

COVID-19

## CORONAVIRUS: WHAT SHOULD YOUR BUSINESS BE DOING TO COMPLY WITH THE LAW AND TAKE ADVANTAGE OF STIMULUS DOLLARS?

April 3, 2020

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*Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#).*

The last month has brought a dizzying array of changes to each of our lives and new legal risks and challenges to individuals, businesses, and non-profits. In this update, we outline steps that you can take now to give your business the best chance to survive and thrive in this evolving environment. We include links to important information and previous updates that you may find useful.

### 1. LEARN ABOUT SMALL BUSINESS ADMINISTRATION (SBA) PROGRAMS AND APPLY FOR AN SBA LOAN

The SBA is offering two loan programs with favorable terms to entities impacted by the COVID-19 pandemic. You should carefully consider which program to apply for, because applying for one may impact your eligibility or relief available from the other.

#### **Paycheck Protection Program (PPP)**

The PPP is a federally guaranteed loan program administered by the SBA as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act and is an extension of the SBA's 7(a) Loan Program. Generally, a qualifying business employs fewer than 500 people, but there are several exceptions. Beginning April 3, 2020, qualifying businesses and non-profits can apply for loans of up to 2.5 times annual payroll costs to cover payroll and certain other expenses. The program is particularly attractive because borrowers do not need to provide collateral nor guarantee the loan, and payments can be deferred. There are no loan fees to the borrower and a portion of the loan (amounts paid for payroll and other defined costs) can be forgiven.

The SBA issued its interim Final Rule for the PPP program on April 2, which answered key questions, including whether payments to independent contractors can be included in calculating annual payroll costs (they can't), how

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much of the loan must be used to cover payroll costs to be forgiven (75%), and that the loan term is 2 years (not 10). The SBA is expanding the range of approved lenders beyond its traditional network of SBA lenders. Because PPP loans are made available on a first-come, first-served basis, we suggest you apply early, using this application that was made available on April 3.

## **COVID-19 Economic Injury Disaster Loans and Loan Advances**

Federal disaster loans and loan advances are available to qualifying small businesses and nonprofits in declared disaster areas to provide relief as a result of COVID-19-related loss of revenue. Up to \$2 million in working capital loans are available, with advances up to \$10,000. Advances do not need to be repaid. You can apply on the SBA website, and the application process has been streamlined and is relatively simple to complete.

Resources:

SBA PPP Information Sheet

PPP Application Form

Economic Injury Disaster Loans and Loan Advance

Issue Alert: Key Tax and Business Provisions (March 27, 2020)

## **2. IF YOU HAVE NOT ALREADY DONE SO, POST THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) NOTICE AND PROVIDE LEAVE AS APPROPRIATE**

The FFCRA is now the law of the land, at least until December 31, 2020, and requires certain employers with fewer than 500 employees to provide employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. This law significantly changed the leave that employers must provide employees. Employers must provide notice of these changes to employees by posting the new DOL notice in the workplace and taking steps to make sure that remote or tele-workers receive notice. The FFCRA provides employers refundable tax credits that reimburse them dollar-for-dollar for the cost of providing paid sick and family leave wages to their employees. To be eligible for such tax credits, employers must retain documentation of all FFCRA leave requests as set forth on the IRS website. The Act also provides a potential exemption for businesses with fewer than 50 employees if the paid-leave requirements would jeopardize the business' viability.

Healthcare providers can choose to exclude their employees in part or in whole at their discretion, and are subject to other significant regulatory changes under the CARES Act, as summarized here.

Resources:

FFCRA Employee Rights Notice

DOL's FFCRA Implementation Regulations

Families First Coronavirus Response Act: DOL Informal Questions and Answers

Temporary Rule: Paid Leave under the Families First Coronavirus Response Act (*Scheduled to be published on 4/6*) (*unpublished version*)

IRS FAQs about COVID-19-Related Tax Credits for Required Paid Leave

Issue Alert: U.S. Department of Labor Issues Regulations Explaining Paid Sick Leave and Expanded FMLA Benefits Under FFCRA (April 1, 2020)

Issue Alert: Key Healthcare Components of the CARES Act (April 2, 2020)

Issue Alert: DOL Issues FFCRA Employee Notice Form (March 25, 2020)

Issue Alert: Tax and Employee Benefit Considerations (March 23, 2020)

Issue Alert: Families First Coronavirus Response Act Becomes Law (March 19, 2020)

Issue Alert: Employer Tips for Managing COVID-19 (March 12, 2020)

Webinar: An Employer's Guide to Coronavirus (March 23, 2020)

### 3. CHECK YOUR INSURANCE POLICIES

Your insurance policies may provide coverage for certain COVID-19 losses through business interruption or other policy terms. Some health insurance carriers are providing policy holders with relief through added medical benefits and short-term moratoriums on minimum-hour requirements to help provide coverage for unpaid leaves of absence and coverage for employees with reduced hours who might otherwise be covered.

We encourage you to check with your carriers, insurance broker, or counsel, to better understand what remedies your insurance policies may provide.

Resources:

Issue Alert: COVID-19 and Business Interruption Insurance

### 4. MAKE SURE YOU'RE FAMILIAR WITH APPLICABLE STAY-AT-HOME ORDERS

As of April 3, Kansas and Missouri are two of 39 states to enact stay-at-home or shelter-in-place orders. The Kansas order supersedes various County orders and provides consistency across the state through at least April 30. The Missouri order takes effect 12:01 a.m. Monday, April 6, 2020 through 11:59 p.m. Friday, April 24. The terms of these Orders vary state to state and, when no state order is in place, county to county, meaning that what constitutes an "essential business" varies by jurisdiction. It is crucial to read the orders adopted by the local jurisdiction in which you are doing business to determine its impact.

Resources:

Kansas Statewide Order

Missouri Statewide Order

Issue Alert: Kansas Gov. Issues Statewide Stay-At-Home Order (March 28, 2020)

Issue Alert: Stay-at-Home Orders (March 23, 2020)

Issue Alert: Essential Services (March 20, 2020)

Issue Alert: COVID-19 Guidance for Religious Institutions (March 18, 2020)

### 5. IF YOU MUST UNDERTAKE REDUCTIONS IN FORCE, UNDERSTAND WARN AND OWBPA OBLIGATIONS

At a time when layoffs and furloughs are increasingly common, check to see if your employment actions trigger WARN Act obligations. The Worker Adjustment and Retraining Notification Act (WARN) generally requires certain employers with 100 or more employees to provide a minimum of 60 calendar days' advance written notice of layoffs affecting 50 or more employees located at a single worksite, whether it is a plant closing or a mass layoff. Keep in mind that how the WARN Act counts employees can be a little counter-intuitive so you may want to visit with counsel with respect to these issues.

Whether a "furlough" or layoff is subject to the WARN Act depends on the employer's size, the nature of the action the employer takes, its duration, and the number of affected employees. The WARN Act provides exceptions for "unforeseeable business circumstances," and the COVID-19 pandemic may meet the elements of that exception depending on your circumstances. If you do business in states other than Kansas, also note that some states have "mini-WARN" provisions with which you must comply, and that the California version does not include an exception for unforeseeable business circumstances.

Decisions about which employees should be laid off should be made for valid business reasons, and not related to an employee's race, color, national origin, gender, religion, age, disability, pregnancy, genetic information, or any other impermissible reason. Remember that for age-discrimination claim releases connected to reduction-in-force severance packages to be valid, the Older Worker Benefit Protection Act (OWBPA) requires certain consideration and revocation periods for employees aged 40 or above. If an employer is offering severance benefits to a group

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(defined as two or more) of employees, it must provide an additional disclosure to employees aged 40 and older and allow these employees to consider the release for at least forty-five (45) days.

Resources:

U.S. Department of Labor WARN Act Compliance Assistance

### 6. UNDERSTAND STATE CHANGES TO UNEMPLOYMENT AND HOW THEY MIGHT IMPACT WORKFORCE ACTIONS

The Kansas and Missouri Departments of Labor are understandably inundated with unemployment applications and questions from employees and employers. Employers should remember to report any layoffs or furloughs related to COVID-19 to their state department of labor, check to see if a shared work program for reduced hours may be beneficial to your business, and consider that employees may receive significantly increased unemployment compensation as a result of the CARES Act, which will provide an additional \$600 per week in unemployment benefits to those already receiving state benefits. We encourage regularly checking your state's Department website for new information.

Resources:

Kansas Department of Labor File by Spreadsheet Fact Sheet

Kansas Department of Labor Layoff Download/Upload Link

Kansas Department of Labor Shared Work Plan Application

Missouri Department of Labor Unemployment Information

Missouri Department of Labor Mass Claims Filing System

Missouri Department of Labor Shared Work Plan

U.S. Department of Labor COVID-19 and the American Workplace

### 7. UNDERSTAND YOUR CONTRACTUAL OBLIGATIONS

The pandemic raises many issues regarding whether your contractual obligations to third parties must be fulfilled and vice versa. The most common reason to excuse performance under these circumstances is a force majeure provision in a contract, so you should check your contract's terms and conditions to see if such a provision is included and whether it may apply. Other contractual defenses such as impracticability or impossibility may also excuse performance under certain circumstances. Remember too that many written employment contracts do not include force majeure terms, which may impact your obligations if decisions are made to terminate employees subject to a written employment agreement.

Resources:

Issue Alert: COVID-19 and Your Contractual Obligations (March 13, 2020)

### 8. NEW ACRONYMS. NEW QUESTIONS. REMAIN CALM.

As attorneys, the pandemic has provided us with an unprecedented set of new and rapidly evolving laws and regulations. Perhaps the best "non-legal advice" that we can offer is to remember to communicate openly and often — whether with co-workers, counsel, accountants, lenders, insurance brokers, and state and federal regulators, to name just a few — to help develop a holistic approach to the challenges you face.

### FOR MORE INFORMATION

If you have questions or want more information regarding business actions amid COVID-19, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Jeff DeGraffenreid** at 316.291.9788 or [jdegraffenreid@foulston.com](mailto:jdegraffenreid@foulston.com). For more information on the firm, please visit our website at

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## RESOURCES

Sign up to receive these issue alerts straight to your inbox here.

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## PRACTICE AREAS

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- Employment & Labor
- Business & Corporate Law