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Preparing the Workplace for Michigan's COVID-19 "Stay Home, Stay Safe" Order

AUTHORS

Luis E. Avila

Maureen Rouse-Ayoub

Stephanie R. Setterington

Ashleigh E. Draft

Barbara A. Moore

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Labor and Employment Advisory
March 24, 2020

On March 23, Governor Gretchen Whitmer authorized Executive Order No. 2020-21, which temporarily requires individuals and businesses to suspend activities that are not "necessary to sustain or protect life." The order went into effect at 12:01 a.m. on March 24 and will continue in effect until at least April 13, 2020.

The order specifically prohibits businesses from operating if such operation would require employees to leave their homes or places of residence. However, companies that operate essential businesses can require their critical infrastructure workers to leave their homes or places of residence to continue operations, subject to certain conditions. Critical infrastructure workers are those workers who perform services that are essential to continuing critical infrastructures in sectors such as health care and public health, law enforcement, public safety and first responders, food and agriculture, energy, wastewater, transportation and logistics, public works and many other sectors described in sections 8 and 9 of the order.

Additionally, workers who are necessary may leave their homes or places of residence to conduct minimum basic business operations. A company may have necessary workers even if the company itself is not a critical infrastructure industry. Necessary workers are workers whose onsite presence is "strictly necessary" to "...maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely."

Employers must take the following steps in order comply with and ensure the health and safety of Michigan workers during the temporary Stay Home, Stay Safe order:

1. Identify which workers are considered critical infrastructure workers pursuant to sections 8 and 9 of the order, and/or which workers are necessary to conduct minimum basic operations pursuant to section 4 (b) of the order.
2. Notify critical infrastructure workers and/or necessary workers of their designation in writing by **April 1, 2020**. The notice may be oral until March 31, 2020 at 11:59 p.m.

3. Restrict in-person activities and the number of workers present to no more than is necessary to perform critical infrastructure functions or maintain minimum basic operations.
4. Remote work to the fullest extent possible.
5. Adopt social distancing practices and other mitigation measures to protect workers and patrons. These practices and measures include, but are not limited to, keeping workers and patrons who are on the premises at least six feet apart from one another, increasing standards of facility cleaning and disinfectant, and adopting policies to prevent workers from entering the premises if they display respiratory symptoms.

Employers also have the option of providing their employees with a safe passage letter as a best practice to ensure employees have proof of designation, should they ever need it. Finally, employers should be aware that any individual who willfully fails to comply with the requirements of this order may be subject to a misdemeanor pursuant to Michigan law.

Please contact any member of Varnum's labor and employment team for assistance regarding the required notice, identifying critical infrastructure workers or any other questions related to the new order.

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Federal Agencies Announce the Availability of Tax Credits Under the Families First Coronavirus Response Act

AUTHORS

Maureen Rouse-Ayoub

Elizabeth Wells Skaggs

Ashleigh E. Draft

Barbara A. Moore

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Labor and Employment

Labor and Employment Advisory
March 23, 2020

UPDATE: *On March 24, 2020 the effective date of the Act was clarified to be April 1, 2020.*

On March 20, 2020 the U.S. Treasury Department, Internal Revenue Service (IRS) and the Department of Labor (DOL) jointly announced that employers covered by the Families First Coronavirus Response Act (the Act) may now begin taking advantage of the special tax credits designed to reimburse them for providing coronavirus-related leave to their employees. These tax credits are available immediately even though the effective date for the Act is April 1, 2020.

The Act covers private employers with fewer than 500 employees, although businesses with fewer than 50 employees may be eligible for an exemption from the leave requirements under DOL regulations that are still forthcoming. The Act also covers several public employers regardless of size. Benefits under the Act are not available to employees who have been furloughed, laid off or placed on leave for economic reasons, even if those economic reasons are tied to the coronavirus pandemic. Read Varnum's full summary of the Act, which was signed into law by President Trump on March 18: President Trump Signs the Families First Coronavirus Response Act

The joint announcement from the Treasury, the IRS and the DOL means that eligible employers may take immediate advantage of the paid leave credits in the form of a dollar-for-dollar offset against certain payroll taxes. If the amount of leave paid pursuant to the Act exceeds the amount of certain payroll taxes owed for all of the employer's employees, the excess is treated as an overpayment and is refundable. Leave amounts, and the corresponding tax credits, are subject to daily caps. Employers may also take a tax credit for the amount of the employer's qualified health plan expenses that may be properly allocated to the employee's coronavirus-related leave under the Act.

Importantly, the agencies' announcement also states that the DOL will be issuing a temporary 30-day, non-enforcement policy, giving employers time to come into compliance with the Act. This 30-day period may start from

the date of enactment, but could also start from some later effective date. During this time employers must still act reasonably and in good faith to comply with the Act.

Please contact any member of Varnum's labor and employment team for help navigating these new laws and regulations.

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President Trump Signs the Families First Coronavirus Response Act

AUTHORS

David E. Khorey

Maureen Rouse-Ayoub

Ashleigh E. Draft

Barbara A. Moore

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Labor and Employment

Labor and Employment Advisory
March 19, 2020

On the evening of March 18 President Trump signed the Families First Coronavirus Response Act, a new law aimed at providing multifaceted relief to workers and families during the COVID-19 outbreak. This Act includes a number of provisions directly affecting employers, and the enacted version contains a number of changes from the bill first passed by the House of Representatives on March 14, 2020. The provisions of the new law affecting employee leave are summarized below. This summary also includes information about tax credits employers may utilize when providing emergency paid leave.

The Emergency Family and Medical Leave Expansion Act

The Family Medical Leave Act is amended to include up to 12 weeks of paid Public Health Emergency Leave. The Act takes effect 15 days after enactment of this Act and will remain in effect until December 31, 2020.

- **Who is a Covered Employer?** Private employers with fewer than 500 employees, and federal, state and local government and public agency employers. Additionally, the Secretary of Labor has the discretion to exempt small businesses with fewer than 50 employees when the imposition of the Act would jeopardize the viability of the business.
- **Who is an Eligible Employee?** Employee eligibility for a qualifying public health emergency is expanded to include employees that have been employed at least 30 calendar days with the employer from whom leave is requested.
- **What is the Qualifying Purpose for Emergency FMLA?** Eligibility for the emergency FMLA is limited to employees that are unable to work or telework due to a need for leave to care for a son or daughter under 18 years of age because the child's school or place of care is closed or child care provider is unavailable, due to a public health emergency.
- **Do Employers Have to Provide All 12 Weeks as Paid?** The first 10 days of the leave may be unpaid. The remainder of the leave shall be paid. Employees may elect to use any accrued paid time off, including medical and sick leave, during the unpaid leave if the first ten days of EFMLEA are unpaid. However, employers may not require employees to use such

accrued paid time off.

- **How Do Employers Calculate Paid Leave?** In general, employees must be paid at a rate of two thirds of the employee's regular rate and be based on the number of hours the employee would normally be scheduled to work. Employees whose schedules vary week to week may be paid based on (i) the average number of hours the employee was scheduled per day over the 6-month period ending on the date the employee takes EFMLEA leave; or (ii) if the employee has not worked 6 months, the reasonable expectation of the employee (at the time of hiring) of the average number of hours per day the employee would normally be scheduled to work.
- **Is there a Cap on the Amount of Paid Leave Provided?** Under the EFMLEA, paid leave shall not exceed $200.00 per day or $10,000 in the aggregate.
- **Do Employers have to Restore Employees to their Jobs When They Return from Leave?** Yes, just as employers are required to restore employees on FMLA to their former position, or a substantially similar position, employees from EFMLEA must be restored to their same position. However, employers with fewer than 25 employees may deny job restoration if certain economic conditions are met.
- **What if I am an Employer Subject to a Multi-Employer Bargaining Agreement?** These employers may fulfill their obligations through contributions to a multiemployer fund that permits employees to secure payment from the fund.
- **What do the "Special Rules" for Certain Employers Mean?**
  - An employer with fewer than 500 employees shall not be subject to civil actions by employees for a violation of the EFMLEA if the employer does not meet the amended definition of employer as set forth in the EFMLEA.
  - Employers of health care providers and emergency responders may elect to exclude employees from the provisions of the FMLA amendments.

The Emergency Paid Sick Leave Act ("EPSLA")

The EPSLA requires certain employers to provide emergency sick leave to any employees with a qualifying need. Specifically, covered employers must provide up to 80 hours of paid sick time to all full-time employees, and the average number of hours that a part-time employee works over a

2-week period to all part-time employees. The Act takes effect 15 days after enactment of this Act and will remain in effect until December 31, 2020.

The following summarizes key provisions of the EPSLA:

- **Who is a Covered Employer?** Private Employers with fewer than 500 employees and government employers. Covered employer also includes "any person acting directly or indirectly in the interest of an employer in relation to an employee" and "any successor in interest of an employer."
  - **However**, the DOL shall have authority to grant a hardship exemption to small businesses with fewer than 50 employees if paid sick leave would "jeopardize the viability of the business as a going concern".
- **Who is an Eligible Employee?** All Employees are eligible for paid sick time and may use immediately regardless of length of employment.
  - **However**, the DOL shall have the authority to issue regulations excluding certain healthcare providers and first responders from the definition of employee.
- **What are the Qualifying Purposes?** An employee may use paid sick time provided under the EPSLA if an employee is unable to **work** OR **telework** for the following COVID-19 related events:
  - The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19;
  - The employee has been advised to self-quarantine due to concerns related to COVID-19.
  - The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
  - The employee must care for an individual that is subject to an order or has been advised to self-quarantine as described above.
  - The employee must care for leave to care for a son or daughter under 18 years of age because the child's school or place of care is closed or child care provider is unavailable, due to COVID-19 precautions.
- **What is the Rate of Paid Sick Time?** Employees are entitled to their regular rate of pay unless leave is to care for a person subject to quarantine or a child whose school or child care is closed because of COVID-19 in which case the pay is reduced to two thirds the regular rate.
- **What is the Cap Amount of Paid Sick Time?** The paid leave benefit is capped at $511 per day and $5,110 in the aggregate for full-rate sick time and $200 per day and $2,000 in the aggregate for two thirds rate sick time.

- **Will Unused Paid Sick Time Provided Under the EPSLA be Carried Over?** No, Paid Sick Time provided under the EPSLA does not carry over from one year to the next.
- **Can I Require an Employee to Find a Substitute Worker if They Need Paid Sick Leave?** No, employers cannot be required to find a replacement employee to cover hours during which the employee is using paid sick time. This applies to all employers, including restaurants, coffee shops, etc.
- **Can I require an Employee to Use Other Paid Leave Before the Emergency Paid Sick Leave?** An employer may not require an employee to use other paid leave provided by the employer before the employee uses the emergency paid sick leave provided by the law.
- **Are Employers Required to Notify Employees of these Benefits? If so, How?** Employers must post a notice of employee rights. The DOL will provide a model notice for employer use within seven (7) days of enactment of the Act.

Tax Credits For Emergency Leave Provisions

Employers may receive certain tax credits to offset the cost of the paid leave provided under the bill, including paid leave provided under the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. These credits are allowed against the Employer portion of Social Security taxes (tax imposed by Section 3111(a) or 3221(a)).

Tax Credits under the Emergency Family and Medical Leave Expansion Act

- An employer may receive a credit for each calendar quarter in an amount equal to 100% of the qualified family leave wages paid. Qualified family leave wages mean wages and compensation paid by an employer which are required to be paid by reason of the Emergency Family and Medical Leave Expansion Act.
- **Limitations**
  - Amount of qualified family leave wages paid are capped at $200 per day for each individual up to $10,000 per calendar quarter.
  - Credit is limited to the Social Security taxes on the wages paid with respect to the employment of all employees of the employer.

- **Refundable Tax Credit**
  - If the amount of the credit exceeds the employers portion of Social Security taxes for wages paid with respect to the employment of all employees of the employer, the excess is treated as an overpayment and is refundable

Tax Credits under the Emergency Paid Sick Leave Act

- An employer may receive a credit for each calendar quarter in an amount equal to 100% of the qualified sick leave wages paid. Qualified sick leave wages mean wages and compensation paid by an employer which are required to be paid by reason of the Emergency Paid Sick Leave Act.
- **Limitations**
  - Amount of qualified sick leave wages paid under the Emergency Paid Sick Leave Act are capped at $511 per day or $200 per day if the leave is for caring for a child or family member for up to 10 days per employee each calendar quarter.
  - Credit is limited to the Social Security taxes on the wages paid with respect to the employment of all employees of the employer.
- **Refundable Tax Credit**
  - If the amount of the credit exceeds the employers portion of Social Security taxes for wages paid with respect to the employment of all employees of the employer, the excess is treated as an overpayment and is refundable

Varnum will continue to monitor these legislative efforts and provide updates as appropriate. For further information, please contact any member of Varnum's labor and employment team.

Labor and Employment: COVID-19 Bulletin

AUTHORS

David E. Khorey

Maureen Rouse-Ayoub

Ashleigh E. Draft

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Labor and Employment Advisory
March 13, 2020

On March 12, 2020 Michigan joined Ohio, Maryland, Oregon, New Mexico and West Virginia in closing all K-12 schools as part of a sweeping attempt to contain the spread of the novel coronavirus (COVID-19). Many large urban school districts such as Los Angeles, Seattle, Atlanta, San Francisco and Washington D.C. have also been closed, with more expected to follow.

Michigan schools are scheduled to reopen on Monday, April 6. In the meantime, many employers are questioning how to handle their employees' unexpected need for childcare.

Michigan employers should be aware that under the state's Paid Medical Leave Act (PMLA), eligible employees may use their accrued paid medical leave if they need to care for a child whose "school or place of care has been closed" due to a public health emergency. See MCL § 408.964(d). Employees may also use PMLA accrued leave if health authorities or health care providers have directed the employee or employee's family member to enter voluntary quarantine, even if the employee or family member has not actually contracted communicable disease. Such leave may also be used following the closure of an eligible employee's primary workplace in the event of a public health emergency.

As employers look for creative ways to adapt, some may be considering requests for onsite childcare, job sharing or flexible schedule arrangements. Each of these scenarios are accompanied by unique liabilities and legal considerations. Varnum's labor and employment law team is ready to assist with strategies that protect your both your business and your workforce during this challenging time.

Coronavirus: Workplace Considerations Related to Global Supply Shortages and Employee Travel

AUTHORS

Ethan J. Beswick

David E. Khorey

Maureen Rouse-Ayoub

Stephanie R. Setterington

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Labor and Employment Advisory
February 25, 2020

The coronavirus has significantly impacted supply chains across the globe, and while companies experiencing production limitations due to reduced inventories are turning to their supply agreements for remedies, these same companies may also face important labor and employment considerations as a result of this viral outbreak. Particularly, major disruptions in supply chains resulting from coronavirus may require employers to temporarily lay off employees in sequences not contemplated by the collective bargaining agreement in order to retain skill sets necessary to continue operations not impacted by the supply chain shortage. Additionally, companies may face employee travel concerns related to coronavirus. Where coronavirus is causing either of these concerns, companies must carefully consider their legal options.

If a company employs a unionized labor force and is anticipating a layoff due to supply chain shortages, it should look to the collective bargaining agreement first for options to implement the layoff. Depending on the contents of the collective bargaining agreement, the company has different options for relief.

- If the collective bargaining agreement contains a force majeure provision[1], such provision **may** permit an employer to take unilateral measures that would otherwise require bargaining.
- If the collective bargaining agreement does not contain a force majeure provision, the National Labor Relations Board's narrow "economic exigency exception"[2] **may** provide relief.
- Notably, employers contemplating layoffs must also evaluate their obligations to provide notice to its employees (unionized and non-unionized) under the Worker Adjustment and Retraining Notification (WARN) Act.

Companies and company employees may also face concerns over employee travel and the threat of coronavirus. Where this is of concern, a company will want to give thought to the following:

- following State Department advisories regarding travel;

- offering and/or implementing alternatives to travel when appropriate; and,
- quarantine periods for employees returning from travel.

If your company is facing either of these coronavirus-related concerns, immediate action is likely in order. Please contact a member of Varnum's Coronavirus Task Force if we can be of assistance to your situation.

For more information on how the coronavirus is impacting global supply chains, please see our previous advisory: Coronavirus and Global Supply: Contractual Protections Can Be a Remedy to the Symptoms from Unhealthy Supply Chains

[1] Such provisions commonly relieve the parties from performing their contractual obligations when certain circumstances beyond their control (Act of God) make performance inadvisable, commercially impractical, illegal or impossible.

[2] See *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995) (providing an exception where unforeseen extraordinary events cause major economic effects on the company and such events require the company to take immediate action)

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COVID-19 Mandatory Closures: Michigan Executive Order 2020-21 Frequently Asked Questions

AUTHORS

Seth W. Ashby

Ethan J. Beswick

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Coronavirus Task Force

Business Law Advisory
March 25, 2020

As Michigan businesses and individuals continue to adjust to Governor Whitmer's Executive Order No. 2020-21 issued on March 23, 2020, questions abound as to what activities and business operations are deemed permissible. As a result of this ongoing uncertainty, the governor's office created a Frequently Asked Questions page to address ambiguities under the executive order.

While the Michigan FAQs do not address all uncertainty, certain questions relating to auto dealerships, home repair businesses, construction firms, real estate agents, brokers and service employees, as well as other general questions relating to essential business designations and critical infrastructure workers, are answered. We anticipate additional questions and answers to be posted from time to time. Varnum attorneys stand ready to assist you directly.

Marijuana Regulatory Agency Expediting Licenses for Home Delivery During COVID-19 Crisis

AUTHORS

Paul A. Albarran

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Cannabis Advisory
March 25, 2020

On March 23, Gov. Gretchen Whitmer ordered most Michigan businesses to temporarily cease in-person operations unless otherwise deemed essential.

Fortunately for cannabis users and businesses, both medical and recreational cannabis facilities are permitted to provide curbside sales and home delivery. However, in-person transactions inside licensed establishments are prohibited.

Under Gov. Whitmer's order, cannabis establishments must designate only as many employees as necessary to provide the minimum basic operations, including those needed to maintain the value of inventory, process transactions and ensure security. Businesses are required to designate which of its employees fall into that category and inform them of the designation. These designations need to be done in writing, through electronic messaging, public websites or other appropriate means. The designations are permitted to be made orally until March 31, 2020.

Through an advisory bulletin from the Michigan Marijuana Regulatory Agency (MRA) dated March 16, 2020 curbside sales are temporarily allowed until the MRA terminates the temporary permissions through the distribution of another bulletin. Establishments need to ensure that all patient or customer information is validated and entered in the statewide monitoring system as if the patient or customer was otherwise purchasing product in the store.

For those cannabis establishments who are not currently licensed for home delivery, the MRA is expediting home delivery licenses that should only take 24 to 48 hours to approve. Additionally, under temporary rules, delivery addresses do not have to match the address on the patient's or customer's ID. Home delivery services must still be approved, so it is important to contact the agency if home delivery is an option that businesses are interested in pursuing.

The home delivery licensing process requires strict adherence to the MMFLA Administrative Rules, Rule 82. Rule 82 has a list of detailed requirements, including: the creation of a secure, authenticating online ordering platform; GPS devices in vehicles to ensure real-time location of vehicles at all times during home delivery; and limits on the quantity of product that can be in the vehicle for delivery. Once an establishment completes a plan addressing the requirements of Rule 82, the plan can be emailed to the MRA enforcement division for approval.

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COVID-19 and Your Early Stage Company: What To Do Now

AUTHORS

Matthew W. Bower

Harvey Koning

Zachary J. Meyer

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Startups and Emerging Companies

Startup Advisory
March 24, 2020

COVID-19 is an unprecedented disruption affecting everyone, including early stage companies. Now more than ever, cash is king. It is time to manage the cash you have and plan for a possible mini-bridge financing to get you to the other side of the coronavirus crisis and to your next funding round.

First, update your cash budget (or create a cash budget if you do not already have one). You need to know how long your cash will last at your current burn rate. Take a hard look at ways to reduce your burn rate.

Next, consider a mini-bridge financing with your existing investors. Launching a new funding round during this crisis is not an option for most startups and early stage companies. But we are seeing companies quietly raise smaller mini-bridge rounds from their existing investors to get through the crisis.

A silver lining for early stage companies is that they have a long investment horizon. Early stage equity does not trade in the public market, and its value does not rise and fall with the stock market's gyrations. Your investors invested for the long term and still have an incentive to protect and grow that investment.

One solution is to do a simple mini-bridge round with your existing investors. The idea is to keep it simple and raise a modest amount of money now. This extends your time horizon and improves the odds of getting your company through the crisis.

You could issue more of whatever securities your existing investors purchased last time. You can also use convertible notes or simple agreements for future equity (SAFEs). These are uncomplicated methods for investing in early stage companies.

Varnum is open for business using technology to work remotely. Please contact your Varnum attorney to discuss how we can support you during these challenging times.

COVID-19 Mandatory Business Closures: Is Your Business Essential?

AUTHORS

Eric R. Post

Ethan J. Beswick

RELATED PRACTICES

Coronavirus Task Force

Business Law Advisory
March 23, 2020

As the COVID-19 crisis continues, states and counties across the United States are entering mandatory shutdown orders for all non-essential businesses. These measures are being taken to slow the spread of the virus, yet they produce adverse effects related to commercial activity that must be carefully considered. Specifically, as a result of these restrictions, companies are scrambling to answer the question of whether or not their business is deemed an essential business, which is therefore permitted to continue its essential operations during mandated shutdowns.

Importantly, this question needs to be answered on a state-by-state (or in some cases county-by-county) basis. The U.S. Department of Homeland Security (DHS) has issued Guidance on the Essential Critical Infrastructure Workforce; however, such guidance is non-binding and advisory in nature. Nonetheless, many state governments have used this guidance in determining the parameters of their own restrictions. Under the DHS guidance, the following industry sectors have been listed as critical infrastructure (i.e., essential under many state orders):

- Health Care/Public Health
- Law Enforcement, Public Safety, First Responders
- Food and Agriculture
- Energy
- Water and Wastewater
- Transportation and Logistics
- Public Works
- Communications and Information Technology
- Community-Based Government Operations and Essential Functions
- Critical Manufacturing
- Hazardous Materials
- Financial Services
- Chemical
- Defense Industrial Base

To date, Michigan and 11 other states have implemented restrictions on commercial activity through mandatory shutdowns: California, Connecticut, Illinois, Louisiana, Massachusetts, New Jersey, New York, Nevada, Pennsylvania, Ohio and Delaware. To the extent a business either resides in or has operations in these states, it is critical to analyze the applicable state orders to confirm whether your particular business is deemed essential and thus can remain open.

In Michigan, the stay at home order in Michigan was announced by Governor Whitmer on the morning of March 24, 2020. The Michigan order goes into effect at 12:01 AM on March 24, 2020 and will continue in effect until at least April 13, 2020. The order specifies that no business may "conduct operations that require workers to leave their homes or places of residence" in Michigan unless those workers are (a) necessary to sustain or protect life (which include the critical infrastructure workers identified by the DHS guidance), or (b) necessary to conduct minimum basic operations. The latter category includes workers "whose in-person presence is strictly necessary" to allow the business to maintain inventory or equipment, ensure security, process payroll and employee benefits or similar workers needed to "facilitate the ability of other workers to work remotely."

In addition, the Michigan order allows suppliers, distributors and service providers of a critical infrastructure business to also continue operations, to the extent necessary to support the primary business, provided that the primary business expressly designates those business partners as a business whose continued operation is necessary to support its work. In turn, once those business partners are expressly designated, they can similarly extend that designation to their own suppliers, distributors and service providers to the extent necessary. In other words, the entire supply chain and service provider network of a critical infrastructure business could be permitted to continue in-person operations, at least to the extent necessary to support or facilitate that business.

It is important to understand that where a business provides both essential and non-essential goods and services, only those operations necessary to support the essential goods or services are exempt the mandated shutdowns. Put differently, simply because a portion of one's business is deemed to be essential is not a free pass to continue operations as usual.

If you have questions about whether your business is essential for purposes of these orders, Varnum stands ready to assist. Please feel free to contact us with any questions or concerns.

Coronavirus and Global Supply: Contractual Protections Can Be a Remedy to the Symptoms from Unhealthy Supply Chains

AUTHORS

Ethan J. Beswick

Brion B. Doyle

Scott J. Hill

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Uniform Commercial Code

Business Law Advisory
February 20, 2020

The outbreak of coronavirus in China has made front page news across the globe in the past month and, while this epidemic has brought about health concerns for individuals around the world, industry concerns have arisen for those buying goods or component parts from the Chinese market. Specifically, when supply chains are interrupted and inventory is short, companies relying on goods supplied from China are wondering where to turn as they face production limitations or, in some cases, line shutdown, impacting downstream commerce. Where companies face these concerns brought about by supply shortages and remedies are required, companies must look first to the language of their supply agreements.

Force Majeure Provisions

First, where a supply agreement contains a force majeure provision (or Act of God provision), the contract language itself may provide options and legal remedies when the production and sale of one's goods becomes commercially impractical or, in some cases, even impossible. Specifically, the invocation of such provision may permit adjustments to the contract's primary terms including: delivery; quantity terms; and, in rare situations, the agreed upon purchase price. These force majeure provisions allow contracting parties the opportunity to address supply disruption where unexpected circumstances prevent a party from performing. Should you find yourself in a position where supply is short and your contract contains a force majeure provision, it may be time for a supplier to provide notice to its buyer.

Uniform Commercial Code

Even in the absence of a force majeure provision, legal protection may still be available that will excuse non-performance due to commercial impracticability. In this situation, the Uniform Commercial Code (UCC) protects a non-performing party from breach under UCC § 2-615. A party may seek baseline protections for the party's non-performance where "performance as agreed has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on

which the contract was made . . . ."[1] Put differently, a seller is excused where its performance is "commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting."[2] Notably, where a seller's ability to supply is only partially impacted, the seller must allocate production/supply among its customers in a fair and reasonable manner.[3] There remain additional factors that must be considered such as burden of proof, foreseeability, duration, etc., and increased costs alone may not be sufficient to meet the burden of proof.

Therefore, where a company is experiencing supply shortages due to the coronavirus's shutdown of commercial facilities in China, the coronavirus likely qualifies to excuse performance under either a supply contract's force majeure provision or under the UCC.

Should your company find itself in this position where it is difficult to maintain inventory levels or produce parts due to lack of supply from a Chinese supplier, it may be time to consider the invocation of force majeure protections under your supply contracts or under the UCC if such force majeure provisions are missing from your contracts. Please contact a member of Varnum's Coronavirus Task Force if we can be of assistance to your situation.

[1] UCC § 2-615(a).

[2] UCC § 2-615, Official Comment 1.

[3] UCC § 2-615(b).

Michigan Health Care Operations in a Stay at Home World

AUTHORS

Scott D. Alfree

Charyn K. Hain

Zachary J. Meyer

Sarah L. Wixson

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Health Care

Health Care Advisory
March 24, 2020

On March 23, 2020 in an escalated response to the spread of the novel coronavirus COVID-19, Michigan joined other states issuing stay at home orders through Executive Order 2020-21. The executive order took effect beginning on March 24, 2020 at 12:01 a.m. and ends April 13, 2020 at 11:59 p.m. As a general matter, among other things, the executive order requires that all individuals living in Michigan stay at home and prohibits the operation of a business or operation that requires workers to leave their homes. However, the executive order provides important exceptions to these requirements that are relevant to health care businesses and operations.

Generally

Of significance, the executive order is only designed to prohibit in-person work that is not necessary to sustain or protect life. Health care businesses and operations, like other employers, may continue to provide services that rely on remote work accomplished from a worker's home. Health care businesses and operations *may* be operated even though it requires workers to leave their homes, and individuals *may* leave their homes and travel as necessary, to the extent limited to:

1. **critical infrastructure workers** (i.e., those workers necessary to sustain or protect life) performing their jobs; or
2. to **workers necessary to conduct minimum basic operations** performing their jobs;
3. to **perform tasks that are necessary to their [or their family's or household members'] health and safety**; or
4. to **obtain necessary services or supplies** for themselves, their family or household members.

Critical Infrastructure Workers

Critical infrastructure workers means those critical infrastructure workers described by the U.S. Department of Homeland Security (DHS) Cybersecurity and Infrastructure Security Agency in its March 19, 2020 guidance on the COVID-19 response. The DHS guidance list of essential

critical infrastructure workers is advisory in nature and not binding in and of itself. The executive order, however, is binding and incorporates this list into its operation. In addition, the executive order further includes certain additional categories of critical infrastructure workers above and beyond those identified in the DHS guidance.

Of relevance to health care businesses and operations, the DHS guidance identifies workers in the health care/public health sector as being critical infrastructure workers and further lists all manner of sector workers considered critical. This list provides a host of job descriptions, including caregivers (such as physicians, mid-level practitioners, nurses and assistants, physical and occupational therapists and assistants, etc.), hospital and laboratory personnel (such as accounting, administrative, housekeeping, etc.), and workers in other medical facilities (such as ambulatory centers, clinics, comprehensive outpatient rehabilitation, hospitals, long term care, etc.).

The executive order further provides a downstream process for a cascading series of designations that a business or operation that employs critical infrastructure employees may itself make for suppliers, distribution centers or service providers whose continued operation is necessary to enable, support or facilitate the work of its critical infrastructure workers (and from those suppliers, distribution centers, or service providers to their suppliers, distributions centers, or service providers). Health care businesses and operations generally fit into the categories of critical infrastructure workers identified in the DHS guidance and may further be designated as critical to the supply chains of other critical infrastructure operations.

There remain conditions on the use of critical infrastructure workers under the executive order. In-person activities that are *not* necessary to sustain or protect life must still be suspended until normal operations resume, and social distancing practices and other mitigation measures to protect workers and patrons remain. The implication for health care businesses and operations is that even if they are permitted to continue providing in-person services because of a critical infrastructure analysis, it should not lead to business as usual. Activity should be limited to that which is in fact critical, and standards should continue to be implemented in recognition of the continued threat of COVID-19.

Workers Necessary to Conduct Minimum Basic Operations

Workers who are necessary to conduct minimum basic operations means those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits) or facilitate the ability of other workers to work remotely. The executive order is not as express about the remaining conditions on the use of workers necessary to conduct minimum basic operations, but it seems likely (and prudent) that the same expectations regarding limiting activity as appropriate and implementing social distancing practices and other mitigation measures be recognized with these workers as with critical infrastructure workers. For health care businesses and operations, workers in these critical positions may already be critical infrastructure workers because of the critical nature of health care sector jobs in Michigan's infrastructure.

Designations

Health care businesses and operations are required to determine which of their workers are critical infrastructure workers and which are necessary to conduct minimum basic operations and then inform such workers of that designation. The designation must be in writing but may be made orally until March 31, 2020 at 11:59 p.m. However, critical infrastructure workers in health care and public health do not need to be so designated. On that basis, health care businesses and operations are likely to have less, if any, need to make formal designations.

Patients

Application of the executive order to the ability of a health care business or operation to remain open to provide in-person services is only half the story. The requirement that all individuals living in Michigan stay at home restricts the basis on which patients may leave their homes to visit a health care business or operation and secure in-person services.

The executive order provides exceptions to this requirement, but they are limited. For example, the exception for performing tasks that are necessary to health and safety includes: leaving home to secure medication; to seek medical or dental care that is necessary to address a medical emergency; or to preserve the health and safety of a household or family member

(including procedures that, in accordance with a duly implemented nonessential procedures postponement plan, have not been postponed). The practical impact is that, even if a health care business or operation remains open after analysis of and compliance with Executive Orders 2020-17 (discussed below) and 2020-21, patients may elect to cancel or postpone procedures or appointments to comply with the travel directives.

As a further example, the exception to obtain necessary services or supplies includes leaving home to purchase needed medical supplies. The exception is qualified such that individuals must secure such services or supplies via delivery to the maximum extent possible.

Executive Order 2020-17

As mentioned above, Executive Order 2020-21 should be read in conjunction with Executive Order 2020-17, which Gov. Whitmer issued on March 20, 2020. Executive Order 2020-17 imposed temporary restrictions on certain health care businesses' or operations' ability to perform non-essential medical and dental procedures for the duration of the declared COVID-19 state of emergency. The effect of Executive Order 2020-17 is in some ways subsumed by the breadth of Executive Order 2020-21. However, Executive Order 2020-17 still remains in effect and continues to impact the scope of procedures that health care businesses and operations may be required to postpone. Of note, the same standards for determining whether a procedure is essential or not in Executive Order 2020-17 are used in Executive Order 2020-21 to describe on what basis patients may leave their homes to seek medical or dental care (i.e., only when that care is necessary to address a medical emergency or necessary to preserve health and safety). See what Varnum's Health Care Practice Team has to say about Executive Order 2020-17 in our advisory Michigan Health Care Facilities Required to Postpone Non-Essential Procedures.

Takeaways

Health care businesses and operations generally may be considered critical to Michigan's infrastructure and may continue to provide certain services even though they require workers to leave their homes. Individuals *may* leave their homes and travel as necessary, to the extent limited to critical infrastructure workers and those workers necessary to conduct minimum basic operations. Formal designation of these workers as such is likely not necessary but recommended. However, these exceptions should not be used to engage in business as usual but require careful

analysis and consideration of the scope of practice, including both procedures/services and necessary personnel. Additionally, the general climate of fear may depress patient turnout for procedures, even if those procedures might strictly be deemed essential as addressing a medical emergency or being necessary to preserve health and safety. It is accordingly paramount that health care businesses and operations make a comprehensive evaluation of the need to use in-person services to deliver health care to patients, along with the costs and benefits of doing so.

Contact Varnum's Health Care Practice Team with questions about how Executive Order 2020-21 impacts your health care business or operation.

Michigan Health Care Facilities Required to Postpone Non-Essential Procedures

AUTHORS

Scott D. Alfree

Charyn K. Hain

Zachary J. Meyer

Sarah L. Wixson

RELATED PRACTICES

Coronavirus Task Force

RELATED INDUSTRIES

Health Care

Health Care Advisory
March 24, 2020

On March 20, 2020 Governor Whitmer issued Executive Order 2020-17 in connection with Michigan's response to the spread of the novel coronavirus COVID-19. The executive order imposed temporary restrictions on certain medical and dental procedures beginning no later than March 21, 2020 at 5:00 p.m. and continuing while the declared COVID-19 state of emergency remains in effect. Under the executive order, certain health care businesses or operations are required to implement a plan to temporarily postpone all non-essential procedures.

Covered Facilities

The executive order does not apply to all health care businesses or operations, however. It applies only to covered facilities, which means all:

- hospitals
- freestanding surgical outpatient facilities
- dental facilities
- state-operated outpatient facilities

The definition of covered facilities is broad but not all-encompassing. Some health care businesses and operations (like many private outpatient clinics that do not otherwise qualify as one of the other categories of covered facilities) are not covered by the executive order.

Non-Essential Procedures

The executive order does not require the postponing of all medical or dental procedures. It only requires postponing non-essential procedures, which means medical or dental procedures that a licensed medical provider determines are not necessary in order to address a medical emergency or to preserve the health and safety of a patient. The executive order specifically identifies certain medical and dental procedures that **must** or **should be** postponed pursuant to a covered entity's postponement plan. These include:

- **Medical Procedures:**

- joint replacement
- bariatric surgery
- cosmetic surgery

- **Dental Procedures:**
  - cosmetic or aesthetic procedures, such as veneers, teeth bleaching or cosmetic bonding
  - any routine hygiene appointments
  - any orthodontic procedures that do not relieve pain or infection, do not restore oral function or are not trauma-related
  - initiation of any crowns, bridges or dentures that do not relieve pain or infection, do not restore oral function or are not trauma-related
  - any periodontal plastic surgery
  - any extractions of asymptomatic non-carious teeth
  - any recall visits for periodontally healthy patients

Essential Procedures

Emergency or trauma-related surgery and procedures are excluded from any requirement for postponement where postponement would significantly impact the health, safety, and welfare of the patient. While not express in the executive order, it is logical (and advisable) that the foregoing determination, like a determination regarding a procedure not being necessary to address a medical emergency or to preserve the health and safety of a patient, be made by a licensed medical provider.

In addition, the executive order is clear about certain medical procedures that **must not** be postponed pursuant to a covered entity's postponement plan. These include:

- **Medical Procedures:**
  - surgeries related to advanced cardiovascular disease (including coronary artery disease, heart failure and arrhythmias) that would prolong life
  - oncological testing, treatment and related procedures
  - pregnancy-related visits and procedures
  - labor and delivery
  - organ transplantation

- procedures related to dialysis

Executive Order 2020-21

On March 23, 2020 in an escalated response to the spread of the novel coronavirus COVID-19, the Michigan joined other states in issuing stay at home orders through Executive Order 2020-21. The effect of Executive Order 2020-21 on health care businesses and operations is wide-ranging and impacts entities whether or not they meet the definition of covered facility. Executive Order 2020-17 remains in effect, and continues to impact the scope of procedures that health care businesses and operations may be required to postpone. Of note, the same standards for determining whether a procedure is essential in Executive Order 2020-17 are used in Executive Order 2020-21 to describe when travel is permitted for medical or dental care (i.e., travel is expressly permitted only when obtaining care is necessary to address a medical emergency or necessary to preserve health and safety). See what Varnum's Health Care Practice Team has to say about Executive Order 2020-21 in the advisory Michigan Health Care Operations in a Stay at Home World.

Takeaways

Some health care businesses and operations had already voluntarily limited or canceled non-essential procedures and appointments. For those that continue to provide medical or dental procedures, it is critical to determine:

- whether the business or operation is a covered facility
- whether and to what extent the facility can or has been performing non-essential procedures
- in what scenarios the facility may perform non-essential procedures because of emergent or trauma-related circumstances or a significant impact on the health, safety and welfare of patients

In light of the issuance of Michigan's stay at home order, it is further paramount that health care businesses and operations evaluate the need to use in-person services to deliver health care to patients after considering the costs and benefits of doing so.

Contact Varnum's Health Care Practice Team with questions about how Executive Order 2020-17 impacts your health care business or operation.

Business Interruption Insurance and COVID-19: Three Ways to Protect Your Rights Amid Uncertainty

AUTHORS

Mark S. Allard

John J. Rolecki

RELATED PRACTICES

Coronavirus Task Force

Insurance

Litigation Advisory
March 20, 2020

Many insureds have heard the insurance companies' latest mantra that:

- business losses suffered in connection with the recent responses to COVID-19 are not covered by policies with business interruption coverage;
- such losses are not caused by the type of physical damage required to file a successful claim; and
- exclusions for losses in connection with viruses are ironclad.

Certainly, there will be opposition by carriers to recovering business interruption losses in connection with COVID-19, and we expect insurance companies to swiftly deny such claims. The legality of such denials is not, however, as certain as insurance companies would have you believe. In addition to filing a proof of loss and a claim with their insurer, insureds can take the following three actions today to best protect their rights.

1. Analyze your policy and review the governing law

Most fundamentally, any blanket statement purporting to assert the legal outcome for all claims under all policies in all situations should be taken with a large grain of salt. Different policies have different terms, and the factual circumstances underlying each loss can vary dramatically from case to case. For example, if a policy expressly defines a relevant term – for example, "physical damage," which is sometimes required to recover business interruption losses – the term might be defined in a manner that presents a potential barrier to recovery. But if your policy does not expressly define the same term and that term presents an ambiguity in the specific context of your business's loss, the term may be construed in favor of coverage. Moreover, courts in different states may construe such terms differently, so it is important to check which law governs your policy.

2. Make note of virus exclusions

The law interpreting virus exclusions is underdeveloped. While these provisions, which appear in some, but not all, policies, may present a coverage issue, there is not clear precedent for the circumstances in which many businesses now find themselves. Moreover, many policies contain civil authority provisions which may provide coverage for losses suffered in connection with a governmental order prohibiting access to a covered location. Issues of what constitutes physical damage or loss will likely arise in this context, too. Again, checking the specific terms and construction of your insurance policy, and how they operate in the specific context of your business's losses, is imperative.

3. Stay abreast of legislative developments

The political landscape regarding COVID-19 is shifting quickly. New Jersey lawmakers are considering a bill to force insurance companies to cover business interruption losses caused by COVID-19. The mayors of certain cities, including New York, have issued orders specifically citing property damage from COVID-19 as the basis for mandating business shutdowns. Although future developments cannot be known, identifying every potential basis for recovery under your business's policy will facilitate any possible recovery as this situation continues to change.

Insurance companies hope that insureds will not file claims, so they can argue later that they were not given timely notice and that the insured lost any future right to recovery under the policy. If the law develops unfavorably for insurers, fewer claims now means less liability for wrongful denials of coverage later. Although we expect that filing a claim is likely to result in a quick denial of coverage at this stage, doing so is an effective way to secure your business's rights for years to come as circumstances and governing law continue to evolve. Additionally, filing a proof of loss is usually required under these policies. Regardless of whether a claim is denied or not, the proof of loss should be filed. Under Michigan law, if an insurer does not pay the claim within 60 days of submission of the proof of loss, the carrier is liable for 12 percent penalty interest should the claim ultimately be allowed.

Varnum has organized an experienced and knowledgeable team that is tracking these and other developments in response to COVID-19. If you are seeking guidance with respect to your business interruption insurance policy or other matters, we would be pleased to assist in identifying all potential means of insurance recovery and strategies to protect your business's rights.

COVID-19: Managing Contractual Uncertainty

AUTHORS

Shanna M. Kaminski

John J. Rolecki

Michael J. Roth

Olayinka A. Ope

RELATED PRACTICES

Coronavirus Task Force

Litigation and Trial

Litigation Advisory
March 19, 2020

COVID-19 impacts everyone and has brought into focus parties' contractual rights and obligations. This is not a novel issue. In the 1870s, smallpox swept through Alpena, Michigan[1] resulting in extended school closings[2] and the school district refusing to pay teachers their contracted salary. Predictably, litigation ensued. The school district argued its obligation to perform (paying teachers) was excused because the smallpox epidemic was an act of God.[3] The school district prevailed at trial but lost in the Michigan Supreme Court.[4] The court reasoned that although the school district's decision to close was wise, it was merely a "strong expediency" not an "absolute necessity,"[5] and that, in the absence of any act of God provision (also known as a *force majeure* provision), teachers should not suffer from the district's decision.[6] The decision remains good law and highlights the difficulty in establishing contractual impossibility of performance in a contract that lacks an act of God provision.

Michigan cases recognize the defense of impossibility in only narrow circumstances. The Michigan Commercial Code (MCC), which specifically deals with the sale of goods, recognizes a related but broader defense of impracticability. The impracticability doctrine excuses a seller's delayed or non-delivery of goods in two scenarios: where the inability to perform is due to compliance with governmental regulations or when performance becomes impracticable due to the occurrence of an unforeseeable event.[7] Sellers cannot always rely on the impracticability defense, however, because they often agree to assume a greater obligation in the contract that expressly allocates liability to them even in circumstances otherwise covered by the MCC's impracticability defense.[8]

Contract terms can create certainty in uncertain circumstances if they cover the circumstances at hand. If they do not, uncertainty can create legal exposure. But that legal exposure can be managed.

As the effects of COVID-19 unfold, parties may resist ongoing compliance, or simply fail to comply, with a broad range of contracts due to the social, cultural and governmental responses to the outbreak. Similarly, we have already encountered scenarios in which parties attempt to wield this phenomenon as a tool to renegotiate unfavorable agreements. To determine the strengths and weaknesses of any such arguments, a contracting party must ascertain whether its contract contemplates the specific scenario and allocates risk in advance (as the Alpena school

district's teaching contract neglected to do, to its detriment). One in this position must also ascertain whether, and to what extent, the default rules provided in the common law or the MCC will govern. The answers to these important threshold questions, among others, will guide the contracting party's strategy in challenging or defending its rights and obligations under a disrupted contract.

Should you find yourself in a contract dispute or simply need to gain a fuller understanding of your rights and obligations under a contract in light of COVID-19, Varnum's Coronavirus Task Force, comprised of a multidisciplinary team of experienced attorneys, can swiftly and calmly navigate you through these uncertain times.

[1] Historical records suggest the epidemic occurred in 1873. See Haltiner, R., The Town That Wouldn't Die, Alpena, Michigan, excerpts available at http://sites.rootsweb.com/~mialpena/HistDoc/townthat.htm.

[2] *Dewey v Union Sch Dist*, 43 Mich 480, 481; 5 NW 646 (1880).

[3] *Id.* at 482.

[4] *Id.* at 483.

[5] *Id.*

[6] *Id.*

[7] MCL 440.2615(a).

[8] MCL 440.2615.

VARNUM
ATTORNEYS AT LAW

Immigration Update: Suspension of All Premium Processing, Additional Visa Services Closures and I-9 Flexibility for Remote Workers

AUTHORS

Kimberly A. Clarke

Nina A. Thekdi

Yvonne Kupfermann

RELATED PRACTICES

Coronavirus Task Force

Immigration

Immigration Advisory
March 20, 2020

U.S. Citizenship and Immigration Services announced suspension of all premium processing until further notice due to COVID-19. Petitioners who have already filed premium processing petitions that do not receive action within 15 calendar days will receive a $1,440 premium fee refund. There is no confirmed date for resumption of premium processing.

Additional U.S. embassies and consulates worldwide have suspended or significantly limited visa appointments and interviews. Routine immigrant and nonimmigrant visa appointments at U.S. consulates in the United Kingdom, Germany, India, France and Mexico, for example, have been canceled until further notice. Other U.S. consulates, including the U.S. consulate in Toronto, are cancelling routine nonimmigrant visa appointments but not immigrant visa appointments. Those with upcoming visa appointments should monitor the relevant consulate's website for the latest information on services. Emergency appointments that require an individual to travel immediately may be available in very limited circumstances.

Effective March 20, 2020 the U.S. Department of Homeland Security removed physical presence requirements associated with Form I-9 for employers **operating remotely**. **This does not apply to workplaces with any employees physically present at the work location.** Employers operating remotely will not be required to review an employee's identity/employment authorization documents in the employee's physical presence and, instead, may do so remotely within three business days. Employers should complete Section 2 by listing COVID-19 as reason for the physical inspection delay and retain copies of the documents presented remotely. Once normal operations resume, all employees that completed onboarding remotely must report to their employer within three business days for in-person document verification. Employers should add the date documents were **physically inspected** to Section 2. This policy is in effect until May 19, 2020 or three business days after termination of the national COVID-19 emergency, whichever is first.

USCIS Suspends Interviews and Premium Processing for Cap H-1B Cases, Consulates Suspend or Limit Visa Interviews

AUTHORS

Kimberly A. Clarke

Nina A. Thekdi

Yvonne Kupfermann

RELATED PRACTICES

Coronavirus Task Force

Immigration

Immigration Advisory
March 18, 2020

U.S. Citizenship and Immigration Services (USCIS) announced temporary suspension until April 1 of all in-person activities at local offices including biometric appointments, permanent residence interviews, asylum hearings and naturalization ceremonies. USCIS will send notices to affected applicants rescheduling.

USCIS also announced suspension of premium processing on cap H-1B petitions. The new H-1B registration period closes March 20, 2020 at noon. USCIS is expected to select cap cases the following week, and petitions may be filed within 90 days after selection. USCIS expected to phase in resumption of premium processing, first with change of status from F-1 status by May 27 and then all cases by June 29.

U.S. Department of State, through its embassies and consulates worldwide, has limited or cancelled visa interviews. With H-2A and H-2B visa processing needed to support seasonal work, Mexican consulates are processing scheduled visa appointments and working with the U.S. Department of Agriculture on protocols to continue processing. To access information on operations at individual consulates, please see: https://travel.state.gov/content/travel/en/traveladvisories/COVID-19-Country-Specific-Information.html

Please contact your Varnum immigration attorney if you have any questions.

COVID-19 (Coronavirus) Response: 401(k) Questions, Part II

AUTHORS

John D. Arendshorst

Jeffrey A. DeVree

RELATED PRACTICES

Coronavirus Task Force

Employee Benefits

Employee Benefits Advisory
March 23, 2020

The workplace and other employment consequences of responding to COVID-19 (coronavirus) will raise questions about 401(k) plan administration. We addressed some questions in a recent advisory. Here are additional questions that may come up soon.

Can the plan be amended to allow loans or hardship withdrawals?

Yes. Many plans allow loans, hardship withdrawals or both. If your plan does not, the plan can be amended to allow either or both. The availability of hardship withdrawals, however, would be a protected benefit, which could not be eliminated in the future except as to future contributions. Employers should carefully consider this before amending the plan to add hardship withdrawals.

Can matching or other employer contributions be reduced or suspended?

Yes, in many cases, but this depends on the type of contribution, and it may also require a plan amendment.

Safe harbor contributions. Safe harbor matching and nonelective contributions normally cannot be reduced or suspended during the year. There are two exceptions. One exception is if the annual safe harbor notice to employees included a statement that the safe harbor contributions might be reduced or suspended during the year. The other exception is if the employer is operating at an economic loss. Each of these exceptions requires a plan amendment, a notice to employees at least 30 days before the effective date and a reasonable opportunity for employees to change their elective contributions after they receive the notice.

Traditional contributions. Traditional (i.e., not safe harbor) matching and other employer contributions normally can be reduced or suspended for any reason. If the amount of the contribution is completely discretionary, the employer may simply exercise this discretion. If the amount of the contribution is determined under a formula, however, as is the case with most matching contributions, the situation becomes more complicated

because the contribution normally cannot be reduced or suspended after employees have already satisfied the requirements for receiving it. For example, if making an employee contribution is the only requirement for receiving the matching contribution, the matching contribution can be reduced or suspended with respect to future employee contributions but not with respect to employee contributions that have already been made. Also, if the contribution formula is specified in the terms of the plan, a plan amendment is required to reduce or suspend the contribution. Finally, although no particular form of notice is required, appropriate communication to employees is important.

Can a layoff or furlough result in accelerated vesting of matching and other employer contribution accounts?

Yes. As with any other significant workforce reduction, a layoff or furlough involving a significant number of participants for more than a brief period of time may cause a partial termination of the plan. This would require full vesting of matching and other employer contribution accounts of the affected participants.

For more information, please contact your primary Varnum attorney or any member of the employee benefits practice team.

For answers to additional 401(k) questions, see COVID-19 (Coronavirus) Response: 401(k) Questions, Part I.

COVID-19 (Coronavirus) Response: Questions and Answers for Health and Welfare Benefit Plans

AUTHORS

John D. Arendshorst

RELATED PRACTICES

Coronavirus Task Force

Employee Benefits

Employee Benefits Advisory
March 23, 2020

What happens to employees' health care coverage if they are on unpaid leave, layoff or furlough?

The terms of the health plan, and your contract with your health insurer or third-party administrator, will determine whether active employee coverage can continue during short-term leaves of absence. Many plans have minimum hour requirements to maintain active coverage. If the terms of your health plan do not permit coverage to continue during a leave of absence, the plan could be amended to do so. However, it is important to coordinate any such expansion of coverage with your plan's insurer, third-party administrator and/or stop loss carrier. Employers who expand coverage for ineligible employees outside the terms of the plan or policy without consent from the insurer or stop loss carrier could lead to claims by newly-eligible employees not being covered.

How does COBRA continuation coverage apply to employees on leave?

COBRA continuation coverage (or state continuation coverage, if applicable) generally must be offered if an employee loses group health plan coverage due to a termination of employment or a reduction in hours. An increase in the employee's share of the group health plan premium due to unpaid leave or a reduction in hours is also considered to be a COBRA qualifying event. An employer may charge the affected employee up to 102 percent of the applicable premium for COBRA coverage, but the employer may pay some or all of the cost of the premium on the employee's behalf.

Will termination of health coverage for employees on leave subject our company to Affordable Care Act penalties?

If an employer terminates group health plan coverage for employees who are placed on unpaid leave or who have a reduction in hours, the termination of coverage may trigger Affordable Care Act (ACA) penalties. The ACA requires applicable large employers to offer coverage to at least 95 percent of full-time employees. If a full-time employee is placed on leave or has a reduction in hours during a stability period, they may still be considered a full-time employee and must be offered coverage.

In addition, the coverage offered must remain affordable to avoid an ACA penalty. If an employee is on unpaid leave for a significant period of time, the coverage may require a continued or increased employer subsidy to remain affordable. This rule applies both to active employee coverage and to COBRA continuation coverage.

How will employees pay required premiums or contributions during a leave period?

The terms of the health plan determine how employees may pay premiums or contributions to maintain coverage during any leave period. These provisions can be amended prospectively at any time. If an employee does not pay premiums or contributions as required while on leave, their coverage could terminate. An employee will not be eligible for COBRA continuation coverage if their coverage terminates due to unpaid premiums.

If an employer offers minimum essential coverage to employees that is affordable and provides minimum value, the employer will not be subject to ACA penalties if an employee declines the coverage or if an employee's coverage terminates due to unpaid premiums or contributions.

Can employees affected by COVID-19 make changes to their cafeteria plan elections?

Cafeteria plans may permit employees to revoke or change elections midyear as a result of a change in the employment status of the employee (or the employee's spouse or dependents), such as a reduction in work hours that affects the employee's eligibility or cost of coverage. The change in election must be consistent with the change in status.

Employees who are absent from work on FMLA leave must be allowed to either revoke their medical coverage and flexible spending account contributions, or to continue coverage but discontinue payment of the employee share of the premium costs and repay their share upon returning to work.

Employees who have a significant increase or decrease in qualified dependent care costs due to school closures may change their dependent care flexible spending contributions consistent with the change in costs.

Employers should review their plan documents to determine which of these options are permitted and whether they should amend the plan to increase flexibility.

Is our company group health plan required to provide testing for, or treatment of, COVID-19 without a deductible?

The Families First Coronavirus Response Act, enacted on March 18, 2020 requires group health plans (including grandfathered plans) to cover COVID-19 testing without any cost-sharing. Plans must also cover services incurred during visits to health care providers that result in COVID-19 testing, to the extent the item or service relates to the testing or evaluation of the patient's need for a test. These requirements do not apply to group health plans that provide only "excepted" benefits or cover only retirees. If a group health plan is a high-deductible health plan (HDHP), the lack of a deductible applied to COVID-19 testing will be disregarded for determining the status of the plan as a HDHP.

The law does not include any requirement with respect to costs for treatment of COVID-19, so treatment costs will still be subject to your plan's standard deductible and cost-sharing rules.

Does our company need to provide paid leave to employees who are absent from work due to COVID-19?

In some cases, yes. Congress has passed several laws in response to the COVID-19 epidemic, including the Emergency Family and Medical Leave Expansion Act, which requires some employers to provide paid leave to certain employees affected by COVID-19. Varnum's labor and employment law team has published an advisory on these changes: https://www.varnumlaw.com/newsroom-publications-families-first-coronavirus-response-act

Can an employer establish leave-sharing programs to allow employees to assist one another with the impact of COVID-19?

Generally, if one employee donates paid leave time to another employee, the leave will be taxable to the donor. However, the IRS permits donation of leave without the donor being taxed if the leave is donated pursuant to a written program established by the employer in response to either a major disaster or for medical emergencies. The COVID-19 emergency may be sufficient for employers to sponsor such a leave-sharing program.

How do HIPAA rules apply to protected health information related to COVID-19?

HIPAA privacy and security rules still apply. However, the rules do permit covered entities and business associates to disclose protected health information (PHI) as necessary to help public health authorities to safely carry out their duties. For example, covered entities may need to disclose PHI as needed to report exposures to the virus or confirmed cases of COVID-19, so long as any such disclosure is the minimum necessary to accomplish the public health purpose. Varnum's employee benefits attorneys can help you determine whether a disclosure is permitted or required and what should be disclosed.

For more information, please contact your primary Varnum attorney or any member of the employee benefits practice team.

COVID-19 (Coronavirus) Response: 401(k) Questions

AUTHORS

John D. Arendshorst

Jeffrey A. DeVree

RELATED PRACTICES

Coronavirus Task Force

Employee Benefits

Employee Benefits Advisory
March 19, 2020

The workplace and other employment consequences of responding to COVID-19 (coronavirus) will raise questions about 401(k) plan administration. Here are some questions that are likely to come up soon.

Can participants modify or terminate their elective contributions?

Yes, by following the plan's normal rules and procedures. If the normal rules and procedures are not flexible enough for the situation, they can be changed temporarily to provide more flexibility.

Does the coronavirus emergency qualify for a hardship withdrawal?

Perhaps, depending on the circumstance, but probably not yet. The IRS recently added federally-declared disasters to the list of safe harbor financial needs, and many plans have been amended to include this. The president's declaration of a national emergency, however, is not the same as a declaration of a disaster. The president could make a further declaration. Or, as in the past, the IRS could create a temporary safe harbor for this specific situation. Even without these additional actions by the president or the IRS, the coronavirus could lead to one or more other safe harbor financial needs or, if the plan permits, other immediate and heavy financial needs. This would depend on the terms of the plan, and the facts and circumstances of the particular situation.

Can participants stop making 401(k) loan payments?

Yes, the plan can allow participants to suspend loan payments temporarily during temporary layoffs and other unpaid leaves of absence, but this will not extend the maximum allowable period for repaying the loan (which is usually five years). When the participant returns to work, the loan payments will resume and either (i) the missed payments will have to be caught up by making additional payments or (ii) the remaining payments will have to be recalculated to pay off the loan during the remaining repayment period.

Can the plan waive a limit on the number of 401(k) loans?

Yes, the plan can waive the limit on the number of loans, but the plan cannot increase or waive the maximum amount that may be borrowed. Many plans have a limit on the number of loans, such as a limit on the number of loans that can be requested during a period of time or a limit on the total number of loans that can be outstanding to a participant at any particular time. The plan may not want to increase these limits permanently, but the plan could increase them temporarily.

Is a plan amendment necessary for any of these actions?

Yes or no, depending on the situation. If the rules you want to change are specifically set forth in the terms of the plan, then the plan would have to be amended. On the other hand, if the rules you want to change were established as administrative policies, they could be changed by administrative action without a plan amendment.

For more information, please contact your primary Varnum attorney or any member of the Employee Benefits Practice Team.

Tax Filing Date Moved To July 15, 2020

AUTHORS

Angelique M. Neal

Eric M. Nemeth

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
March 20, 2020

Treasury Secretary Mnuchin announced today that the filing due date for income tax returns will be extended to July 15, 2020 amid the COVID-19 pandemic. This extended due date will apply to individual and business income tax returns for the 2019 tax year that are required to be filed by April 15, 2020. Varnum's tax team will provide updates once more information becomes available.

Details on the extension of the April 15, 2020 tax payment deadlines can be found in our previous advisory, Due Dates for Income Tax Payments Are Postponed as a Result of COVID-19.

Due Dates for Income Tax Payments Are Postponed as a Result of COVID-19

AUTHORS

Angelique M. Neal

Eric M. Nemeth

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Tax Planning, Compliance and Litigation

Tax Advisory
March 19, 2020

On March 17, 2020 Secretary of Treasury Mnuchin announced that due to COVID-19 (coronavirus) and its impact on the economy, the government will allow a deferral of tax payments that are due to the IRS by April 15, 2020.

To implement the payment deferral, on March 18, 2020 the IRS issued Notice 2020-17 setting forth payment relief available for taxpayers affected by the ongoing COVID-19 pandemic.

Takeaways from Notice 2020-17

1. The IRS has NOT extended the time to file federal income tax returns. Individual income tax returns remain due by April 15, 2020. If you are unable to file by the due date, you should request an extension of time to file using Form 4868.
2. The due date for making federal income tax payments that were due on April 15, 2020 has been postponed to July 15, 2020.
   - Individuals can postpone payments up to $1 million
   - Corporations can postpone payments up to $10 million
3. The payment relief applies to:
   - Federal income tax payments due on April 15, 2020 for the 2019 tax year
   - Federal estimated income tax payments due on April 15, 2020 for the 2020 tax year
4. Penalties, additions to tax and interest will NOT apply to postponed payments made by July 15, 2020
5. NO extension is provided for the payment or deposit of any other type of federal tax, or for the filing of any tax return or information return

In addition, taxpayers that are assessed penalties or additions to tax despite the relief provided in Notice 2020-17 may seek reasonable cause relief under IRC 6651 for failure to timely pay, or seek waiver under IRC 6654 for failure to pay estimated income tax.

While Notice 2020-17 does provide clarification on payment relief, questions on this program still remain. Varnum's tax team will provide updates as they evolve.

Coronavirus Update: Important Guidance for IRS Tax Filers

AUTHORS

Angelique M. Neal

Eric M. Nemeth

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Tax Advisory
March 17, 2020

Due to the situation created by the coronavirus, Varnum's tax team has been fielding questions from clients, co-workers and accountants about potential changes in the tax filing and tax payment deadlines, as well as other IRS administrative issues such as examinations, collection actions and payment plans.

Because the president declared a national emergency, the IRS has broad powers under statute to extend certain deadlines. The IRS also has broad administrative authority. As of the date and time of this email, there has been no official guidance issued on extending the April 15 deadline for the filing of income tax returns. However, statements made on March 17, 2020 by Secretary of Treasury Mnuchin suggest that the government will allow a 90-day deferral of tax payments to the IRS.

Under this program, individuals can defer up to $1 million of tax payments, and corporations can defer up to $10 million, with no penalties and interest for 90 days. This program does appear to require the filing of a tax return first in order to obtain the deferral. Many questions on this program remain, and Varnum's tax team will provide updates as they evolve.

Out of an abundance of caution, individuals may want to file an extension (Form 4868) prior to the filing deadline. This is NOT an extension in time to pay. As such, the first quarter tax estimates are due April 15 as is any shortfall in the expected 2019 tax liability. Please note, with respect to the payment deferral program, the secretary has not clarified whether the extension form or the estimated tax payment voucher falls under the definition of "return" for the payment deferral program. Finally, there are some safe harbors for estimated tax payments that may apply. Check the IRS website or talk to a tax advisor.

Tax preparers should check with the IRS employee assigned to any matter for the case status, including document requests, etc. If your client is honoring an IRS levy on an employee at this time, those obligations are still in force unless notified otherwise by the IRS. Some deadlines such as filing a Tax Court Petition for relief are statutory in nature and still valid.

This is an unprecedented situation, and we will provide further updates as they evolve.

Michigan Small Businesses Hurt by Coronavirus Can Apply for Relief Via SBA, MEDC

AUTHORS

Mary Kay Shaver

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Coronavirus Task Force

Public Finance

Public Finance Advisory
March 20, 2020

While Michigan small businesses are being hit hard by repercussions of the coronavirus and the precautionary measures taken to control its spread, steps are being taken to provide some relief in the form of low-interest loans and grants. Two programs were announced this week by the U.S. Small Business Administration (SBA) and Michigan Economic Development Corporation (MEDC).

Following a request by Gov. Gretchen Whitmer, Michigan has been declared eligible for disaster loan assistance through the SBA. Businesses impacted by the coronavirus can apply for loans of up to $2 million. Loans are available with a 3.75 percent interest rate and terms as long as 30 years. Deferment of payments for up to four months is also available.

Borrowers can apply directly to the SBA at https://disasterloan.sba.gov/ela/. Applicants will need to create an account with a username and password. The application requires a significant amount of financial information and will be rejected if not complete. If approved, funds will be available in approximately 30 days (approximately 21 days to process application and five days for documentation).

The MEDC has also announced a program to provide $20 million in loans and grants for businesses impacted by the COVID-19 outbreak, although some details – including how to apply for them – are still pending.

Funds for both the MEDC loan and grant programs are expected to be available on or about April 1, 2020. Funds from either program may be used for various expenses, including working capital to support payroll, rent, mortgage payment, utility expenses or similar expenses that occur in the ordinary course of business.

The MEDC grant program will be administered through local economic development organizations or nonprofit economic development organizations and provide grants of up to $10,000 each to eligible businesses. Qualifications for eligible businesses include:

- The company is in an industry outlined in Executive Order 2020-9, or any subsequent executive order of similar intent (EO), or demonstrates it

is otherwise affected by the COVID-19 outbreak, that meets one or more of the following: provides support to impacted employees; is located in a downtown district or high impact corridor or has 50 employees or less; or is a company that provides services to companies outlined in the EO and requires additional employees to support to companies or employees impacted by EO;

- The company has 50 employees or less;
- The company needs working capital to support payroll expenses, rent, mortgage payments, utility expenses or other similar expenses that occur in the ordinary course of business; and
- The company is able to demonstrate an income loss as a result of the EO or the COVID-19 outbreak.

The MEDC loan program will provide up to $10 million in loans with a 0.25 percent interest rate and terms of interest-only for 60 months, followed by a full-amortizing 60-month term. Qualifications for eligible businesses include:

- The company is in an industry outlined in Executive Order 2020-9 or demonstrates it is otherwise affected by the COVID-19 outbreak, or is a company that provides goods and services to companies to the aforementioned;
- The company has fewer than 100 employees;
- The company needs working capital to support payroll expenses, rent, mortgage payments, utility expenses or other similar expenses that occur in the ordinary course of business;
- The company can demonstrate that it is unable to access credit through alternative sources;
- The company can demonstrate an income loss of as a result of Executive Order 2020-9.

Additional information can be found online at michiganbusiness.org/covid19/

Coping with Parenting Time During the COVID-19 Pandemic

AUTHORS

Shalini Nangia

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Custody, Parenting Time and Child Support

Family Law

Family Law Advisory
March 23, 2020

On March 23, 2020 Governor Whitmer issued an executive order directing Michigan residents "to remain at home or in their place of residence to the maximum extent feasible." The executive order allows people to travel pursuant to court order, including the transportation of children pursuant to a custody agreement.

As a result, Governor Whitmer's Stay at Home, Stay Safe Order is not a reason, in and of itself, to deny parenting time. Every family is different and has its own set of circumstances. For example, if one of the parents is a first responder, you may have valid concerns about the health and safety of your children and family. If you have concerns about your parenting time exchanges impacting the health and safety of your children, discuss it with your coparent and attorney. Negotiate specific safeguards that may protect your children and your families from exposure. For example, arranging for makeup parenting time once this emergency passes or scheduling parenting time by Skype/FaceTime may also be appropriate. If you and your coparent agree to modify your parenting time during this pandemic, make sure to document any agreements via email or through your attorney.

All parents must understand that the pandemic itself is not a reason to deny parenting time. Court orders must be followed. As a result, if you and your coparent are unable to agree, consider using mediation or arbitration to resolve the issue. Alternative Dispute Resolution is available through Skype, Zoom or telephone.

This is a challenging time for everyone. Despite the animosity and tension you may share with a coparent, it is important to focus on what is best for your children and family at this time.

Closure of Michigan Schools Due to Coronavirus Concerns Creates Host of Legal Issues

AUTHORS

Charyn K. Hain

David E. Khorey

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Coronavirus Task Force

Labor and Employment

RELATED INDUSTRIES

Higher Education

Education Advisory
March 13, 2020

On March 12, 2020 Michigan Gov. Gretchen Whitmer and State Superintendent Michael Rice announced that all K-12 school buildings are ordered to be closed from Monday, March 16 to Sunday April 5, 2020 to slow the spread of COVID-19. Several other states implemented similar measures, with more expected to follow suit.

The closure of all K-12 school buildings, while a prudent step in fighting the spread of COVID-19, creates a plethora of issues for school administrators, staff, parents and students. The Michigan Department of Education has committed to assisting school districts, academies and private schools through this time period.

However, many issues will be district and school specific, such as whether and how to provide online learning opportunities, how to ensure appropriate access to food to children who receive aid, staff pay and union-related issues, assessing contracts with vendors, and crafting appropriate communication with concerned and upset parents and staff members.

Related businesses will feel the impact in at least temporary reductions in work force and loss of revenues from cancelled events.

Issues School Districts May Face

- Cascading issues caused by the closures: childcare needs, food assistance, loss of learning time, provision of educational services by alternative means, etc.
- Districts will receive general assistance from MDE, but each district will have specific community needs and resources to be able to handle closure related issues
- How to best utilize this time to prevent the spread of COVID-19 in buildings and facilities
- Dealing with contractual and vendor relationships

Varnum's education and labor law teams are ready to assist with all these issues and provide counsel to school boards and administrators as they navigate these unprecedented times.

Alcohol Sales and Delivery Options for Liquor License Holders Under Coronavirus-related Restrictions

AUTHORS

Christopher P. Baker

RELATED PRACTICES

Beverage Control and Liquor Licenses

Coronavirus Task Force

RELATED INDUSTRIES

Hospitality

Hospitality & Beverage Control Advisory
March 19, 2020

UPDATE: *On March 22, 2020 the ban termination date referenced below was extended to April 13, 2020.*

Most of the liquor licensed community in Michigan is striving for options that will facilitate the full range of services possible for the public, in light of Governor Whitmer's Executive Order 2020-9, which essentially banned the public from most venues of public accommodation, such as our state's restaurants, hotels, theaters and golf courses, as well as the Michigan breweries, wineries and the associated tap and tasting rooms.

Under the present ban, which is in effect through April 13, most food establishments, including bars, taverns, brewpubs, microbreweries, breweries, distilleries, golf courses, bowling alleys, movie theaters and other businesses that hold an on- premises license – including a Class C, Tavern B or Club license, or a Brewpub license – are prohibited from permitting public access for onsite consumption. At the present time, many owners and operators are questioning the scope of operations, if any that are permitted during this ban. The Hospitality and Alcohol Beverage Control Practice Team at Varnum is analyzing the options.

Pick-up Service

First, there are opportunities for certain liquor license holders to make alcohol available for pick-up service, in the same manner as orders of food or groceries are presently available. Businesses which hold licenses for the sale of packaged beer and wine (SDM) and/or packaged spirits (SDD) are permitted to continue off-premise sales from the retail stores. In addition, grocery stores, liquor stores and other retailers may continue curbside service of alcohol, if they presently possess such curbside service authorization from the state of Michigan.

For restaurants, bars and taverns that presently possess a SDM license in combination with a Class C license, the establishments are permitted to continue to offer pick-up services, and may permit up to five members of the public to be given access at any time to the premises solely for pick-up of packaged beer and/or wine. Unfortunately, if the restaurant, bar or hotel

does not possess an SDM as part of their license, no alcohol may be provided to go as part of a food order.

Michigan manufacturers potentially possess the same alcohol pick-up option: select Michigan suppliers (microbrewers, brewers, small winemakers and small distillers) that possess an on-premise tasting room permit for sales of alcohol to go, as well as off-premise tasting room licensees with permits for sales of alcohol to go, may additionally continue to offer pickup services. Varnum Hospitality and Alcohol Beverage Control Practice Team members are prepared to review the licenses and permits of a license holder to determine their eligibility for this service.

Home Delivery

Second, in addition to onsite pick-up services, options exist for home deliveries of alcohol together with food orders. Those licensees who wish to continue delivery of alcoholic products may do so, provided that the following conditions are met:

1. The restaurant, bar, or tavern, must possess an SDM license. Those Class C or B hotel licensees that do not possess an SDM license are not eligible for alcohol delivery services. Those that wish to take advantage of this option must comply with three criteria:
    - The beer and/or wine must be delivered by the licensee's own employees, as third party food delivery services are not permitted to transport alcohol.
    - The employee who delivers the beer or wine must confirm that the individual accepting delivery is at least 21 years of age. We are recommending that the information is documented with photographs of the ID and that all records are retained for a minimum of two years.
    - The employee making the delivery must have successfully completed a state recognized alcohol server training program.
2. SDD licensed operators may also provide home delivery services if the same criteria is met.
3. Brewpubs and microbrewers may also deliver beer products under the same terms and conditions as set forth above. Beer growlers may continue to be filled as part of off-premises sale and consumption. Unfortunately, wineries operating a taproom, including meaderies, are not extended the home delivery option.

Options for Golf Courses

As the weather starts to break and all of the state's golfers start seeking tee times, the state's guidelines are applicable to golf courses with on-premises lounges and restaurants, as golf courses are restricted in the same manner as other places of public accommodations: indoor facilities like clubhouses or restaurants operated by the golf course must close for on-premises consumption but may continue to offer food and beverage through walk-up services and other means expressly permitted around the state. As a result, no banquet or other large gatherings may be permitted, as groups no larger than five are permissible, and only for purposes of the pickup of food and drink orders.

The members of Varnum's Hospitality and Alcohol Beverage Control Practice Team are monitoring all new developments and are in daily contact with the Michigan Liquor Control Commission. Please continue to refer to the Varnum website for updates and know that Varnum is truly in your corner. Please also feel free to contact Christopher Baker or any other member of the team for further clarification or questions.