



CORONAVIRUS LEGAL UPDATE

March 24, 2020

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ROUSE FRETS WHITE GOSS GENTILE & RHODES, P.C.
LEGAL UPDATE:
FAMILIES FIRST CORONAVIRUS RESPONSE ACT

March 24, 2020

The Families First Coronavirus Response Act (FFCRA) was passed by Congress and signed into law by President Trump on March 18, 2020. The Act provides an expansive scope of benefits and rights to individuals impacted by the COVID-19 emergency. The Act imposes significant requirements on employers with fewer than 500 employees. As of March 20, 2020, the DOL has not yet developed its guidance on the FFCRA. The following is a broad overview of two of the acts related to leave.

A. EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT (EFMLEA)

The Act amends the Family and Medical Leave Act (FMLA) specific to COVID-19.

- **Employers subject to the act.** The Act applies to employers with fewer than 500 employees. (The DOL has not yet provided guidance on how to count the number of employees. The DOL is expected to issue applicable regulations on or before April 1, 2020. The DOL may likely apply traditional concepts regarding integrated and joint employees.)
- **Eligible employees.** An employee who has been employed for at least 30 calendar days and is unable to work (or telework) due to a need to care for a son or daughter under 18 years of age of such employee, if the school or place of care has been closed.
- **Secretary of Labor exemptions.** The Secretary of Labor shall have the authority to exempt the following from these provisions:
 - Certain health care professionals and emergency responders, and
 - Small businesses with fewer than 50 employees when these requirements could jeopardize the validity of the business as a going concern.
- **Leave Requirements:**
 - **First ten days unpaid.** The first ten days of leave may consist of unpaid leave.
 - **Employee election.** During the first ten days, the employee can elect to substitute accrued vacation, personal leave, or medical or sick leave for unpaid leave.
 - **Subsequent days are paid.** An employer shall provide paid leave for each day of leave thereafter.
- **Calculation of paid leave.** The paid leave shall not be less than two-thirds of the employee's regular rate of pay, and at the number of hours the employee is regularly scheduled to work. Paid leave, however, shall not exceed \$200 a day or \$10,000 in the aggregate.

- **Length of leave.** 12 work weeks of leave during a 12-month period.
- **Notification.** If the leave is foreseeable, an employee shall provide notice of the leave as soon as practicable.
- **Job restoration requirements.** An employer with fewer than 25 employees does not have to restore the employee to his/her position if very specific conditions exist. Whether a restoration requirement will be applicable is based on various identified “reasonable efforts” by the employer. Under certain circumstances, the employer will be required to make “reasonable efforts” within a year of discharge to contact the employee if a similarly held position becomes available.
- **Exclusion of health care providers and emergency responders.** An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employees from the application of these provisions.
- **Multiemployer bargaining agreement.** Under certain circumstances, an employer who is a party to a multiemployer collective bargaining agreement may fulfill its obligations to provide paid sick time by making an equivalent contribution to the plan fund based on the paid leave each of its employees is entitled to under this section.
- **Effective Date.** April 1, 2020.
- **Expiration Date.** December 31, 2020.

B. EMERGENCY PAID SICK LEAVE ACT (EPSLA)

This Act is specific to COVID-19.

- **Eligible employees.** Any employee working for an employer. There is no minimum length of employment.
- **Employers subject to the Act.** In the case of a private entity or individual, employs fewer than 500 employees (as defined under the Fair Labor Standards Act).
- **Paid sick time requirement.** An employer shall provide each employee with paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:
 1. The employee is subject to a federal, state, or local quarantine or isolation order due 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 seeking a medical diagnosis.
 4. The employee is caring for an individual who is subject to an order as provided in (1) or has been advised as per (2).

5. The employee is caring for a son or daughter if the school or place of care for the child has been closed, or the childcare provider is unavailable, due to COVID-19 precautions.
 6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.
- **Duration of paid sick leave.**
 - Full-time employees: 80 hours to be used this year.
 - Part-time employees: number of hours equal to the number of hours the employee works, on average, over a two-week period, which must be used before the end of the year.
 - **Calculation of paid sick time.** Calculated based on the employee's required compensation subject to caps. Required compensation shall not be less than the greater of the employee's regular rate of pay or the minimum wage rate.
 - **Caps on paid leave and amount of pay.** The paid sick time shall not exceed:
 - \$511 per day and \$5,110 in the aggregate for the reasons for leave under (1)-(3) above.
 - For reasons described in sections (4)-(6) above, \$200 per day and \$2,000 in the aggregate. Additionally, the pay must be provided at two-thirds of the employee's regular rate of pay or the minimum wage, whichever is greater. There is a different calculation for part time employees.
 - Not later than 15 days after enactment, the Secretary of Labor shall issue guidelines to assist employers in calculating the amount of paid sick time.
 - **Sequencing of leave.**
 - An employee may use this paid sick time first.
 - The employer cannot require the employee to first use other paid leave provided by the employer. Employer cannot require the employee entitled to leave to find a replacement employee to cover the hours during which the employee is using paid sick time.
 - **No carryover.** This paid sick time does not carryover from one year to the next.
 - **Secretary of Labor exemptions.** The Secretary of Labor shall have the authority to exempt from the Act:
 - certain health care professionals and emergency responders,
 - small businesses with fewer than 50 employees when these requirements could jeopardize the validity of the business as a going concern, and
 - as necessary to carry out the purposes of the Act.

- **Employer notice.** Each employer shall post and keep posted, in a conspicuous place where notices are typically posted, a notice, to be prepared or approved by the Secretary of Labor. No later than seven days after enactment, the Secretary of Labor shall provide a model notice.
- **Employee notice.** After the first workday an employee receives paid sick time, an employer may require the employee to follow reasonable notice procedures to continue receiving paid sick time.
- **Prohibited acts.** Employers are prohibited from discharging, disciplining, or discriminating against an employee who takes this leave, files a complaint under this Act, or testifies in a proceeding on a complaint.
- **Employer violation of the Act.** An employer who violates the act will be deemed to have failed to pay minimum wages under the FLSA and will be subject to penalties. An employer who willfully violates the act will be subject to the additional penalties provided under the FLSA for willful violations under that act.
- **Does not diminish other rights.** This section does not diminish any other rights or benefits an employee is entitled under federal, state, or local law, collective bargaining agreements, or existing employer policy.
- **No payout upon separation.** An employer is not required to payout paid sick time provided by this Act upon the employee's separation from his/her employment that has not been used.
- **Multiemployer bargaining agreement.** Under certain circumstances, an employer who is a party to a multiemployer collective bargaining agreement may fulfill its obligations to provide paid sick time by making an equivalent contribution to the plan fund.
- **Effective date.** April 1, 2020.
- **Expiration date.** December 31, 2020.

C. EMERGENCY UNEMPLOYMENT INSURANCE STABILIZATION AND ACCESS ACT

The Act provides \$1 billion in emergency grants to states for activities related to processing and paying unemployment insurance benefits.

- **Emergency grants.** Of the \$1 billion in grants, \$500 million is reserved for emergency grants to states where unemployment has increased at least a 10% over the same quarter in 2019.
- **Eligibility.** To receive the grant, states must temporarily ease eligibility requirements that restrict access to unemployment insurance benefits. Specifically, states must waive work search requirements, waive required waiting periods, and eliminate increases in employer unemployment insurance taxes if an employer is directly impacted by COVID-19.
- **Additional funding.** The other \$500 million will be used to provide immediate additional funding to all states for staffing and administrative costs associated with processing and paying unemployment insurance benefits, so long as states meet certain basic requirements for ensuring access to eligible workers.

D. WAGE AND HOUR ISSUES

The Department of Labor's (DOL) Wage and Hour Division has issued guidelines to employers in response to the COVID-19 and other public health emergencies. The following guidelines are subject to any applicable provisions of the FFCRA.

- **Payment to non-exempt employees.** The Fair Labor Standards Act (FLSA) requires employers to pay non-exempt employees only for hours worked. Therefore, if the employer's business closes temporarily because of COVID-19, it does not have to pay its employees. If the employer sends a non-exempt employee home to work remotely, the employer must pay at least the minimum wage for all hours worked and one and a half the regular rate of pay for all overtime hours worked. The non-exempt employee does not have to be paid for any week when no work is performed. However, employers should review any state and local pay obligations. Non-exempt employees must continue to record all hours worked.
- **Payment to exempt employees.** Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited circumstances. The FLSA does not require employer-provided vacation. Where an employer offers a bona fide benefits plan or vacation time to its employees, the employer can require that any accrued vacation or leave time be taken during an office closure, so long as the employee still receives the employee's guaranteed weekly salary. If the exempt employee does not have sufficient PTO available, the employee must still be paid the full guaranteed salary for any week in which the employee performs any work. An employer does not have to pay exempt salaried employees in weeks they perform no work.
- **Requiring employees to work from home as an infection control strategy.** Employers may encourage or require employees to work remotely as an infection-control strategy, including based on timely information from public health authorities such as the Centers for Disease Control (CDC) or state and local health departments. Telework may also be a reasonable accommodation under the American's With Disabilities Act (ADA) during a pandemic. Employers cannot single out employees either to work remotely or to continue reporting to the workplace on the basis of a protected class, such as national origin, disability, race, gender, age, or pregnancy. Employers are still required to keep an accurate record of all hours worked for all hourly non-exempt employees and should provide the employees with a method of recording all hours worked.
- **Payment or reimbursement for telework expenses.** If an employee is required to work from home, the employer cannot require the employee to pay or reimburse the employer for items that are business expenses of the employer if doing so reduces the non-exempt employee's earnings below the required minimum wage or overtime compensation. In other words, costs for internet access, computer, additional phone line, etc., which are incurred by an employee in order to work from home cannot reduce a non-exempt employee's earnings below minimum wage or required overtime compensation. There is no DOL guidance on whether an employer must reimburse a non-exempt employee for home expenses incurred to work remotely, such as personal home internet or phone services. An employer should discuss with the employee if he/she anticipates increased expenses related to working remotely. In the event an employee would have to invest in a more robust internet service, the employer may have to reimburse the employee for that additional expense or pay the expense directly.

E. EEOC GUIDANCE ABOUT THE ADA, THE REHABILITATION ACT, AND COVID-19

The EEOC enforces workplace discrimination laws such as the American's with Disabilities Act (ADA) and the Rehabilitation Act, including employer obligations to provide reasonable accommodation and rules about medical examinations and inquires. The EEOC recently released some guidance about the ADA, the Rehabilitation Act and COVID-19. The EEOC noted that the ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. The World Health Organization (WHO) has declared COVID-19 to be an international pandemic.

The EEOC provided the following guidance in question and answer form to help employers navigate through the COVID-19 outbreak.

- ***How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during COVID-19 pandemic?***

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- ***When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?***

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

- ***Does the ADA allow employers to require employees to stay home if they have symptoms of COVID-19?***

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

- ***When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?***

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

- ***If an employer is hiring, may it screen applicants for symptoms of COVID-19?***

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

- ***May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?***

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

- ***May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?***

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

- ***May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?***

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

- ***Is COVID-19 a disability under the ADA?***

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment." Conceivably, a COVID-19 infected individual's illness would have to have the requisite impairment on life activities to qualify as a disability under the ADA.

Regardless of whether employees or applicants meet the definition of disability under the ADA, employers implementing health and safety procedures must be mindful of disability-related inquiries on employees and applicants.

Current CDC guidance classifies COVID-19 as a direct threat, which means an employer is permitted to take certain actions, such as sending an employee home if diagnosed with COVID-19 or symptoms associated with the virus.

Lawful actions available to employers can be extremely fact specific and should be vetted through legal counsel to be sure employers are not violating the ADA, EEOC guidelines, or local health and safety directives.

- ***Mandatory reporting requirements: Are employers required to report exposed/infected employees?***

At this time, there does not appear to be a mandatory reporting requirement imposed on employers in the event an employee contracts or is exposed to COVID-19. If one is imposed, it will likely come from a state or local health department. OSHA's Guidance on Preparing Workplaces for COVID-19 does not include a mandate or general language indicating employers must report cases of COVID-19.

Local health departments encourage the open disclosure of important information; however, the ADA requires employers to keep employee medical information confidential, including requests for reasonable accommodation. This advice was echoed in the March 6, 2020 Kansas Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 which reminded employers to maintain confidentiality as required by the ADA while informing fellow employees of possible exposure.

The CDC encourages employers of employees with confirmed COVID-19 to maintain ADA required confidentiality while informing fellow employees of their exposure.

F. WORKER'S COMPENSATION ISSUES

- **Basis for claim.** Kansas and Missouri both recognize occupational diseases under certain circumstances as a compensable basis for a worker's compensation claim. [Note that Missouri's recognition of occupational diseases extends only to those occurring after August 28, 2005 where occupational exposure is the prevailing factor which caused the medical condition and disability.]
- **Kansas/Missouri guidance.** As of March 19, 2020, no formal guidance has been issued from Missouri or Kansas specific to whether employees may file for worker's compensation due to COVID-19.
 - The Kansas Department of Labor issued a statement recognizing the impact of the Coronavirus on both employers and employees and pledges to update their webpage for more information. Rouse Frets is committed to keeping apprised of any new developments in workers compensation issues, and will monitor statements from Missouri, Kansas, and other areas which may be impacting clients.
 - In the case of federal employees, those who have tested positive for COVID-19 after employment-related exposure may submit a claim for coverage under the Federal Employees' Compensation Act.
- **Other states.** It is highly likely that with Missouri and Kansas's recognition of occupational diseases, and the actions taken by other states, that COVID-19 could form the basis for workers compensation claims. Other states announcements are as follows:
 - Pennsylvania: COVID-19 may trigger an allowable "disease-as-injury" or "occupational disease" claim.
 - Texas: Worker's compensation claims are evaluated on a case-by-case basis, but an occupational disease could result in a compensable claim.
 - California acknowledged eligibility for worker's compensation benefits for workplace injuries occurring out of exposure and contraction of COVID-19 during an employee's regular course of business.

Alternatively, not all states recognize COVID-19 as a valid basis for a worker's compensation claim. In Washington claims are only permissible for healthcare providers and first responders. Other claims may be evaluated on a case-by-case basis, however, generally exposure or contraction is not an allowable, work-related condition recognized by Washington.

G. EMPLOYER TAX CREDITS AGAINST PAYROLL TAXES

- **Payroll tax credits.** Employers are entitled to a tax credit for 100% of the qualified wages paid by the employer under the *Emergency Paid Sick Leave Act* and the *Emergency Family Medical Leave Expansion Act*.
- **Base credit amount.** The Credit is applied against the employer portion of Social Security taxes imposed by IRC section 3111(a) (relating to “OASDI” taxes for old age, survivors, and disability) or IRC section 3221(a) (relating to “Tier 1” Railroad Retirement excise taxes).
- **Additions to base credit.** The modified bill increased the amount of the base credit to include:
 - the employer’s “qualified health plan expenses” allocable to the qualified sick leave wages paid, and
 - the amount of tax imposed by IRC section 3111(b) (relating to employer portion of Medicare tax) on the qualified sick leave wages or qualified family leave wages.
- **Maximum credit.** The maximum credit generally should not exceed the amount of the employer’s share of social security taxes calculated as 6.2% of the OASDI wage base of \$137,700 for 2020 subject to the following additional restrictions:
 - **EMFLEA.** The maximum amount under the emergency paid sick leave provisions is capped at either \$511 or \$200 for each day an individual is paid qualified sick leave depending upon the eligibility category. See discussion on “Cap on paid leave and amount of pay” discussed above. The total number of days taken into account cannot exceed 10 days.
 - **EPSLA.** The maximum amount under the temporary FMLA provisions cannot exceed \$200 for any day for which the individual is paid qualifying family leave wages. In aggregate, a maximum of \$10,000 in wages per employee for all calendar quarters would be eligible for the credit.
- **Other limitations.** No credit is allowed under these provisions if the wages are also used to calculate a credit under IRC section 45S (relating to the family and medical leave credit).
- **Refundable.** Employers are entitled to a refund of a credit in excess of the IRC section 3111(a) or IRC section 3221(a) tax amounts.
- **Self-employed individuals.** A self-employed individual is entitled to a refundable credit against the tax imposed by subtitle A (relating to income taxes) with respect to qualified sick leave equivalent amounts. The individual must regularly carry on a trade or business (as defined in Code section 1402) and must have met criteria to receive paid leave under the EPSLA.
- **Employment tax consequences.** Any wages required to be paid by reason of the EMFLEA and the EPSLA are not considered wages for purposes of IRC section 3111(a) or 3221(a).
- **Income tax consequences.** The amount of the credit claimed by the employer will be considered “gross income” for income tax purposes.

- **Effective date.** Will take effect no later than 15 days after enactment. Expires on December 31, 2020.

H. US DEPARTMENT OF LABOR (DOL) GUIDANCE ON EMPLOYER TAX CREDITS

The DOL has provided the following guidance on its website on the ability of employers to take immediate advantage of the paid leave credits. The DOL stated that it will release further guidance the week of March 24, 2020 on the employer tax credits.

- **Prompt Payment for the Cost of Providing Leave**

- When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns ([Form 941](#) series) with the IRS.
- Under guidance that will be released next week, eligible employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS.
- The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes and the employer share of Social Security and Medicare taxes with respect to all employees.
- If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.

- **Examples**

- If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.
- If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

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During this unprecedented time, our firm is here to help you meet the challenges you encounter as a result of COVID-19. Our attorneys hold many honors set by Chambers USA and others as distinguished practitioners. For more information, contact your attorney at the firm.

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LEGAL UPDATE:
CHANGES TO 2019 TAX FILING DEADLINE

March 24, 2020

In response to the evolving COVID-19 public health crisis, the federal government has extended the 2019 federal tax payment deadline for certain taxpayers. Below is a summary of extended tax filing deadlines at the federal and state level as of the date indicated.

- **Filing deadline.** The federal deadline to file 2019 income tax returns and pay taxes for calendar year filers is July 15, 2020. Under previous guidance, the filing deadline remained April 15th but Treasury Secretary Mnuchin issued new guidance on March 20 extending both the federal filing and payment deadlines to July 15, 2020.
- **Payment deadline.** The deadline to pay taxes if you owe federal income taxes is extended 90 days to Wednesday, July 15.
- **Tax refunds.** Taxpayers due tax refunds are not affected by current Coronavirus legislation.
- **Eligibility.** Individuals (Form 1040), C Corporations (Form 1120), certain Trusts and Estates (Form 1041) and disregarded entities like revocable trusts and single member LLCs that report activity on either Form 1040 or Form 1120 are eligible for the 90-day tax payment deferral.
- **Automatic deferral.** The taxpayer does not need to make an affirmative election to defer payment, the extension is automatic provided a timely filed return or extension is filed.
- **Deferral amount.** The deferral amount is limited to tax liabilities of \$1 million or less for individuals filing Form 1040 and tax liabilities of \$10 million or less for corporations filing Form 1120. Tax liabilities in excess of these amounts must be paid by April 15 to avoid interest and penalties.
- **2020 estimated taxes.** The deferral provisions only pertain to 2019 income tax return payments, 2019 extension payments, and first quarter 2020 estimated tax payments. No other changes to the remaining 2020 estimated income tax payment schedule are contemplated at this time.
- **Other tax payments and contributions.** The extension does not apply to other tax types (e.g. payroll) and does not extend the date for making eligible contributions to an IRA or other retirement contributions.
- **Interest & Penalties.** No interest or penalty should accrue during the automatic deferral period. Any payments made after the 90-day deferral period would begin accruing interest and penalty as of the extended due date.

- **State Taxes.** Missouri has also extended its individual tax filing deadline to July 15, consistent with the IRS. Kansas tax returns and payments are still due April 15; taxpayers should monitor the situation as to whether Kansas will conform with the IRS.
- **Extension of Time to File.** An automatic six-month extension is granted to taxpayers who file Form 4868 – Extension of Time to File by April 15, 2020. The extended due date to file the return is October 15, 2020, but a final or estimated tax payment must be made by July 15 to avoid interest and penalties. Kansas and Missouri may require separate extension filings depending on taxpayer type and whether the taxpayer expects to owe additional tax.

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LEGAL UPDATE:
FORECLOSURE AND EVICTION RELIEF

March 24, 2020

In response to the evolving COVID-19 public health crisis, the federal government and certain states have enacted measures to protect U.S. homeowners, renters, and commercial businesses from foreclosure and eviction. In addition, several of the country's leading mortgage lenders have announced programs to provide financial relief to homeowners and businesses. Below is a summary of the current status of these measures and programs as of the date indicated.

- **Federal government**

- On March 18, President Trump directed the Department of Housing and Urban Development (HUD) to suspend evictions and foreclosures through April. The moratorium will apply only to homeowners with mortgages insured by the Federal Housing Administration, a HUD agency that backs affordable home loans issued through private firms.
- On March 18, the Federal Housing Finance Agency also directed Fannie Mae and Freddie Mac to suspend foreclosures and evictions in connection with single-family mortgages for at least 60 days.
- In addition, Fannie Mae and Freddie Mac homeowners who have suffered a loss of income can qualify to make reduced payments or be granted a complete pause in payments for up to 12 months with no late fees, penalties, or negative credit reporting. Regulators expect the entire mortgage industry to quickly adopt a similar policy.
- These measures do not apply to any other homeowners. At the time of writing, the federal government has not yet announced any similar protections for renters or businesses that are temporarily unable to pay rent under their leases.

- **Kansas**

- On March 18, Governor Kelly issued an executive order prohibiting all financial institutions operating in Kansas from initiating any mortgage foreclosure efforts and any commercial or residential eviction efforts until May 1, 2020.
- The State of Kansas has also established the Hospitality Industry Relief Emergency (HIRE) Fund to provide \$5 million in bridge loans to Kansas hospitality businesses (including restaurants, bars, hotels, and conference and event centers) during the COVID-19 crisis. Eligible businesses in Kansas can [apply](#) for a loan of up to \$20,000 at 0% interest for 36 months, with no repayments for the first four months. The funds can be used for, among other things, commercial lease payments and utility bills.

- **Missouri.** As of the date of writing, Missouri has yet to enact any similar measures.
- **Private industry.** As of the date of writing, many of America's leading mortgage lenders – including Ally Bank, Bank of America, Quicken Loans, TD Bank, and Wells Fargo – are offering relief programs to homeowners who are temporarily unable to make their mortgage payment in the current environment, including loan forbearance, modifications, and extensions.

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LEGAL UPDATE:
“FORCE MAJEURE” AND BUSINESS CONTINUITY ISSUES

March 24, 2020

As COVID-19 spreads and the public health crisis continues to evolve, you may be faced with potentially devastating business disruptions. One area of uncertainty is whether a party's nonperformance under a contract will be excused when it is unable or unwilling to fulfill its obligations in the current environment. In a scenario where you are seeking either to compel or avoid contractual performance, the answer may depend on frequently overlooked boilerplate language: the force majeure clause.

A. Force Majeure: What You Should Know

- ***What is “force majeure”?***

Many agreements contain a “force majeure” clause, which may excuse a party from performing under the agreement when it is prevented or delayed from doing so by unforeseen circumstances beyond its control.

- ***What is an example?***

A typical force majeure clause might state that, for example, neither party will be responsible for any failure or delay in the performance of its obligations under the agreement arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, acts of war or terrorism, civil or military disturbances, natural catastrophes, government action, work stoppage, or communication disruption.

- ***How does it apply to COVID-19?***

The following are examples of situations where a party might seek to invoke force majeure in the current environment:

- A restaurant is closed by government order and is now incapable of generating any revenue to pay rent under its lease.
- A product supplier sources certain essential parts from a quarantined area and is now unable to deliver the product on time.
- A client suddenly needs to cancel professional services, but the agreement imposes a severe cancellation penalty.

- ***What language should I look for?***

A party's ability to successfully assert force majeure will depend on the specific language of the clause and the factual circumstances surrounding the nonperformance. As such, you should carefully read the force majeure clause and consider the following:

- ***Is the event covered?*** Does the provision specifically reference a pandemic or outbreak of disease? If not, other circumstances related to COVID-19 may still qualify as force majeure events. For example, a government-imposed quarantine or shutdown of transportation systems in response to the outbreak would surely constitute “government action.”
- ***Was the event foreseeable?*** Some provisions require the event to have been not just outside the party’s control but also unforeseen by the parties. Absent language to that effect, some courts may still require unforeseeability as a condition unless otherwise specifically stated in the agreement. While pandemics are not generally foreseeable, it would be difficult to argue that COVID-19 was unforeseen if the agreement was signed in the early stages of global outbreak.
- ***Was performance impossible?*** The mere occurrence of an event is not enough; the event must also prevent the party from fulfilling its obligations. If COVID-19 simply renders performance inconvenient or marginally more expensive, it will be difficult to invoke force majeure.

B. Other Defenses Excusing Performance

For contracts without a force majeure clause, a party may still raise the common law defenses of impracticability, impossibility, or frustration of purpose.

- ***Impracticability.*** In certain situations, a court may determine that the parties intended to require performance only if it was commercially practicable. A party must generally establish that (i) an intervening event has occurred, (ii) the event made performance extremely expensive or difficult, and (iii) the parties did not anticipate the event when the contract was made. Uniform Commercial Code § 2-615, which applies to contracts for the sale and leasing of goods, provides a similar defense in situations where “performance as agreed has been made impracticable by the occurrence of a contingency.”
- ***Impossibility.*** While impracticability is a subjective condition for courts to determine, the doctrine of impossibility applies when a contractual duty is not just impractical but objectively impossible for a party to perform. For example, a contractor agrees to renovate a building which is then destroyed in a natural disaster and no longer exists.
- ***Frustration of Purpose.*** This doctrine excuses performance when a party’s principal purpose is substantially frustrated by an intervening event, the non-occurrence of which was a basic assumption of the contract. It is often confused with impossibility, with the difference being that here a party may be physically able to perform the contract but no longer has a reason to. For example, a university contracts with a sports apparel manufacturer to purchase uniforms for the upcoming season, but the season is then canceled due to COVID-19.

C. Practical Business Continuity Strategies

If you have contracts that may be impacted by COVID-19, you should consider taking the following steps to mitigate business risk:

- Review your contracts to identify which ones may contain an applicable force majeure clause.

- If applicable, explore potential options that allow you to meet your contractual obligations, even if they are more expensive.
- Update your form contracts to account for pandemics, virus outbreaks, and other emerging risks to performance.
- Review your insurance policies to determine whether they cover disruptions caused by COVID-19.
- Maintain detailed records tracking the costs and scope of interruption to your business.

Rouse Frets White Goss Gentile Rhodes, P.C.

During this unprecedented time, our firm is here to help you meet the challenges you encounter as a result of COVID-19. Our attorneys hold many honors set by Chambers USA and others as distinguished practitioners. For more information, contact your attorney at the firm.

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