based in the United States.

Coronavirus Economic Stabilization Act

- Loans on favorable terms:
 - Maximum interest rate of 2%
 - 6 month deferral of all principal and interest payments
- But with strings attached:
 - Cannot reduce employment levels by more than 10% of the size of the workforce on March 24, 2020.

Coronavirus Economic Stabilization Act

- A borrower company must certify that:
 - Funds will be used to retain at least 90% of workforce until September 30
 - It will not increase salaries of highly compensated executives
 - It is not in bankruptcy
 - It will not pay stock dividends or engage in stock buy-back during the term
 - It will not outsource or offshore jobs during loan term or 2 years thereafter
 - It will not abrogate a CBA for the term of the loan or 2 years thereafter
 - It will remain neutral in any unionizing effort for the term of the loan

Payroll Tax Deferral

- The CARES Act permits employers to defer payment of the employer portion of payroll taxes that would otherwise be due between March 27 and December 31, 2020.
- Employers that defer payroll taxes must pay at least 50% of the deferred payroll taxes by December 31, 2021, and the remaining 50% by December 31, 2022.
- Any employer that receives forgiveness for any portion of a Paycheck Protection Program Loan is ineligible to defer federal payroll taxes.

Q. Is there anything beneficial in the CARE Act for employers who had to reduce staff prior to the legislation being implemented?

A. Considerations

1. ESA Loan – 2% interest, no forgiveness
2. PPP Loan with no forgiveness (1% interest)
3. February 15 is operative date – return to headcount/pay to this level by June 30, can get forgiveness under PPP
4. Tax Credit if business drops enough

Potential Legal Issues

- Americans With Disabilities Act (ADA)
- Occupational Safety and Health Act (OSHA)
- Family and Medical Leave Act (FMLA)
- Title VII of the Civil Rights Act of 1964
(*discrimination based on race or national origin*)
- Fair Labor Standards Act (FLSA)



Potential Legal Issues

- National Labor Relations Act (NLRA) and Railway Labor Act (RLA)
- Worker Adjustment and Retraining Notification Act (WARN)
- Workers' Compensation
- Contract / Common law claims
- State and local laws regarding leave, wages, etc.



Legal Issues - ADA

- COVID-19 is generally not a “disability” under the ADA, but could lead to or affect disabling conditions
- Beware of potential “regarded as” claims
- Persons with existing disabilities (e.g., compromised immune systems) might request a reasonable accommodation
 - Don’t neglect the interactive process



Legal Issues – ADA / Title VII

- **Temperature check**
 - EEOC gave the green light
 - Ensure proper procedures (e.g., safety and confidentiality)
- https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm



Potential Legal Issues – FLSA

- Changed pay practices due to
 - telework
 - job coverage
- Monitoring/regulating telework
- Impact on exempt/non-exempt status



Potential Legal Issues – FLSA

- Telecommuting recordkeeping and pay issues
- Deductions for voluntary absences (exempt and non-exempt)
- Deductions for involuntary absences (exempt and non-exempt)



Legal Issues – WARN Act

- Only an issue with six-month shut down
 - Check state law
- Temporary lay-offs or shut downs permitted
- If statute triggered (extreme event), Coronavirus epidemic may be an exception to the 60-day notice requirement

Legal Issues - OSHA

- Requires that employers provide employees with workplace free from “recognized hazards” that cause or are likely to cause death or serious physical harm (general duty clause)
- Under OSHA, employees may refuse to work when there is a reasonable belief that there is a risk of imminent death or serious injury
- Beware of perceived retaliation for complaints about workplace safety



COVID-19 Cases as Recordable Events under OSHA

- In areas where there is ongoing community transmission, employers other than those in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services), and correctional institutions may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work.
- Accordingly, until further notice, OSHA will not enforce its recordkeeping requirements to require these employers to make work-relatedness determinations for COVID-19 cases, except where: (1) There is objective evidence that a COVID-19 case may be work-related; and (2) The evidence was reasonably available to the employer.
- Employers of workers in the healthcare industry, emergency response organizations and correctional institutions must continue to make work-relatedness determinations pursuant to 29 CFR Part 1904.”

CDC Facemask Guidance for Essential Workers

Critical Infrastructure workers who have had an exposure but remain asymptomatic should adhere to the following practices prior to and during their work shift:

- **Pre-Screen:** Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility.
- **Regular Monitoring:** As long as the employee doesn't have a temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
- **Wear a Mask:** The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.
- **Social Distance:** The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
- **Disinfect and Clean work spaces:** Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.

CDC Safe Work Practices

ADDITIONAL CONSIDERATIONS

- Employees should not share headsets or other objects that are near mouth or nose.
- Employers should increase the frequency of cleaning commonly touched surfaces.
- Employees and employers should consider pilot testing the use of face masks to ensure they do not interfere with work assignments.
- Employers should work with facility maintenance staff to increase air exchanges in room.
- Employees should physically distance when they take breaks together. Stagger breaks and don't congregate in the break room, and don't share food or utensils.



Questions?



David Gobeo
Partner
West Palm Beach Office
561.345.7512
dgobeo@fordharrison.com



Amy Turci
Partner
Jacksonville Office
904.357.2004
aturci@fordharrison.com