VARNUM'S COVID-19 RESOURCE CENTER

Client Advisories

Updated December 1, 2020

VARNUM
ATTORNEYS AT LAW

Table of Contents

Business Law

New Restrictions Under Michigan Epidemic Order to Take Effect Nov. 18 1-3

Federal Reserve Announces Changes to MSLP, Including Lower Minimum Loans and Clarification for PPP Borrowers 4

COVID-19 Legislation & Requirements for Michigan Employers Following Michigan Supreme Court's Ruling Against Governor Whitmer 5-9

Emergency Order Issued by the Michigan Department of Health and Human Services 10-12

Michigan Supreme Court Issues Opinion on Governor Whitmer's Emergency Powers 13-15

Selling Cell Tower Leases Can Help with COVID-19 Financial Challenges 16-17

Federal Reserve Expands Main Street Lending Program for Nonprofits 18-19

Securing Growth in a Time of Uncertainty: Michigan Formally Launches Office of Future Mobility and Electrification 20-21

Landlords Tread Carefully Through Eviction Waters 22-23

Confusion in Bankruptcy Courts Regarding Debtor Eligibility for PPP Loans 24-25

Federal Reserve Launches the Main Street Lending Program 26-27

COVID-19 Privacy Implications: Workplace Temperature Screening 28-32

Federal Reserve Further Expands Main Street Lending Program 33-37

Michigan's Phased Reopening Continues: Further Easing under Executive Order 2020-115 38-39

Rescission of Michigan's Stay Home, Stay Safe Order: Top 10 Things to Know 40-41

Further Relaxation of Michigan's Stay Home, Stay Safe Order 42

Coronavirus Food Assistance Program Announced: Farmers to Receive Direct Support 43

Michigan's Phased Reopening: Executive Orders 2020-91 and 2020-92 44-45

Challenges and Potential Remedies for Auto Suppliers in the Wake of COVID-19. 46-48

Is Your Now-Online Business Protecting Itself From Privacy Threats and Potential Liability? 49-51

The Federal Reserve's Main Street Lending Program: Practical Takeaways for Lenders 51-54

Michigan's Manufacturing Sector Resumes May 11 55-57

VARNUM
ATTORNEYS AT LAW

Business Law *(continued)*

Construction and Other Real Estate Businesses to Resume Under Revised Order....58-60

Main Street Lending Program: Federal Reserve Announces Revised Terms....61-68

Main Street Lending Program: Revised Term Sheets Expected Soon....69

Stay at Home, a Little Longer: Key Changes and Loosened Restrictions Under Michigan's Executive Order 2020-59....70-72

Navigating Construction Contract Delays Amid COVID-19....73-74

Michigan's Extended Stay Home Stay Safe Order: 10 Things You Need To Know....75-77

COVID-19: Federal Reserve Announces New Loan Facility for Main Street Businesses....78-82

SBA Addresses Concerns of Faith-Based Organizations....83-84

Health Crisis Puts Video Conferencing In the Spotlight – What To Know to Avoid Risk....85-86

CARES Act Also Benefits Nonprofits....87-88

Cell Tower Leases Can Help With Current Financial Problems....89

CARES Act Provides $500 Billion to Eligible Businesses, States and Municipalities....90-93

President Trump Signs Historic, $2T COVID-19 Stimulus Bill....94-98

Changes to the Bankruptcy Code Under the CARES Act....99-100

COVID-19 Mandatory Closures: Michigan Executive Order 2020-21 Frequently Asked Questions....101

Marijuana Regulatory Agency Expediting Licenses for Home Delivery During COVID-19 Crisis....102-103

COVID-19 and Your Early Stage Company: What To Do Now....104

COVID-19 Mandatory Business Closures: Is Your Business Essential?....105-106

Coronavirus and Global Supply: Contractual Protections Can Be a Remedy to the Symptoms from Unhealthy Supply Chains....107-108

Education

Michigan K-12 Schools Closed to In-Person Instruction Following Executive Order 2020-35....109

Closure of Michigan Schools Due to Coronavirus Concerns Creates Host of Legal Issues....110

Employee Benefits

COVID-19 Related Modifications to Cafeteria Plans and Flexible Spending Accounts 111-112

Tax-Free Disaster Relief Payments Permissible Under Section 139 1113-114

Primary Impacts of the Coronavirus Aid, Relief and Economic Security Act on Employee Benefit Plans 115-116

COVID-19 (Coronavirus) Response: 401(k) Questions, Part II 117-118

COVID-19 (Coronavirus) Response: Questions and Answers for Health and Welfare Benefit Plans 119-122

COVID-19 (Coronavirus) Response: 401(k) Questions 123-124

Estate Planning

Governor Whitmer Signs Legislation Ratifying Remotely Witnessed, Notarized, and Signed Documents Through End of 2020 125

Estate Planning in a Low Interest Rate Environment 126-127

Remote Signing and Notarization for Estate Plans During COVID-19 Pandemic 128

CARES Act Relief for Borrowers of Eligible Federal Student Loans 129-30

Family Law

Virtual or In-Person School? What to Do When Divorced Parents Disagree 131-132

Can I Get Divorced During COVID-19? 133-135

The Pros and Cons of Zoom Court Hearings 136-139

Filing a Motion in Family Court During Coronavirus: What Constitutes an Emergency? 140-141

Personal Protection Orders Extended 142

Mediation in Family Law Cases During COVID-19 143-146

Could the COVID-19 Pandemic Impact Child Custody and Relocation? 147-148

Domestic Violence During COVID and Tips to Counter Electronic Surveillance 149-150

The Effects of COVID-19 on Support Orders 151

Is There a Change in the Custodial Environment Due to Special Circumstances from COVID-19? 152-153

Modifications of Parenting Time During the COVID-19 Pandemic 154-155

Coping with Parenting Time During the COVID-19 Pandemic 156

Health Care

Governor Whitmer Extends Restriction Suspensions for Health Care Providers . 157-158

CMS Accelerated and Advance Payment Program 159-162

Michigan Health Care Operations in a Stay at Home World..... 163-167

Michigan Health Care Facilities Required to Postpone Non-Essential Procedures..... 168-170

Hospitality & Beverage Control

New Executive Order Shuts Down Significant Indoor Bar, Tavern and Nightclub Services in Michigan..... 171-172

Michigan Initiates Limited Spirit Buyback Program..... 173-174

Alcohol Sales and Delivery Options for Liquor License Holders Under Coronavirus-related Restrictions..... 175-177

Immigration

Department of State Issues Additional Guidance for Nonimmigrant Visas 178

Executive Order Bars Entry for Certain Nonimmigrants..... 179

USCIS Phases in Premium Processing..... 180

President Trump's Executive Order Does Not Impact Immigration Applicants Currently in the US 181

H-2A Update: COVID-19..... 182

Immigration Consequences of Temporary Layoffs/Furloughs..... 183

Immigration Update: Suspension of All Premium Processing, Additional Visa Services Closures and I-9 Flexibility for Remote Workers..... 184

USCIS Suspends Interviews and Premium Processing for Cap H-1B Cases, Consulates Suspend or Limit Visa Interviews 185

Labor and Employment

Governor Whitmer Announces New Efforts to Increase Enforcement of COVID-19 Workplace Safety Rules..... 186-187

DOL Revises FFCRA Regulations Following Federal Court Decision..... 188-189

New Michigan Executive Order Clarifies Definition of Principal Symptoms of COVID-19 for Workers Who Stay Home 190-191

New Michigan Executive Order Updates Workplace Rules..... 192-193

New Executive Orders Revise Michigan's Worker Safety Rules 194-195

New MI Executive Order Allows Outpatient Health Care Facilities To Resume Non-Essential Procedures Starting May 29 196-197

Labor and Employment *(continued)*

Michigan Ramps Up Workplace Safety Regulations and Enforcement Powers Under New Executive Order 198-199

COVID-19 Tests in the Workplace 200-201

Unemployment Benefits: Six Things Michigan Employers Should Know 202-204

Best Practices for Employers' COVID-19 Preparedness and Response Plans 205-206

Governor Whitmer Signs Executive Order with Special Provisions for Workers 207-208

New Michigan Executive Order Sets Forth Rules for Handling Employee Absences From Work Due to Potential Risk of Infecting Others 209

DOL Clarifies the Families First Coronavirus Response Act Small Business Exemption 210-211

Families First Coronavirus Response Act Effective Date and Additional Guidance from the U.S. Dept. of Labor 212-213

Preparing the Workplace for Michigan's COVID-19 "Stay Home, Stay Safe" Order 214-215

Federal Agencies Announce the Availability of Tax Credits Under the Families First Coronavirus Response Act 216-217

President Trump Signs the Families First Coronavirus Response Act 218-222

Labor and Employment: COVID-19 Bulletin 223

Coronavirus: Workplace Considerations Related to Global Supply Shortages and Employee Travel 224-225

Litigation

COVID-19 and Executive Orders: When State Action Impedes Performance 226-227

Litigating in Michigan: A Guide for General Counsel on Court Closures and New Orders 228

Michigan Supreme Court Extends Filing Deadlines in the Face of COVID-19 Pandemic 229

Michigan Trial Courts Impacted by Coronavirus Precautions 230

Business Interruption Insurance and COVID-19: Three Ways to Protect Your Rights Amid Uncertainty 231-232

COVID-19: Managing Contractual Uncertainty 233-234

Public Finance

SBA Issues New Interim Final Rule Simplifying PPP Loan Forgiveness 235

SBA Issues Guidance on Change of Ownership for PPP Borrowers 236-238

Public Finance *(continued)*

SBA Issues Update on Treatment of Owners and Certain Non-Payroll Costs with Regard to PPP Loan Forgiveness 239

SBA Issues FAQs on Forgiveness of Paycheck Protection Program Loans 240

SBA Issues Additional Interim Final Rule for PPP Loan Forgiveness and Loan Review Procedures 241-242

President Signs the Paycheck Protection Flexibility Act: What You Need To Know 243-244

SBA Issues Final Rules for PPP Loan Forgiveness and Loan Review Procedures 245-251

SBA Issues PPP Forgiveness Application and New Interim Rule on Eligibility ... 252-253

SBA Issues New Guidance on Certification Relating to PPP Necessity 254-257

SBA Issues Interim Rules on and Final Application for the $349 Billion Paycheck Protection Program 258-263

Paycheck Protection Program, a SBA Loan Program Expanded in CARES ACT 264-267

Michigan Small Businesses Hurt by Coronavirus Can Apply for Relief Via SBA, MEDC 268-269

Tax

IRS Confirms PPP-Funded Expenses Are Non-Deductible 270

IRS Unveils New Taxpayer Relief Initiatives 271-272

IRS Issues Guidance on Deferral of Certain Employee Payroll Taxes 273-274

July 15, 2020: What This Date Means to You and to the IRS 275-277

COVID-19: Another Option for Employers Whose Employees are Facing Health and Financial Hardship 278-280

Michigan Treasury Issues Updates on Sales, Use and Withholding Tax Deadlines 281-282

Guidance Issued on Extended Deadlines for Property Tax Matters, Including Appeals to Tax Tribunal 283

CARES Act: Maximizing Relief 284-287

Qualified Opportunity Zones: COVID-19 Deadline Extensions 288-289

Update II: Due Dates for Tax Payments, Returns and Other Documents Postponed Due to COVID-19 290-292

Michigan Treasury Issues Income Tax Deadline FAQs 293

Tax *(continued)*

Economic Impact Payments – What You Need to Know 294-297
Tax Fraud Alert: COVID-19 Relief Payments 298
Claiming Tax Credits under FFCRA and CARES Act 299-302
IRS Response to COVID-19 – Changes in Procedures Regarding Signatures and Use of Email 303
Tax Relief for Businesses Under the CARES Act 304-307
Michigan Income Tax Filing Deadlines Automatically Extended 308-309
CARES Act: Tax Relief for Individuals 310-313
Update: Due Dates for Income Tax Payments Postponed Due to COVID-19 314-315
IRS Unveils New People First Initiative 316-318
Tax Filing Date Moved To July 15, 2020 319
Due Dates for Income Tax Payments Are Postponed as a Result of COVID-19 320
Coronavirus Update: Important Guidance for IRS Tax Filers 321

VARNUM
ATTORNEYS AT LAW

New Restrictions Under Michigan Epidemic Order to Take Effect Nov. 18

AUTHORS

Seth W. Ashby

Ethan J. Beswick

Ashleigh E. Draft

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
November 16, 2020

On November 15, Michigan Department of Health and Human Services Director Robert Gordon and Michigan Gov. Gretchen Whitmer announced a new Epidemic Order (the "Order"), which implements heightened restrictions on Michigan residents resulting from recent increases in COVID-19 cases across the state. Specifically, the Order requires certain places of public gathering and businesses to shut their doors, while others are permitted to continue accepting patrons and guests, subject to strict limitations.

Where gatherings are permitted, all individuals are required to wear a face mask, including at permitted residential gatherings except when eating or drinking, and maintain social distancing. The Order does not change the requirements applicable to workplace gatherings set forth in the Emergency Rules issued by MIOSHA on October 14, which we summarized in a prior advisory. The Order takes effect on November 18, 2020 and remains in effect until December 9, 2020. Here are the top ten things you need to know about the new Order:

Gatherings

1. Indoor gatherings are (i) prohibited at non-residential venues, except as permitted by other sections of the Order, and (ii) permitted at residential venues only where no more than 10 persons from no more than two households are gathered.

2. Outdoor gatherings at non-residential venues are permitted, where (i) 25 or fewer persons are gathered at a venue without fixed seating, and attendance is limited to 20 persons per 1,000 square feet, or (ii) 25 or fewer persons are gathered at a venue with fixed seating, and attendance is limited to 20 percent of seating capacity at the venue.

3. Outdoor gatherings at residential venues are permitted where 25 or fewer persons are gathered, comprised of no more than three households.

Businesses

4. Gatherings are prohibited at entertainment venues and recreational facilities, including auditoriums, arenas, cinemas, conference centers, concert halls, performance venues, sporting venues, stadiums, theatres, amusement parks, arcades, casinos, skating rinks, etc.

5. Restaurants may remain open to serve guests seated in outdoor spaces (6-foot social distancing required), and for take-out services. Indoor service is prohibited.

6. Retail stores, libraries, and museums may permit guests to enter their premises, so long as occupancy does not exceed 30 percent of total limits set by the fire marshal. Retail stores must establish lines to regulate entry and checkout, with markings for patrons to maintain 6-foot social distancing requirements.

7. Exercise facilities may remain open, so long as (i) occupancy does not exceed 25 percent of the limits established by the fire marshal, (ii) 12 feet of distance exists between each occupied workout station, and (iii) gatherings for group fitness activities or classes are prohibited.

8. Facilities offering non-essential personal care services such as hair, nail, massage, tattoo, and similar personal care services are permitted to accept guests by appointment only, and face masks are to be worn at all times. Previously, face masks could be removed to the extent necessary to receive such services.

Schools and Sports

9. All Michigan high schools must transition to virtual learning, while K-8 schools are permitted to conduct in-person learning subject to local health department and school district rules. This restriction does not apply to students who are English Language Learners or participants in special education services. Local school districts may choose to implement stricter requirements. Colleges and universities must transition to virtual learning only.

10. Gatherings for the purpose of organized sports are prohibited, unless participants, teams and venues comply with enhanced testing regimens specified in the Michigan Department of Health and Humans Services' Additional Mitigation Measures for Safer Athletic Practice and Play guidance. Generally, this means that professional and collegiate sports may

continue subject to compliance with these enhanced restrictions and without spectators. The Michigan High School Athletic Association (MHSAA) announced on November 15, 2020 that all fall and winter sports are suspended, effective immediately.

Violation of the Order is a misdemeanor punishable by not more than six months imprisonment, or a fine of $200, or both. Additionally, civil fines of up to $1,000 for each violation or day that a violation continues may be assessed.

Please contact your Varnum attorney for assistance in understanding what the Order means for you and your business.

VARNUM
ATTORNEYS AT LAW

Federal Reserve Announces Changes to MSLP, Including Lower Minimum Loans and Clarification for PPP Borrowers

AUTHORS

Seth W. Ashby

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
October 30, 2020

On October 30, 2020 the Federal Reserve announced changes to its Main Street Lending Program (Main Street Program). As previously described for private borrowers and for non-profit borrowers, this program provides up to $600 billion in liquidity to eligible lenders that make direct loans to eligible for-profit businesses and certain non-profit organizations. According to the Federal Reserve, the Main Street Program has made almost 400 loans totaling $3.7 billion, or 0.62% of program capacity, since its launch this summer. The program has attracted criticism for imposing terms that many view as restricting wider acceptance by borrowers and lenders alike. This is evidenced by the relatively small take-up to date.

In particular, many potential borrowers have wanted to apply for Main Street loans in amounts less than the minimum, including small businesses that participated in the Paycheck Protection Program (PPP). In response, the Federal Reserve has now reduced the minimum loan size for three Main Street Program facilities available to for-profit and non-profit borrowers from $250,000 to $100,000 and adjusted the fees to encourage lenders to make these smaller loans. Additionally, a new Frequently Asked Question was issued clarifying that PPP loans of up to $2 million may be excluded for purposes of determining the maximum loan size under the Main Street Program if certain requirements are met.

Specifically, (i) if the eligible borrower has applied for forgiveness of its PPP loan, the "Forgiveness Amount" as reported by the borrower may be excluded, except to the extent the PPP lender or Small Business Administration (SBA) has determined such amount is ineligible for forgiveness; and (ii) if the eligible borrower has not yet applied for forgiveness of its PPP loan, the amount that it has a reasonable, good-faith basis to believe will be forgiven may be excluded. In all other cases, PPP loans may not be excluded for purposes of determining the maximum loan size under the Main Street Program, except to the extent that the SBA has actually determined that such loans are eligible for forgiveness.

On October 31, the Federal Reserve announced that the applicable legal documents have been updated to reflect these changes, and that the Main Street Portal is now accepting loans relying on these revised terms.

COVID-19 Legislation & Requirements for Michigan Employers Following Michigan Supreme Court's Ruling Against Governor Whitmer

AUTHORS

Seth W. Ashby

David E. Khorey

Ethan J. Beswick

Ashleigh E. Draft

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Labor and Employment

Business Law Advisory
October 15, 2020

Update: *Gov. Whitmer signed the employer liability protection-related bills on October 22 and the extension of unemployment benefits on October 20.*

Following the Michigan Supreme Court's ruling on October 2, 2020, Michigan businesses faced uncertainty surrounding the effectiveness of the Governor's Executive Orders and limitations on their ability to operate normally, their present responsibilities to protect workers during the pandemic, and whether state agencies, the Legislature, or counties would be responsible for enacting new COVID-19 rules. The following article provides Michigan businesses with recent updates on new COVID-19 legislation and agency directives, while providing clarity on the question of the effectiveness of Executive Orders enacted after April 30, 2020.

Michigan Passes New COVID-19 Legislation

On October 14, 2020, the Michigan Legislature approved more than a dozen bills related to COVID-19. After the Michigan Supreme Court's (the "MSC") ruling against the Governor on October 2, 2020, the Governor and the Legislature have been engaged in negotiations. The Governor sought to reintroduce many of the policies she enacted through Executive Orders while the Legislature wanted to modify those policies and enact new laws to protect businesses. The two groups have now found a common ground, and the packet of bills includes coronavirus liability protections to businesses, extended unemployment benefits, and other COVID-19 policies, such as permission for electronic public meetings and electronic signatures during the pandemic.

Employer Liability Protections

Most notable for businesses, the packet of bills passed late on October 14 includes several bills providing employers with immunity from COVID-19 related claims that workers may bring against their employers. The

employer liability bills provide for the following:

- **Michigan House Bill 6030**: Under this bill, businesses who act in compliance with federal, state, and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19 which had legal effect at the time of the conduct that allegedly caused harm, are immune from liability for a COVID-19 claim. Note that the immunity is not limited to claims brought by employees. Therefore, if businesses were in compliance with all legal COVID-19 guidance, then they are protected from claims that could be brought by employees, customers, vendors, suppliers, and any other person who entered the business after March 1, 2020. In addition, the act provides that a de minimis deviation from strict compliance does not deny a business from immunity. This provision applies retroactively to any claim or cause of action that accrues after March 1, 2020.
- **Michigan House Bill 6031:** Similar to HB 6030, this bill amends the Michigan Occupational Safety and Health Act to clarify that an employer is not liable under the Act for an employee's exposure to COVID-19 if the employer was operating in compliance with all federal, state, and local statutes and regulations, executive orders, and agency orders related to COVID-19 that had legal effect at the time of the exposure. The de minimis deviation rule described above also applies to this bill. This amendment applies retroactively to any claim or cause of action that accrues after March 1, 2020.
- **Michigan House Bill 6032:** This bill prohibits employees from reporting to work if they: (1) test positive for COVID-19, (2) display the principal symptoms of COVID-19, or (3) come into close contact with an individual who tests positive for COVID-19, or with an individual who displays the principal symptoms of COVID-19. The bill also explains when an employee who falls into one of the above categories may return to work. Significantly, the bill also **prohibits employers from disciplining, discharging or retaliating against an employee** who: (1) does not report to work for the reasons listed above, (2) opposes a violation of the act, or (3) reports health violations related to COVID-19. The prohibition against discipline or retaliation **does not apply** to a situation where an employee, after displaying the principal symptoms of COVID-19, fails to make reasonable efforts to schedule a COVID-19 test within three (3) days after receiving a request from their employer to get tested.

Note that this bill also provides employees with a civil cause of action if their employer violates this act. Moreover, employers are not shielded from liability under HB 6030. Therefore, employers should carefully consider

whether they are permitted to discipline or discharge any employee who lawfully remains home for COVID-19 related reasons permitted under this bill and modify their policies to conform to the requirements of this bill.

Expanded Unemployment Provisions

The packet of bills also includes a bill that adopts a majority of Executive Order 2020-76, which previously provided workers with temporary expansion in unemployment eligibility. The new bill on expanded unemployment benefits provides for the following:

- **Michigan Senate Bill 886:** This bill amends the Michigan Employment Security Act to: (1) extend the maximum unemployment benefit period from 20 weeks to 26 weeks, (2) require benefits to be charged to the non-chargeable account if the worker qualifies for benefits for COVID-19 related reasons, (3) allow employers to use the work-share program even if not normally eligible; and (4) allow workers to receive benefits while taking time off work for a COVID-19-related cause. This bill **does not** mention waiving the "actively searching for work requirement," which suggests that claimants will need to prove they are looking for a job to get paid. Currently, the expanded unemployment provisions are set to remain in effect through December 31, 2020.

Michigan Supreme Court's Final Rulings

On October 12, 2020, the MSC issued an order (the "New Order") in response to Governor Whitmer's motion to stay the precedential effect of the MSC's prior order, dated October 2, 2020 (the "Former Order"). The Former Order ruled that all of Governor Whitmer's COVID-19 related Executive Orders (issued after April 30) lacked any basis under Michigan law. The New Order makes it clear that the MSC's Former Order took effect immediately on October 2, 2020. Specifically, the New Order denies the Governor's argument to stay the precedential effect of the Former Order, by stating the Former Order was issued in response to certified questions of the federal district court, and as such, the MSC's task was to simply respond to those questions. Once the MSC responded to the certified questions, as it did by issuing the Former Order, the contents of that order became effective immediately.

MDHHS October 9 Emergency Order

Although the recent MSC ruling invalidated certain Executive Orders, the Michigan Department of Health and Human Services (MDHHS) has issued similar rules under the Michigan Public Health Code—a different statute than the law that was declared unconstitutional earlier this month. First enacted by the Michigan Legislature after the Spanish Flu of 1918, the Michigan Public Health Code gives the Director of MDHHS special powers during a pandemic.

Using this authority, MDHHS issued a new Epidemic Order on October 9, 2020. This Epidemic Order re-packages many of the requirements from the recently invalidated Executive Orders. These rules include:

- Face coverings must be worn over the nose and mouth in gatherings of two or more people, including stores, offices, schools, and events. Businesses may not admit people without masks, with few exceptions.
- Limits on residential gatherings: Indoor gatherings of up to 10 persons and outdoor gatherings of up to 100 persons at a residence are permitted, and face coverings are strongly recommended but not required.
- Capacity limits for non-residential indoor and outdoor gatherings.
- Limited capacity for restaurants and bars. Although there are no longer bar closures, the bars may only serve alcohol to patrons who are seated at tables.
- Organized sports must require masks (except for swimming) and have gathering limits.
- Employment protections for employees who are in isolation or quarantine and cannot go to work.

Note, however, that not all workplace rules contained in the Governor's prior Executive Orders have been re-stated in the current MDHHS Epidemic Orders. The Order is effective immediately and remains in effect through October 30, 2020.

MIOSHA Emergency Rules

On October 14, 2020, the Michigan Occupational Safety and Health Administration (MIOSHA) within the Michigan Department of Labor and Economic Opportunity (LEO) promulgated rules to clarify the safety requirements employers must follow to protect their employees from

COVID-19 (the "Emergency Rules"). LEO cited the Michigan Occupational Safety and Health Act and several Executive Reorganization Orders in support of its authority to take such action. The rules are set to take effect "upon filing with the secretary of state" and will remain in effect for 6 months following the effective date. The Emergency Rules apply to all employers covered by the Michigan Occupational Safety and Health Act.

The Emergency Rules largely adopt the employer requirements of Executive Order 2020-184 "Safeguards to protect Michigan's workers from COVID-19." Note, the Emergency Rules also implement some, but not all, of the industry specific requirements found in Executive Order 2020-184 for the following industries: construction; manufacturing; retail, libraries, museums; restaurants and bars; health care; in-home services; personal-care services; public accommodations; sports and exercise facilities; meat and poultry processing; and casinos. Employers should coordinate these Emergency Rules with the requirements issued by MDHHS.

Please contact any member of the Varnum team for assistance in understanding how these updates may affect your workplace.

Emergency Order Issued by the Michigan Department of Health and Human Services

AUTHORS

Seth W. Ashby

Ethan J. Beswick

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
October 6, 2020

On Monday, October 5, 2020, Director Robert Gordon of the Michigan Department of Health and Human Services (the "Department") issued an emergency order that places restrictions on gathering sizes within the state and imposes face covering requirements in various situations (the "Order"). The Order, which became effective immediately and remains in place through October 30, 2020, was issued in response to the October 2 opinion of the Michigan Supreme Court, limiting Governor Whitmer's authority to issue or re-issue executive orders in response to the COVID-19 pandemic. As we anticipated, the Governor's executive orders are being re-packaged and re-issued by various governmental bodies asserting authority to issue such directives.

In this case, the Department is operating under the authority afforded it by Section 2253 of the Public Health Code (the "Code"), governing epidemics and emergency orders and procedures. Specifically, this section of the Code states: "If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws."

The Order provides for the following:

Gatherings

Similar to Executive Order 2020-183, persons at gatherings must maintain six feet distance from one another, and:

1. Indoor gatherings of up to 10 people are permitted at non-residential venues, where each person present is wearing a face covering. Further, indoor gatherings of 10-500 people are permitted at non-residential venues where all persons gathering wear a face covering, and (i) if the venue has fixed seating, attendance is limited to 20 percent of seating capacity, provided that 25 percent seating capacity is permitted in Region 6 (as defined in Executive Order 2020-176), or (ii) if the venue is without fixed seating, attendance is limited to 20 persons per 1,000 square feet in each occupied room, provided that 25 persons per 1,000 square feet in each occupied room are permitted in Region 6.

2. Outdoor gatherings of up to 100 people are permitted at non-residential venues, where each person present is wearing a face covering. Further, outdoor gatherings of 100-1,000 people are permitted at non-residential venues where all persons wear a face covering, and (i) if the venue has fixed seating, attendance is limited to 30 percent seating capacity; or (ii) if the venue is without fixed seating, attendance is limited to 30 persons per 1,000 square feet.
3. Additionally, the following gatherings are among those that are exempt from the gathering requirements noted above: (i) voting or election-related activities at polling places; (ii) law enforcement, correctional, medical, or first-responder trainings (provided these cannot be conducted remotely), (iii) organized sports; and (iv) students in a classroom or daycare setting.

Mask Requirements

Businesses, government offices, schools (except those in Region 6), and other operations may not allow indoor gatherings to take place unless individuals are wearing a face covering. The requirement to wear a face covering does not apply to individuals that (i) are younger than five years old; (ii) cannot medically tolerate a face covering; (iii) are eating or drinking while seated at a restaurant; (iv) are exercising outdoors while maintaining social distancing; (v) are swimming; (vi) are officiating or engaging in religious service; or (vii) are giving a speech for broadcast or to an audience, provide that the audience is socially distant from the speaker. Additionally, face coverings are "strongly recommended" (but not required) for indoor gatherings of up to 10 people occurring at a residence and "recommended" (but not required) for outdoor gatherings of up to 100 people occurring at a residence.

Bars and Restaurants

Similar to Executive Order 2020-183, food service establishments must (i) close indoor common areas in which people can congregate, dance, or otherwise mingle, and (ii) prohibit indoor gatherings anywhere alcoholic beverages are sold except for where patrons are seated and socially distanced from one another.

Organized Sports

The Order permits organized sporting activities including practices and games, so long as (i) athletes wear face coverings (except when swimming) or consistently maintain six feet separation, when training for, practicing for, or competing in an organized sport; (ii) the live audience is either limited to two guests per athlete, or complies with the gathering requirements noted above; and (iii) no concessions are sold at indoor events.

Enforcement

A violation of the Order is (i) a misdemeanor punishable by not more than six months' imprisonment, or a fine of not more than $200, or both, and (ii) subject to a *civil* fine of up to $1,000. Law enforcement officers are empowered to enforce the Order and specifically authorized to investigate potential violations of the Order.

Should you have questions about what the Order means for your businesses' operations, we stand ready to assist you.

Michigan Supreme Court Issues Opinion on Governor Whitmer's Emergency Powers

AUTHORS

Seth W. Ashby

Aaron M. Phelps

Ethan J. Beswick

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
October 5, 2020

UPDATE: *On October 5, Michigan Department of Health and Human Services Director Robert Gordon issued an Emergency Order under Section 2253 of the Michigan Public Health Code restricting gathering sizes and certain business activity and requiring face coverings in public spaces and by participants in organized sports. This Emergency Order, which became effective immediately and remains in effect through October 30, 2020, extends many of the requirements contained in certain of Governor Whitmer's Executive Orders.*

On Friday, October 2, 2020, the Michigan Supreme Court filed an opinion (the "Opinion") that limits Governor Whitmer's constitutional authority to issue or re-issue executive orders in response to the COVID-19 pandemic (the "Executive Orders").

Further, on October 5, Governor Whitmer filed a motion with the Michigan Supreme Court requesting clarification that the Opinion will not take effect until October 30, 2020. While the Opinion's ultimate outcome is yet to be seen, it is almost certain the ruling will create near-term volatility and a murky operating environment for businesses across the state, as the Governor has indicated her intent to re-issue the substance of her Executive Orders under alternative laws or through administrative rules. Further, in the wake of the Opinion, local governments and health departments have begun to issue their own directives.

To parse the meaning of the Opinion, and its consequences, we have set forth what we believe to be three of the immediate takeaways from Friday's ruling.

1. The Opinion Answers a Narrow Question with Broad Consequences.

The Opinion was issued by the Michigan Supreme Court in response to certified questions it received from the United States District Court for the Western District of Michigan (the "Federal Court"). Such questions arose in the context of a case the Federal Court is adjudicating, which seeks to determine whether a previous Executive Order restricting the ability of medical professionals to perform elective medical procedures is valid

under the Michigan constitution. Before making a determination in that case, the Federal Court requested guidance from the Michigan Supreme Court on whether the Governor has the power that she has asserted to issue Executive Orders. Specifically, the Federal Court requested the Michigan Supreme Court's opinions on the following certified questions:

- Whether, under the Emergency Powers of the Governor Act of 1945, or the Emergency Management Act of 1976, Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic; and
- Whether the Emergency Powers of the Governor Act of 1945 and/or the Emergency Management Act of 1976 violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

The Opinion then responded to these questions by ruling (a) the Governor did not have authority after April 30, 2020 to issue or renew executive orders related to the pandemic, and (b) the Emergency Powers of the Governor Act of 1945 unlawfully delegates legislative power to the executive branch, in direct violation of the Michigan Constitution.

2. Existing Executive Orders to be Re-Packaged Under Separate Authority.

The Michigan Supreme Court has therefore restricted the Governor's powers, and the Attorney General has already stated her office will no longer enforce the Executive Orders by criminal prosecution. In its Opinion, the court invited the Governor and the Legislature to work together to address the challenges of the COVID-19 pandemic.

The Governor has indicated that the contents of some of the Executive Orders will be re-issued under the Michigan Health Code, which permits the Director of the Department of Health and Human Services (DHHS) to issue orders during an on-going pandemic. The scope of the Director's authority is more limited than the powers asserted by the Governor. Additionally, local health departments retain their authority to ensure the public health is protected, and as such, local health departments will likely issue directives to protect the public in their jurisdictions. Therefore, while the Governor's powers have been restricted, some aspects of the Executive Orders will likely remain in place.

3. Michigan Businesses Should be Mindful of Existing Executive Orders In the Near Term and Prepare Operations With a Risk-Adjusted Approach.

Michigan businesses may rightfully begin asking questions regarding the Opinion's effect on their operations. In brief, we do not believe drastic operational changes should be implemented until the dust settles. In the coming days, we are likely to see new orders from the DHHS and/or local governments and health departments. Whether those orders are valid will depend on their contents as compared to statutory authority. It is also important to note that Michigan Occupational Safety & Health Administrative rules and regulations must be adhered to, and employers must continue to provide safe working environments for their employees. To date, no affirmative liability protections have been enacted in Michigan.

Varnum continues to navigate hundreds of businesses through the volatile operating environment brought upon by COVID-19. Should you have questions regarding what the Opinion means for your business, we stand ready to assist you.

Selling Cell Tower Leases Can Help with COVID-19 Financial Challenges

AUTHORS

John W. Pestle

Peter A. Schmidt

RELATED PRACTICES

Coronavirus Task Force

RELATED INDUSTRIES

Cell Towers

Cell Tower Advisory
July 28, 2020

Businesses, individuals, cities, schools and other entities face financial problems due to the COVID-19 outbreak, including potential cash flow problems, loan defaults, workouts or even bankruptcy. But if the person or entity has a cell tower lease, there may be a solution.

That is because selling a cell lease and future leasing rights can provide a bridge of hundreds of thousands to millions of dollars to weather the storm until things return to normal. Done correctly such leases/leasing rights (1) can sell for up to 210 times monthly rents, sometimes higher for cities or schools, and (2) not affect current or future operations, property values or development.

There is precedent for this following the 2008 financial crisis: Landlords sold off cell leases to generate immediate funds. For example, some sales were by cities or schools to generate funds but operating remained essentially unchanged. We have helped clients sell approximately 100 leases/leasing rights. Many of the sales were for such financially related reasons.

Our experience is that there are two important, intertwined aspects to such sales. The first is a bid process with many bidders to obtain the best price and also assure all interested parties that the best price has been obtained. The second are terms in the unique easement used to convey the lease and future leasing rights to the buyer that protect the future use, development and value of the building or property with the lease. The two are intertwined because to best protect the seller, such terms need to be identified at the start and included in the request for bids.

If the cell antennas are on the roof of a building or other structure, there are additional complications. That is because the easement needs to convey both well-defined (1) space for the antennas on the roof, (2) space on the ground for radios and equipment, and (3) spaces in between for connecting cables and access. If the structure is a water tower or other government building that provides an essential public service, its primacy and protection need to be addressed as well.

Poorly done lease sales easements can destroy or greatly reduce the value of the property with the cell antennas. We have seen this when we represented potential purchasers who walked away from the purchase (or got a large reduction in the sales price) for just this reason.

If a lease sale may be something you would like to discuss, contact John Pestle (jwpestle@varnumlaw.com, 616/336-6725) or Pete Schmidt (paschmidt@varnumlaw.com, 616/336-6411).

Federal Reserve Expands Main Street Lending Program for Nonprofits

AUTHORS

Seth W. Ashby

Dale R. Rietberg

RELATED PRACTICES

Coronavirus Task Force

Nonprofit Organizations

Business Law Advisory
July 27, 2020

On June 15, 2020 the Federal Reserve expanded access for certain nonprofit organizations to its Main Street Lending Program (MSLP). The program is targeted toward small and medium-sized nonprofits (those with 15,000 or fewer employees or 2019 revenues of $5 billion or less) and recognizes the critical role that nonprofit organizations play in the economy, particularly during this time when many are facing heightened demand for their services.

This program is particularly attractive to borrowers because its five-year loans defer interest for the first year and principal payments for the first two years of the term of the loan. The remaining principal balance is payable 15 percent at the end of year three, another 15 percent at the end of year four and the remaining 70 percent balance due at the end of year five. Within this program, there are two separate types of loan facilities available to qualifying nonprofits. One pertains to entirely new loans (Nonprofit Organization New Loan Facility or NONLF). NONLF loans are available in a minimum loan size of $250,000 and a maximum of the lesser of (1) $35 million or (2) the borrower's average 2019 quarterly revenue. The second loan facility is an expansion of existing loans that have been originated before June 15, 2020 and have a remaining maturity of at least 18 months (Nonprofit Organization Expanded Loan Facility or NOELF). NOELF loans are offered in a minimum size of $10 million and a maximum of the lesser of (1) $300 million or (2) the borrower's average 2019 quarterly revenue. In either case, the loan may not be subordinated to any other debt of the borrower. Interest rates are set at LIBOR plus three percent, the same rate established for loans to business borrowers under the MSLP.

Eligibility for these loans is limited to organizations formed in the United States and recognized as tax exempt under IRC §501(c)(3) (i.e., charitable, educational, religious, scientific, literary or testing for public safety) or IRC §501(c)(19) organizations (i.e., veterans organizations). Additional borrower eligibility criteria include:

- Must have been in continuous operation since January 1, 2015
- Minimum of 10 employees
- Endowments of less than $3 billion

- Total non-donation revenues equal to or greater than 60 percent of expenses for the three-year period 2017-2019
- 2019 operating margin (ratio of adjusted EBIDA to unrestricted operating revenue) of at least two percent
- Minimum of 60 days' current cash on hand
- Ratio of liquid assets (cash and investments) to outstanding debt of greater than 55 percent

In addition, applicants must have significant operations and a majority of its employees in the United States. Certain certifications and covenants are also required.

Unlike Paycheck Protection Program loans, there is no loan forgiveness component to the MSLP. These are full recourse loans. However, the two programs have similar policy goals in that borrowers under the MSLP are required to exercise commercially reasonable efforts to maintain payroll and retain employees.

Please contact your Varnum attorney should you have any questions on this latest expansion of the MSLP.

Securing Growth in a Time of Uncertainty: Michigan Formally Launches Office of Future Mobility and Electrification

AUTHORS

John J. Rolecki

Jeffrey M. Stefan II

Paul A. Albarran

RELATED PRACTICES

Coronavirus Task Force

RELATED INDUSTRIES

Autonomous and Connected Vehicles

Automotive Advisory
July 7, 2020

Amid the COVID-19 pandemic, on July 6, 2020 Gov. Gretchen Whitmer announced the formal launch of the Office of Future Mobility and Electrification (OFME), seeking to secure Michigan's place as a leader in mobile connectivity. Trevor Pawl will lead the office as chief mobility officer.

The OFME will focus on six objectives:

1. Enticing new investment and job creation from tech companies focused on the future of the automotive industry—autonomous and electric vehicles;
2. Expanding Michigan's smart infrastructure to continue building upon systems designed to facilitate autonomous and shared transportation;
3. Establishing Michigan as a destination for young companies to start and grow technologies enabling more efficient transportation of people and goods;
4. Attracting a talented workforce to meet the demands of the mobility sector;
5. Facilitating the transition from traditional combustion vehicles to electric vehicles while expanding access to charging infrastructure; and
6. Ensuring the state is competitive in electric and autonomous vehicle manufacturing.

The establishment of the OFME recognizes the need for a comprehensive approach to improving the mobility sector—engaging government, education and the private sector to position Michigan as a destination for the future of transportation. The OFME will establish a strategic policy team to recommend public policy surrounding autonomous and connected vehicle technology, electric vehicles, charging infrastructure and shared transportation.

The OFME will also focus on relationships between Michigan-based auto suppliers, Silicon Valley and other high-tech markets. These relationships are necessary to increase software development opportunities in the state, balancing the manufacturing fabric that is traditionally strong in Michigan.

The establishment of the OFME positions Michigan as a leader in mobility. It also has the potential to play a crucial role in Michigan's economic recovery during the COVID-19 pandemic by attracting talent, creating jobs and stimulating the state's economy.

Landlords Tread Carefully Through Eviction Waters

AUTHORS

Thomas W. Forster

Melissa B. Papke

Lauren E. Potocsky

RELATED PRACTICES

Coronavirus Task Force

Real Estate, Development and Construction

Real Estate Advisory
July 1, 2020

State Eviction Moratoriums

Many states throughout the country have implemented eviction moratoriums, prohibiting landlords from evicting tenants for a period of time during the COVID-19 pandemic. The specifics of such moratoriums vary widely by state and, in some places, the moratoriums have already expired and landlords are free, at least under state law, to proceed with evictions pursuant to such state executive orders.

In Michigan, Gov. Gretchen Whitmer initially issued Executive Order 2020-54 (COVID-19) preventing residential tenant evictions unless there is a risk to people or property. The governor has since extended the content of the original executive order, most recently with Executive Order 2020-134, which rescinded the previous orders and further extended the moratorium to July 15, 2020. However, the restrictions do not apply if the tenant, person claiming under the tenant or mobile home owner presents both a substantial risk to another person, as well as an imminent and severe risk to property.

Landlords Beware: CARES Act Considerations

Despite the expiration of state-specific eviction moratoriums, landlords should be keenly aware of their potential ongoing obligations under the CARES Act federal moratorium.

Pursuant to the CARES Act, beginning on March 27, 2020 and extending for 120 days thereafter, landlords of covered properties are prohibited from filing new eviction actions against tenants for nonpayment of rent. The Act further provides that a landlord of such covered property must provide the tenant with 30 days of notice prior to eviction, and such notice may not be given until after the expiration of the moratorium period. It is important to note that evictions filed prior to March 27, non-covered tenancies and evictions based on something other than nonpayment of rent are not prohibited by the CARES Act.

Under the Act, covered properties include properties that: (1) participate in a "covered housing program" as defined by the Violence Against Women Act; (2) participate in the "rural housing voucher program under section 542 of the Housing Act of 1949;' (3) have a federally backed mortgage loan; or (4) have a federally backed multifamily mortgage loan. It is important to note that the provisions of the CARES Act do not absolve tenants of their legal obligation to pay rent to their landlords, and tenants may face legal liability including evictions following the expiration of the moratorium.

As such, although many landlords throughout the country may be able to proceed with evictions pursuant to state law, federal law may still prohibit such actions if the property in question falls within the purview of the CARES Act. In Arkansas, for example, despite the expiration of the moratorium allowing evictions to proceed as of May 18, 2020 the Arkansas Supreme Court has ordered that any eviction complaint filed May 18, 2020 through July 25, 2020 must affirmatively plead that the property subject to the eviction dispute is not a covered dwelling under the CARES Act.

Other Considerations

Landlords should ensure that any eviction proceeding not only complies with state law and the CARES Act but also with potential city, state and other federal housing agency regulations. For example, the Boston Housing Authority has voluntarily postponed filing eviction actions during the COVID-19 pandemic, and the U.S. Department of Housing and Urban Development authorized a temporary moratorium effective as of March 18, 2020 on all evictions of tenants living in properties secured with single-family mortgages insured by the Federal Housing Administration, which was recently extended until at least August 31, 2020.

Please contact Tom Forster, Melissa Papke or Lauren Potocsky with any questions regarding these or other eviction considerations.

Confusion in Bankruptcy Courts Regarding Debtor Eligibility for PPP Loans

AUTHORS

Brendan G. Best

Olayinka A. Ope

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Public Finance

Restructuring, Insolvency and Creditors' Rights

Bankruptcy Advisory
June 23, 2020

The Small Business Administration's (SBA) rules and regulations concerning the eligibility of businesses for Paycheck Protection Program (PPP) loans when the business is involved in bankruptcy have recently been a source of substantial uncertainty, with the nationwide split of authority in bankruptcy courts. While these cases deal with a very small minority of PPP recipients and are a relative novelty in that regard, these decisions could foretell future issues for companies who have received PPP loans but are later forced to file Chapter 11, specifically regarding their eligibility for loan forgiveness.

The SBA is enabled with emergency rulemaking authority to adopt rules and regulations to manage application and qualifications for PPP loans under the CARES Act. Pursuant to this authority, the SBA publishes Interim Final Rules (IFR). The SBA's April 28, 2020 IFR expressly disqualified applicants who are debtors in a bankruptcy proceeding at any time between the date of application and when the loan is disbursed.[1] Several companies in bankruptcy proceedings, whose loans have been denied, have challenged the SBA's rulemaking authority in this regard, leading to a nationwide split on this issue in bankruptcy courts.

Specifically, these courts have rendered opinions to decide whether the SBA can impose a policy disqualifying a business in bankruptcy proceedings from participating in the PPP and whether the SBA violates other laws for doing so.[2] More than a dozen cases have been decided in the last two months, with the recent decisions highlighting the confusion that bankruptcy courts face in discerning the intent of Congress and the purpose of the CARES Act.

In decisions amounting to a majority of court decisions to date, bankruptcy courts have ruled in favor of the debtor on the merits or a request for injunctive relief.[3] One decision in favor of the debtor, with detailed analysis, has been rendered in the *In re Gateway Radiology Consultants, P. A.* bankruptcy case. In that case, the bankruptcy court concluded that excluding Chapter 11 debtors conflicts with the intent of Congress and the purpose of the CARES Act. The bankruptcy court determined that collectability was not a criterion for a qualification which Congress intended to focus on and rejected the SBA's argument that debtors had a higher risk of misusing PPP funds for non-covered expenses.[4]

On the other hand, in a minority stance are bankruptcy courts that have found that the IFR is not in violation of the CARES Act, and that the SBA has not exceeded its statutory authority under the APA. Some of these courts point to the extreme urgency with which the CARES Act was enacted, which they say necessitated clarifying rulemaking, as well as the historical broad authority granted by Congress to the SBA which allows for such rulemaking in areas where the CARES Act is silent.[5]

Given the large number of PPP recipients and the potential for a dramatic increase in the number of companies forced to file for bankruptcy protection in the near future, the ultimate resolution of this issue may have significant implications for the future. Varnum will continue to follow the current case split, as well as their possible implications for other debtors that may have received a PPP loan pre-filing and will seek to have the loans forgiven as part of the Chapter 11 process.

[1] See Interim Final Rule, 13 C.F.R. Parts 120-21, Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility (RIN 3245-AH37), at p. 8-9.

[2] The laws invoked are under the Administrative Procedures Act (the "APA") 5 U.S.C. § 706(2)(C), APA 5 U.S.C. § 706(2)(A), and under the Bankruptcy Code's antidiscrimination provision, 11 U.S.C. § 525.

[3] *In re Skefos*, No. 19-29718-L, 2020 WL 2893413 (Bankr. W.D. Tenn. June 2, 2020) (order granting the Debtor's motion for PI); *In re Gateway Radiology Consultants, P.A.*, No. 8:19-BK-04971-MGW, 2020 WL 3048197 (Bankr. M.D. Fla. June 8, 2020) (enjoining the SBA from disqualifying the Debtor and finding that the decision-making of the SBA was not reasoned); *Diocese of Rochester v U.S. Small Bus. Admin.*, No. 6:20-CV-06243 EAW, 2020 WL 3071603 (W.D.N.Y. June 10, 2020).

[4] *In re Gateway Radiology Consultants, P.A.,* No. 8:19-BK-04971-MGW, 2020 WL 3048197, at *15-17.

[5] *Schuessler v United States Small Bus. Admin.*, No. AP 20-02065-BHL, 2020 WL 2621186 (Bankr. E.D. Wis. May 22, 2020) (denying declaratory and injunctive relief and dismissing the complaints in three consolidated Chapter 12 cases); *In re iThrive Health, LLC*, Adv. Pro. No. 20-00151 (Bankr. D. Md. June 8, 2020) (finding Debtor would not prevail on the merits and denying preliminary injunction; but granting Debtor's motion to dismiss the bankruptcy without disclosing if Debtor intends to move to reinstate the bankruptcy after PPP funding is approved as contemplated by Debtors in Arizona and S.D. Florida); *In re Henry Anesthesia Assoc.*, 2020 WL 3002124 (Bankr. N.D. Ga. June 4, 2020).

Federal Reserve Launches the Main Street Lending Program

AUTHORS

Seth W. Ashby

Brendan G. Best

Michael J. Romaya

Kristen M. Veresh

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
June 15, 2020

On June 15, 2020 the Federal Reserve announced the launch of its Main Street Lending Program (Main Street Program). As previously described, this program will provide up to $600 billion in liquidity to eligible lenders that make direct loans to eligible businesses (generally speaking, U.S. companies with 15,000 or fewer employees or 2019 annual revenues of $5 billion or less). Specifically, the Main Street Program is designed to support small and mid-sized businesses that were in good financial condition before the pandemic but now need loans to help maintain operations until they have recovered from the economic downturn.

This announcement does not mean that eligible businesses may begin to apply for Main Street Program loans, however. The first step will be registering eligible lenders that desire to participate. Interested lenders that are eligible may register as of June 15, 2020. Once an eligible lender has been registered, it may begin to process loans for the Main Street Program. Also, there is no prescribed form of application for these loans nor does the Federal Reserve intend to publish a list of eligible lenders that have been registered for participation. Potential borrowers should contact their existing lenders to confirm whether they will participate and to discuss the application process.

For assistance and further information, please contact your Varnum attorney.

Additional Main Street Lending Program Advisories

Federal Reserve Further Expands Main Street Lending Program
Business Law Advisory, June 8, 2020

Main Street Lending Program: Federal Reserve Announces Revised Terms
Business Law Advisory, April 30, 2020

Main Street Lending Program: Revised Term Sheets Expected Soon
Business Law Advisory, April 29, 2020

COVID-19: Federal Reserve Announces New Loan Facility for Main Street Businesses
Business Law Advisory, April 9, 2020

COVID-19 Privacy Implications: Workplace Temperature Screening

AUTHORS

Susan E. Benington

Jeffrey M. Stefan II

Charumati Ganesh

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Data Privacy Advisory
June 15, 2020

While preparing to reopen offices, companies are assessing various screening programs to mitigate the risk of spreading COVID-19. Symptom and temperature screening has been endorsed by the White House[1] and Centers for Disease Control and Prevention (CDC)[2], as well as the Equal Employment Opportunity Commission (EEOC).[3] Some states even require employers to conduct regular temperature checks on employees. For example, Colorado requires certain critical and non-critical businesses to conduct daily temperature checks and monitor employees' symptoms, and employers with 50 or more employees at one location must implement stations for symptom screenings and temperature checks.[4]

Temperature screening can be conducted in a number of ways. Employers could require employees to take their own temperatures at home, designate one or more employees to manually conduct the screenings on-site or employ an automated no-contact screening method. A number of technologies are available for no-contact temperature screening, such as infrared scanners (raygun-like devices aimed at a person's forehead which estimates the body's internal temperature), facial recognition and thermal scanning devices, and wearables like watches and stick-on sensors which can often be paired with smartphone apps.

While these devices are a convenient way to monitor employees for fevers and mitigate the spread of COVID-19 in the workplace, companies should be mindful that collecting information through temperature screening devices could come with heightened privacy obligations due to the potential sensitivity of the information.

To mitigate privacy and security compliance risks, the following is recommended when considering whether and how to implement a temperature screening program:

Understand privacy implications when determining the best screening approach.

Reducing the amount of sensitive information your company collects will reduce the risk of a data breach or other privacy law violations. This is true both domestically and internationally, depending on where employees are

based. If your company opts to implement a temperature screening policy, some of the obligations that may be triggered include:

- **State Data Breach Laws:** Every state in the U.S. has enacted a data breach notification statute which, depending on the nature of the breach, could require a company to notify individuals, State Attorneys General, and federal credit reporting and investigative agencies. Some of the laws require an offer of credit monitoring services.
- The more sensitive the data, the higher likelihood that these state statutes and related obligations will be triggered. Several state data breach statutes and privacy laws[5] require personally identifiable medical information be secured from unauthorized access or breach. This would include an employee's first name or first initial and last name in combination with medical information (e.g., results from temperature tests, information about the employee's taste/smell, testing for the virus, doctors' notes or similar information).
- **The FTC Act and CCPA:** If you implement a temperature screening program, the FTC Act and CCPA (for California residents) require that your privacy statements (and other disclosures) are transparent about the personal information that is collected as part of the screening and how it is used and shared. CCPA may also give an employee the right to request access or deletion of the information, subject to applicable exceptions.
- **Americans With Disabilities Act (ADA)**: The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances. While the EEOC has recently clarified that employers may implement temperature checks and make inquiries about COVID-19 symptoms, broader monitoring activities and inquiries about symptoms **not** directly related to COVID-19 are still subject to the ADA requirements.[6] The ADA also has strict regulations regarding disclosure of the identity of an employee who has tested positive for COVID-19.
- **Global Data Protection Regulation (GDPR):** GDPR applies to all companies processing the personal data of European Union residents. This information, even if it just notes that a temperature is "high" or "within a normal range," will constitute "data concerning health" under the GDPR. By recording this data, you will be processing a "special category of personal data." The GDPR generally prohibits processing of this kind of data unless you can demonstrate you satisfy certain enumerated legal grounds.[7]

- **Health Information Portability and Accountability Act (HIPAA):** HIPAA should **not** trigger additional obligations on employers that conduct temperature screening because an employer's HIPAA obligations are generally limited only to covered health plans that are sponsored by the business.

If temperature screening is conducted using cameras and facial-recognition technology, make sure the necessary disclosures have been made and the proper consents are obtained.

Body temperature alone is not biometric information; however, face scans and fingerprints are. There are a number of state laws which require businesses to provide adequate notice and, at times, obtain affirmative consent before collecting biometric information from individuals. The most notable of these are the California Consumer Privacy Act (CCPA) and the Illinois Biometric Privacy Act (BIPA).

- **Companies doing business in California need to give proper notice:** Companies that do business in California and have in excess of $25 million in annual gross revenues or otherwise process or sell large amounts of personal information of California residents have certain specific obligations to consider. Under the CCPA, beginning in January 2021 employers must provide employees with CCPA-compliant privacy disclosures anytime they collect certain personal information, including medical information, facial scans and most of the information collected using smartphone apps. The notice must explain what information will be collected and the purpose/use of such collection. The information collected may not be used for any purpose other than what is disclosed in the notice. Intentional violations of the CCPA may result in civil penalties of up to $7,500 for each violation.

- **Companies collecting the biometric information of Illinois residents need to give proper notice AND obtain written consent from individuals:** The BIPA requires private entities that collect, retain or disclose biometric information to follow certain requirements to ensure that individuals have consented to such data collection. Those entities must develop publicly-available written policies which detail retention schedules and guidelines for permanent deletion of the information once the purpose of collecting the information is satisfied. There have

been dozens of BIPA-related lawsuits against employers in recent months, and individuals are entitled to the greater of actual or liquidated damages of up to $1,000 for each negligent violation of the BIPA or $5,000 for each intentional or reckless violation of the BIPA.

- Though Illinois is the only state that has a private right of action for violations of its biometric privacy law, Texas and Washington have enacted similar laws which allow their attorneys general to bring enforcement actions against violators.

Thoroughly vet any third party who is assisting with screening or whose software is being used for screening employees.

If your company is using the services of a third party to screen employees (i.e., for elevated temperatures), including mobile applications developed by third parties, it is important to review these agreements and make sure that they include sufficient privacy and security provisions that address their obligations and limited use rights as it relates to the personal information being collected through the screening.

Adequately protect the information collected from employees and maintain the confidentiality of that information.

Whether the information from temperature screenings is collected by employees at home or collected on-site, it must be adequately protected and kept confidential. Collected information should be shared only with those who have a need to know and should be protected under HIPAA standards. Employers must also maintain all information about an employee's illness as a confidential medical record in compliance with the ADA, separate from the employee's personnel file.

Many states also have laws requiring businesses to maintain adequate safeguards to protect personal information. For example, New York's Stop Hacks and Improve Electronic Data Security Act (SHIELD Act) requires businesses to implement and maintain information security protocols, and its definition of personal information was recently amended to include biometric information.

[1] https://www.whitehouse.gov/openingamerica/
[2] https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html; https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf
[3] https://www.eeoc.gov/wysk/what-you-should-know-about-ada-rehabilitation-act-and-coronavirus
[4] https://drive.google.com/file/d/107dLRAJaD4ZtNJGy8geSf0UvngesvKYd/view
[5] *See, e.g.*, Ala. Code § 8-38-2(6); 815 ILCS 530/5.; § 407.1500(1)(9), RSMo; 2019 Wash. Sess. Laws Ch. 241. S.H.B. 1071, § 1 (effective 3/1/20).
[6] https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act
[7] https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/data-protection-and-coronavirus/workplace-testing-guidance-for-employers/

Federal Reserve Further Expands Main Street Lending Program

AUTHORS

Seth W. Ashby

Brendan G. Best

Michael J. Romaya

Kristen M. Veresh

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
June 8, 2020

On June 8, 2020, the Federal Reserve further expanded its Main Street Lending Program (Main Street Program) to bolster participation by borrowers and lenders. These changes include:

- Lowering the minimum loan size for certain loans to $250,000 (from $500,000);
- Increasing the maximum loan size for all loan facilities (as described below);
- Increasing the term of each loan facility to five years (from four years);
- Extending the repayment period for all loans by delaying principal payments for two years (rather than one year), with interest-only payments commencing year two; and
- Raising the Federal Reserve's participation to 95 percent for all loans.

Once operational, the Main Street Program will provide up to $600 billion in liquidity to eligible lenders that make direct loans to eligible, for-profit businesses (generally speaking, U.S. companies with 15,000 employees or fewer, or 2019 annual revenues of $5 billion or less). The Federal Reserve also announced its intention to establish a program for nonprofit organizations. Linked below are copies of the Federal Reserve's revised Term Sheets and revised set of Frequently Asked Questions (FAQs).

The Main Street Program is comprised of three facilities: the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF), and the Main Street Expanded Loan Facility (MSELF). Loans under the MSNLF and MSPLF are new loans originated after April 24, 2020 by an eligible lender that include the program's minimum requirements. Loans under the MSELF are upsized tranches, originated after April 24, 2020, of existing loans by an eligible lender that include the program's minimum requirements.

As revised, all loans will be a five-year term loan with lender risk retention of 5 percent. MSNLF and MSPLF loans now have a minimum of $250,000. MSNLF loans now have a maximum of $35 million (without exceeding four times 2019 adjusted EBITDA), and MSPLF loans now have a maximum of $50 million (without exceeding six times 2019 adjusted EBITDA). Previously, both MSNLF and MSPLF loans were capped at $25 million. The minimum

size of an MSELF loan is still $10 million, but the maximum is now $300 million (without exceeding six times 2019 adjusted EBITDA). Previously, the maximum size of an MSELF loan was $200 million (without exceeding either (i) 35 percent of outstanding and undrawn available debt that is pari passu in priority with the underlying loan and equivalent in secured status or (ii) six times 2019 adjusted EBITDA). The 35 percent condition was removed.

Principal payments are now deferred for two years, while interest payments remain deferred for one year (capitalized per the lender's customary practices). Also, all loans will be amortized as follows: 15 percent due at the end of each of years three and four, with a balloon payment of 70 percent due at the end of year five. Previously, principal payments would have been deferred for only one year, and MSNLF loans would have been amortized in equal, annual installments.

Subject to underwriting, Main Street Program loans can be unsecured. MSELF loans must be secured if the underlying loan is secured, in which case any collateral securing the underlying loan (at the time of upsizing or on any subsequent date) must secure the MSELF loan on a pari passu basis.

Once an eligible lender has been registered for participation, it may begin to process loans for the Main Street Program. However, at this time lender registration has not been opened and the Federal Reserve is in the process of updating previously-released instructions and forms of certain documents for participation (including borrower certifications and covenants). Also, there is no prescribed form of application for these loans, nor does the Federal Reserve intend to publish a list of eligible lenders that have been registered for participation. Potential borrowers should contact their existing lenders to confirm whether they will participate and to discuss the application process.

For assistance and further information, please contact your Varnum attorney.

Additional Information for Potential Borrowers

Per the Federal Reserve's release of form documentation on May 27, borrowers will be subject to extensive financial reporting during the life of any Main Street Program loan. This will require the calculation and certification of numerous financial data on both a quarterly and annual

basis. The financial reporting covenant within a multi-lender facility that is being upsized under the MSELF will be deemed sufficient, however, if it was negotiated in good faith before April 24, 2020. These requirements are set out in Appendix C to the FAQs.

Main Street Program loans also will be subject to mandatory prepayment in the event of a borrower's material misstatement or knowing breach with respect to certain of the certifications and covenants that are required to be made (including as to executive compensation, stock buyback and dividend restrictions), and will require a cross-acceleration provision triggering an event of default if any other debt of the borrower to the Main Street Program lender or its affiliates is accelerated. Loans under the MSELF that involve a multi-lender facility are subject to additional requirements to the extent feasible under the underlying loan documents given the added complexity of such facilities, and an existing cross-acceleration provision under such a facility will be deemed sufficient if it was negotiated in good faith before April 24, 2020.

Finally, among other things, the FAQs clarify each of the following:

- To satisfy federal regulation applicable to the Federal Reserve's emergency lending authority, each borrower must certify that it is "unable to secure adequate credit accommodations from other banking institutions." This does not mean that no credit from other sources is available to the borrower. Rather, the borrower may certify that it is unable to secure "adequate credit accommodations" because the amount, price, or terms of credit available from other sources are inadequate for the borrower's needs during the pandemic. Also, borrowers are not required to demonstrate that applications for credit had been denied by other lenders or otherwise provide support. However, each borrower must make all certifications in good faith.
- Each loan must include an adjustable rate of interest equal to LIBOR (1 or 3 months) plus 3.0 percent (i.e., lenders do not have discretion in setting the interest rate, regardless of borrower size or risk profile), and lenders are not permitted to charge any fees beyond what is set out in the Term Sheets (except (i) de minimis fees for customary and necessary services to underwrite the loan such as appraisal and legal fees or (ii) customary consent fees if such fees are necessary to amend existing loan documentation in the context of upsizing a loan in connection with the MSELF).
- If an eligible business has an existing loan that requires prepayment of more than "a de minimis amount" upon incurrence of new debt, the

business cannot receive a loan under the MSNLF or the MSELF unless such requirement is waived or reduced to a de minimis amount by the relevant creditor (i.e., absent such waiver or reduction, the business would need to be qualified for a loan under the MSPLF, which permits the refinancing of existing debt owed to lenders other than the Main Street Program lender at the time of origination).

- While all of a business's affiliated entities, domestic and foreign, must be considered when applying the employee and revenue eligibility criteria, only the business's consolidated subsidiaries (i.e., excluding parent companies and sister affiliates) are considered for determining whether the business has "significant operations in and a majority of its employees based in the United States." This test is met, for example, if greater than 50 percent of such consolidated business's assets are located in the U.S., or annual net income is generated in the U.S., or annual net operating revenues are generated in the U.S., or annual consolidated operating expenses (excluding debt service expenses) are generated in the U.S.
- A U.S. business owned by a foreign company can qualify as an eligible borrower; however, the borrower itself must be a qualifying entity that was created or organized in the United States or under the laws of the United States prior to March 13, 2020, with "significant operations in and a majority of its employees based in the United States" (see above for analysis), and proceeds of any Main Street Program loan cannot be used for the benefit of the borrower's foreign parents, affiliates or subsidiaries.
- If an eligible borrower is the only business in its affiliated group that has sought funding through the Main Street Program, its affiliated group's debt and EBITDA are not relevant to determining whether that business can qualify, except to the extent that the borrower's subsidiaries are consolidated into its financial statements. On the other hand, if the eligible borrower has any affiliate that has previously borrowed or has an application pending to borrow under the Main Street Program, then the entire affiliated group's debt and EBITDA are relevant to determining whether the eligible borrower's maximum loan size.
- In connection with their obligation to provide certain financial records and to calculate their 2019 adjusted EBITDA, (i) only eligible borrowers that are subject to U.S. GAAP reporting requirements or that already prepare their financials in accordance with U.S. GAAP must submit U.S. GAAP-compliant financial records, (ii) only eligible borrowers that typically prepare audited financial statements must submit audited financial statements (otherwise eligible borrowers should submit reviewed financial statements or financial statements prepared for the

purpose of filing tax returns), and (iii) only eligible borrowers that typically prepare financial statements that consolidate the borrower with its subsidiaries (but not its parent companies or sister affiliates) must submit such consolidated financial statements.

Resources

Main Street New Loan Facility (MSNLF)Term Sheet

Main Street Priority Loan Facility (MSPLF) Term Sheet

Main Street Expanded Loan Facility (MSELF) Term Sheet

Main Street Lending Program Frequently Asked Questions (FAQs)

Additional Main Street Lending Program Advisories

Main Street Lending Program: Federal Reserve Announces Revised Terms
Business Law Advisory, April 30, 2020

Main Street Lending Program: Revised Term Sheets Expected Soon
Business Law Advisory, April 29, 2020

COVID-19: Federal Reserve Announces New Loan Facility for Main Street Businesses
Business Law Advisory, April 9, 2020

Michigan's Phased Reopening Continues: Further Easing under Executive Order 2020-115

AUTHORS

Ethan J. Beswick

Eric R. Post

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
June 8, 2020

On June 5, 2020 Michigan Gov. Gretchen Whitmer issued Executive Order 2020-115 (the Order) which provides additional guidance for individuals and business as Michigan continues to reopen from coronavirus-related shutdowns. Specifically, the Order provides for the following:

- Personal care services — including hair and nail salons, spas, and massage, tattoo and tanning services — may reopen beginning June 10, 2020 in Regions 6 and 8 (described below), and may reopen across the state beginning June 15, 2020.
- Beginning June 10, Regions 6 and 8 (i.e., the Upper Peninsula and the northern Lower Peninsula) will move to Phase 5 of the governor's MI Safe Start Plan. As such, those regions will be subject to the following restrictions:
  - Social gatherings among persons not part of the same household are permitted to the extent that persons maintain six feet of distance from one another. If the gathering is indoors, it may not exceed 50 people and if outdoors, the gathering may not exceed 250 people.
  - Entertainment and amusement businesses in these regions, including arcades, bowling alleys, movie theatres, concert spaces, stadiums or similar venues may reopen subject to maximum capacity restrictions.
  - Work that can be performed remotely should be performed remotely. (Note this is distinct from the rule for the remainder of the state, which is that such work must be performed remotely.)
- Former rules governing the remaining regions of the state are still in place pursuant to Executive Order 2020-110
- Any business or operation requiring its employees to leave their home or place of residence for work is subject to the rules and safeguards found in Executive Order 2020-114, which generally updates industry safety practices and requirements from Executive Order 2020-97, and provides new safeguards for business and operations that may now open under the Order.

Should you have any questions about how Executive Order 2020-114 or Executive Order 2020-115 apply to your business or operation, please contact your Varnum attorney.

Rescission of Michigan's Stay Home, Stay Safe Order: Top 10 Things to Know

AUTHORS

Eric R. Post

Ethan J. Beswick

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
June 2, 2020

On June 1, 2020 Michigan's Gov. Gretchen Whitmer issued Executive Order 2020-110, which significantly relaxes restrictions on Michigan's businesses and individuals, as well as withdraws Michigan's series of Stay Home, Stay Safe orders. Effective immediately, Michiganders are no longer required to stay home; however, certain businesses will remain closed and specific activities that present a heightened risk of infection will remain prohibited. Here are the top ten things you need to know about the current stage of Michigan's new normal:

Individuals

1. Restrictions on social gatherings and events have been loosened. Up to 10 people are permitted to gather indoors and up to 100 people are permitted to gather outdoors. However, individuals who leave their homes must continue to follow all social distancing measures recommended by the CDC (e.g., maintaining six feet from people from outside one's household, etc.).

2. Individuals must continue to wear face coverings when in enclosed public spaces (unless medically intolerable). However, individuals may be required to temporarily remove a face covering for identification purposes. Individuals may also remove a face covering to eat or drink when in a restaurant or bar.

Businesses

3. Any work that is capable of being performed remotely (i.e., without the worker leaving his or her residence) must be performed remotely.

4. Any business or operation requiring employees to leave their home or place of residence to work is subject to the rules and workplace safeguards set forth in Executive Order 2020-97.

5. Businesses no longer have to specifically designate their in-person workers. There is no longer any distinction between critical infrastructure workers, workers performing minimum basic operations and workers performing resumed activities.

6. Businesses may deny entry or access to any individuals (i.e., workers, customers or other visitors) who refuse to wear a face covering.

7. Retailers are permitted to resume normal operations (i.e., without prescheduled appointments) beginning June 4, 2020 subject to compliance with the workplace safety guidelines cited above.

8. Restaurants and bars statewide may reopen on June 8, 2020 subject to capacity constraints and compliance with the workplace safety guidelines cited above. (Restaurants and bars in the Upper Peninsula and the northern Lower Peninsula are already permitted to be open.)

9. Libraries, museums and outdoor public swimming pools (at 50 percent capacity) may reopen on June 8, 2020 subject to additional state guidance and/or the workplace safety guidelines cited above.

10. The following businesses must remain closed: movie theatres, gyms, fitness centers, sports facilities, facilities offering non-essential personal care services (e.g., hair, nail, tanning, spas, tattoo and similar personal care services involving close contact of persons), casinos, and indoor services or facilities involving close contact of persons for amusement or other recreational/entertainment purposes (e.g., amusement parks, arcades, bingo halls, etc.).

Further Relaxation of Michigan's Stay Home, Stay Safe Order

AUTHORS

Seth W. Ashby

Eric R. Post

Ethan J. Beswick

Ashleigh E. Draft

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
May 21, 2020

Michigan's Stay Home, Stay Safe order was further amended today by Gov. Gretchen Whitmer via Executive Order 2020-96 (Order). The Order loosens restrictions on individual gatherings, relaxes restrictions formerly placed upon retailers and motor vehicle dealerships, and announces the pending rescission of requirements that health care and veterinary facilities implement plans to postpone mon-essential procedures and services. In particular, the Order makes the following changes:

- Beginning immediately, small social gatherings of not more than 10 people are permitted (statewide).
- Beginning May 26, the following businesses may resume activities by appointment only (statewide):
  - Motor vehicle showrooms
  - Retail activities, provided stores limit occupancy to 10 customers at any one time (retail activities are defined to include the selling of goods and the rendering of services incidental to the sale of goods, like packaging and processing for delivery)
- Beginning May 29, certain non-essential medical, dental and veterinary procedures may resume, subject to specified workplace restrictions.
- The Stay Home, Stay Safe order otherwise remains in effect until May 28. All other places of public accommodation (e.g., restaurants and bars in most of lower Michigan, movie theaters, gyms, hair salons, etc.) remain closed at this time per Executive Order 2020-69.

Coronavirus Food Assistance Program Announced: Farmers to Receive Direct Support

AUTHORS

Kimberly A. Clarke

Brion B. Doyle

Ethan J. Beswick

RELATED PRACTICES

Coronavirus Task Force

RELATED INDUSTRIES

Agriculture

Agriculture Advisory
May 19, 2020

On May 19, the U.S. Secretary of Agriculture announced the details of the Coronavirus Food Assistance Program (CFAP), which will provide up to $16 billion in relief for COVID-19 related losses to America's farmers and ranchers. Applications will be accepted beginning May 26 from agricultural producers who have suffered losses resulting from the coronavirus pandemic. In addition to CFAP, the U.S. Department of Agriculture's (USDA) Farmers to Families Food Box program is partnering with distributors to purchase $3 billion in fresh produce, dairy and meat to deliver food to Americans in need.

CFAP has been designed to provide direct relief and financial assistance to agricultural producers suffering a five percent or greater price decline due to lower demand, surplus production and disruptions to shipping patterns resulting from the pandemic. Funding for the program is derived partially ($9.5 billion) from the Coronavirus Aid, Relief, and Economic Stability (CARES) Act, with the remaining funding being provided by the Commodity Credit Corporation Charter Act ($6.5 billion). Farmers and ranchers eligible for assistance under CFAP include those engaged in the production of the following: non-specialty crops and wool (e.g., malting barley, canola, corn, soybeans, etc.); livestock; dairy; and specialty crops (e.g., almonds, beans, broccoli, sweet corn, strawberries, tomatoes, etc.).

Applications will be processed by the USDA through local Farm Service Agency offices, and documentation to support a producer's application and certification may be requested. Payment under the program is limited to $250,000 per person or entity, and 80 percent of a recipient producer's payment will be provided upon approval of the application. Should you have questions or wish to apply for funding under the CFAP, Varnum's agriculture attorneys stand ready to assist you.

Michigan's Phased Reopening: Executive Orders 2020-91 and 2020-92

AUTHORS

Seth W. Ashby

Eric R. Post

Ethan J. Beswick

Ashleigh E. Draft

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
May 18, 2020

On May 18, 2020 Gov. Whitmer issued Executive Orders No. 2020-91 and 2020-92 which provide clarification regarding worker protection during the coronavirus pandemic and amendments to the Stay Home, Stay Safe order. The Stay Home, Stay Safe order now divides Michigan into eight separate regions, with different regions subject to differing reopening timelines based on their respective progress in the fight against COVID-19. Most notably, restaurants and retail stores in Northern Michigan and the Upper Peninsula are permitted to reopen beginning May 22 subject to certain restrictions.

Executive Order 2020-91

This order replaces what was formerly Section 11 of Executive Order 2020-77. Specifically, the new order provides for various workplace safety standards and enhanced enforcement of these rules.

Executive Order 2020-92

The new iteration of the Stay Home, Stay Safe order generally provides for the following changes:

- Michigan is now divided into eight different regions, each of which is subject to its own timeline and schedule regarding phased reopening plans.
- Beginning May 22, 2020 the following workers in certain areas of Northern Michigan and the Upper Peninsula (i.e., Regions 6 and 8), are permitted to resume operations subject to the specified workplace standards:
  - Retail workers
  - Office workers performing work that is not able to be performed remotely
  - Restaurant and bar staff (at 50 percent capacity)
- Any workers that are necessary to prepare a workplace to follow the standards described in Executive Order 2020-91 are deemed workers who perform resumed activities and may resume in-person work effective immediately.

- The order does not limit the ability of cities, villages or townships to take a more cautious approach, such as limiting restaurants to outdoor seating.
- The order does ***not*** permit the reopening of other places of public accommodation that have been closed pursuant to Executive Order 2020-69 (e.g., salons, theaters, libraries, etc.).

VARNUM
ATTORNEYS AT LAW

Challenges and Potential Remedies for Auto Suppliers in the Wake of COVID-19

AUTHORS

Seth W. Ashby

Brendan G. Best

Katie K. Roskam

Ashleigh E. Draft

Justin L. Fitzgerald

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

RELATED INDUSTRIES

Automotive

Business Law Advisory
May 11, 2020

Manufacturing Interruption

For the past several weeks, in Michigan as well as other states, OEM production temporarily halted, presenting challenges to automotive suppliers, as well as their lenders and investors, to accurately project available liquidity and required capital in the near and medium term. While governmental restrictions on manufacturing are slowly easing, the future is still uncertain. In Michigan, manufacturing facilities are restarting operations on May 11, including automotive suppliers, and the Big 3 have agreed not to restart until May 18 (and only at 25 percent capacity initially). Additionally, manufacturing in Michigan may not restart until the facility has been prepared to follow enhanced safeguards. Such facilities are required to adopt special safety measures, including conducting entry screening protocols for workers and anyone entering the facility each day, requiring a questionnaire covering symptoms and exposure to people with possible COVID-19 infections, and temperature screening as soon as no-touch thermometers may be obtained. Such facilities must also create dedicated entry points and prohibit entry to all non-essential in-person visits, including tours, as well as train employees on COVID-19-related issues like how the virus spreads, signs and symptoms, steps workers must take to notify the business of suspected or confirmed diagnoses, and the use of personal protective equipment. Additionally, all manufacturing workers in Michigan must wear masks when they cannot consistently maintain six feet of separation. These requirements create additional variability and uncertainty as to the timing of the manufacturing restart for the OEMs and their suppliers.

Access to CARES Act Lending Programs

While lenders are generally taking a pause regarding enforcement of loan covenants and remedies, suppliers are under internal and external pressure to project future sales, manage cash flow and liquidity, and plan for required capital expenditures. Accessing short-term liquidity is among the highest priorities. The federal stimulus package known as the CARES Act authorized funding for certain liquidity programs, including the Small Business Association's Paycheck Protection Program (PPP).

While the PPP has provided much-needed, short-term liquidity to small businesses with favorable loan terms (including the potential to qualify for loan forgiveness), automotive suppliers have faced challenges accessing this program due to eligibility requirements. An entity generally is eligible for the PPP if it, combined with its affiliates, (i) is a small business concern as defined in Section 3 of the Small Business Act and meets the SBA employee-based or revenue-based size standard corresponding to its primary industry or the SBA's alternative size standard, or (ii) has 500 or fewer employees. Due to these somewhat restrictive eligibility requirements, many automotive suppliers do not qualify for the PPP.

An additional source of financing on the horizon is the Federal Reserve's Main Street Lending Program (Main Street Program), which utilizes CARES Act funding and will provide up to $600 billion in liquidity to lenders that make direct loans to eligible businesses. Compared to the PPP, the Main Street Program will be open to a more expansive pool of businesses. As announced by the Federal Reserve on April 30, the Main Street Program is available to for-profit businesses with up to 15,000 employees or up to $5 billion in 2019 annual revenues. While the Main Street Program does not have a loan forgiveness component, it could be an attractive liquidity option for automotive suppliers that were in sound financial condition before the pandemic and remain bankable in the eyes of their lenders. As of May 9, the Main Street Program is not operational and the Federal Reserve has not confirmed a start date. Potential borrowers also should be mindful of the various restrictions and requirements of the Main Street Program, which we have summarized in a recent advisory.

Varnum is working with automotive suppliers to find solutions to these issues and to help them access other alternative sources of capital, such as mezzanine financing and sale-leaseback transactions.

Mexico's Shut-Down Order

The global automotive industry inextricably links Mexico to the rest of the North American automotive supply chain, including American companies. Hard on the heels of the ratification of the United States-Mexico-Canada Agreement , in 2020 the automotive supply chain faces a new problem when it comes to Mexico: the COVID-19 pandemic. Mexico, a major supplier of auto parts for U.S. automotive companies, has temporarily shut down non-essential trade and shuttered non-essential business until May 30. This order was originally set to expire on April 30 but was extended for another month. In the U.S., automotive manufacturing is beginning to restart as noted above. To date, Mexico has not provided any indication that it deems

suppliers of automotive companies to be essential businesses, creating even more uncertainty for automotive suppliers in the U.S.

On behalf of some of its supplier clients, Varnum is coordinating with counterparts in Mexico to understand that government's order and is working with governmental officials to obtain consent to the reopening of closed Mexican businesses that form part of the supply chain for critical businesses in the U.S. Varnum continues to stay up to date on the latest developments in Mexico on this issue.

Varnum attorneys from various disciplines are closely monitoring developments that impact automotive suppliers and other manufacturers, as well as issues for lenders and investors. We will continue to provide updates and analysis as these developments occur. Please contact your Varnum attorney or any member of our Coronavirus Task Force for more information.

VARNUM
ATTORNEYS AT LAW

Is Your Now-Online Business Protecting Itself From Privacy Threats and Potential Liability?

AUTHORS

Susan E. Benington

Jeffrey M. Stefan II

Charumati Ganesh

RELATED PRACTICES

Coronavirus Task Force

Data Privacy and Cybersecurity Law

Business Law Advisory
May 11, 2020

Over the last several weeks, many businesses have become more reliant on a virtual business model due to COVID-19. Now, those businesses face a myriad of unexpected privacy and cybersecurity issues. We encourage businesses who have made the transition to an online presence to implement the following steps:

1. Update Privacy Notices

As your business model evolves, your privacy policies should as well. Providing a clear and accurate explanation of your data collection, sharing and retention policies can reassure customers and clients that you are handling their personal information responsibly and may help minimize regulatory enforcement risk. Consider some scenarios where your privacy notices may need to be updated:

- If you are offering online or mobile app products or services for the first time, do your customers or clients know whether the information they share with you will be exposed to third parties, sold or used for marketing purposes?

- If you have transitioned from conducting meetings with clients in person to using a video conferencing platform like Zoom or Skype, do your clients know if those calls are being recorded or if the video conferencing service has access to your calls?

- If you typically have your customers or clients sign sensitive documents (e.g., tax documents) but are now using e-signatures, do your clients know what steps you are taking to ensure that those documents are transmitted securely and whether they are being shared with third parties?

Updating your privacy statement is especially important if you do business in California or outside the United States. The California Consumer Privacy Act (CCPA) and the Global Data Protection Regime (GDPR) require businesses who fall under their scope to make a number of highly specific disclosures in their privacy statements. Please note that your business may be subject to the CCPA and GDPR even if you are based outside of California or Europe.

2. Update Vendor Contracts

Is your business starting to share more personal information with existing or new vendors in order to support new online or electronic capabilities, such as online sales, video conferencing, electronic document sharing or app-based educational tools?

Making sure necessary privacy and security terms are included in vendor agreements is an important step in protecting personal information for which your business is responsible. These terms can also limit risk should a vendor mishandle the information or violate its privacy obligations. Data sharing agreements should also clearly describe a vendor's authorized uses for the data in addition to any other limitations, such as limitations prohibiting the vendor from sharing your information with third parties.

3. Update Data Collection and Storage Practices

Is your business receiving personal information from customers online for the first time? Have you determined what types of personal information are necessary for you to carry out your business? Do you have procedures in place for safeguarding the information?

One step that businesses can take to shield themselves from liability is to simply limit the amount of data being collected. Collecting and storing large amounts of personal or proprietary information that is not necessary for a business purpose will make your business a more desirable target for hackers and could subject you to heavy penalties if your customers' personal information is compromised in a data breach.

Businesses must also ensure that they are adequately safeguarding the personal information that users share with them. There are a number of steps you can take to increase your protection of personal information:

- Implement end-to-end encryption for all sensitive information
- Institute multi-factor authentication protocols
- Install effective antivirus and cybersecurity software
- Limit the number of employees who can access personal information.

4. Update Internal Policies and Educate Employees

A key way to minimize your business's risk of liability is to have a written policy that details the way your business handles customer information. This should be communicated clearly to your employees so that they are aware of how to handle personal and confidential information. If your workforce is new to remote work, remind them not to use personal devices for anything work-related and to opt for personal hotspots rather than public Wi-Fi when working outside of their homes.

If you have any questions about how to manage privacy and security issues as you transition your business to an online model, contact Varnum's Data Privacy and Cybersecurity Practice Team.

The Federal Reserve's Main Street Lending Program: Practical Takeaways for Lenders

AUTHORS

Kristen M. Veresh

Shaquari M. Everson

RELATED PRACTICES

Banking and Finance

Business and Corporate

Coronavirus Task Force

Business Law Advisory
May 8, 2020

In our initial advisory on April 30, we discussed the revised terms for the Federal Reserve Main Street Lending Program (Main Street Program). In this advisory, we focus on the lender requirements under the Main Street Program.

Which Lenders Can Participate in the Main Street Program?

Loans under each of the three facilities - the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF) and the Main Street Expanded Loan Facility (MSELF) – may only be made by eligible lenders. In addition, under the MSELF the upsized portion of the loan may only be made by an eligible lender that is one of the existing lenders on the loan to be upsized. As of the date of this advisory, an eligible lender is a U.S. federally insured depository institution (including a bank, savings association or credit union), a U.S. branch or agency of a foreign bank, a U.S. bank holding company, a U.S. savings and loan holding company, a U.S. intermediate holding company of a foreign banking organization, or a U.S. subsidiary of any of the foregoing. Such term does not include non-depository lenders or non-bank financial institutions. However, according to the FAQ's issued in connection with the revised term sheets for the Main Street Program, the Federal Reserve is currently "considering options to expand the list of eligible lenders in the future."

How Does This Differ From a Typical Bank Loan?

As discussed in previous advisories, the Main Street Program will be supported by a $75 billion equity investment by the Department of Treasury in a Special Purpose Vehicle (SPV). The Federal Reserve Bank of Boston will also commit to lend to this SPV, such that the SPV may then purchase at par value (i) a 95 percent participation in each eligible loan extended under the MSNLF, (ii) an 85 percent participation in each eligible loan extended under the MSPLF, and (iii) a 95 percent participation in the upsized tranche of the eligible loan under the MSELF (provided the eligible loan is upsized on or after April 24, 2020). The sale of the eligible loan to

the SPV will be structured as a true sale and must be completed promptly after the origination of the eligible loan. The eligible lender will then be required to retain its five percent or 15 percent interest, as applicable, in the eligible loan until such loan matures (or in the case of the MSELF, the upsized tranche of the loan matures), or the SPV sells its participation.

As a result of this guaranteed sale of a participation in each eligible loan, an eligible lender has additional incentive to extend loans to customers under the Main Street Program with the assurance that it will only be required to retain a small portion of the risk associated with such loan on its books.

Evaluation and Certifications by Eligible Lender With Respect to Each Facility

Despite the reduced participation held by eligible lenders in eligible loans, eligible lenders are still expected to conduct an assessment of each borrower's financial condition and creditworthiness at the time the borrower applies for an eligible loan. As of the date of this advisory, no specific criteria is provided with respect to the extent of this assessment, other than the requirement that eligible lenders will need to apply their own underwriting standards and may require additional information and documentation from borrowers to complete this assessment. Ultimately, eligible lenders are meant to treat the eligible borrower requirements set forth under the Main Street Program as minimum requirements. A borrower is not guaranteed the extension of an eligible loan simply because it constitutes an eligible borrower. The final decision as to whether to extend an eligible loan will result from the eligible lender's assessment.

In addition to performing the above-described assessment, eligible lenders will also be expected to make the following certifications and commitments in connection with each loan (in addition to other certifications required by applicable statutes and regulations):

- **No prepayment of existing eligible lender debt:** The eligible lender must commit that it will not request repayment of debt or payment of interest on such debt extended by the eligible lender to the eligible borrower until the eligible loan is repaid in full, unless the debt or interest payment is mandatory and due, or in the case of default and acceleration. According to the FAQ's, this certification does not prevent the eligible lender from accepting partial prepayment on an eligible borrower's existing line of credit with the eligible lender, in accordance with the borrower's normal course of business usage for such line of credit.

- **No cancellation or reduction of lines of credit:** The eligible lender must commit that it will not cancel or reduce any existing committed lines of credit to the eligible borrower, except in an event of default.
- **Calculation of 2019 EBITDA:** The eligible lender must certify that the methodology used for calculating the eligible borrower's adjusted 2019 EBITDA for the leverage requirement in determining the maximum loan size is the methodology the eligible lender has previously used for adjusting EBITDA when extending credit to the eligible borrower or similarly situated borrowers on or before April 24, 2020.
- **No conflict of interest:** The eligible lender must certify that it is eligible to participate in the facility, including in light of the conflicts of interest prohibition in Section 4019(b) of the CARES Act.

Resources

Main Street New Loan Facility (MSNLF)Term Sheet
Main Street Priority Loan Facility (MSPLF) Term Sheet
Main Street Expanded Loan Facility (MSELF) Term Sheet
Main Street Lending Program Frequently Asked Questions (FAQs)

VARNUM
ATTORNEYS AT LAW

Michigan's Manufacturing Sector Resumes May 11

AUTHORS

Seth W. Ashby

Eric R. Post

Peter G. Roth

Ethan J. Beswick

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
May 7, 2020

Starting May 11, 2020 the manufacturing industry may resume in-person operations in Michigan pursuant to Gov. Whitmer's Executive Order 2020-77, issued today (the Order). The Order rescinds the former Stay Home, Stay Safe Order while updating certain provisions of the Order relating to resumed activities. Notably, the bulk of the stay-at-home restrictions put in place under prior orders remain in place until May 28. An overview of the most notable changes found in the Order are as follow:

- The definition of "workers who perform resumed activities" has been amended to include the following categories of workers:
  - ***Workers necessary to perform startup activities at manufacturing facilities, including activities necessary to prepare the facilities to follow the workplace safeguards defined below***;
  - Effective **May 11, 2020, *workers necessary to perform manufacturing activities, subject to the safeguards described below. manufacturing may not commence until the facility at which the work will be performed has been prepared to follow the workplace safeguards***; and,
  - Workers at suppliers, distribution centers or service providers whose in-person presence is necessary to enable, support or facilitate another business's or operation's resumed activities.
    - As noted in our prior advisories, this corrects a gap that was present in the prior orders with respect to the supply chains of resumed businesses.
- In-person workers are now required to wear masks when they are unable to maintain six feet of separation from other individuals in the workplace, and face shields should be considered when workers cannot maintain three feet of separation.
- Notably, for ID purposes an individual may be required to temporarily remove a face covering upon entering an enclosed public space.
- **Manufacturing facilities must adopt the following workplace safeguards**:
  1. Conduct a daily entry screening protocol for workers, contractors, suppliers and other individuals entering the facility (including a questionnaire and temperature screening as soon as no-touch

thermometers can be obtained);

2. Create dedicated entry points at every facility for daily screening and ensure physical barriers are in place to prevent anyone from bypassing the screening;
3. Suspend all non-essential in-person visits, including tours;
4. Train workers on the following:
    1. routes by which the virus is transmitted from person to person;
    2. distance the virus can travel in the air, as well as the time it remains viable in the air and on surfaces;
    3. symptoms of COVID-19;
    4. steps workers must take to notify the business of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19;
    5. measures the facility is taking to prevent worker exposure to the virus, pursuant to the business's COVID-19 preparedness and response plan;
    6. rules workers must follow to prevent exposure and spread of the virus;
    7. the use of personal protection equipment.
5. Reduce congestion in common spaces wherever practicable (e.g., closing salad bars/buffets, placing markings six feet apart on floors for standing in line, reducing cash payments, etc.);
6. Implement rotational shift schedules where possible (e.g., increase the number of shifts, alternative days/weeks) to reduce the number of workers in the facility at the same time;
7. Stagger start times and meal times;
8. Install temporary physical barriers, where practicable, between work stations and lunch tables;
9. Create protocols for minimizing personal contact upon delivery of materials to the facility;
10. Adopt protocols to limit the sharing of tools/equipment to the maximum extent possible;
11. Frequently and thoroughly clean and disinfect high-touch surfaces with special attention to parts, products and shared equipment;
12. Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite and discontinue use of hand dryers;
13. Notify plant leaders and potentially exposed individuals upon identification of a positive case of COVID-19 in the facility, as well as

maintain a central log for symptomatic workers or workers who test positive for COVID-19;

14. Send potentially exposed individuals home upon identification of a positive case of COVID-19 in the facility;
15. Encourage workers to self report to plant leaders as soon as possible after developing symptoms of COVID-19; and
16. Shut areas of the manufacturing facility for cleaning and disinfection, as necessary, if a worker goes home because he/she is displaying symptoms of COVID-19.

Importantly, the Order does not distinguish between those manufacturing operations that are operating as a critical infrastructure business and those that will be reopening as permitted resumed activities. As such, it appears all manufacturing operations conducting in-person work will need to adhere to the workplace safeguard requirements listed above. Finally, with respect to auto manufacturing, Gov. Whitmer announced an agreement has been made among the governor's office, OEMs and the UAW that the OEMs will not open for operations until May 18, 2020 and on such date they will only open at 25 percent capacity.

Construction and Other Real Estate Businesses to Resume Under Revised Order

AUTHORS

Melissa B. Papke

Eric R. Post

RELATED PRACTICES

Construction Law

Coronavirus Task Force

Real Estate, Development and Construction

Real Estate and Construction Law Advisory
May 5, 2020

Beginning May 7, 2020 the construction industry and certain other real estate businesses may resume in-person operations in Michigan under the conditions set forth in Gov. Whitmer's Executive Order 2020-70 (the Order). The Order replaces and updates the prior Stay Home, Stay Safe orders issued by the governor in March and April 2020 (collectively, the former orders). While most of the stay-at-home restrictions implemented under the former orders remain in place, workers in the construction industry and related building trades – along with real estate brokers, appraisers, inspectors, surveyors and others – are now included in the growing list of resumed activities that may be conducted in person in Michigan. Such activities are not completely without restriction, however.

As noted below, the Order applies only to certain specified construction- and real estate-oriented businesses, and it imposes very specific restrictions on those that resume in-person operations. If you have any questions or would like assistance in implementing the policies or practices required under the Order, please contact your Varnum attorney or the authors of this advisory.

What specific businesses or workers are affected?

1. Workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians and similar workers);
2. Workers in the real estate industry, including agents, appraisers, brokers, inspectors, surveyor, and registers of deeds;
3. Workers who perform work that is traditionally and primarily performed outdoors (including forestry workers, outdoor power equipment technicians, parking enforcement workers and similar workers); and
4. Workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19.

What restrictions must those businesses follow?

In addition to the restrictions applicable to all in-person operations permitted under the former orders (summarized here and here), these businesses must follow certain additional restrictions while the Order remains in place (currently until May 15, 2020):

1. Businesses in the real estate industries described at item (ii) above must limit the number of people that are present at any given time. Specifically, any showings, inspections, appraisals, photography/videography and final walk-throughs must be by appointment only, and no more than four people may be on the premises at one time. The Order prohibits in-person open houses and certain types of private showings.

2. Construction and the building trades described at item (i) above must abide by a number of new restrictions. As further detailed in the Order, such businesses must:

1. Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another and limit in-person interaction with clients and patrons to the maximum extent possible.
2. Provide personal protective equipment (PPE) such as gloves, goggles, face shields and face masks as appropriate for the activity being performed.
3. Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible, and to ensure frequent and thorough cleaning of tools, equipment and frequently touched surfaces.
4. Designate a site-specific supervisor to monitor and oversee the implementation of the business's COVID-19 preparation and response plan (as required under the former orders). The supervisor must remain onsite at all times during activities. An onsite worker may be designated to perform the supervisory role.
5. Conduct a daily entry screening protocol for workers and visitors entering the worksite, including a questionnaire covering symptoms and exposure to people with possible COVID-19, together with a temperature screening if possible.
6. Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided above or, in the alternative, issue stickers or other indicators to workers to show that they received a screening before entering the worksite that day.

7. Require face shields or masks to be worn when workers cannot consistently maintain six feet of separation from other workers.
8. Provide instructions for the distribution of PPE and designate onsite locations for soiled masks.
9. Encourage or require the use of work gloves, as appropriate, to prevent skin contact with contaminated surfaces.
10. Identify choke points and high-risk areas where workers must stand near one another (such as hallways, hoists and elevators, break areas, water stations and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.
11. Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by workers.
12. Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among workers at the worksite.
13. Restrict unnecessary movement between project sites.
14. Create protocols for minimizing personal contact upon delivery of materials to the worksite.

What's Not Covered?

Notably, while the Order specifically applies to the construction industry and the building trades referenced above, it is unclear whether the vendors needed to supply construction materials are also permitted to resume in-person operations. As noted in our prior advisory, the Order contemplates the supply chain needs of critical infrastructure businesses, but it does not clearly address the needs of resumed activities work like construction. Varnum is in contact with the governor's office on this point, and we remain hopeful that it will be addressed in future orders.

Furthermore, the Order continues to rely on the original version of the federal Department of Homeland Security/CISA guidance incorporated into the former orders. Unlike nearly all other states, Michigan has elected not to adopt the newer, more expansive versions of that guidance in its stay-at-home order. This means that the critical infrastructure in Michigan is defined more narrowly than most other states.

Main Street Lending Program: Federal Reserve Announces Revised Terms

AUTHORS

Seth W. Ashby

Brendan G. Best

Michael J. Romaya

Kristen M. Veresh

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
April 30, 2020

On April 30, 2020 the Federal Reserve announced revised terms for its Main Street Lending Program (Main Street Program). Once operational, the program will provide up to $600 billion in liquidity to eligible lenders that make direct loans to eligible businesses. The revised terms include the addition of a third facility within the Main Street Program and expansion of eligibility requirements for both lenders and businesses. This advisory summarizes the key changes from the initial terms that were announced on April 9 and includes additional details per the revised terms. We will provide future advisories that focus on topics of interest for specific types of businesses and that summarize any changes and guidance the Federal Reserve may release. Linked below are copies of the Federal Reserve's revised Term Sheets and initial set of Frequently Asked Questions.

According to the Federal Reserve, the Main Street Program will support small and midsized businesses that were in sound financial condition before the pandemic. Citing more than 2,200 letters from the public, the Federal Reserve decided to expand the loan options available to businesses under this program as compared to the initial terms. These changes include:

- Adding a third facility or loan option with increased risk sharing by lenders for borrowers with greater leverage;
- For new loans, lowering the minimum loan size from $1 million to $500,000;
- For the upsized tranche of existing loans, increasing both the minimum loan size from $1 million to $10 million and maximum loan size from $150 million to $200 million;
- Expanding the pool of businesses eligible to borrow.

The Main Street Program is now comprised of three facilities: the Main Street *New* Loan Facility (MSNLF), the Main Street *Priority* Loan Facility (MSPLF) and the Main Street *Expanded* Loan Facility (MSELF). The MSPLF is new and allows for greater leverage by borrowers (six times 2019 adjusted EBITDA, compared to four times 2019 adjusted EBITDA under the MSNLF), in exchange for greater risk sharing by lenders (retention of a 15 percent share compared to a five percent share under the MSNLF and MSELF). Also, the loan underlying any MSELF upsized tranche may be a secured or

unsecured term loan *or* revolving credit facility (and the upsized tranche of such loan will be a term loan, subject to the other program terms).

All three facilities use the same borrower and lender eligibility criteria, and they have many of the same features (including the same four-year maturity, interest rate, one-year deferral of principal and interest, as well as the ability of the borrower to prepay without penalty). Note that, due to complaints as to having to implement new systems to issue loans based on the secured overnight financing rate, the revised terms provide for an adjustable interest rate equal to London inter-bank offering rate plus three percent (the margin no longer has a range).

Loans may be eligible for the Main Street Program if originated after April 24, 2020. As per the initial terms, the Main Street Program's total liquidity will not exceed $600 billion, and it utilizes seed capital from Treasury's Exchange Stabilization Fund made available under Title IV of the Coronavirus Aid, Relief and Economic Security Act (CARES Act). As a result, borrowers must follow executive compensation, stock buyback and dividend restrictions that apply for the duration of the loan plus one year. However, the dividend restriction is relaxed to permit tax distributions to owners of pass-through businesses such as S corporations or LLC/partnerships. This program will cease participations on September 30, 2020 unless extended by Treasury and the Federal Reserve.

Additional details are as follows:

Eligibility

Eligible entities are certain businesses that have either 15,000 employees or fewer (the initial terms capped this at 10,000) *or* 2019 annual revenues of $5 billion or less (the initial terms capped this at $2.5 billion). Each such business must be a for-profit, legally-formed entity that was created or organized in the U.S. or under the laws of the U.S. prior to March 13, 2020 with "significant operations in and a majority of its employees based in the United States." An additional requirement is that the business must not have participated in Treasury's direct lending programs established under Section 4003(b)(1)-(3) of the CARES Act.

Certain businesses (including hedge funds and private equity firms by adoption of recent SBA guidance related to the Paycheck Protection Program) are ineligible to participate in this program even if they satisfy all other eligibility criteria. Moreover, nonprofit organizations are not currently eligible, although the Federal Reserve indicated that it is evaluating the

feasibility of adjusting the borrower eligibility criteria and loan eligibility metrics for such organizations.

In determining how many employees a business employs, the Federal Reserve adopted the framework set out in the Small Business Association (SBA) regulations. That is, the business must count as employees all full-time, part-time, seasonal or otherwise employed persons (excluding volunteers and independent contractors). This includes employees obtained from a temporary employment agency or professional employer organization. The business must take the average total number of such persons employed for each pay period over the 12 months prior to the origination or upsizing of the loan pursuant to this program.

In determining 2019 annual revenues, a business may use revenue per its 2019 generally accepted accounting principles audited financial statements *or* receipts (as such term is used by the SBA) for fiscal year 2019 as reported on its federal tax return. In addition, a business must aggregate the employees and 2019 annual revenues of the business itself with those of its domestic and foreign affiliates, in accordance with the SBA's affiliation rules.

The Federal Reserve also clarified that eligibility does *not* mean automatic qualification. The terms set out in the Federal Reserve's Term Sheets are minimum requirements. Each participating lender must conduct an assessment of the applicant's financial condition and creditworthiness at the time of application and apply its own underwriting standards. Ultimately, each lender must determine whether the applicant is approved for a loan under the Main Street Program. However, participating lenders are not expected to independently verify an applicant's certifications or actively monitor ongoing compliance with required covenants.

Loan Amounts and Priority

Loans under the MSNLF and MSPLF are available at a minimum of $500,000 and up to $25 million. However, the maximum size of such a loan cannot, when added to the applicant's existing outstanding and undrawn available debt, exceed (i) under the MSNLF, four times 2019 adjusted EBITDA and (ii) under the MSPLF, six times 2019 adjusted EBITDA. Although new loans would have been unsecured under the initial terms, these loans may be secured *or* unsecured as the lender may determine.

As for priority, MSNLF and MSPLF loans differ:

- MSNLF loans must not be, at the time of origination or any time thereafter, contractually subordinated in terms of priority to any other loans or debt instruments. This means that MSNLF loans may not be junior in priority in bankruptcy to the borrower's other unsecured loans or debt instruments. However, a MSNLF loan may be a secured loan (including in a second lien position) or an unsecured loan (regardless of the term or secured or unsecured status of its existing debt), and the borrower is not prevented from incurring new secured or unsecured debt after receiving a MSNLF loan so long as the new debt would not have higher contractual priority in bankruptcy than the MSNLF loan.
- MSPLF loans, at the time of origination and all times thereafter, must be senior to or *pari passu* with, in terms of priority *and* security, all other loans or debt instruments other than mortgage debt.

Loans under the MSELF are available at a minimum of $10 million and up to $200 million. However, the maximum size of such a loan cannot exceed (i) 35 percent (the initial terms capped this at 30 percent) of the applicant's existing outstanding and undrawn available debt that is *pari passu* in priority with the MSELF loan and equivalent in secured status (i.e., secured or unsecured) *or* (ii) when added to the applicant's existing outstanding and undrawn available debt (i.e., regardless of priority and secured status of such debt), exceed six times 2019 adjusted EBITDA. At the time of upsizing and all times thereafter, the upsized tranche must be senior to or *pari passu* with, in terms of priority *and* security, all other loans or debt instruments other than mortgage debt. Also, if the underlying loan is part of a multilender facility, the lender originating the upsized tranche must be one of the lenders that holds an interest in the underlying loan at the date of upsizing (but other members of the multilender facility are not required to satisfy the lender eligibility criteria, which exclude all nonbanks among other lenders).

For MSNLF and MSPLF loans, the methodology used by the participating lender to calculate 2019 adjusted EBITDA must be the methodology previously used for adjusting EBITDA when extending credit to the applicant or to similarly situated borrowers on or before April 24, 2020. For MSELF loans, the methodology must be the methodology it previously used for adjusting EBITDA when originating or amending the underlying loan on or before April 24, 2020. This approach recognizes that market practices differ for businesses across industries and sizes.

The term "existing outstanding and undrawn available debt" includes all amounts borrowed under any loan facility, including unsecured or secured loans from any bank, nonbank financial institution or private lender, as well as any publicly issued bonds or private placement facilities. It also includes unused commitments with certain exclusions (e.g., any undrawn commitment that is no longer available due to change in circumstances such as borrowing bases is excluded). This calculation is made as of the date of the loan application.

As per the initial terms, participating lenders may originate new loans under the Main Street Program (MSNLF and MSPLF) *or* use the Main Street Program to increase the size of existing loans to their eligible customers (MSELF). However, borrowers may only participate in one of the Main Street Program facilities and must not also participate in the Federal Reserve's Primary Market Corporate Credit Facility (which is a separate lending program that supports large companies through the purchase of eligible corporate bonds from and lending through syndicated loans to such companies).

The Federal Reserve reiterated that small businesses that participate in the Paycheck Protection Program may additionally take advantage of the Main Street Program. These programs are not mutually exclusive for businesses that qualify under both.

Term, Amortization and Collateral

Loans still have a four-year term, but the revised terms provide for their amortization:

- For MSNLF loans, one-third of principal is due at the end of each of years two and three, and one-third is due at maturity at the end of year four.
- For MSPLF and MSELF loans, 15 percent of principal is due at the end of year two, 15 percent is due at the end of year three, and a balloon payment of 70 percent of principal is due at maturity at the end of year four.

As noted above, loans may be secured *or* unsecured as the lender may determine. Also, the Federal Reserve clarified that lenders can require new or additional collateral for upsizing existing loans under the MSELF.

Additional Requirements

Numerous additional requirements apply. As per the initial terms, the participating lender may not cancel or reduce any existing lines of credit to the borrower (provided the lender may do so in an event of default), and the borrower may not seek to cancel or reduce any of its outstanding lines of credit with any lender (including the participating lender). For clarity, this does not prohibit the reduction of availability under existing lines of credit in accordance with their terms (e.g., due to changes in borrowing bases).

With respect to any existing debt of the borrower:

- Under the MSNLF and MSELF, the borrower may not repay principal or pay interest on debt until the Main Street Program loan is repaid in full, unless the principal or interest payment is mandatory and due.
- Under the MSPLF, the borrower may not repay principal or pay interest on debt until the Main Street Program loan is repaid in full, unless the principal or interest payment is mandatory and due. However, the borrower may use proceeds of the MSPLF loan, at the time of origination, to refinance existing debt owed to a different lender (i.e., not the lender originating the MSPLF loan).

According to the Federal Reserve, these covenants will not prohibit: (i) repaying a line of credit (including a credit card) in accordance with the borrower's normal course of business usage for such credit; (ii) incurring and paying additional debt obligations required for the normal course of business and on standard terms, provided that such debt is secured by newly-acquired property such as inventory or equipment and, apart from that security, is of equal or lower priority as that of the Main Street Program loan; or (iii) refinancing maturing debt.

Under the revised terms, the borrower is no longer required to attest that it requires financing due to the pandemic. Also, the workforce provision under the Main Street Program is limited to the borrower making commercially reasonable efforts to retain employees during the term of the loan. This means the borrower should undertake good faith efforts in this regard in light of its capacities, the economic environment, its available resources and the business need for labor. For clarity, a borrower that has already furloughed or laid off workers as a result of the pandemic is still eligible to apply to the Main Street Program.

We referenced certain CARES Act-imposed requirements, including executive compensation, stock buyback and dividend restrictions that apply for the duration of the loan plus one year (subject to the relaxing of the dividend restriction to permit tax distributions to owners of pass-through businesses such as S corporations or LLC/partnerships). In addition, pursuant to Section 4019 of the CARES Act, the borrower must certify that none of the U.S. president, the U.S. vice president, the head of an executive department or a member of Congress (or their spouse, child, daughter-in-law or son-in-law) has a "controlling interest" (defined as 20 percent or more of the voting power or value of any class of equity) in the borrower.

Finally, as previously noted, the Federal Reserve's authority to provide emergency lending does not permit loans to failing or insolvent businesses, including any debtor in bankruptcy. The revised terms require the borrower to certify that it has a reasonable basis to believe that, as of the date of the Main Street Program loan and after giving effect to such loan, the borrower has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period.

Fees and Application Process; Disclosure

Participating lenders must pay a facility fee to the Main Street Program equal to 100 basis points of the principal amount of the MSNLF or MSPLF loan or 75 basis points of the principal amount of the upsized tranche under the MSELF and may choose to pass this fee on to their borrowers. In addition, participating lenders may charge an origination fee of up to 100 basis points of the principal amount of the MSNLF or MSPLF loan or up to 75 basis points of the principal amount of the upsized tranche under the MSELF. However, lenders have discretion over whether and when to charge the origination fee. In turn, the Main Street Program will pay each participating lender 25 basis points of the principal amount of its participation per annum for loan servicing.

Further details for obtaining, completing and/or submitting applications for loans under the Main Street Program have not been released. ***For clarity, the Main Street Program is not yet operational***. In the meantime, eligible entities should contact their existing lenders to confirm whether they will participate as lenders and to request more information on the application process.

Finally, as previously described, the Federal Reserve will make publicly available certain information regarding the Main Street Program, including names and details of participants, as well as amounts borrowed and interest rate charged.

For assistance and further information concerning the Main Street Program, please contact your Varnum attorney.

Main Street Lending Program: Revised Term Sheets Expected Soon

AUTHORS

Seth W. Ashby

Brendan G. Best

Michael J. Romaya

Kristen M. Veresh

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
April 29, 2020

As described in our previous advisory, on April 9, 2020 the Federal Reserve announced it was exercising its emergency lending authority to create a Main Street Lending Program (Main Street Program) to provide up to $600 billion in liquidity to lenders that make direct loans to main street businesses.

On April 29, Federal Reserve Board Chair Jerome Powell announced that a second round of term sheets for the Main Street Program would be released soon and that this program would become operational shortly thereafter. These new term sheets follow the Federal Reserve's reported receipt of more than 2,200 comment letters and its active discussions with various stakeholders, including investment and retail banks, with a goal of maximizing the efficacy of the Main Street Program for eligible businesses of differing sizes and capital needs.

We will provide an analysis of the new term sheets once released. Powell also reiterated the Federal Reserve's commitment to utilizing its full range of tools to support the U.S. economy, noting that preserving the flow of credit is essential. Powell also remarked that these tools are being "forcefully, proactively and aggressively" deployed but remain subject to legal limits. In particular, Powell cautioned that the Federal Reserve's lending authority does not allow it to make grants but only loans to solvent businesses with an expectation of being repaid.

Separately, on April 23 the Federal Reserve announced that it would be making publicly available certain information regarding its emergency lending programs, which will include the Main Street Program. Specifically, names and details of participants in such programs, as well as amounts borrowed and interest rate charged, will be reported by the Federal Reserve. Potential borrowers may want to keep this in mind when analyzing their options for seeking capital.

Stay at Home, a Little Longer: Key Changes and Loosened Restrictions Under Michigan's Executive Order 2020-59

AUTHORS

Eric R. Post

Ethan J. Beswick

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
April 24, 2020

Gov. Whitmer issued Executive Order 2020-59 (Order) on April 24, 2020. The Order replaces and updates the former Stay Home, Stay Safe orders issued by the governor on March 23, 2020 (Executive Order 2020-21) and April 9, 2020 (Executive Order 2020-42) (together, the Former Orders). The Order generally continues the stay at home restrictions implemented under the Former Orders but with several key changes. In most cases, the Order eases the restrictions imposed on businesses originally, particularly with respect to certain retail operations. Here is an overview of the relevant changes:

General Information

1. The Order goes into effect immediately and generally extends the existing stay-at-home rules through **May 15, 2020**.
2. The Order's enforcement terms and penalties remain the same (i.e., up to $500 fine and/or 90 days in jail for willful violations and potential for other sanctions).
3. The Order's restrictions on in-person operations remain the same with respect to critical infrastructure workers and workers performing minimum basic operations. However, the Order now permits in-person operations by certain workers who perform a resumed activity, as detailed below.
4. As noted above, the definition of critical infrastructure workers has not changed. The Order continues to incorporate only Version 1.0 of the DHS/CISA guidance regarding critical infrastructure as issued March 19, 2020. **In other words, existing restrictions on many manufacturing companies and construction firms remain the same** (assuming those companies do not employ workers who perform resumed activities, described below).

Changes for Businesses

5. The Order creates a new class of businesses that may resume in-person operations — those employing *workers who perform resumed activities*.

1. Such workers generally consist of the following:
    - Workers who process or fulfill remote orders for goods for delivery or curbside pick up;
    - Workers for garden stores, nurseries. lawn care, pest control and landscaping operations (including maintenance workers and groundskeepers necessary to maintain the safety and sanitation of certain outdoor recreation establishments not closed under Executive Order 2020-43);
    - Workers who perform bicycle maintenance or repair;
    - Workers for moving or storage operations.
2. Businesses must designate these workers in writing.
3. Businesses employing such workers may sell goods to customers via curbside pick up or delivery **only**, and such businesses must also comply with the social distancing requirements described in the Order. These businesses can sell any goods previously sold in the ordinary course of business, including goods that are not deemed necessary.
4. Notably, the Order does **not** address the supply-chain needs of a "resumed" business, particularly with respect to goods that are not "necessary." As written, the Order only contemplates the necessary suppliers of critical infrastructure businesses. Therefore, it is theoretically possible that a "resumed" business could operate only to the extent of its existing inventory of "non-necessary" goods, unless its suppliers have independent grounds on which to continue operations. We are hopeful this is addressed by the Governor in the near future.

6. All businesses and operations whose workers perform in-person work **must** provide non-medical grade face coverings to their workers (N95 masks and surgical masks should generally be reserved for health care professionals, and first responders). Additionally, certain garden stores, nurseries, and lawn care/landscaping operations must provide PPE, such as gloves, goggles, face shields, and face masks to their employees, as appropriate, and should adopt protocols limiting the sharing of tools and equipment to the extent possible.

7. Stores with more than 50,000 square feet may now reopen those areas of the store that were closed under the Former Orders, including those areas relating to the sale of carpet or flooring, furniture, paint, and garden and nursery supplies.

Changes for Individuals

8. Individuals are now expressly permitted to leave their homes to engage in recreational boating and golfing (subject to existing social distancing requirements).

9. Individuals may again travel between residences within the state, including moving to a new residence.

10. Individuals able to medically tolerate a face covering must wear face coverings such as homemade masks, scarfs, bandanas or handkerchiefs over their nose and mouth when in any enclosed public space (e.g., grocery store, etc.). Notably, no individual is subject to penalty under the Order for failure to wear a face covering when in any enclosed public space as required by the Order. Non-discrimination protections under the Elliott-Larsen Civil Rights Act and other Michigan laws also apply to protect individuals who wear face masks pursuant to the Order.

Navigating Construction Contract Delays Amid COVID-19

AUTHORS

Richard T. Hewlett

Lauren E. Potocsky

RELATED PRACTICES

Construction Law

Coronavirus Task Force

Construction Law Advisory
April 13, 2020

Owners, contractors and subcontractors across the country are encountering delays arising from the COVID-19 pandemic, and face an unclear reality as to how such delays will affect various project schedules and budgets. In Michigan, such delays are increasingly inevitable as a result of Gov. Gretchen Whitmer's Stay Home, Stay Safe order for Michigan residents, which has halted construction across the state (except under specific circumstances). In short, the impact of this pandemic and resulting governmental orders largely depends on the terms of the particular construction contract in play.

Standard construction forms may provide some clarity for owners and contractors who have active construction contracts on such forms. For example, under Section 14.1.1 of the AIA A201-2017 General Conditions, a contractor may terminate the contract if the work is stopped for 30 consecutive days for reasons including, among other things, the issuance of a court order or order of a public authority having jurisdiction, or an act of government such as a declaration of national emergency, either of which requires that all work on the project be stopped. More explicitly, Section 6.3.1(j) in ConsensusDocs 200 Standard Agreement and General Conditions between Owner and Constructor provides that a contractor delayed by a cause beyond its control, such as an epidemic, shall be entitled to an equitable extension of time for performance under the contract.

Other non-standard construction contracts may contain a clause that would allow a party to receive damages in the event of delays. Construction delays are typically classified as either inexcusable or excusable delays. An inexcusable delay occurs when a contractor or another party (such as a subcontractor or supplier) is at fault for the delay due to such party's own fault or neglect. However, an excusable delay occurs when circumstances beyond a contractor's or other party's control lead to a delay, through no fault or neglect of their own.

Conversely, many other construction contracts contain a no damages for delay clause. This clause typically appears in a contract between an owner and a general contractor, or a general contractor and a subcontractor, and shields a party from liability caused by a delay of the project. Thus, despite the delay, this provision generally prohibits a party from recovering

damages resulting from another party's delay (unless such delay is attributable to the misconduct or intentional act of the delaying party), often only providing an extension of time to perform.

Whether a delay attributable to the COVID-19 pandemic would be the type of delay contemplated by a no damages for delay provision depends on the specifics of the clause and the other terms in the parties' contract.

A contract may also contain other provisions that affect liability for delays, such as a force majeure clause, which might relieve a party's obligations under the contract due to uncontrollable delays. Force majeure refers to an unexpected event that cannot be predicted or controlled by the parties, such as fire, flood, governmental order, acts of God, etc., which then prevents a party from timely performing its contractual duties. The provision typically relieves a party of their contractual duties, but in most contracts a force majeure clause merely delays a party's time for performance rather than excusing it altogether. A force majeure clause will apply strictly in accordance with the terms of the contract but will only be allowed as an excuse for delay attributable to the particular event that caused the delay (e.g., the COVID-19 pandemic and Michigan's resulting Stay at Home order), and not to any other delays in performance that may have occurred prior to the force majeure event.

Ultimately, the rights and obligations of the parties to a construction contract in the midst of the COVID-19 pandemic will be largely governed by the terms of the contract itself. It is imperative that parties to construction contracts carefully follow the rules of the notice provisions of the contract (i.e., providing timely notice of delays to the other party [or parties] to the contract), regularly communicate with one another, document such communication and, if necessary, potentially negotiate a change order to account for the governmentally-mandated delays. Varnum attorneys stand ready to assist you with understanding the particulars of COVID-19's impact on your construction contract.

VARNUM
ATTORNEYS AT LAW

Michigan's Extended Stay Home Stay Safe Order: 10 Things You Need To Know

AUTHORS

Eric R. Post

Ethan J. Beswick

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
April 10, 2020

On April 9, 2020 Michigan Governor Gretchen Whitmer issued Executive Order No. 2020-42 (Order), which rescinds and supersedes the original Stay Home, Stay Safe Executive Order No. 2020-21 (Former Order), which was issued March 23, 2020. The Order has clarified certain provisions of the Former Order while also making some substantive changes. Below is a high-level summary of those changes; please contact your Varnum attorney for more detail.

General Information

1. The Order went into effect April 9, 2020 at 11:59 p.m. It extends the existing stay at home/shelter-in-place rules through April 30, 2020.

2. The Former Order's enforcement terms and penalties remain the same. Willful violations of the Order may result in a misdemeanor offense punishable by 90 days in jail and/or a $500 fine, and abuses of a business's designation authority (with respect to its supply chain or workers) are subject to sanctions.

Clarification

3. The Order expressly provides that workers do not need to carry copies of their critical designations or any other documentation when leaving home for work.

4. **The Order clarifies that *only* Version 1.0 of the DHS/CISA Guidance regarding critical infrastructure, as issued March 19, 2020 is incorporated**. The amended and expanded Version 2.0 of the DHS/CISA Guidance, as issued March 28, 2020 is expressly not adopted.

Substantive Changes

5. The Order prohibits individuals from travelling between residences within the state after April 10, 2020. The Former Order allowed such travel. The Order also expressly prohibits all travel to vacation rentals.

6. **The new Order eliminates the requirement that critical infrastructure businesses designate their critical suppliers/distributors/service providers in writing.** In other words, a written designation between businesses in a supply chain is no longer necessary. Suppliers, distributors and service providers can now determine on their own whether they are "necessary to enable, support, or facilitate another business's or operation's critical infrastructure work." This ability to self-designate one's business as critical then flows downstream to the remainder of the supply chain. (Also, note that such suppliers, etc., are still required to designate their own critical workers in writing.)

7. The Order designates certain additional workers as critical infrastructure workers, including those in the following businesses:

- Retail stores selling groceries, medical supplies and "products necessary to maintain the safety, sanitation, and basic operation of residences, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers."
- Laundromats and dry cleaners.
- Hotels and motels, if the hotel/motel does not offer certain amenities like gyms, pools, meeting rooms, etc.
- Motor vehicle dealerships, but only those workers necessary to facilitate remote/electronic sales or leases or to deliver vehicles to customers (the showroom must stay closed).

8. **All businesses, operations and government agencies that continue in-person work must develop a COVID-19 preparedness and response plan.** This plan must be consistent with OSHA's Guidance on Preparing Workplaces, and the plan must be available at company headquarters or the worksite.

9. The Order generally provides that any store that continues in-person sales must do the following:

- Establish lines to regulate entry by customers.
- Utilize curbside pickup where possible.
- Stores with less than 50,000 square feet of customer floor space must limit the number of people in the store (*including* employees) to 25 percent of the total occupancy limits established by the relevant fire inspector.

- Stores with more than 50,000 square feet must:
  - Limit number of customers in the store at one time (*excluding* employees) to four people per 1,000 square feet of customer floor space (which excludes the store areas closed per below).
  - Close areas of the store - using signs, removing goods from shelves or other appropriate means - that are dedicated to the following classes of goods: carpet or flooring; furniture; garden centers and plant nurseries; and paint.
  - By April 13, 2020 refrain from advertising or promoting goods that are not groceries, medical supplies or certain other items necessary for residences.
  - Create at least two hours per week of shopping time dedicated for certain vulnerable populations.

10. The Order prohibits the advertising or renting of short-term vacation properties unless necessary for certain health care workers assisting in the COVID-19 response.

COVID-19: Federal Reserve Announces New Loan Facility for Main Street Businesses

AUTHORS

Seth W. Ashby

Brendan G. Best

Michael J. Romaya

Kristen M. Veresh

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
April 9, 2020

On April 9, 2020 the Federal Reserve announced it was taking additional actions to provide up to $2.3 trillion in loans to support the U.S. economy, including:

1. support for the Small Business Administration's (SBA) Paycheck Protection Program by supplying liquidity to participating lenders backed by PPP loans;
2. expanding recently-announced facilities supporting markets issuing credit to large businesses and related secondary markets (the primary and secondary market corporate credit facilities), as well as the term asset-backed securities loan facility; and
3. establishing a municipal liquidity facility for assistance to state and local governments.

Among such actions is the creation of a Main Street Lending Program (Main Street Program) to provide financing to lenders that make direct loans to main street businesses. This emergency lending facility will support small and mid-sized businesses that were in good financial standing before the pandemic and that may be too small to access broader capital markets or the Federal Reserve's facilities supporting larger corporates, or that may not qualify for the SBA's Paycheck Protection Program. According to Treasury Secretary Steven Mnuchin, 40,000 mid-sized companies employing 35 million Americans stand to benefit from this program.

The Main Street Program utilizes seed capital from the Treasury's Exchange Stabilization Fund made available under Title IV of the Coronavirus Aid, Relief and Economic Security Act (CARES Act). When leveraged by the Federal Reserve, this capital provides up to $600 billion in liquidity to participating lenders that provide qualifying loans to eligible businesses. Lenders are required to retain a 5 percent share of each loan, selling the remaining 95 percent to the Main Street Program. This program will cease participations on September 30, 2020 unless extended by the Treasury and Federal Reserve.

Eligibility

Eligible entities are businesses with up to 10,000 employees *or* up to $2.5 billion in 2019 annual revenues. Each such business must be created or organized in the United States or under the laws of the United States with "significant operations in and a majority of its employees based in the United States." As noted above, the Federal Reserve indicated that this program is available for businesses in good financial standing before the pandemic. The Federal Reserve's authority to provide emergency financing does not permit loans to failing or insolvent businesses, including any debtor in bankruptcy. Participating lenders will need to apply customary underwriting standards for all loans made under the Main Street Program.

No guidance was provided as to whether affiliation rules may apply to these eligibility thresholds or how applicants must count their employees (e.g., full-time equivalents or full-time, part-time and other-basis employees like the SBA's Paycheck Protection Program requires).

Loan Amounts

Loans are available at a minimum of $1 million, up to a certain maximum amount. For new loans (originated on or after April 8, 2020), the maximum amount is equal to the lesser of:

1. $25 million; and
2. an amount that, when added to the applicant's existing outstanding and committed but undrawn debt, does not exceed four times 2019 EBITDA.

For upsizing existing loans (originated before April 8, 2020), the maximum amount is equal to the lesser of:

1. $150 million;
2. 30 percent of the applicant's existing outstanding and committed but undrawn bank debt; and
3. an amount that, when added to the applicant's existing outstanding and committed but undrawn debt, does not exceed six times 2019 EBITDA.

The leverage conditions could preclude highly-leveraged businesses from participating. No guidance was provided as to how EBITDA should be calculated, including whether any non-GAAP add-backs to EBITDA will be allowed for purposes of determining loan amounts under this program. Applicants must certify, among other things, satisfaction of the leverage condition.

As indicated above, participating lenders may originate new loans under the Main Street Program *or* use the Main Street Program to increase the size of existing loans to their eligible customers (in which case up to 95 percent of the upsized tranche may be sold to the Main Street Program). However, lenders may not originate a new loan and also upsize an existing loan to the same customer under the Main Street Program, and businesses may not participate in both the Main Street Program and the Primary Market Corporate Credit Facility.

On the other hand, small businesses that participate in the SBA's Paycheck Protection Program may additionally take advantage of the Main Street Program. These programs are not mutually exclusive for businesses that qualify under both.

Terms

Loans have a four-year term (extent of amortization is not specified) and an adjustable interest rate equal to the Secured Overnight Financing Rate (SOFR), currently at 0.01 percent, *plus* a margin of between 2.5 percent and 4.0 percent per annum. Principal and interest payments are deferred for 12 months. New loans are available on an unsecured basis; any collateral securing existing loans that are upsized under this program will secure the loan participation on a pro rata basis. The Federal Reserve's term sheet suggests that lenders might require new or additional collateral for upsizing existing loans under this program. All loans are available with no prepayment fee or penalty. However, unlike the SBA's Paycheck Protection Program for small businesses, loans provided under this program are *not* eligible for any forgiveness.

Additional Requirements

The following additional requirements apply to loans made under the Main Street Program:

- Proceeds may not be used to repay or refinance any other debt of the borrower.
- While the loan remains outstanding, the borrower may not repay any other debt of equal or lower priority, with the exception of mandatory principal payments.
- The participating lender may not cancel or reduce any existing lines of credit to the borrower, and the borrower may not seek to cancel or reduce any of its outstanding lines of credit with any lender (including

the participating lender).

- The borrower must attest that it requires financing due to the pandemic and that it will make reasonable efforts to maintain its payroll and retain its employees during the term of the loan. No guidance was provided as to how this will be applied to businesses that have already furloughed or terminated employees.
- Any borrower whose securities are publicly traded must agree not to engage in stock buybacks for the duration of the loan plus one year (except to the extent required under a preexisting contractual obligation), and each applicant (i.e., whether or not public) must agree not to pay dividends on common stock for the duration of the loan plus one year. No guidance was provided as to whether exceptions to the dividend restriction will be implemented for tax distributions to owners of pass-through businesses such as S-corporations or LLC/partnerships.
- For the duration of the loan plus one year, the borrower must agree to the following:
  - for any non-union employee or officer whose 2019 total compensation exceeded $425,000, total compensation for any 12-month period may not exceed 2019 total compensation levels;
  - for any employee or officer whose 2019 total compensation exceeded $3.0 million, total compensation for any 12-month period may not exceed the sum of (i) $3.0 million plus (ii) 50 percent of the excess over $3.0 million;
  - for any person in either of the above categories, severance upon termination may not exceed two times 2019 maximum total compensation.

Notably, the last two requirements as to stock buybacks, dividends and executive compensation are expressly dictated by the CARES Act. Also, the Federal Reserve is taking comments on the program's terms and conditions until April 16, 2020 and may make adjustments. Any such adjustments will be publicly announced.

Application Fees and Process

Applicants must pay an origination fee equal to 100 basis points of the principal amount of the loan to be sold to the Main Street Program (i.e., up to 95 percent of the original principal amount of new loans or the upsized tranche, as applicable). Participating lenders must also pay a facility fee equal to the amount of the origination fee, and lenders are authorized to charge this fee to applicants. Further details for obtaining, completing and/

or submitting applications for loans under the Main Street Program have not been released. Eligible entities should contact their existing lenders pending the release of any further guidance.

Potential applicants should be mindful of existing debt agreements, as well as provisions within their charters, operating agreements, shareholder agreements or other key contracts that may restrict their ability to borrow funds. For assistance and further information, please contact your Varnum attorney.

SBA Addresses Concerns of Faith-Based Organizations

AUTHORS

Dale R. Rietberg

RELATED PRACTICES

Coronavirus Task Force

Nonprofit Organizations

Nonprofit Advisory
April 7, 2020

Churches, religious organizations and faith-based organizations were delighted to learn that they were eligible for funding under the recently enacted Paycheck Protection Program (PPP) included in the recently enacted federal CARES Act (the Act). Upon closer inspection, however, many of these organizations began to express concerns about whether applying for funds under the Act might infringe upon their religious autonomy. Fortunately, the Small Business Administration (SBA) recently issued an Interim Final Rule and a separate Frequently Asked Questions designed to address these concerns.

One concern of churches and other faith-based organizations is that they might be deemed to be part of larger affiliations with other organizations adhering to similar religious values, thus potentially disqualifying themselves from the PPP loans because they would exceed the 500 employee limit. The SBA clarified that the affiliation rules will not apply if the affiliation "is based on a religious teaching or belief or is otherwise part of its exercise of religion." The affiliation rules will apply only if the affiliation is for non-religious reasons. If a faith-based organization is relying on this exemption, the SBA recommends the attachment of an addendum to the PPP loan application to claim this exemption. The SBA has drafted a sample addendum to be used for this purpose, although applicants are free to draft their own.

Many churches and other faith-based organizations are also concerned that they might not qualify for a PPP loan because they have never applied for recognition of tax exemption and have no IRS determination letter to that effect. The SBA guidance now clarifies that no such IRS determination letter is required.

Yet another concern of religious organizations is that they might be sacrificing some element of their religious autonomy if they apply for a PPP loan. In that regard, the SBA guidance explicitly provides that "a loan through any SBA program does not (1) limit the authority of religious organizations to define the standards, responsibilities, and duties of membership; (2) limit the freedom of religious organizations to select the individuals to perform work connected to that organization's religious exercise; nor (3) constitute waiver of any rights under federal law, including rights protecting religious autonomy and exercise under the Religious

Freedom Restoration Act of 1993 (RFRA)...or the First Amendment." Indeed, the guidance goes even further to provide that a faith-based organization "will retain its independence, autonomy, right of expression, religious character, and authority over its governance...." This should provide a significant degree of comfort to religious organizations that otherwise had expressed significant reservations over whether to apply for the SBA loans.

Finally, some religious organizations have expressed anxiety over whether they would be subject to federal nondiscrimination laws. As some religious organizations had feared, the SBA confirmed that receipt of federal loan monies would constitute federal financial assistance (FFA) and thus would subject such organizations to federal nondiscrimination obligations. This would include nondiscrimination on the basis of sex, which would implicate such matters as transgender rights, gay marriage and termination of pregnancies. To address these concerns, the SBA effectively bifurcated the issue into two categories. For goods, services or accommodations offered to the general public, the nondiscrimination rules would apply. As an example, the SBA cited a restaurant or thrift store that was open to the general public. For goods, services or accommodations offered strictly to its own members, however, the nondiscrimination rules were deemed not to apply. More specifically, the SBA guidance provided that the nondiscrimination regulations would not be applied "in a way that imposes substantial burdens on the religious exercise of faith based loan recipients, such as by applying those regulations to the performance of church ordinances, sacraments, or religious practices, unless such application is the least restrictive means of further a compelling governmental interest. In any case, these nondiscrimination rules will not apply once the PPP loan is repaid.

Although perhaps not as clear a road map as religious organizations would have liked, the guidance does demonstrate sensitivity by the SBA to these types of concerns.

Health Crisis Puts Video Conferencing In the Spotlight – What To Know to Avoid Risk

AUTHORS

Susan E. Benington

Jeffrey M. Stefan II

RELATED PRACTICES

Coronavirus Task Force

Data Privacy and Cybersecurity Law

Data Privacy Advisory
April 3, 2020

New technologies, such as video conferencing products, are becoming increasingly popular during the current health crisis. But there are serious privacy and security obligations that must be considered when offering such products. Here are some things companies can do now to make sure the launch or use of an emerging product doesn't turn into a liability:

For companies launching a new online or connected device product:

- Make privacy and security a priority by performing a privacy impact assessment of a product's features that captures all of the data use in scope and the planned treatment and security of that data.
- Analyze what domestic or global laws or best practices may apply to the product, such as the FTC Act, state breach laws, or broader privacy laws, such as CCPA, and the fines or penalties that exist for non-compliance.
- Implement compliant privacy notices and product security or risk facing significant public relations or consumer backlash, and subsequent litigation.

For companies and employees that want to use a new online or connected device product:

- Educate employees about company policies and acceptable use guidelines when it comes to using new technologies on work devices or to perform work functions, such as team meetings. To avoid unauthorized or inadvertent exposure of sensitive employee or company data, employees should know to first check with a designated team, such as IT or legal, to see if a new product is company-sanctioned and/or governed by a commercial license or agreement that will protect the company and its employees by keeping sensitive data secure.
- Research the product manufacturer to learn about any past practices that may demonstrate a failure to make data privacy and security a priority, such as past lawsuits, investigations, negative media or consumer attention, or settlements with government investigative

agencies.

- Create a culture that keeps everyone safe online by raising awareness about personal use or use by family members. As consumers, take the time to read terms of use and privacy notices, so that you know how the information you are sharing through the use of an online product, such as video recordings and conversation transcripts, is secured, used, and shared.

Please contact Jeff Stefan, Susan Benington, or your relationship partner for further information on any of the topics in this alert.

CARES Act Also Benefits Nonprofits

AUTHORS

Christopher A. Ballard

Dale R. Rietberg

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Nonprofit Organizations

Nonprofit Advisory
March 31, 2020

The recently enacted CARES Act legislation contains at least two significant benefits that may be of interest to nonprofit organizations. One is in the form of Paycheck Protection Loans. These loans, which will be available through SBA-approved lending institutions, will permit a nonprofit to borrow up to 2 1/2 times the organization's average monthly payroll expense. Principal and interest payments are deferred for at least six months and processing fees are waived. No personal guarantees are required. Perhaps of most interest is that a significant portion of the loan will be forgiven if the organization can document that it has not reduced the number of its full time equivalent (FTE) employees as compared to 2019. If there has been a reduction in FTEs, the amount of the loan forgiven is reduced on a pro rata basis. The loans are available to 501(c)(3) organizations with less than 500 employees, including faith-based organizations and churches.

The second benefit under the CARES Act is available to those nonprofits who have experienced a 50 percent or greater decline in gross receipts as a result of the COVID-19 crisis, or whose operations have been fully or partially suspended as a result of a government order limiting commerce, travel or group meetings. Such organizations may qualify for a 50 percent refundable credit for wages paid during the crisis. The credit equals 50 percent of qualified wages up to $10,000 paid to each employee or $5,000 in actual credit per employee. This benefit may be of particular value to those nonprofits that rely on earned income and have had to close their doors due to the current crisis.

In addition, charities will also be interested in the increased limitations for charitable contributions available to their donors. The CARES Act expands the charitable contribution deduction for both individual and corporate taxpayers if the donations are in the form of either cash or certain food inventory to 501(c)(3) charities (except supporting organizations and donor advised funds).

First, a $300 above-the-line deduction has been added so individuals who do not elect to itemize their deductions can deduct cash contributions to these charities made in 2020.

Second, the 60 percent of adjusted gross income (AGI) limitation on charitable contribution deductions for individuals is increased to 100 percent of AGI for these cash contributions. Similarly, the 10 percent of

taxable income limitation on charitable contribution deductions for C corporations is increased to 25 percent of taxable income for these cash contributions. Any of these contributions by an individual or corporation in excess of the new limit can be carried forward under the normal rules.

In addition, the limitation on charitable contribution deductions for donations of food inventory to a charitable organization that will use it for the care of the ill, the needy or infants is increased. Such donations are generally deductible in an amount equal to basis plus half the gain that would be realized on the sale of the food (but not to exceed twice the basis).

In the case of a C corporation, the deduction for donations of food inventory formerly could not exceed 15 percent of the corporation's income. In the case of a taxpayer other than a C corporation, the deduction could not exceed 15 percent of aggregate net income of the taxpayer for that tax year from all trades or businesses from which those contributions were made (computed without regard to the taxpayer's charitable deductions for the year). For 2020, the limitation in both cases is now increased to 25 percent.

The CARES Act is a massive piece of legislation and undoubtedly has many other provisions of potential interest to nonprofits. Please see our other Varnum advisories for additional information.

Cell Tower Leases Can Help With Current Financial Problems

AUTHORS

John W. Pestle

Peter A. Schmidt

RELATED PRACTICES

Coronavirus Task Force

RELATED INDUSTRIES

Cell Towers

Cell Tower Advisory
March 31, 2020

Selling a cell tower lease can generate large sums of money but not affect an organization's ongoing operations. Businesses or other entities with cell leases that are facing financial challenges due to the COVID-19 virus may want to consider such a sale.

Cell tower leases have sold in the range of 200 times monthly rents, despite the lease having terms allowing cancellation on short notice. Purchasers, including large publicly-traded companies, ignore such terms because they know cancellation would lead to a gap in cell service.

Very importantly, a well drafted sale will not affect the lease owner's continued use or development of the building or property on which the cell tower is located. A lease sale can provide a financial bridge to help an organization get through the current economic situation.

Varnum has helped clients sell nearly 100 cell leases. Some sales were by clients with financial issues, such as a city and a school district under emergency management who sold assets to generate funds but without affecting ongoing operations.

Getting the best price and terms (property use unaffected) usually requires getting bids. This also assures owners, lenders and creditors that the sales price is the best possible.

If a lease sale may be something you would like to consider, contact John Pestle (jwpestle@varnumlaw.com, 616/336-6725) or Pete Schmidt (paschmidt@varnumlaw.com, 616/336-6411). Time is of the essence since such sales usually require title insurance, surveys, environmental assessments and mortgage holder approval.

CARES Act Provides $500 Billion to Eligible Businesses, States and Municipalities

AUTHORS

Seth W. Ashby

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

Business Law Advisory
March 30, 2020

On March 27, 2020 the Coronavirus Aid, Relief and Economic Security Act (CARES Act) was signed into law. Among other programs and types of assistance intended to provide relief to those impacted by the pandemic and to stimulate the economy, the CARES Act provides $500 billion to Treasury's Exchange Stabilization Fund for states, municipalities and eligible businesses (including those in certain severely distressed industries, as well as mid-sized businesses not eligible to participate in the Paycheck Protection Program).

The funds will be made available as follows:

1. **Direct lending by Treasury**, through designated financing agents to businesses in severely distressed industries including up to $25 billion for airlines $4 billion for air cargo firms and $17 billion for businesses deemed critical to U.S. national security. By April 6, 2020 Treasury must publish procedures for application and minimum requirements for this aspect of the program.
2. **Support of Federal Reserve facilities** of $454 billion (plus funding not used as described above) for eligible businesses, states and municipalities. This support may be provided by purchasing obligations or interests directly from issuers, purchasing obligations or interests in secondary markets, or making loans or other advances (including secured loans). While $454 billion refers to the amount that Treasury may use in support of these facilities, the Federal Reserve is expected to use leverage against the assets and capital of the vehicles established for these facilities to create up to $4 trillion in lending according to the administration. We anticipate Treasury and the Federal Reserve issuing guidance in the coming weeks.

As to all facilities under this program, Treasury has broad discretion in setting general terms and conditions. Interest rates will be determined by Treasury based on the risk and current average yield on outstanding U.S. debt obligations (see below as to the mid-sized businesses facility). Any applicant whose securities are publicly traded must agree not to engage in stock buybacks for the duration of the loan plus one year (except to the extent required under a preexisting contractual obligation), and each applicant (i.e., whether or not public) must agree not to pay dividends on

common stock for the duration of the loan plus one year. Assistance will be treated as indebtedness for federal income tax purposes, and Treasury may issue regulations or guidance to carry out this purpose (e.g., providing that the acquisition of warrants, stock options or other equity interests does not result in an ownership change for purposes of IRC 382).

Notably, unlike the Paycheck Protection Program, loans provided under this program are not eligible for forgiveness. Also, each applicant must agree to restrictions that substantially limit executive compensation and severance that last for one year following repayment. This program will be overseen by a Congressional Oversight Commission and a special inspector general who will keep Congress informed through quarterly reports.

Additional terms for direct lending by Treasury to businesses in severely distressed industries:

1. credit is not otherwise reasonably available to the applicant;
2. the loan must be prudently incurred as determined by Treasury;
3. the loan must be secured by sufficient collateral *or* carry interest at a rate that reflects the risk of the loan and not less than market prior to the pandemic;
4. the loan duration may not exceed five years;
5. until September 30, 2020 the applicant must retain at least 90 percent of its employment level as of March 24, 2020;
6. the applicant must be created or organized in the U.S. and have significant operations in and a majority of its employees based in the U.S.; and
7. the applicant must have incurred or is expected to incur covered losses such that the continued operations of the business are jeopardized, as determined by Treasury.

Additionally, Treasury may not provide assistance unless either (a) the applicant's securities are publicly traded and Treasury receives a warrant or equity interest in the applicant *or* (b) as to any applicant whose securities are not publicly traded, Treasury receives a warrant or equity interest in the applicant or a senior debt instrument issued by the applicant. In any event, Treasury may not exercise voting power with respect to any common shares acquired.

For mid-sized businesses (with between 500 and 10,000 employees), including, to the extent practicable, nonprofit organizations, Treasury must endeavor to implement a facility that provides financing to lenders that

make direct loans to such businesses as part of its support of Federal Reserve programs and facilities under this legislation. The annualized interest rate may not exceed two percent. For a minimum of six months (Treasury has discretion to extend this period), no principal or interest will be due. Each applicant will be required to certify that:

- the pandemic makes necessary the loan to support the applicant's ongoing operation;
- loan proceeds will be used to retain at least 90 percent of the applicant's workforce, at full compensation and benefits, until September 30, 2020;
- the applicant intends to restore no less than 90 percent of its workforce that existed at February 1, 2020 and to restore all compensation and benefits to its workers no later than four months after the end of the pandemic;
- the applicant is domiciled and created or organized in the U.S. with significant operations in and a majority of its employees located in the U.S.;
- the applicant is not a debtor in a bankruptcy proceeding;
- the applicant will not pay dividends on its common stock, or repurchase any publicly-listed equity security, while the loan is outstanding (except to the extent required under a preexisting contractual obligation);
- the applicant will not outsource or offshore jobs for the term of the loan plus two years; and
- the applicant will not abrogate any existing collective bargaining agreements for the term of the loan plus two years and will remain neutral in any union organizing effort for the term of the loan.

The foregoing only supplement Federal Reserve measures. On March 23, 2020 the Federal Reserve announced new measures to support the economy in light of the pandemic, including:

1. support for critical market functioning;
2. establishing new programs providing up to $300 billion in financing to businesses and individuals;
3. establishing two new facilities to support markets issuing credit to large businesses and related secondary markets;
4. establishing a third Term Asset-Backed Securities Loan Facility to support the flow of credit; and

5. facilitating the flow of credit to municipalities by expanding the existing Money Market Mutual Fund Liquidity Facility and the existing Commercial Paper Funding Facility.

The Federal Reserve also indicated it would be announcing a new Main Street Business Lending Program to support lending to eligible small and mid-sized businesses. For its part, the CARES Act clarifies that the mid-sized businesses facility that it has authorized does not limit the Federal Reserve's discretion in establishing other programs and facilities within the Federal Reserve's authority, including such Main Street Business Lending Program. As of March 29, 2020 the Main Street Business Lending Program has not been formally announced by the Federal Reserve.

Potential applicants should be mindful of existing debt agreements, as well as provisions within their charters, operating agreements, shareholder agreements or other key contracts, that may restrict their ability to borrow funds or give collateral (including by way of granting equity interests). For assistance and further information, please contact your Varnum attorney.

VARNUM
ATTORNEYS AT LAW

President Trump Signs Historic, $2T COVID-19 Stimulus Bill

AUTHORS

John D. Arendshorst

Seth W. Ashby

Eric M. Nemeth

Mary Kay Shaver

RELATED PRACTICES

Banking and Finance

Coronavirus Task Force

Employee Benefits

Government and Municipal

Labor and Employment

Tax Planning, Compliance and Litigation

RELATED INDUSTRIES

Health Care

Higher Education

Business Law Advisory
March 27, 2020

On March 27, 2020 within hours of the bipartisan voice vote by the House of Representatives to approve the version of the bill that the Senate had unanimously approved on March 25, President Trump signed the Coronavirus Aid, Relief and Economic Security Act (CARES Act). The CARES Act provides an unprecedented level of relief and support, and we summarize certain key provisions below.

With complex legislation, Varnum anticipates certain technical corrections to the CARES Act, and we are proactively assisting representatives in that work with respect to the Paycheck Protection Program. Moreover, Congressional leaders have already announced intentions to begin drafting additional stimulus legislation. Varnum will continue to monitor these efforts and provide updates as appropriate. Please contact your Varnum attorney for further information.

CARES Act: Key Provisions

For workers impacted by the pandemic:

Expanded unemployment insurance, including an additional $600 per week in such compensation for up to four months and federal funding to the self-employed, sole proprietors and independent contractors who are not usually eligible for such compensation. Under this bill, the federal government also provides certain incentives to states (e.g., fully funding the first week of unemployment compensation for states that suspend their waiting week provisions). An amendment to ensure that additional unemployment insurance did not result in an individual receiving unemployment compensation that is more than the amount of wages the individual was earning prior to becoming unemployed failed to pass.

For participants in qualified retirement plans or IRAs who are financially impacted by the pandemic:

The ability to withdraw up to $100,000 in emergency funds from their retirement plan accounts or IRAs without early distribution penalties. These withdrawals may (but are not required to) be repaid over a period of three years. Participants may also take loans of up to $100,000 (up from the usual limit of $50,000). In addition, participants are not required to take required minimum distributions for the 2020 calendar year.

For individual taxpayers:

A refundable tax credit ($1,200 for singles and $2,400 for joint taxpayers), plus $500 for each child. This begins to phase out at $75,000 of adjusted gross income for singles and $150,000 of adjusted gross income for joint taxpayers, and phases out entirely at $99,000 and $198,000, respectively. Generally, 2019 or 2018 tax returns will be used to calculate the rebate.

For business taxpayers:

- A 50 percent refundable payroll tax credit on wages paid up to $10,000 during the pandemic for certain employers. With conditions, the credit is available for employees retained but not currently working due to the pandemic for employers of more than 100 employees and for all employee wages for employers of 100 or fewer employees.
- Delay of employer-side Social Security payroll tax payments, with 50 percent owed on December 31, 2021 and 50 percent owed on December 31, 2022.
- Expansion of the net interest deduction limitation (which currently limits a business taxpayer's ability to deduct interest paid to 30 percent of EBITDA) to 50 percent of EBITDA for 2019 and 2020. This will increase liquidity for those businesses with interest-bearing debt during the pandemic.

For small businesses (fewer than 500 employees), 501(c)(3) nonprofit organizations, sole proprietorships and self-employed individuals:

A $349 billion Paycheck Protection Program, to help such entities make payroll and cover other expenses, including rent, utilities, mortgage interest and interest on other debt obligations, from February 15, 2020 to June 30, 2020. Eligible entities may borrow up to $10 million, based on a formula tied to 2 1/2 times average monthly payroll, covering employees making up to $100,000 per year. The loans are eligible for deferral of principal and interest payments for not less than six months or more than one year. Also, loans may be forgiven up to an amount used to pay payroll, rent, utilities and mortgage interest during the eight weeks following the loan disbursal. Such loan forgiveness amount will be reduced by a reduction in the workforce or reduction in wage and salary levels by more than 25 percent. Temporary workforce and wage and salary reductions from February 15, 2020 through 30 days after the passage of the CARES Act will not reduce the amount forgiven so long as such workforce and wage and salary reductions are eliminated by June 30, 2020.

For primarily larger businesses, as well as states and municipalities:

$500 billion to Treasury's Exchange Stabilization Fund. This includes up to $25 billion for airlines, $4 billion for air cargo firms and $17 billion for businesses deemed critical to U.S. national security, as well as $454 billion (plus funding not used as described above) for other eligible participants. Notably, loans under this program may not be forgiven; participants whose securities are publicly traded may not engage in stock buybacks for the duration of the loan plus one year; no participants may pay dividends on common stock for the same period; and all participants must retain at least 90 percent of their employment level as of March 24, 2020. There are other terms and conditions, including limiting employee compensation and severance. This program will be overseen by a Congressional Oversight Commission and a special inspector general. Additionally, Treasury must endeavor to implement a facility that provides financing to lenders that make direct loans to mid-sized businesses (those with between 500 and 10,000 employees), with an interest rate not to exceed two percent per annum, subject to other terms and conditions.

For financial institutions:

- Providing temporary accounting relief from troubled debt restructurings beginning March 1, 2020 until 60 days after the end of the pandemic.
- Modifying the Dodd-Frank Act to give the FDIC authority to establish a temporary program to guarantee bank debt.
- Giving the option to delay implementation of the current expected credit loss standard until the earlier of December 31, 2020 and the end of the pandemic.
- Reducing the community bank leverage ratio from nine percent to eight percent until the earlier of December 31, 2020 and the end of the pandemic.
- Temporarily waiving national bank lending limits until the earlier of December 31, 2020 and the end of the pandemic.

For educational institutions:

Supplemental spending of $14 billion, as well as provisions temporarily excusing payments by borrowers with federally-held loans (without interest accruing) until September 30, 2020, relaxing or clarifying current regulations on behalf of borrowers (including as to Pell Grant recipients), and providing that canceled classes would not count against a student's satisfactory academic progress calculation.

For the health care system:

Supplemental spending that includes over $117 billion for hospitals and veterans' care, as well as provisions to address supply shortages, coverage of diagnostic testing, support for health care providers, telehealth service access, drug creation for treatment of the coronavirus, and Medicare and Medicaid extensions.

For state and municipal governments:

A $150 billion Coronavirus Relief Fund for expenditures incurred to deal with the pandemic. The fund would be allocated by population proportions, with a minimum of $1.25 billion for each state.

CARES Act Changes to the Bankruptcy Code

The CARES Act will allow many more businesses that may benefit from a Chapter 11 reorganization to take advantage of the new provisions of the United States Bankruptcy Code, namely the relaxed requirements for confirming a plan of reorganization. Read more in our advisory Changes to the Bankruptcy Code Under the CARES Act.

Varnum will continue to monitor these legislative efforts and provide updates as appropriate. Please contact your Varnum attorney for further information.

VARNUM
ATTORNEYS AT LAW

Changes to the Bankruptcy Code Under the CARES Act

AUTHORS

Brendan G. Best

Shanna M. Kaminski

RELATED PRACTICES

Coronavirus Task Force

Restructuring, Insolvency and Creditors' Rights

Bankruptcy Advisory
March 26, 2020

On March 25, 2020 the Coronavirus Aid, Relief and Economic Security Act (CARES Act) was passed by the Senate. It is expected to pass the House of Representatives today and be immediately signed into law by President Trump. The CARES Act aims to provide emergency assistance and health care response for individuals, families and businesses affected by the 2020 coronavirus pandemic. Surprisingly, the CARES Act makes some important changes to various provisions of the United States Bankruptcy Code.

In February, the Small Business Reorganization Act (SBRA) became effective. The SBRA created a new subchapter under Chapter 11 of the United States Bankruptcy Code that is commonly referred to as Subchapter 5. Subchapter 5 aims to give businesses with debts that are under a certain threshold a faster and less expensive option for reorganizing under Chapter 11. Legal commentators had long lamented that Chapter 11's high costs and complexities make it too difficult for small businesses to successfully reorganize.

Under the SBRA, a business qualifies to file a case under Subchapter 5 if its debts are in the amount of $2,725,625 or less. Section 1113 of the CARES Act increases the debt limit from $2,725,625 in debts to $7.5 million in debts. Therefore, businesses with debts of $7.5 million or less will now qualify to file cases under Subchapter 5. This change in the debt limit applies only to cases filed after the CARES Act becomes effective and is applicable for one year after the CARES Act becomes effective. After one year, the debt limit for cases under Subchapter 5 will return to $2,725,625 absent an extension by Congress.

Importantly, the CARES Act will allow many more businesses that may benefit from a Chapter 11 reorganization to take advantage of the new provisions of the United States Bankruptcy Code, namely the relaxed requirements for confirming a plan. Under the provisions of Subchapter 5, a plan of reorganization will generally be confirmed so long as it provides that all disposable income for three to five years will be used to make plan payments.

The CARES Act also makes some changes to Chapter 7 and Chapter 13 of the United States Bankruptcy Code. First, the CARES Act amends the definition of current monthly income to exclude payments made to the

debtor pursuant to the CARES Act from being treated as income in the means test calculation that determines a debtor's eligibility to file a Chapter 7 bankruptcy case.

Next, it excludes payments made to the debtor pursuant to the CARES Act from the calculation of disposable income that is conducted for the purposes of determining whether a Chapter 13 plan of reorganization may be confirmed.

Finally, it permits Chapter 13 debtors with plans that have already been confirmed to modify them based on a material financial hardship related to the coronavirus pandemic, including extending payments under the plan for up to seven years after the initial plan payment was due. All of these changes are applicable in pending Chapter 7 and Chapter 13 cases and will be applicable for one year after the CARES Act becomes effective.

VARNUM
ATTORNEYS AT LAW

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

AUTHORS

Seth W. Ashby

Ethan J. Beswick

RELATED PRACTICES

Business and Corporate

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

RELATED PRACTICES

Coronavirus Task Force

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.

VARNUM
ATTORNEYS AT LAW

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

AUTHORS

Matthew W. Bower

Harvey Koning

Zachary J. Meyer

RELATED PRACTICES

Coronavirus Task Force

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.

VARNUM
ATTORNEYS AT LAW

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

RELATED PRACTICES

Business and Corporate

Coronavirus Task Force

International Business Law

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).

VARNUM
ATTORNEYS AT LAW

Michigan K-12 Schools Closed to In-Person Instruction Following Executive Order 2020-35

AUTHORS

Charyn K. Hain

RELATED PRACTICES

Coronavirus Task Force

RELATED INDUSTRIES

Higher Education

Education Advisory
April 3, 2020

In-person instruction is over for the 2019-2020 school year, but public school districts and public school academies are required to provide alternative instruction to K-12 students beginning no later than April 28 under the directive of Executive Order 2020-35. Each district and academy must prepare a compliant plan, addressing many issues, including content delivery, budgeting, free meal, method of notifying parents and mental health services. While many laws have been temporarily suspended and certain requirements waived, there are many issues that remain unclear, such as the effect of teacher evaluations. Additionally, parents and school officials await guidance from the Michigan Department of Education and the Michigan Department of Civil Rights with respect to special education students.

Varnum education attorneys are able to assist your district or academy in working through these and other issues created by these unprecedented circumstances.

VARNUM
ATTORNEYS AT LAW

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

AUTHORS

Charyn K. Hain

David E. Khorey

RELATED PRACTICES

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.

VARNUM
ATTORNEYS AT LAW

COVID-19 Related Modifications to Cafeteria Plans and Flexible Spending Accounts

AUTHORS

John D. Arendshorst

Olayinka A. Ope

RELATED PRACTICES

Coronavirus Task Force

Employee Benefits

Employee Benefits Advisory
June 4, 2020

In response to the COVID-19 pandemic, the IRS has issued two notices that allow employers to provide some relief to cafeteria plan participants. Together, Notice 2020-20 and Notice 2020-29 allow cafeteria plans to permit prospective midyear election changes for any reason during calendar year 2020 and to provide an extended period for employees to incur eligible expenses for reimbursement under flexible spending accounts.

Cafeteria Plan Election Changes

Usually, employees are required to make cafeteria plan benefit elections before the beginning of the plan year, and these elections may only be changed midyear in response to a permissible election change event. However, Notice 2020-29 allows an employer to amend its cafeteria plan to permit certain prospective election changes during calendar year 2020 regardless of whether a participant meets the usual election change requirements.

For employer group health plans, the following changes are permitted:

- Employees who initially declined coverage may enroll in health coverage;
- Employees who enrolled in one coverage option may enroll in different health coverage; and
- Employees who enrolled in health coverage may revoke their coverage election, if the employee certifies in writing that the employee is or will immediately be enrolled in other health coverage.

For health FSAs and dependent care FSAs, the following changes are permitted:

- Employees may revoke existing elections on a prospective basis;
- Employees may increase or decrease an existing election; or
- Employees may make a new election.

An employer implementing this relief can determine the extent to which additional elections will be permitted. For instance, an employer may consider only allowing employees to elect increased benefits or coverage or may allow some types of changes but not others.

The employer may want to consider the potential for adverse selection in implementing these changes and, if the change affects insurance coverage, the employer should confirm that its insurer will accept these midyear changes. In addition, any changes remain subject to the cafeteria plan non-discrimination rules and other applicable laws.

Extended Grace Period

Usually, for an eligible expense to be reimbursable by a health FSA or dependent care FSA, the expense must be incurred during the cafeteria plan's plan year (and, for plans that permit a grace period, during a period of up to 2½ months following the end of the plan year). However, under the new IRS guidance, an employer may also amend its cafeteria plan to permit employees to use amounts remaining in a health FSA or dependent care FSA at the end of a plan year or grace period ending in 2020 to pay or reimburse expenses incurred through December 31, 2020.

Employers implementing this extension should notify participants that if the claim period is extended for a health FSA that is not HSA-compatible, participants with unused amounts remaining at the end of a plan year or grace period ending in 2020 will not be eligible to make HSA contributions during the extended period. In addition, employers who offer flexible spending accounts administered by a third-party administrator should verify that they can implement these changes.

Plan Amendments

Employers who choose to allow increased flexibility for participant elections or an extended grace period, as described above, must adopt a plan amendment. The cafeteria plan relief may be implemented immediately, as long as an amendment is adopted on or before December 31, 2021 and may be effective retroactively as early as January 1, 2020. In addition, the employer must inform all eligible employees of the opportunity to participate in the changes.

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

VARNUM
ATTORNEYS AT LAW

Tax-Free Disaster Relief Payments Permissible Under Section 139

AUTHORS

Jeffrey A. DeVree

Katie K. Roskam

RELATED PRACTICES

Coronavirus Task Force

Employee Benefits

Employee Benefits Advisory
March 30, 2020

A new section 139 was added to the federal tax code in the wake of 9/11 in order to allow businesses, nonprofits, and state and local governments to make disaster relief payments to individuals who have been affected by a disaster. The disaster relief payments are generally tax free to the individuals who receive them. If made by an employer to an employee, payments would be taxable compensation. Under section 139, however, they can be tax free to the employee and still deductible by the employer.

For section 139 to apply, the disaster must be a qualified federal disaster, and the payments must be qualified disaster relief payments. Based on the president's declaration that the COVID-19 pandemic is a national emergency, and the IRS' interpretation of the declaration for other tax purposes, it appears that the COVID-19 pandemic is a qualified federal disaster under section 139. As a result, payments for relief from this disaster will be qualified disaster relief payments under section 139 if: (a) the payments are made to reimburse reasonable and necessary personal, family, living or funeral expenses incurred as a result of the COVID-19 disaster; and (b) the expenses are not compensated by insurance or otherwise (qualified expenses).

When adding section 139 to the tax code, Congress indicated that employees would not be required to substantiate expenses with receipts, credit card statements, etc. Even so, it is still important to document the terms of any qualified disaster relief payment program so that it is clear that the payments are intended to reimburse employees for qualified expenses. Qualified expenses during the COVID-19 pandemic could include:

- out-of-pocket medical expenses, like sanitizing cleaning products, rubber gloves, face masks and hand sanitizer;
- funeral expenses incurred as a result of COVID-19;
- increased childcare costs incurred as result of COVID-19, including potential technology costs for online education;
- increased utility costs or food costs due to the quarantine;
- increased costs related to working from home including printer paper, office supplies, energy costs or higher speed WiFi.

It is important to note that section 139 does not apply to payments made to compensate employees for lost wages or to provide severance pay, nor does it apply to payments made to reimburse expenses incurred for non-essential items or services (i.e., a Netflix subscription).

If any employer desires to make disaster relief payments that are intended to qualify under section 139, we recommend that the employer establish a written program that:

1. specifies which employees are eligible for payments (although there is no formal nondiscrimination testing applicable to these payments, appropriate eligibility parameters should be created);
2. includes requirements to ensure that the payment amounts are reasonably expected to be commensurate with the unreimbursed reasonable and necessary qualified expenses of the employees;
3. describes how the amount will be paid;
4. contains information about what to do if the employee chooses not to receive payments;
5. clarifies that the employer has discretion to administer the program; and
6. sets a term for the program.

In addition, if practicable in light of the circumstances, employers may consider requesting that those employees who receive payments provide a written confirmation that they incurred qualified expenses at least in the amount of the payment that were not reimbursed by insurance or otherwise for the employer's files.

VARNUM
ATTORNEYS AT LAW

Primary Impacts of the Coronavirus Aid, Relief and Economic Security Act on Employee Benefit Plans

AUTHORS

John D. Arendshorst

RELATED PRACTICES

Coronavirus Task Force

Employee Benefits

Employee Benefits Advisory
March 27, 2020

On March 27, 2020 Congress passed the Coronavirus Aid, Relief and Economic Security Act (CARES Act), which is intended to provide significant relief and support to businesses in numerous areas. As outlined below, the legislation provides immediate tools to increase flexibility for retirement plan sponsors and participants though plan administrative action, with an extended subsequent period to update their plan documents accordingly.

1. 401(k) plan emergency withdrawals

Plans may permit individuals financially impacted by COVID-19 to withdraw up to $100,000 in emergency funds from their plan retirement accounts or IRAs through December 31. An individual is considered to be financially impacted by COVID-19 if:

1. the individual is diagnosed with COVID-19;
2. their spouse, or dependent is diagnosed with COVID-19; or
3. the individual experiences adverse financial consequences as a result of being quarantined, furloughed, laid off or having work hours reduced due to COVID-19, or is unable to work due to lack of child care due to COVID-19, or a business owned or operated by the individual closes or reduces hours due to COVID-19.

Plan administrators may rely on an employee's certification that the employee meets one or more of these conditions in determining whether a distribution is permitted. Any funds withdrawn may be repaid into the same retirement accounts for up to three years in one or more contributions. The participant may also repay the amount into a different retirement account and treat the amount as an eligible rollover distribution. If the individual does not repay the amount to an eligible retirement plan, the distribution will be included in taxable income over a period of three years.

Individuals who take such a withdrawal before age 59½ will be exempt from paying the usual 10 percent penalty on early withdrawals from retirement accounts.

2. 401(k) plan emergency loans

Plans may permit individuals financially impacted by COVID-19 (using the same definition as for 401(k) plan emergency withdrawals) to take loans of up to $100,000 from their retirement accounts (instead of the usual limit of $50,000). Loan repayments, which can be spread out over five years, may be delayed up to one year.

3. Required minimum distributions

Required minimum distribution requirements will not apply for calendar year 2020.

4.Qualified plan amendments

Plans may operate to permit emergency withdrawals, emergency loans and waive required minimum distributions, as described in paragraphs (1) through (3) without a formal amendment, so long as the plan is amended by the end of the 2022 plan year.

5. Pension payments

Employers maintaining single-employer pension plans can delay making minimum required contributions due this year until January 2021. Contributions would be due with interest, accrued at a plan's effective rate.

6. Extension of Cooperative and Small Employer Charity Pension Plan status

The Cooperative and Small Employer Charity Pension Flexibility Act of 2014 provides more favorable funding rules for certain defined benefit pension plans of charities, schools and volunteer organizations, referred to as cooperative and small employer charity (CSEC) plans. CSEC plan status is now extended to charitable employers whose primary tax-exempt purpose is conducting medical research (either directly, or indirectly through grant-making) or providing services to mothers and children.

VARNUM
ATTORNEYS AT LAW

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.

VARNUM
ATTORNEYS AT LAW

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.

VARNUM
ATTORNEYS AT LAW

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.

VARNUM
ATTORNEYS AT LAW

Governor Whitmer Signs Legislation Ratifying Remotely Witnessed, Notarized, and Signed Documents Through End of 2020

AUTHORS

Christopher J. Caldwell

Laura E. Radle

Janelle G. Haggadone

RELATED PRACTICES

Coronavirus Task Force

Estate Planning

Estate Planning Advisory
November 11, 2020

This year to date, Gov. Gretchen Whitmer has signed 192 executive orders, with the majority of these orders relating to the COVID-19 pandemic. Several of these orders permitted remote witnessing, remote notarization, and electronic signing of estate planning documents, which allowed clients and their attorneys to sign estate planning and real estate documents from virtually anywhere.

When the Michigan Supreme Court ruled that the Governor had no authority to extend emergency declarations used to mandate COVID-19 restrictions beyond April 30, 2020, the validity of estate planning documents that had been remotely witnessed, notarized, and/or signed after that date became an open question.

On Thursday, November 5, Gov. Whitmer signed several bills into law to address this issue. 2020 PA 246, 247, 248, and 249. These new laws give effect to documents witnessed, signed, or notarized remotely from April 30, 2020 through December 31, 2020. Additionally, registers of deeds are required to accept electronic documents for recording and to accept a physical copy of an electronically signed document that is properly notarized through the end of 2020. However, as of January 1, 2021, remote witnessing and notarization will again be unavailable unless further legislation is passed, so there is a limited window of opportunity to take advantage of these changes.

If you have any questions about these new laws, or if you want to discuss the advisability of using remote witnessing, notarization, or signing through the end of the year, please contact your Varnum estate planning attorney.

Estate Planning in a Low Interest Rate Environment

AUTHORS

Christopher J. Caldwell

RELATED PRACTICES

Coronavirus Task Force

Estate Planning

Estate Planning Advisory
April 13, 2020

As the crisis surrounding COVID-19 continues, most people have focused their attention on immediate critical issues, including concerns about health and safety for themselves and their loved ones, employment and their overall financial situation. Although estate planning might follow those items in a list of priorities for most people, the current situation presents planning considerations that may not be immediately apparent. A more present sense of one's own mortality may drive those who have not made plans before to begin the process of creating an estate plan. For those who have existing plans, are they up to date? And, how does the changing economic environment affect prior decisions?

One result of the current situation is that interest rates are lower now than they have been for some time. For example, the April 2020 Applicable Federal Rates (AFRs), which determine the minimum interest that must be charged for below-market loans and which are often used for intrafamily lending, have decreased to 0.91 percent for loans less than three years in duration, 0.99 percent for loans of three years or more and less than nine years, and 1.44 percent for loans of nine years or longer. In addition, the 7520 rate, equal to 120 percent of the midterm AFR and used for discounting remainder interests to present value, is 1.2 percent.

For families in which intrafamily lending has already occurred, the reduced interest rates provide an opportunity to amend the terms of existing promissory notes to capture the lower rate. This has at least two practical effects:

- First, it reduces the amount the borrower must repay, potentially easing the burden on a borrower in a situation where cash flow may be reduced.
- Second, in situations where a parent has already lent to a child who will later inherit from the parent, the decreased interest rate may help to facilitate wealth transfer, as the parent receives lower payments under the note and thus minimizes the assets being added back to the lender's taxable estate.

Situations where such loans might exist could include:

- A parent extended a loan to a child to help get through a difficult time.
- A parent may have loaned money to a child with the idea that the child could invest the money at a higher rate of return than the interest charged under the note, thus allowing growth to occur in the child's estate instead of the parent's estate.
- More complex planning techniques, such as a sale to an intentionally defective trust, in which the seller's goal is to freeze the value of their estate for the price at which at asset was sold on an installment basis, allowing the future growth to occur outside of the seller's taxable estate.

In addition to addressing existing loans, other planning techniques, such as a grantor retained annuity trust (GRAT) or a charitable lead trusts (CLT), which rely on the 7520 rate, also become more attractive in a low interest rate environment, particularly for individuals who have estates potentially subject to the federal estate tax. A GRAT involves a transfer of assets to a trust in which the settlor retains an annuity payment for a term of years. At the end of the term, the remaining assets pass to the trust's beneficiaries without any estate tax implications. A CLT operates similarly, except that the payment for the specified term of years is made to a charity. In both cases, the ongoing payment is based on the 7520 rate. A lower rate results in a lower annual payment back to the settlor in a GRAT or the charity in the case of a CLT and a larger estate tax-free distribution to descendants in the future.

Although not everyone will need to use techniques such as a GRAT or a CLT, the current situation presents opportunities to individuals of varying economic circumstances to address intrafamily loans and wealth transfer that may not have been considered previously.

VARNUM
ATTORNEYS AT LAW

Remote Signing and Notarization for Estate Plans During COVID-19 Pandemic

AUTHORS

Christopher A. Ballard

Rebecca K. Wrock

RELATED PRACTICES

Coronavirus Task Force

Estate Planning

Estate Planning Advisory
April 10, 2020

In response to the COVID-19 pandemic, estate planning documents may be notarized remotely effective immediately and continuing through May 6, 2020. Executive Order 2020-41 (Order), signed April 8, 2020 by Gov. Gretchen Whitmer, allows for remote notarization and witnessing to take place via video conference.

Trusts, wills, durable powers of attorney, patient advocate designations, living wills and deeds are among the documents that can now be executed with a notary public and witnessed by video conference. For documents required to be notarized and/or witnessed in person, the Order allows for the continued availability of these important tools, while practicing social distancing and restricting in-person interactions to those that are strictly necessary.

Perhaps now more than ever, reviewing or implementing an estate plan, including wills, trusts, durable powers of attorney and, in particular, health care directives, can be a critical step to protecting yourself and your family. The Order ensures that crucial planning can continue uninterrupted and offers peace of mind during these unprecedented and uncertain times.

VARNUM
ATTORNEYS AT LAW

CARES Act Relief for Borrowers of Eligible Federal Student Loans

AUTHORS

Rebecca K. Wrock

RELATED PRACTICES

Coronavirus Task Force

Estate Planning

Estate Planning Advisory
April 6, 2020

Relief for borrowers of student loans owned by the U.S. Department of Education (eligible student loans) for a period of at least 60 days was previously announced by executive order on March 13, 2020. The Coronavirus Aid, Relief and Economic Security Act (CARES Act) replaced this executive order and expanded upon that relief to offer borrowers no interest and no payments on eligible student loans for a period of six months, among other benefits.

No Interest on Student Loans

Interest will be waived on all eligible student loans effective March 13, 2020 and continuing through September 30, 2020. The adjustment will be automatic; there is nothing borrowers need to do to have the interest waiver applied to their eligible federal loans.

Option to Stop Payment on Student Loans

In addition, payments on eligible student loans will be automatically paused through September 30, 2020; borrowers do not need to take any action to receive this benefit. There will be no penalties or late fees assessed. Because the relief is in the form of waiving interest rather than the federal government making loan payments for borrowers, borrowers will see no difference in their student loan balances between now and September 30, 2020 unless they choose to continue making payments. Any payments made on eligible student loans during this period will be applied to principal (after paying interest accrued prior to March 13, 2020).

Skipped Payments Counted Toward Forgiveness Programs

Borrowers on an income driven repayment plan may stop payments through September 30, 2020 and still have skipped payments count towards their 20 or 25 years (depending on the plan) of payments.

Similarly, borrowers who are pursuing Public Service Loan Forgiveness (PSLF) may stop payments through September 30, 2020 and still have skipped payments count toward the 120 monthly payments required. The

status of this benefit, as it relates to borrowers who were pursuing PSLF but would currently otherwise be considered ineligible for the program due to reduced hours or a loss of qualifying employment, is in need of clarification. Importantly, the required 120 monthly payments need not be consecutive, so if further guidance shows that those pursuing PSLF but affected by job loss or reduced hours are not eligible to have skipped payments count towards PSLF, borrowers can still resume progress towards PSLF once qualifying full-time employment resumes.

Tax-Free Employer Contributions for Student Loans

Employers who pay student loans as an employee benefit may contribute up to $5,250 tax free for 2020.

Suspension of Student Loan Debt Collection

Debt collection on defaulted eligible student loans has been halted. Borrowers whose wages continued to be garnished after March 13, 2020 should contact their employer, and any funds received by the Department of Education in error will be returned to the borrower. Borrowers whose federal tax refunds were to be withheld due to defaulted federal student loan debt will have those refunds returned if the process for withholding the refund was not already completed prior to March 13, 2020. Similarly, borrowers who had a portion of their Social Security withheld to repay defaulted student loan debt will have that portion returned if the payment was in the process of being withheld on or after March 13, 2020.

Loans That Are Not Eligible

Note that some Perkins loans are held by educational institutions and some FFEL debts are owned by commercial lenders, and neither category of loans is eligible for the interest waiver at this time. While FFEL Program and federal Perkins loans that are not owned by the government can be consolidated into a Direct Consolidation Loan, which would be eligible, borrowers should be careful to note whether the interest rate after the zero percent interest waiver ends would be higher than what the borrower is currently paying. Consolidation also causes any outstanding interest to capitalize. Private loans are not eligible for these benefits.

VARNUM
ATTORNEYS AT LAW

Virtual or In-Person School? What to Do When Divorced Parents Disagree

AUTHORS

Julia A. Perkins

Shalini Nangia

Mark E. Hills

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Custody, Parenting Time and Child Support

Family Law Advisory
August 21, 2020

Family law attorneys and their clients have been met with a variety of challenges since the start of the pandemic: how to safely manage parenting time, domestic violence concerns with abusers and survivors continuously stuck in the home together, courts being inaccessible and eventually Zoom hearings. We had all hoped that COVID would disappear by the summer, but clearly that is not the case, and the newest challenge is how best to school children this fall. Without a clear mandate from the government, most school districts are providing parents with a choice between in-person and virtual learning. The decision is difficult even for intact families, but when parents are divorced, it can lead to gridlock. The decision of in-person versus virtual learning is a legal custody issue that must be made jointly and agreed upon. But what is the remedy when the parents do not agree?

Judges often hear school choice disputes where they have to conduct evidentiary hearings. A prepared parent and lawyer typically file a motion well in advance of the start of the school year. But in this instance, parents have been in limbo waiting to see what happens with COVID, what the state mandates and what their school districts decide. Most districts only announced plans in the first week or two of August, leaving parents and courts in an impossible time crunch. What can parents do?

The standard option when parents have a joint legal custody dispute is to file a motion with the court. More than ever, the facts of your situation will be critical: the age and grade of the child, health issues in either household, details about the virtual teaching platform, both parents' employment situations, the availability of third parties such as grandparents or new spouses, child care, transportation, a child's learning disabilities, etc. Courts do not have any legal precedence on this particular issue, and there are many competing expert opinions available. Even the CDC has modified its guidelines over time, so the medical guidance may not be as solid as it is with infant vaccines. Everyone has a different risk tolerance with COVID and this is a decision with no right answer. As always, your judge's personal views may influence the outcome. Is the judge more cautious and less likely to make a decision that could irreversibly impact the health of the child, or is the judge likely to focus on the practical and financial issues of the family? Is the case a high-conflict case where one parent is likely filing

the motion to harass the other? What if the time crunch makes it impossible to get into court to even address these issues?

If your judge cannot schedule a hearing in time, you can try alternative dispute resolution methods, such as mediation or arbitration, with a seasoned family law attorney. Before engaging in any discussions, be sure to have as much detailed information from the school district as possible. It is important to involve children in the discussion regardless of their ages. Older children may have relevant input to consider and may have questions of their own related to the structure of the day offered by schools, including how they will handle lunch, recess, assemblies, field trips, after school activities, etc. Younger children can be educated about the importance of masks and social distancing as it relates to their school day so that they can report to you what they observe in school if they are attending in person. You can explore online for educational interactive resources and extra-curricular activities for children if one parent is concerned about children being limited to online learning. Disagreeing parents can defer to their pediatrician – ask how he/she keeps their own family safe from exposure. It may make sense to work on an agreement only for the first semester and revisit after the new year. If parents are able to agree that any changes to the parenting time schedule to accommodate these unique learning options are temporary and not intended to modify existing school or parenting time arrangements, it may be easier to make decisions before school starts.

Can I Get Divorced During COVID-19?

AUTHORS

Shalini Nangia

Julia A. Perkins

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Family Law

Family Law Advisory
July 7, 2020

COVID-19 has impacted marriages for better and for worse. For some the additional time at home with the family has been just what the doctor ordered. For others, the lockdown has highlighted the incompatibility of the situation. Most people have been holding their breath to see how things will shake out post-COVID; however, we have not been able to get past COVID as quickly as we had hoped and are realizing that we have to continue to function amidst the pandemic. Those contemplating divorce wonder if it is feasible, given the uncertainty of the world. Though COVID may add an extra layer of consideration in an already complicated decision, the past few months have shown us that it is possible to get divorced during COVID. It may just be a more virtual experience with an added layer of uncertainty.

Infrastructure

It has taken a few months, but most processes and professionals associated with a divorce case are functioning, albeit with different formats. Many courts and Friends of Court are still backlogged from the lock down period, so delays could be an issue, but services are resuming. Over the last few months, we have adapted to phone meetings, video conference mediations, electronic court filings, Zoom court hearings and, when needed, masked in-person meetings. Technology also allows us to involve financial planners, realtors, appraisers, therapists and accountants as needed. People have gotten creative by sitting in their cars for privacy or parking outside WiFi hotspots for internet access.

Custody/Parenting Time

Since the start of the pandemic, courts across Michigan have consistently held that parents must follow existing parenting time orders. There have been limited exceptions due to long distance or special medical circumstances, but for the most part children have been going between both parents' homes and utilizing more virtual time over Skype, FaceTime, Houseparty and other apps. Parents who are in the process of negotiating parenting time schedules may want to consider special provisions to deal with child care, virtual school issues, travel and support in the event a parent becomes affected by COVID. However, you can expect courts to address custody and parenting time issues as they usually would, based

upon the statutory best interest factors.

Homes

The marital home is often the biggest asset in a divorce case, and people are rightfully concerned about the effects of COVID on the housing market. If neither party is able to keep the home, is this a good time to sell? According to several realtors across Southeast Michigan, COVID has not put a damper on home sales in this area. Sales temporarily went down in mid-March, but home prices did not collapse. For now, COVID is still considered a temporary setback. However, as COVID lingers, it is possible that the housing market will see a negative impact, especially if more people lose jobs and have less confidence in the economy as well as their own personal financial situation. At present, the overall momentum in the housing market is strong, and interest rates remain low. Realtors report that there is low inventory of homes with pent-up demand; many sellers are seeing bidding wars and selling above their asking prices. Delays in new construction are contributing to the low inventory of available homes, so if you are in the market for a new home due to a pending divorce, you may have to consider renting or staying in the marital home longer than anticipated.

Finances

While housing prices have remained steady (or have improved) since COVID, some financial situations are less stable due to unemployment, pay cuts, salary deferments or a volatile stock market. Parties may agree that it is not feasible to support two households at this time or that it is better to wait out the COVID pandemic. Though it is important to note that all divorce cases, regardless of when filed, involve some amount of financial uncertainty, employment and financial markets are never completely secure. The same income that supported one household now has to support two; assets are split in half, new budgets have to be imposed, etc. Perhaps COVID has amplified some of these factors. If waiting is not an option, and the divorce case is proceeding, you may have to revise expectations. There may be less money available to pay down debt, buy out home equity or put toward the down payment of a new house, or you may have to delay retirement.

If spousal support is an issue in the divorce and income is uncertain due to COVID, you could consider a reservation of the issue or a modifiable amount. Child support (by law) remains modifiable upon a change in

circumstances, but if parties know that changes are likely in the short term, they can include alternate support scenarios or automatic support reviews into their divorce agreements to avoid having to file motions to modify with the court. You can also opt to handle child care payments outside the child support formula, so that the support order does not need to be changed each time your child care situation changes. In such a scenario, each parent would pay his/her share of child care directly to the child care provider or make arrangements to reimburse each other, rather than including an annualized amount of child care in the monthly child support payment. Many parents utilized this arrangement before COVID; however, the additional court back logs and increased uncertainty of employment and child care options makes this an especially prudent option in upcoming divorce cases.

If you are contemplating filing for divorce and have concerns about any of these issues, Varnum's family law team is available to answer your questions.

VARNUM
ATTORNEYS AT LAW

The Pros and Cons of Zoom Court Hearings

AUTHORS

Shalini Nangia

Julia A. Perkins

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Family Law

Family Law Advisory
May 19, 2020

Regardless of when Gov. Whitmer's stay-at-home orders end, most courts will not be fully open to the public for the foreseeable future. Faced with this uncertainty, most courts have begun conducting motion and evidentiary hearings via Zoom. Over the last few weeks, many of us have gotten used to teleconferencing for meetings, mediations and depositions, but court hearings present unique challenges. The process is sure to evolve in the coming weeks and months, but so far we know the following:

Pros

1. Timing. Courts and litigants are finally moving forward with hearing dates that have been stalled. After two months of mostly dealing with emergencies, courts can finally start to clear their dockets. Parties can start to make progress in their divorces, and get decisions in their interim and post-judgment their disputes.

2. Convenience. Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes, offices or cars. The litigants avoid paying those same costs for their lawyers to attend the hearing including travel time.

3. Witness Credibility. Some judges feel that Zoom hearings allow them to truly assess witness credibility since they are making prolonged eye-to-eye contact, often on a large screen in their courtrooms. Such a format allows for fewer distractions and more focus on the witness than in a traditional courtroom.

4. First-hand Home Assessment. Judges can immediately resolve a parent's concerns about the other parent's home being deficient for parenting time by seeing the home, the child's room and the refrigerator/pantry first-hand.

5. Exhibits. Teleconferencing will force attorneys to be better prepared and reach agreements with opposing counsel as to exhibits.

Cons

Most of the concerns around Zoom hearings revolve around the courts' live broadcasting of the hearings on YouTube to comply with the Michigan Supreme Court's administrative order that courtrooms must remain open to the public.

1. Control. Judges cannot control a virtual courtroom the same way they can a real courtroom in terms of who is physically present, who is using a cell phone, who is talking to whom, who is coaching witnesses, etc.

2. Who Really Is Watching? In theory, anyone can walk into a real courtroom to watch a family law hearing, but the reality is that most people are not going to take the time from work, drive to court, find parking, go through security, etc., unless it is a very compelling reason. But, with more people at home, they have more time on their hands, and if all they have to do is sit on their laptop and anonymously log on to YouTube, there could be many lurkers – coworkers, bosses, neighbors, church parishioners, or worse yet, children. While many of us struggle with the technology, our tech-savvy children live on YouTube and could easily discover ugly details of their parents' divorce case.

3. Protecting the Integrity of Testimony. In trials/evidentiary hearings judges will usually sequester third-party witnesses in the hallway outside the courtroom. With YouTube access and Zoom, sequestration and cell phone usage is much harder to enforce. Will judges be able to tell if witnesses are being coached or using notes?

4. Illegal Recordings. YouTube is supposed to display a warning that the court hearings are not allowed to be recorded by the public – only courts are able to use the record feature on Zoom. However, realistically, courts have no way of knowing if third parties have illegally recorded the hearing on their cell phones.

5. Disclosure of Confidential Information. You may need to share confidential financial, medical or personal information in family law hearings – tax records, bank statements, CPS reports, psychological evaluations, etc. If documents are being introduced into evidence through Zoom's share screen feature, these will also be visible on YouTube. How long before hackers figure out that trolling court hearings is a good way to gain access to account numbers and birth dates?

6. Safety in Domestic Violence Cases. If parties are residing in the same home, it may be dangerous for domestic violence survivors to safely participate in court hearings. Survivors cannot rely on courthouse security measures, bailiffs or the support of their attorneys in person.

7. More Time and Expense. As we all learn how to maneuver in this new virtual world, it takes attorneys and courts more time to prepare clients and exhibits.

8. Judging Witness Demeanor. While some believe this technology gives judges a clearer line on judging witness demeanor, some believe it does not since judges may not be able to see a witness's demeanor such as shaky hands.

Possible Solutions/Tips

1. Maintaining Control. Judges can enter stipulated or ex parte injunctive orders with common sense protections as to the ban on recordings, witness tampering and banning access to children. Such orders may not prevent bad actors from doing these things, but at least the orders provide the judges the ability to hold violators in contempt of court if the acts are discovered. Word will spread within the community that there are consequences. Judges can use Zoom breakout rooms for in-chambers conferences or side bars that are not on the record to address private matters. Judges can ask to see rooms to ensure that witnesses are not being coached or using inappropriate notes. They might not be able to order it but could suggest that witnesses wear headphones to ensure against the possibility of coaching.

2. Safeguarding Sensitive Matters. Most, if not all, courts will not live broadcast personal protection order hearings, adoption or juvenile court proceedings on YouTube as they are not public proceedings by statute. Courts have some discretion to determine what makes sense in individual cases, but attorneys will have to file motions to exclude hearings from being broadcast. At least one court (Washtenaw County Circuit) has decided not to live broadcast any non-criminal hearings but will make recordings available upon request.

3. Advance Preparation and Cooperation. Attorneys taking responsible and common sense approaches will have a huge impact in safeguarding people's privacy. Attorneys should prepare their clients for the risks of this new format – maybe they will opt to wait or try and settle out of court. Attorneys will have to communicate with each other and hopefully agree to

exhibits in advance and redact private information. When talking on the record, they should refer to exhibits by their labels rather than by describing the details. Exhibits and testimony should refer to children by initials or first names only, without dates of birth.

Courts will need to find a way to balance the need to move cases forward with the public's right to access as well as judge accountability against the litigants' rights to confidentiality, all while maintaining the integrity of the evidentiary hearing. If both sides agree to delay, their matter may be scheduled for a future in-person hearing, but if both do not agree, courts have the discretion to move forward with these hearings. Rest assured, there are committees of attorneys, judges and administrators working on solutions to some of the known concerns. We are all learning and improving as we go.

VARNUM
ATTORNEYS AT LAW

Filing a Motion in Family Court During Coronavirus: What Constitutes an Emergency?

AUTHORS

Shalini Nangia

Julia A. Perkins

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Family Law

Family Law Advisory
May 6, 2020

As our courts effectively remain closed for regular business, most courts are only hearing what are deemed emergency motions while scheduling others out for much later hearing dates via telephone or Zoom. But the question becomes, what does the court consider to be an emergency? For instance, many parents have real concerns about their children exercising parenting time in the other parent's home if someone living there is an essential worker, whether that be a doctor, nurse, truck driver or employee of a grocery store. But is that an emergency? That alone does not rise to the level of denying parenting time or an emergency motion to suspend parenting time. What if a parent tells the other parent that a person living in his home has a fever but still wants to exercise parenting time? Is that an emergency? Likely not. Another parent insists that his child get on a plane from an area with no COVID to come into an area that has been considered a hot bed. That the parenting time might be exercised in a hot bed does not likely make it an emergency, but that the child will have to travel to an airport, sit on a plane and travel out of an airport might. In other words, that child will not be able to social distance and certainly could have greater risk to being exposed. While the courts want parents to follow the parenting time orders, they also seem to favor limiting people's movements in accomplishing that compliance.

Every scenario must be evaluated individually, but most judges seem to agree that that an emergency must meet the standards for seeking *ex parte* relief (relief provided without notice to the other side and no initial hearing). Parties request *ex parte* relief by asking the court to enter an order based on the belief that irreparable injury will occur if the court does not enter the order immediately. This happens in cases where the party is concerned that if the other party is provided notice of the relief sought, the notice itself could or would precipitate negative or harmful events.

Scenarios arising due to COVID or the stay-at-home orders are not exactly the same, but judges seem to be applying that standard. Irreparable injury gives a basis for the standard to use when determining whether your particular facts are an emergency for being heard by the family court quickly. Likely the parents have already had a discussion, sometimes heated, as to what is in the best interests for the children. They do not agree, and one parent insists on exercising parenting time. If the parent

believes that irreparable injury would occur or if the likelihood is so great given the specific facts, then a motion might be filed to have the court determine what is in the best interests of the child.

If you have a situation or believe you will have a situation coming up soon, it is advisable to contact a lawyer to discuss your situation. Sometimes talking it through with a lawyer is helpful, and a lawyer can provide strategies to possibly rectify the situation outside of court, such as an offer of specific makeup parenting time or an attempt at mediation if time allows

VARNUM
ATTORNEYS AT LAW

Personal Protection Orders Extended

AUTHORS

Mark E. Hills

RELATED PRACTICES

Coronavirus Task Force

Family Law

Family Law Advisory
April 28, 2020

On April 27, 2020 Gov. Gretchen Whitmer issued Executive Order 2020-63 which extends all personal protection orders (PPOs) that expire between April 27, 2020 and June 1, 2020. Those PPOs will now expire on July 21, 2020. The order does not prohibit objection to the extension of a PPO. It also does not prohibit a motion to modify or terminate a PPO and does not prohibit a petitioner from consenting to terminate a PPO.

For more information about this order or related matters, please contact a member of Varnum's Family Law Practice Team.

Mediation in Family Law Cases During COVID-19

AUTHORS

Shalini Nangia

Julia A. Perkins

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Family Law

Family Law Advisory
April 23, 2020

Many family law attorneys would argue that alternative dispute resolution (ADR) formats such as mediation, arbitration and collaboration are more effective than litigation in family law cases. Due to COVID-19, ADR (most often mediation) is the only immediate option available for many. Some family courts are conducting hearings remotely via Zoom, but for the most part they are not able to address non-emergent disputes. As of now, judges are not compelling mediations via Zoom, so attorneys and/or clients have to agree to participate. Users are reporting great results from Zoom mediations, but there are pros and cons to consider.

Technology: *Does everyone have the technology needed to participate? Is Zoom secure?*

There may be other platforms available, but most attorneys are using Zoom for mediations. Zoom is available on PCs, Macs, Android phones and iPhones. Users can try a free version, but conferences are limited to 40 minutes. However, as long as the host of the meeting – usually the mediator – has purchased a package, there are no time limits, and he/she can invite as many people as needed. Even if users do not have WiFi available, they can use Zoom on their phones. There were initial reports of "Zoom bombings" where outsiders were infiltrating meetings with inappropriate content. Zoom immediately responded with fixes to the program, including the ability to enter passwords to secure sessions.

Privacy: *The kids are in the house. What if I want to talk privately with my attorney? Do I have to look at my spouse the whole time?*

With in-person mediations, children are usually with sitters or in school so people can travel to the office in separate vehicles and sit in separate rooms to minimize tensions. Depending on the ages of the children and the configuration of the home, it may be impossible to arrange for privacy in four to eight hour blocks. Some have created privacy by being in separate

rooms or with one party in the car or at their workplace if they are essential workers who have access.

Zoom allows the mediator to put people into separate cyber rooms so the user does not need to look at their spouse or opposing counsel during mediation. The mediator goes back and forth between rooms and can create multiple rooms to have conferences with one or both attorneys. The mediator has to assign specific people to each room, and only those people are allowed in and out so there is no danger that a user's spouse can sneak into the user's room. For extra security, the mediator can also lock a room with a password.

The bottom of the screen has a toolbar which allows a user to mute your microphone or turn off video. There is also a chat button which allows a user to message those in a particular room. The chats are not visible to people in the other breakout rooms but would be to the mediator when he/she enters the user's room. The chat feature is likely more useful in a large group meeting rather than a mediation setting. There is also a help button which allows a user to message the mediator to enter the user's room for assistance.

Domestic Violence: *How can mediators assess for domestic violence and ensure safety for survivors?*

Cases involving domestic violence are not often appropriate for mediation – in person or via Zoom. However, the Zoom setting poses additional risks for survivors. They are not able to have attorneys physically present as a support and some survivors are stuck in the same home with their abusers. Safeguards (if possible) include mediating from a location outside the home. Some argue that such mediations qualify as essential under Gov. Whitmer's stay-at-home order, so a survivor could go to an attorney's office to participate.

Michigan's mediation court rule requires mediators to screen for domestic violence before every mediation, and this remains true with Zoom mediations. Just as with in-person mediations, the mediator can call participants separately before the mediation date to screen (Zoom allows the mediator to assess facial and body reactions) or put people in separate breakout rooms during the mediation. Some mediators choose to send questionnaires, though this method is riskier because the mediator cannot see, hear or even be sure who is completing the form.

It is important to assess with an attorney if a Zoom mediation might exacerbate the situation. If a user does not feel safe participating in the process, it may be best to wait until the stay-at-home order is lifted.

Memorializing an Agreement: *If we reach agreements how can we make them binding? How can I review a written document with my attorney?*

The agreements reached at mediation need to be memorialized in a written document and signed by both parties. Sometimes this can happen at in-person mediations if an attorney or the mediator drafts something during the session, and everyone reviews and signs that document before leaving the mediation. Such review and signing are also possible in the age of Zoom with e-signing through programs such as Clio, Adobe and Docusign (e.g., users should make sure the programs are encrypted for security). Documents can be shared via email or a screen-sharing option. The breakout rooms provide attorneys and clients the ability to privately review a document together.

If time or technology do not allow for electronic signatures, parties can place their agreements on the record, and the mediator can record the recitation via a Zoom feature or on their phone. A written agreement can be drafted from the recording and emailed to everyone for review and signatures. This option may be better for those who prefer to spend more time drafting and reviewing but want to lock down the agreements before someone changes their mind.

Cost: *I am not working and cannot afford to pay an attorney or mediator.*

For divorce cases, you may have to wait until the courts are functioning at a more regular pace or until dispute resolution centers are functioning with Zoom or back to scheduling in-person mediations. However, some courts are offering free mediations for motions thanks to local attorneys volunteering their time. Contact the court or local bar association for information on such programs.

Conclusion

Zoom mediations may not work for every case. Some attorneys, clients and issues require in-person sessions to be effective, and some do not feel comfortable making major life decisions from their cars. There is something to be said for the human element of mediating in person. However, others want finality of their issues now so they can have some certainty in these uncertain times.

Zoom (and similar programs) are likely to be around well after the stay-at-home order expires. Attorneys, judges, staff and litigants will need to adapt. Thankfully, Zoom is user-friendly and has free, easy-to-follow trainings on its website. The bottom line is that Zoom offers an efficient, productive alternative when people are anxious to resolve disputes but have limited options.

VARNUM
ATTORNEYS AT LAW

Could the COVID-19 Pandemic Impact Child Custody and Relocation?

AUTHORS

Shalini Nangia

Julia A. Perkins

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Family Law

Family Law Advisory
April 16, 2020

As a result of the COVID-19 pandemic, many face uncertainty about their jobs and careers. The last week of March saw 6.6 million Americans applying for unemployment benefits, and many more experienced reduction in their compensation. The uncertainty could lead to more people choosing to relocate closer to family or take jobs that may require them to relocate for different economic opportunities. If you share physical custody of your children with their parent, what should you consider before making the decision to relocate?

Under Michigan law, a parent is prohibited from relocating a child, whose custody is governed by a court order, more than 100 miles from the child's legal residence at the time of the original court order. As a result, parents who share custody of their child and want to relocate will need court permission. MCL 722.31. The court analyzes a parent's request to move with a child in four steps. The first is to determine whether the relocating parent can support the move of the child by analyzing the following factors:

1. Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
2. The degree to which each parent has complied with and utilized his or her time under a court order governing parenting time with the child and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
3. The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent, as well as whether each parent is likely to comply with the modification.
4. The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
5. Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

MCL 722.31

What impact, if any, does the COVID-19 pandemic have on a court's analysis of the above factors? First of all, as far as the COVID-19 pandemic relates to the potential quality of life of a particular geographic region, as more and more data becomes available regarding the outbreak, certain regions of the country that found themselves more susceptible to COVID-19 may be less likely to increase the quality of life for a parent and child. Certain geographic areas may pose more of a health risk to families until the development of a vaccine. Second, many parents, although acting reasonably and in the best interests of their child, have informally agreed to modify their parenting time due to Gov. Whitmer's Stay Home, Stay Safe order. Although it is difficult to imagine a court would criticize a parent for putting a child's health first, lapses in parenting time and parental absence can dramatically impact a child's relationship with a parent, which a court may be hard pressed to ignore, despite good intentions. At the end of the day, a parent's desire to provide more stable financial and family support during this uncertain time may not necessarily result in a court approving the move.

Change of domicile and relocation motions are complex. If you find yourself contemplating this legal action, it is important to consult with the experienced Varnum family law team to ensure you are analyzing all of your options before making a decision.

VARNUM
ATTORNEYS AT LAW

Domestic Violence During COVID and Tips to Counter Electronic Surveillance

AUTHORS

Shalini Nangia

Julia A. Perkins

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Family Law

Family Law Advisory
April 13, 2020

A scary and unintended consequence of stay home orders is a marked increase in incidents of domestic violence. Hotlines around the world are reporting a huge surge in the number of calls reporting both physical and psychological abuse. People often assume that domestic violence only refers to physical violence, but other common forms of abuse include: isolation from friends, family and employment; physical and electronic surveillance; and restricted access to money, food, clothing and sanitary facilities.

Being isolated in homes nearly 24 hours a day provides abusers with the perfect opportunity to exert power and control. Survivors – often women and children – no longer have jobs, school, friends/family or even daily errands to provide cooling off periods or support. To make matters worse, abuse can often be intensified when abusers face financial strain. What resources are available while we are all stuck at home?

Legal Action

Though most courts are essentially closed to civil matters, they are all addressing emergency motions and petitions for personal protection orders. If you are in immediate danger, call 911.

Community Support

Community organizers, religious leaders and mental health workers and doctors are often available for support remotely, and many are mandatory reporters. You can call 211 for local resources, including shelters and hotlines, or have an online chat at www.m211.org – both provide free and confidential assistance 24 hours a day. The call traffic is busiest from 9:00 a.m. to 5:00 p.m., but the operators are available 24 hours a day.

Tips to Counter Electronic Surveillance

As we become more dependent on electronic devices and social media, abusers have increasingly used these mediums to control their partners.*

1. Be aware of all devices that an abuser could be using to control you – phones, laptops, tablets, cameras, thermostats, smart speakers, newer car models and your children's devices.
2. Do not keep notes or passwords in your phone's notepad feature, as login information could be synched to the cloud, and your abuser could be reading them.
3. Secure all email, social media and cloud accounts with a password manager and two-factor authentication. Use passwords suggested by your device, not anything personal that can be guessed. For security questions, such as your mother's maiden name, make up a random answer.
4. Use burner phones that are not attached to any shared credit cards.
5. Do not use shared accounts for iTunes, Google or iCloud, where your abuser can access your location, emails, photographs, web browsing history etc.
6. Check privacy settings on all social media (e.g., Facebook, Instagram, Twitter), Venmo, WhatsApp, YouTube and Google (including Google Maps) accounts. Set up alerts for when someone else logs into your accounts.
7. Your phone can be a critical aide for you but also the source for most of your abuser's information. Certain changes can help keep you safer:
    - Secure your smartphone by using a six-digit passcode instead of fingerprints and or facial recognition, which some abusers use to try and unlock phones when you are sleeping.
    - Turn off notification options for your texts, emails and apps.
    - Turn off location services on your apps. On Android phones, open Settings/Location/App permission. On iPhones, open Settings/Privacy/Location Services.
    - Delete any unknown apps.
    - Update the operating system to improve security and possibly wipe out certain types of stalkerware.
8. Check out sites such as www.techsafety.org and www.WomensLaw.org for valuable information and counselors who can walk you through how to create secure passwords, turn off location sharing as well as disable cameras and microphones on devices.

*Contains information from April 6, 2020 article on *Wirecutter* – "Domestic Abusers Can Control Your Devices. Here's How to Fight Back"

VARNUM
ATTORNEYS AT LAW

The Effects of COVID-19 on Support Orders

AUTHORS

Shalini Nangia

Julia A. Perkins

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Custody, Parenting Time and Child Support

Family Law

Family Law Advisory
April 7, 2020

In the wake of COVID-19 and Governor Whitmer's Executive Order 2020-21, millions of people find themselves with limited or no income. What does this mean for their existing child and spousal support orders? Current orders remain in place, and arrears will accrue based on the amount ordered. The Family Support Act requires the Friend of the Court offices to review child support orders not less than every three years, however, the act allows for more frequent reviews upon a substantial change in circumstances.

If the payor and payee can reach agreement for temporary modifications, they should put them in writing and submit revised Uniform Child or Spousal Support Orders to the court for entry. Without an agreement, people should consider filing a motion to modify their support orders. There is a caveat for people who have non-modifiable spousal support orders, as the court is not likely to modify such obligations. If there is any ambiguity in your judgment, you should review with an attorney.

Every county's Friend of the Court website has information on how to file modification motions, and Varnum's family law attorneys are available to answer questions, prepare motions and file them with the court. Though most courts are not able to handle anything beyond emergency filings, they are still processing filings, and your motion will at least preserve your date for retroactive modification so that the revised amount will go into effect retroactively to the date you filed the motion. In addition, the Michigan State Disbursement Unit remains operational and will continue to process payments as received.

Ottawa County is allowing anyone who has a lost a job or income due to COVID-19 to call or email their Friend of the Court investigator and request a joint phone conference to review child support for modification (no motion or appointment needed). They will promptly enter orders on agreements and will refer any disagreements to a phone or video conference with a referee.

The Michigan Supreme Court, State Bar of Michigan, the local courts, the state legislature and attorneys are working together every day to improve access to the courts and address people's concerns about support, filing deadlines and enforcement/modification of orders during this crisis. We will continue to update our clients as new information emerges.

VARNUM
ATTORNEYS AT LAW

Is There a Change in the Custodial Environment Due to Special Circumstances from COVID-19?

AUTHORS

Shalini Nangia

Julia A. Perkins

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Custody, Parenting Time and Child Support

Family Law

Family Law Advisory
April 6, 2020

In this unprecedented time, with so many conflicting messages, many parents with custodial orders in place are not sure how to best comply with existing parenting time schedules. In response to Governor Whitmer's stay-in-place order, No. 2020-21, some people have voluntarily modified their custody and parenting time orders for various reasons, e.g., distance between homes is too far, making exchanges unsafe; a member of someone's household is a first responder or frontline person and both parents agree not to take the risk[1]; a member of someone's household is more vulnerable to the virus because of health issues; or someone has tested positive for the coronavirus. Others are acting unilaterally and violating court orders, citing their children's health as a justification, still others are hoping the court will make the call. However, most courts are effectively closed for routine matters, and some courts are even ill-equipped to handle emergencies. Therefore, the best – and only – option may be to reach common sense agreements with the other parent in the best interests of your children.

Legitimate concerns for any parents who make COVID-related parenting time adjustments are, 1) how long such a modification will last, and 2) will they be able to return to the regular schedule when this situation improves? It is possible that parents could go weeks, possibly months, without physically being in their children' presence. Will the other parent use a huge break from the schedule as a reason to later file for modification of parenting time?

For now, most judges are favoring compliance with current parenting time schedules and are supportive of providing make-up parenting time for parents who are not having parenting time. However, as missed days turn into weeks and possibly months, make-up parenting time may not be realistic in every case. And, will a long gap in parenting time alter the established custodial environment? This legal concept considers where the children, over an appreciable period of time, tend to look for their necessities in life – food, love, comfort, nurturing. Evaluating the established custodial environment is the starting point for every parenting time and custody determination in court. If one parent has the children physically 100 percent of the time for a long period of time, will the children

start looking to that parent for such necessities and change the established custodial environment? Likely not. Parents can work together to send the appropriate message to children so they can maintain a connection with a non-custodial parent.

Parents who are modifying their parenting time schedules can take steps to maintain/preserve the relationship between the children and the other parent. First, parents should let children know that the stay-in-place order is temporary, and any changes to the parenting time schedule are for safety or health reasons. Second, the non-custodial parent should have generous time over Skype, Zoom, FaceTime or other such mediums and should be able to spend time with the children outside at a distance if possible. The parents should be creative with the children to facilitate a continuing close relationship with the children and the non-custodial parent.

Although courts have ruled that temporary orders and long gaps can change an established custodial environment in certain cases, these are often cases where parents are unilaterally keeping children from the other parent or otherwise engaged in protracted battles. Modifications due to COVID-19 circumstances are unique, and courts are likely to take that into consideration if faced with motions once the stay-in-place order is lifted.

If you have questions or concerns about how to best manage your current parenting time order, Varnum offices are open remotely, and family law attorneys are available to discuss your specific circumstances.

[1] This, in and of itself, is not a reason to withhold parenting time in violation of the order.

VARNUM
ATTORNEYS AT LAW

Modifications of Parenting Time During the COVID-19 Pandemic

AUTHORS

Shalini Nangia

Julia A. Perkins

Erika Leuffen Salerno

RELATED PRACTICES

Coronavirus Task Force

Custody, Parenting Time and Child Support

Family Law

Family Law Advisory
March 30, 2020

Governor Whitmer's Executive Order 2020-21, requiring people in Michigan who are deemed non-essential workers or not engaging an essential activities to stay at home, has caused many parents to question whether they are required to abide by their custody and parenting time orders to return their children to the non-custodial parent.

Section 7(b)(4) of Executive Order 2020-21 specifically states that individuals may travel "[a]s required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement." Furthermore, on March 16, 2020 the Michigan State Supreme Court issued a statement that custody and parenting time orders remain in effect and "[o]nly a new court order can change that. Parents should continue to follow their court orders."

On March 26, 2020 members of the family bar, including judges and referees, participated on a webinar on this issue as we navigate through unique and new territory. The consensus seemed to be that absent a very strong fact-based scenario, parents must follow their current parenting time orders. It does not appear to be enough that the custodial parent is not aware of the contact of the non-custodial parent with others or the contacts those members of the non-custodial parent's household make with other people. It does not appear to be enough that the non-custodial parent is a first responder and therefore naturally more at risk than those parents who are homebound. It is presumed that those first responders are taking the necessary precautions and protocols.

There are cases, however, where it may be that by granting parenting time you are putting your child in serious risk or harm. For example, if the child must fly to get to parenting time and has a high risk condition, such as being diabetic or having an auto-immune disease. Although most courts are accepting emergency motions, they have limitations on access to the courthouse and limitations on when they can hear the motion. Furthermore, although they can hold the hearing by telephone and/or by videoconference, they must adhere to the court rules which require that the hearing be recorded. If that is not a possibility, then you may be left without an avenue to appropriately have your order modified, if warranted.

The issue will likely be heard, whether it is before the scheduled parenting time or after when the non-custodial parent files a contempt motion or a motion for make-up parenting time. All parents should attempt to work together to resolve these issues. If the custodial parent has concerns, contact the other parent and offer make-up parenting time and frequent Skype or Facetime. If that does not work and you believe a motion is necessary, contact an attorney and ask whether an emergency motion, or a motion that can provide relief without a hearing is appropriate. Do all you can to appear that you made the most effort in this difficult situation.

If you would like to discuss parenting time issues with a Varnum family law attorney, we are here to help.

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.

Governor Whitmer Extends Restriction Suspensions for Health Care Providers

AUTHORS

Scott D. Alfree

Sarah L. Wixson

Chloe N. Cunningham

RELATED PRACTICES

Coronavirus Task Force

RELATED INDUSTRIES

Health Care

Health Care Advisory
April 30, 2020

On April 26, 2020 Gov. Gretchen Whitmer signed an executive order extending the suspension of scope of practice laws for Michigan hospitals and health care providers. *See* EO 2020-61. Gov. Whitmer first ordered temporary relief from certain restrictions and requirements governing the provision of medical services on March 29, 2020. *See* EO 2020-30.

The original order temporarily suspended restrictions relating to the scope of practice, supervision, and delegation of health care professionals. Notably, the following practices are permitted during the COVID-19 emergency:

- Physician assistants may provide medical services appropriate to their training, education and experience without a written practice agreement with a physician.
- Advanced practice registered nurses may provide medical services appropriate to their training, education and experience without physician supervision.
- Registered nurses and licensed practical nurses may order throat or nasal swab tests for individuals suspected of being infected by COVID-19.
- Pharmacists may provide care for routine health care, chronic disease or similar conditions appropriate to their training, education and experience without physician supervision.

Additionally, licensed health care professionals or designated health care facilities that provide services to combat COVID-19 are not liable for injuries sustained in relation to those services, unless such injuries are the result of gross negligence.

The new order extends the prior order's duration and expands its scope. This order temporarily suspends certain licensing requirements for physicians, physician assistants, registered professional nurses, licensed practical nurses and respiratory therapists who: 1) are licensed in good standing in another country, 2) have at least five years practice experience, and 3) have practiced for at least one year in the last five years. These licensure requirements are extended as necessary to allow the Department of Licensing and Regulatory Affairs (LARA) to issue an appropriate licensure

that lasts for the duration of the emergency.

The new order is effective immediately and continues until the end of the declared states of emergency and disaster.

VARNUM
ATTORNEYS AT LAW

CMS Accelerated and Advance Payment Program

AUTHORS

Scott D. Alfree

Sarah L. Wixson

Chloe N. Cunningham

RELATED PRACTICES

Coronavirus Task Force

RELATED INDUSTRIES

Health Care

Health Care Advisory
April 13, 2020

In order to increase cash flow to health care providers and suppliers impacted by the COVID-19 pandemic, the Centers for Medicare & Medicaid Services (CMS) has expanded its Accelerated and Advance Payment Program (Program) to a broader group of Part A providers and Part B suppliers. During the period of the COVID-19 public health emergency, CMS may provide accelerated or advance payments to a Medicare provider/supplier who submits a request to the appropriate Medicare Administrative Contractor (MAC) and meets the required qualifications.

CMS's Program applies to hospitals, physicians, non-physician providers and suppliers. Different types of providers/suppliers have varying eligibility for payment amount and repayment timeline. Generally, however, providers/suppliers can receive an advance payment of 100 percent of their Medicare costs for a period of three months.

The Program helps ensure that providers/suppliers have the necessary cash flow needed to combat the COVID-19 pandemic. The Program increases providers' cash flow by pre-paying providers for their Medicare services. It is important to note that the Program is separate from the Public Health Fund created by the CARES Act. The Public Health Fund aids providers in testing and care for COVID-19 patients by offering monetary relief that does not need to be repaid. However, the Program is a loan program to support disruptions in case flows due to the pandemic.

Provider Eligibility

To be eligible for advance payment, CMS states that providers/suppliers must meet four criteria:

1. Have billed Medicare for claims within 180 days immediately prior to the date of signature on the provider's/supplier's request form;
2. Not be in bankruptcy;
3. Not be under active medical review or program integrity investigation; and
4. Not have any outstanding delinquent Medicare overpayments.

In addition to the above criteria established by CMS, MACs may include additional criteria in their applications. This additional criteria is discussed below in the application process section.

Payment Details

The amount of accelerated or advance payment a provider/supplier can request varies. Most providers/suppliers may request up to 100 percent of the Medicare payment amount for a three-month period. A six-month period is available for inpatient acute care hospitals, children's hospitals and certain cancer hospitals. Critical access hospitals (CAH) can request up to 125 percent of their payment amount for a six-month period. The amount requested must be a good faith estimate.

Accelerated or advance payments are a loan and must be repaid. After receiving accelerated or advance payment, providers/suppliers can continue to submit their Medicare claims as usual and will receive full payments. However, 120 days after providers/suppliers receive accelerated or advance payment, CMS will begin to apply claims payments to offset the balance of accelerated or advance payments. The deadline for repayment varies based on provider or supplier as follows:

- Inpatient care hospitals, children's hospitals, certain cancer hospitals and CAHs have up to one year from the date the payment was made to repay the balance.
- All other providers and suppliers have to repay the balance 210 days from the date of the payment.

Application Process

To apply for accelerated or advance payment, providers/suppliers need to complete and submit a one-page request form. The request forms vary based on the individual MAC. The two MACs within Michigan's jurisdiction are CGS Administrators, LLC (CGS) and National Government Services, Inc. (NGS); the latter is for home health and hospice claims.

CMS has established COVID-19 hotlines at each MAC that are operational Monday through Friday to assist with accelerated payment requests.

- Information regarding hotlines
- Full list of MACs organized by state jurisdiction

Each MAC will work to review and issue payments within seven calendar days of receiving the request. Due to CMS's efforts to streamline this process, payments are now generally being processed within four to six days. For faster processing, it is recommended that providers/suppliers submit applications to their MACs electronically.

CGS Application

CGS's application generally reflects the criteria established by CMS and requires the following:

- Provider information (i.e., name, phone number, Medicare and NPI numbers, and email address)
- Reason for request (i.e., "[d]elay in provider/supplier billing process is of an isolated temporary nature beyond the provider/supplier's normal billing cycle due to COVID-19 and not attributable to other third party payers or private patients" or other)
- Certification that provider has no plans to file for bankruptcy or retain bankruptcy counsel
- Requested payment amount (i.e., electing for maximum or less than maximum)

CGS's application: https://www.cgsmedicare.com/pdf/covid_accelerated_req_form.pdf

NGS Application

NGS's application imposes more robust criteria, including:

- Provider information (i.e., name, address, provider and NPI number, provider type [Part A or Part B])
- Requested payment amount
- Point of contact information
- Certification of provider eligibility:
  - The provider has billed claims during the 180 days prior to the request
  - The provider does not have any outstanding/accelerated advanced payments pending for more than 90 days
  - The provider is not in default or delinquent with any pending overpayments
  - The provider is not under fraud investigation

- The provider has not filed for bankruptcy
- The provider's impaired cash position must be such that it would not be alleviated by receipts anticipated within 30 days of the request

Additionally, NGS requires that providers submit, on their organization's letterhead, a detailed explanation of the system issue they are experiencing, specifically whether the issue is CMS related or due to the provider's internal systems.

NGS's application: http://www.mssnyenews.org/wp-content/uploads/2020/03/1770_033020_request_adv_payment_form_j6jk-1.pdf

Michigan Health Care Operations in a Stay at Home World

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 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.

VARNUM
ATTORNEYS AT LAW

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.

VARNUM
ATTORNEYS AT LAW

New Executive Order Shuts Down Significant Indoor Bar, Tavern and Nightclub Services in Michigan

AUTHORS

Christopher P. Baker

RELATED PRACTICES

Beverage Control and Liquor Licenses

Coronavirus Task Force

RELATED INDUSTRIES

Hospitality

Hospitality & Beverage Control Advisory
July 2, 2020

Governor Whitmer has again invoked the Emergency Powers of the Governor Act under the theory that bars in Michigan are "often crowded, indoors, and poorly ventilated...[and] are noisy, requiring raised voices." The governor issued Executive Order 2020-143 which declared that bars and nightclubs in identified regions of the state of Michigan (essentially, the Lower Peninsula other than the northwest section of the state) must cease all indoor service, effective July 2,2020. Restaurants may remain open for indoor service, but all patrons, whether indoors or outdoors, must be seated in socially distanced tables. This most recent executive order will be highly problematic for food and liquor establishments, their patrons and the agencies delegated with the obligation to enforce the terms.

First, the order discriminates against a vast number of establishments, as it targets those taverns, bars and gathering places that happen to operate in regions of the state other than regions 6 and 8 (northwest Michigan and the Upper Peninsula). Food and liquor establishments that are impacted in the balance of the state are forced to shut down interior service, despite any individual efforts or policies to successfully operate safely. Furthermore, despite evidence that the level of COVID-19 cases in some of the impacted counties is no greater than those experienced by the two excepted regions of the state, any establishment deemed a bar or nightclub is presently forced to limit service, simply by virtue of their location.

Second, establishment owners who are presently operating under strict state, county and local guidelines are now imposed with greater requirements and restrictions. In accordance with the order, operators must:

1. require patrons to wear a face covering except when seated at their particular table or bar top (unless the patron is unable medically to tolerate a face covering);
2. require patrons to remain seated at their tables or bar tops except to enter or exit the premises, order food or use the restroom;

3. sell alcohol and beverage only via table service, not via orders at the bars except to the patrons seated at the bar; and,
4. prohibit access to common areas in which people can congregate, dance or otherwise mingle.

Finally, the enforcement community will find the order challenging. Neither the Liquor Control Code of 1998 nor the state's Administrative Code defines a "bar or nightclub." While Executive Order 2020-143 targets bars and nightclubs, there is a lack of any standard that can be applied to accurately identify those establishments that must comply and that are subject to a misdemeanor if they fail to comply. No police officer, deputy or code enforcement agent will possess the capacity to accurately determine whether an establishment can or cannot remain open. The order relies upon a financial test. Those on-premises establishments (not micro brewers, brewers, wineries or distillers operating a taproom) whose gross receipts from the sale of alcohol exceed 70 percent of all sources of revenue, based upon their 2019 tax returns, and those new enterprises that only commenced business in 2020 whose first quarter statements reflect more than 70 percent of sales from alcohol, are considered a bar or nightclub for purposes of the order. Absent the posting of tax returns on their entrance, any establishment that does not fall within the criteria will not be able to defend a claim that their location is a bar or a nightclub, and could be subjected to an enforcement action. As a result, many establishments that are attempting to rebound from the recently-lifted state restrictions will suffer yet another setback as a result of this executive order.

VARNUM
ATTORNEYS AT LAW

Michigan Initiates Limited Spirit Buyback Program

AUTHORS

Christopher P. Baker

RELATED PRACTICES

Beverage Control and Liquor Licenses

Coronavirus Task Force

RELATED INDUSTRIES

Hospitality

Hospitality & Beverage Control Advisory
April 14, 2020

On April 13, 2020 Michigan Gov. Gretchen Whitmer implemented Executive Order 2020-46 in an effort to provide some relief to on-premises retail licensees in Michigan in the form of a buyback of liquor ordered from the state of Michigan through any one of the Authorized Distribution Agents (ADAs) in March 2020. The classes of licensees eligible for the program are limited and include Class C, B-Hotel, G-1, Club, Continuing Care Retirement Center, Aircraft, Watercraft and Train Licenses. Off-premises retail license holders, such as SDM (packaged beer and wine) and SDD (packaged spirits) license holders are not eligible for this program. There are a multitude of components to the program.

First, eligible spirits are those purchased from an ADA prior to March 16, 2020. At the moment, those spirits purchased subsequent to the cutoff date shall not be included.

Second, the Michigan is authorizing the Liquor Control Commission (MLCC) to accept buyback requests by either email or the MLCC website. At the time of this advisory, the MLCC webpage has not been updated with the appropriate application. Further updates with either a dedicated webpage or a link to the new application will follow.

When a licensee elects to participate, the MLCC will advance to the licensee an amount equal to 100 percent of the purchase price of the spirits in the inventory of the licensee (note that no other alcoholic product is eligible, such as beer or wine).

At the moment, the cutoff deadline for the program is Friday, April 17, 2020 at 5:00 p.m. The order does not authorize an extension, and therefore this deadline may be hard with no exceptions for late requests.

Upon advancing cash to a licensee pursuant to this buyback program, the MLCC will acquire legal title to all spirits purchased by the licensee before March 16, 2020 that are in the licensee's inventory at the time the licensee opts into this buyback program. This transfer of title does not suggest nor require the licensee to return the product through the appropriate channels. Rather than requiring the licensee to physically return the product, the licensee must exercise reasonable care to account for and preserve the inventory of any such spirits.

Under the terms of the order, until such time as the MLCC takes actual possession of the spirits, which will not transpire earlier than 90 days after the end of the declared state of emergency by the governor's office, the licensee may regain title by repaying in full the amount of the buyback.

As forms are released or further details are announced by the MLCC or the governor's office, the members of Varnum's Hospitality and Alcohol Beverage Control Practice Team will provide updates to this development. In the meantime, please contact Christopher P. Baker at 734/372-2922 or cpbaker@varnumlaw.com, or other members of the practice team, for further information.

VARNUM
ATTORNEYS AT LAW

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.

VARNUM
ATTORNEYS AT LAW

Department of State Issues Additional Guidance for Nonimmigrant Visas

AUTHORS

Kimberly A. Clarke

Nina A. Thekdi

Yvonne Kupfermann

RELATED PRACTICES

Coronavirus Task Force

Immigration

Immigration Advisory
August 14, 2020

The Department of State issued additional guidance for national interest exceptions for nonimmigrant visas, including H-1Bs, H-2Bs, J-1s, L-1s and dependents. H-1B and L-1 applicants traveling to resume ongoing employment in the U.S. in the same position with the same employer or to provide employment as a technical specialist, expert, senior level manager or a worker that facilitates the immediate and continued recovery in the U.S. or to provide a critical infrastructure need may qualify for exceptions. Please contact your Varnum immigration attorney with any questions.

VARNUM
ATTORNEYS AT LAW

Executive Order Bars Entry for Certain Nonimmigrants

AUTHORS

Kimberly A. Clarke

Nina A. Thekdi

Yvonne Kupfermann

RELATED PRACTICES

Coronavirus Task Force

Immigration

Immigration Advisory
June 23, 2020

President Trump's executive order temporarily suspends entry of nonimmigrants seeking H-1B, H-2B, L-1 and J-1 (intern, trainee, camp counselor, au pair or work travel program) status and their dependents until December 31, 2020. The order does not apply to individuals who are currently in the U.S. and seeking a change or extension of their status or for individuals that possess a nonimmigrant visa as of June 24, 2020 as long as the individuals enter U.S. before the visa expires. Those on visas in the U.S. should carefully review visa validity and travel restrictions for their destinations and U.S. return before planning international travel.

The order also does not apply to lawful permanent residents, spouses and children of U.S. citizens, food supply chain workers providing essential services and individuals determined to be in the national interest. The order directs the Department of Labor to monitor EB-2, EB-3 and H-1B visas for further regulation. Please contact your Varnum immigration attorney with questions.

VARNUM
ATTORNEYS AT LAW

USCIS Phases in Premium Processing

AUTHORS

Kimberly A. Clarke

Nina A. Thekdi

Yvonne Kupfermann

RELATED PRACTICES

Coronavirus Task Force

Immigration

Immigration Advisory
May 29, 2020

U.S. Citizenship and Immigration Services (USCIS) will resume premium processing as of the dates below:

- **June 1**: All eligible Form I-140, Immigrant Petitions for Alien Workers
- **June 8**: Cap-exempt H-1B petitions and all eligible non-H-1B Form I-129 petitions filed before June 8
- **June 15**: H-1B petitions filed on or after June 8 by cap-exempt employers or for beneficiaries exempt based on a Conrad/IGA waiver
- **June 22**: All eligible Form I-129 petitions, including H-1B cap-subject petitions

Please contact your Varnum immigration attorney for more information or questions regarding premium processing a pending petition.

VARNUM
ATTORNEYS AT LAW

President Trump's Executive Order Does Not Impact Immigration Applicants Currently in the US

AUTHORS

Kimberly A. Clarke

Nina A. Thekdi

Yvonne Kupfermann

RELATED PRACTICES

Coronavirus Task Force

Immigration

Immigration Advisory
April 23, 2020

President Trump's executive order temporarily suspends green card seekers from entering the U.S. for 60 days. The order only applies to individuals who are outside of the U.S. and seeking entry as an immigrant (permanent resident/green card holder). The order does not apply to spouses and minor children of U.S. citizens, foreign investors, health care workers, individuals with approved green cards and members of the U.S. Armed Forces. In addition, the order does not apply to individuals who are currently in the U.S. and are seeking a green card/permanent residence through adjustment of status. Nonimmigrant work visas remain unaffected but will be re-evaluated in 30 days. Please contact your Varnum immigration attorney if you have questions.

VARNUM
ATTORNEYS AT LAW

H-2A Update: COVID-19

AUTHORS

Kimberly A. Clarke

Kristiana M. Coutu

Brion B. Doyle

RELATED PRACTICES

Coronavirus Task Force

RELATED INDUSTRIES

Agriculture

Agriculture Advisory
March 31, 2020

H-2A arrivals in 2020 have been significantly impacted by COVID-19 with several agencies implementing policy changes to address visa processing and travel restrictions. The following is the current status of efforts:

- H-2A visa applications are being processed by consulates despite temporary suspension of routine visa services at all U.S. embassies and consulates because H-2 applications are mission critical.
- Returning workers in the U.S. in the past 12 months were visa processed without an interview. On March 26, 2020 consulates in Mexico announced interview waivers to first-time applicants and to applicants whose visas expired in the past 48 months. Applicants who qualify will not require a consulate interview and may be scheduled to apply for visas immediately.
- Mexican H-2A workers may travel to U.S. job locations once processed by the consulate as essential travel.
- USDA and DOL are facilitating identification of foreign and domestic workers that may be available and eligible to transfer to other U.S. agricultural employers to replace workers unable to consular process.
- Employers unable to meet three-fourths guarantee obligation due to COVID-19 pandemic need to request termination under the existing contract impossibility provision due to events outside employer's control.
- Families First Coronavirus Response Act (FFCRA) requires employers to provide paid leave to workers (including H-2A workers) suffering COVID-19 symptoms, quarantined or who are unable to work or need to care for children due to certain COVID-19 related issues. Please see multiple Varnum advisories for FFCRA details and guidance. Information is also included in Varnum's Agricultural Employment Compliance Guide for subscribers.

VARNUM
ATTORNEYS AT LAW

Immigration Consequences of Temporary Layoffs/Furloughs

AUTHORS

Kimberly A. Clarke

Nina A. Thekdi

Yvonne Kupfermann

RELATED PRACTICES

Coronavirus Task Force

Immigration

Immigration Advisory
March 26, 2020

U.S. Citizenship and Immigration Services and the Department of Labor have not issued any special exceptions or guidance for temporary layoffs related to COVID-19 business shutdowns. Employers contemplating temporary layoffs should consider the immigration consequences both to the employer and employees. Generally, employment must continue for an employee to maintain immigration status with a maximum 60-day grace period to find new employment or leave the U.S. after the last day worked.

Students on Optional Practical Training (OPT) status are permitted a maximum of 150 days of unemployment – up to 90 days total during the initial 12-month OPT period and an additional 60 days for students granted a 24-month STEM OPT extension.

Aside from exceptions for medical or voluntary leaves initiated by the employee, employers with H-1B employees are required to continue to pay H-1B employees until the petition is withdrawn.

If you are considering a temporary layoff of employees currently in the U.S. on an employment-based visa status, please contact your Varnum immigration attorney to review the consequences and any necessary steps that should be taken to protect both the employer and the employee.

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.

VARNUM
ATTORNEYS AT LAW

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.

VARNUM
ATTORNEYS AT LAW

Governor Whitmer Announces New Efforts to Increase Enforcement of COVID-19 Workplace Safety Rules

AUTHORS

David E. Khorey

Richard R. Symons

Ashleigh E. Draft

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor & Employment Advisory
November 6, 2020

On November 5, 2020, Governor Whitmer announced that the Michigan Occupational Safety and Health Administration (MIOSHA) would be increasing enforcement of the MIOSHA Emergency Rules on COVID-19 (Emergency Rules), with a specific focus on promoting more remote work for offices. Recall that MIOSHA issued the Emergency Rules on October 14, 2020, following the Michigan Supreme Court's ruling against the Governor on October 2, 2020.

According to the Governor, MIOSHA will be implementing a new state emphasis program for office work. The purpose of the program will be educating employers on compliance with COVID-19 guidelines and rules, and encouraging more remote work. In addition, MIOSHA will be increasing scrutiny of remote work policies required by Emergency Rule 5(8), which states that all employers must "create a policy prohibiting in-person work for employees to the extent that their work activities can feasibly be completed remotely." The increased enforcement efforts may also result in more in-person inspections by MIOSHA. The new program and increased enforcement efforts are expected to begin sometime next week.

The following day, on November 6, 2020, the Michigan Department of Health and Human Services (MDHHS) released new guidance for employers. The MDHHS guidance, issued with reference to the MIOSHA Emergency Rules, states that "employers should only permit in-person work when attendance is strictly required to perform job duties." The guidance goes on to state that this "strict requirement" should "not be construed as permitting in-person work solely because working remotely may result in decreased productivity or efficiency" or "because there may be additional costs relating to performing work remotely." Rather, the guidance explains, this "strict requirement" means that in-person work is only permitted when a worker is "unable to physically complete" his or her job tasks in a remote setting.

Failure to comply with the MIOSHA Emergency Rules could result in several consequences for Michigan businesses. Under Section 35 of the Michigan Occupational Safety and Health Act, MIOSHA has the authority to cite employers, require abatement, and fine employers up to $7,000 for failing

to produce a remote work policy, or if an employer's COVID-19 Preparedness and Response Plan fails to comply with the Emergency Rules. In light of the forthcoming enforcement efforts and the penalties connected with non-compliance, Michigan businesses should review their COVID-19 Preparedness and Response Plans for compliance with the Emergency Rules, and prepare a remote work policy in accordance with Emergency Rule 5(8) and taking into consideration the new MDHHS guidance.

Please contact any member of the Varnum team for assistance in understanding how these developments may affect your workplace.

VARNUM
ATTORNEYS AT LAW

DOL Revises FFCRA Regulations Following Federal Court Decision

AUTHORS

Luis E. Avila

David E. Khorey

Ashleigh E. Draft

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor Advisory
September 15, 2020

On September 11, 2020, the U.S. Department of Labor (DOL) issued revised regulations under the Families First Coronavirus Response Act (FFCRA). These revisions, which are scheduled to take effect on September 16, were released in response to a recent New York federal court decision that struck down elements of the FFCRA final rule, *New York v. U.S. Dep't of Labor, et al.*, No. 20-CV-3020 (S.D.N.Y. Aug. 3, 2020).

New York v. U.S. Dep't of Labor struck down four parts of the FFCRA final rule: (1) the requirement that FFCRA leave is available only if an employer has work available for the employee; (2) the requirement that an employee must gain his or her employer's consent before taking FFCRA leave intermittently; (3) the definition of who may be excluded from FFCRA leave as a "health care provider"; and (4) the requirement that an employee must provide his or her employers with certain notice and documentation before taking FFCRA leave.

In its revised regulations, the DOL clarifies and doubles down on some of its original positions, while making changes to other positions. Specifically, the DOL:

- Reaffirms that paid leave under the FFCRA may only be taken if the employer has work available for the employee to perform and denies FFCRA leave to workers when their employers do not have work for them.
- Reiterates that intermittent leave under FFCRA may only be taken with employer consent.
- Amends and narrows the definition of "health care providers" who are excluded from FFCRA coverage. Under the revised definition, a worker is a health care provider only if the individual is "capable of providing health care services," including "diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care." This means that FFCRA leave will now be available to certain health care industry employees—such as medical receptionists, records managers, maintenance staff, and others—who were previously excluded from coverage.
- Clarifies that required documentation must be provided "as soon as practicable, which in most cases will be when the employee provides

notice" of the need for FFCRA leave.

Varnum continues to monitor these regulatory changes and will provide updates as appropriate. To discuss how these changes may affect your workplace, please contact any member of Varnum's labor and employment team.

VARNUM
ATTORNEYS AT LAW

New Michigan Executive Order Clarifies Definition of Principal Symptoms of COVID-19 for Workers Who Stay Home

AUTHORS

David E. Khorey

Barbara A. Moore

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
August 28, 2020

On August 27, 2020, Governor Whitmer signed a new executive order revising and clarifying a previously issued executive order. On August 7, 2020, Governor Whitmer signed Executive Order 2020-166 to update the protections for employees who remain home from work when they or one of their close contacts has symptoms of COVID-19 or tests positive for the disease. The only change between EO 2020-166, and its replacement, EO 2020-172, is the new definition of the "principal symptoms of COVID-19." EO 2020-172 will be applied prospectively and is effective as of August 27, 2020.

The purpose of EO 2020-166 and its predecessor order, EO 2020-36, was to allow employees to stay home from work when they were at particular risk of infecting others with COVID-19. The order was not intended to protect employees who stay home for unrelated reasons such as a cold, food poisoning, or allergies. However, the updated definition of the principal symptoms of COVID-19 contained in EO 2020-166 encouraged absenteeism and mistakenly protected workers who did not actually display symptoms of COVID-19.

Specifically, EO 2020-166 defined the principal symptoms as "fever, sore throat, a new uncontrollable cough that causes difficulty breathing, diarrhea, vomiting, abdominal pain, new onset of a severe headache, and new loss of taste or smell." Under this definition, medical professionals had the discretion to provide workers with written documentation excusing them from work when they had any of the symptoms listed under EO 2020-166, even if the symptoms were caused by existing conditions. Thus, under EO 2020-166, medical professionals could err on the side of caution, and provide doctor's slips for individuals who posed little to no risk of infecting others with COVID-19.

EO 2020-172 to clarifies this very issue. The order now states that the principal symptoms are:

- (i) any one of the following not explained by a known medical or physical condition:

- fever,
- an uncontrollable cough,
- shortness of breath; or

- (ii) at least two of the following not explained by a known medical or physical condition:
  - loss of taste or small
  - muscle aches ("myalgia")
  - sore throat
  - severe headache
  - diarrhea
  - vomiting; or
  - abdominal pain.

Moving forward, employees who remain home and wish to seek the benefits and protections provided under EO 2020-172 must meet the stricter definition of the "principal symptoms of COVID-19." Employers should carefully review doctor's slips and requests to stay home to ensure that an employee's absence is covered by EO 2020-172.

Please contact any member of Varnum's labor and employment team for assistance in understanding how these updates may affect your workplace.

VARNUM
ATTORNEYS AT LAW

New Michigan Executive Order Updates Workplace Rules

AUTHORS

Luis E. Avila

David E. Khorey

Elizabeth Wells Skaggs

Ashleigh E. Draft

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
August 11, 2020

On August 7, 2020 Governor Whitmer signed an executive order updating protections for employees who stay home from work when they or one of their close contacts has symptoms of COVID-19 or tests positive for the disease. The new order, EO 2020-166, rescinds and replaces EO 2020-36.

Like the previous order, EO 2020-166 prohibits employers from discharging, disciplining or otherwise retaliating against an employee who stays home when he or she is at particular risk of infecting others. Important updates are summarized below:

- Employers may now require documentation from the local health department that an employee is under an order or quarantine or isolation.
- The list of principal symptoms, which may cause an employee to quarantine or isolate, has been updated to reflect new guidance from the CDC. COVID-19 principal symptoms now include fever, sore throat, a new uncontrolled cough that causes difficulty breathing, diarrhea, vomiting, abdominal pain, new onset of severe headache and new loss of taste or smell.
- Close contact is defined as being within six feet of an individual for 15 minutes or more.
- Time periods for quarantine and isolation are updated to reflect recent CDC guidance. EO 2020-166 states that:
  - **Individuals who test positive for COVID-19** should remain in their homes until:
    - 24 hours have passed since the resolution of their fever;
    - 10 days have passed since their symptoms first appeared or since they were swabbed for a test that yielded the positive result; and
    - other symptoms have improved.
  - **Individuals who display one or more of the principal symptoms** of COVID-19 (and are awaiting test results) should stay in their homes until:
    - 24 hours have passed since the resolution of their fever;
    - 10 days have passed since their symptoms first appeared; and

- other symptoms have improved or they receive a negative COVID-19 test

- **All people who have had close contact with an individual** who tests positive for COVID-19 or with an individual who displays symptoms of the virus should remain at their homes until either 14 days have passed since the last close contact or the symptomatic individual receives a negative COVID-19 test. This section does not apply to health care professionals and those working in a health care facility, first responders, CPS employees, childcare employees, adult foster care employees and workers at correctional facilities.

As before, employers must allow employees to stay home from work for the time periods described above. Employers must treat a quarantining or isolating employee as if he or she was taking medical leave under Michigan's Paid Medical Leave Act, MCL 408.961. Employers are permitted, but not required, to debit the time away from work against the employee's accrued leave. If the employee has no paid leave, the leave may be unpaid.

For businesses under 500 employees covered by the Families First Coronavirus Response Act (FFCRA), Emergency Paid Sick Leave may be available to cover all or part of the employee's absence. FFCRA leave is not available if the employee is able to work remotely from home during his or her quarantine or isolation. Please see Varnum's client advisory on FFCRA for more information.

Please contact any member of Varnum's labor and employment team for assistance in understanding how these updates may affect your workplace.

VARNUM
ATTORNEYS AT LAW

New Executive Orders Revise Michigan's Worker Safety Rules

AUTHORS

Luis E. Avila

Barbara A. Moore

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
July 10, 2020

On Thursday, July 9, 2020 Michigan Gov. Whitmer issued Executive Order 2020-145, which provides for revised workplace safety rules to protect Michigan workers from COVID-19 and rescinds Executive Order 2020-114. Specifically, the revised rules now require **all businesses** to do the following:

- Require face coverings in shared spaces, including during in-person meetings and in restrooms and hallways;
- Provide any communication and training on COVID-19 infection control practices in the primary languages common in the employee population; and
- Place posters in the languages common in the employee population that encourage staying home when sick, cough and sneeze etiquette, and proper hand hygiene practices.

Executive Order 2020-145 also incorporates new requirements for restaurants and bars, as set forth in Executive Order 2020-143. Furthermore, the governor has established workplace safety rules for meat and poultry processing plants, which include:

- Conducting daily entry screening at dedicated entry points for all workers, suppliers and visitors;
- Configuring communal work environments so employees are spaced at least six feet apart;
- Requiring employees to wear a face mask whenever present at the facility, except when removal is necessary to eat or drink;
- Providing and requiring use of personal protective equipment including clean cloth face coverings, face shields, etc., as required by the order;
- Installing physical barriers, such as strip curtains or Plexiglas, to separate meat and poultry processing employees;
- Taking measures to ensure adequate ventilation in work areas;
- Staggering employees' arrival, departure, break and lunch times to avoid congregations of employees;
- Reducing processing capacity or modifying production lines and/or staggering workers to minimize the number of employees in the facility

at any one time; and

- Disinfecting an employee's workstation and tools handled by the employee if the employee becomes or reports being sick.

In addition, on Friday July 10, 2020 Gov. Whitmer issued Executive Order 2020-147 addressing masks and face coverings. Businesses subject to this order must come into compliance with the requirements by Monday, July 13, 2020. Failure to comply with this order may result in a loss of operating licenses including, but not limited to, a liquor license. Specifically, the order requires any business open to the public to **refuse entry or service** to people who refuse to wear a face covering as required by the order. Child care centers and day, residential, travel or troop camps are not considered businesses open to the public for purposes of this order. Governors in the states of Kansas, Maine, Nevada, Pennsylvania and Washington have imposed similar requirements on businesses.

Businesses open to the public must, however, permit entry and provide services to certain individuals not wearing a face covering, including individuals who are younger than five years old and those who cannot medically tolerate a face covering. Businesses may also ask customers to temporarily remove their face covering for identification purposes. In addition, customers are allowed to remove their masks when engaged in specific services, including when they are eating or drinking while seated, exercising or receiving a service for which temporary removal is necessary.

Businesses are also required to post signs at entrances instructing customers of their legal obligation to wear a face covering while inside. At this time, signs do not need to contain any particular language; however, the Michigan Department of Labor and Economic Opportunity may later require businesses to post signs developed by the department or conform with department-established requirements.

Lastly, Michigan employers should take note that Executive Order 2020-147 mistakenly states that it replaces Executive Order 2020-114.

Should you have any questions about how Executive Order 2020-145 or Executive Order 2020-147 may impact your business or operation, or if you need assistance updating COVID-19 employment policies, please contact any member of Varnum's labor and employment team for assistance.

VARNUM
ATTORNEYS AT LAW

New MI Executive Order Allows Outpatient Health Care Facilities To Resume Non-Essential Procedures Starting May 29

AUTHORS

David E. Khorey

Zachary J. Meyer

Ethan J. Beswick

Ashleigh E. Draft

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

RELATED INDUSTRIES

Health Care

Labor and Employment Advisory
May 21, 2020

On Thursday, May 21 Gov. Whitmer rescinded Executive Order 2020-91, issued only three days prior, and released an amended order that now includes new provisions governing outpatient health care facilities. This latest order, Executive Order 2020-97 (Order), also makes some minor adjustments to the workplace safety rules announced earlier in the week.

The governor's latest announcement allows outpatient health care facilities, including doctor's offices, dental offices and veterinary clinics to resume non-essential procedures starting May 29, 2020. These offices must abide by a number of workplace safety protocols, and the Order does not provide an expiration date for the new safety measures.

The Order provides 15 workplace safety rules specific to health care facilities, including limiting waiting room occupancy, conducting a common screening protocol for all patients and adding special hours for patients highly vulnerable to severe illness from COVID-19. Facilities are also instructed to enable contactless sign-in as soon as practicable. Such facilities must also abide by the general business workplace safety rules set out in section one of the Order.

The new Order maintains the enhanced enforcement powers first revealed in Executive Order 2020-91. The State of Michigan now has two routes of enforcement it may pursue against employers who fail to follow the workplace safety rules enumerated in the Order. First, the workplace safety rules are given the force and effect of regulations adopted by the state agencies that oversee workplace health and safety. Such agencies are given full authority to enforce the rules, and any challenges to penalties must move through the agencies' administrative appeals process. Second, the Order states that violations of the workplace safety rules are also violations of the Michigan Occupational Health and Safety Act (MIOSHA). As a result, Michigan's Occupational Safety and Health Administration will have the authority to conduct investigations into violations, issue penalties and distribute cease operation orders.

Varnum attorneys remain ready to assist employers with compliance matters and responses to complaints concerning unsafe workplaces, including MIOSHA investigations. Please contact any member of Varnum's labor and employment team for assistance.

VARNUM
ATTORNEYS AT LAW

Michigan Ramps Up Workplace Safety Regulations and Enforcement Powers Under New Executive Order

AUTHORS

David E. Khorey

Richard R. Symons

Ethan J. Beswick

Ashleigh E. Draft

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
May 19, 2020

Gov. Whitmer released detailed new workplace safety regulations on Monday, May 18, 2020 through Executive Order 2020-91 (Order). The Order also provides the State of Michigan with enhanced enforcement capabilities and greater consequences for employers who disregard the rules. The Order does not identify an expiration date for the new workplace rules.

New Workplace Safety Rules

The Order sets out 17 general workplace safety rules that apply to all employers who are conducting in-person operations during the coronavirus pandemic, pursuant to Executive Order 2020-92. While some of these workplace safety rules are restated from previous executive orders, others - such as the requirement that employers designate one or more workplace supervisors to oversee COVID-19 control strategies - are new. New rules include mandated COVID-19 employee training and the development of a daily entry self-screening protocol for all employers.

In addition to the general workplace safety rules, the Order identifies numerous industry-specific workplace safety rules to combat the spread of COVID-19. Industries that must comply with these specific rules are: employers whose work is performed outdoors; construction; manufacturing; research laboratories (excluding labs that perform diagnostic testing); retail stores that are open for in person sales; offices; and restaurants and bars.

Enhanced Enforcement Powers

Previously, employers who failed to follow COVID-19 workplace safety rules were subject to a misdemeanor punishable by up to a $500 fine and/or 90 days in jail. The Order now provides two new routes for enforcement. First, the workplace safety rules are given the force and effect of regulations adopted by the state agencies that oversee workplace health and safety. Such agencies are given full authority to enforce the rules, and any challenges to penalties must move through the agencies' administrative appeals process. Second, the Order states that violations of the workplace

safety rules are also violations of the Michigan Occupational Health and Safety Act (MIOSHA). As a result, Michigan's Occupational Safety and Health Administration will have the authority to conduct investigations into violations, issue penalties and distribute cease operation orders.

In addition, because the Order mandates employee training on how to report unsafe working conditions, employers should anticipate the possibility of such internal reports or MIOSHA investigations. Employers should also be mindful not to retaliate against employees who file such complaints.

Varnum attorneys are ready to assist employers with compliance matters and responses to complaints concerning unsafe workplaces, including MIOSHA investigations. Please contact any member of Varnum's labor and employment team for assistance.

VARNUM
ATTORNEYS AT LAW

COVID-19 Tests in the Workplace

AUTHORS

Luis E. Avila

Maureen Rouse-Ayoub

Stephanie R. Setterington

Ashleigh E. Draft

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
April 24, 2020

The U.S. Equal Employment Opportunity Commission (EEOC) has updated its Technical Assistance Guidance to clarify that employers may administer and/or require COVID-19 testing as a gateway mechanism before allowing employees to return to the workplace without violating the American with Disabilities Act. Screening workers for health risks is one way for businesses to meet their legal responsibility to provide employees with a safe workplace and to potentially isolate employees that carry the virus but are asymptomatic from infecting others. However, as cautioned by the EEOC, testing only confirms whether the virus is currently present. Employees may still acquire the virus after testing, requiring ongoing compliance with the employer's existing infection control practices to protect workers.

The EEOC has approved use of the following screening mechanisms if completed in a manner that is consistent with the EEOC guidance including confidentiality of medical information:

- **Screening for Symptoms:** Employers may ask employees entering the workplace about any symptoms identified by public health authorities as associated with COVID-19. For instance, employers may ask employees about fever, cough, shortness of breath, loss of smell or taste, as well as gastrointestinal problems such as nausea, diarrhea and vomiting. Employers must maintain the confidentiality of any notes or documentation related to this screening.
- **COVID-19 Tests:** Employers may administer a COVID-19 test (designed to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace without running afoul of the Americans with Disabilities Act. Employers considering this course of action should review guidance from the U.S. Food and Drug Administration concerning safe and accurate testing.
- **Temperature Checks:** Employers may require all employees to have a daily temperature check before entering the workplace and may maintain a log of the results. Again, employers must maintain the confidentiality of this medical information.

The utility and permissibility of employers using antibody (or serology) tests is still an open question. The EEOC has not yet spoken to whether such tests are allowable in the workplace.

All medical information about a particular employee, including information relating to COVID-19, should be stored separately from the employee's personnel file, thereby limiting access to this confidential information. However, employers may store medical information related to COVID-19 in existing medical files and need not create a new file system solely for this information.

Employers considering adopting testing procedures should be mindful of the potential for false positives or false negatives and have internal protocols in place for follow up to clear employees to return to the workplace.

Varnum continues to monitor this situation and will provide updates as appropriate. Please contact any member of Varnum's labor and employment team with questions about applying this guidance to your workplace.

VARNUM
ATTORNEYS AT LAW

Unemployment Benefits: Six Things Michigan Employers Should Know

AUTHORS

Kimberly A. Clarke

Ashleigh E. Draft

Tiffany K. Snow

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
April 21, 2020

The COVID-19 pandemic and the accompanying economic downturn have placed many employers in difficult and unprecedented circumstances. This advisory provides a summary of the most frequently asked questions Varnum has received related to unemployment benefits during the pandemic.

1. When are Michigan employees entitled to unemployment benefits?

Individuals are entitled to benefits if they are no longer working through no fault of their own and are able and available to work. During the COVID-19 pandemic, Michigan has waived work search requirements for unemployed individuals. Unemployment benefits are generally not available to individuals who have the ability to work from home (or telework) and are not available to individuals who are receiving paid sick leave or other paid leave benefits. An employee who refuses to come to work, when work is available, due to fear of exposure to the virus, is not entitled to unemployment benefits.

Quitting work without good cause in order to obtain unemployment benefits is fraud, and Michigan's Unemployment Insurance Agency (UIA) may pursue action against fraudulent claimants. Employers also have a duty to truthfully respond to requests for information received from the UIA and may be subject to fraud actions for intentionally helping individuals pursue benefits to which they are not entitled.

2. When are Michigan employees entitled to underemployment benefits?

Underemployment occurs when a worker is employed, but his/her hours or wages have been reduced for reasons other than the worker's request. Such employees may be eligible for unemployment benefits under certain circumstances. An underemployed claimant must report all gross earnings to the UIA each week through the UIA's online portal, and the claimant will receive a reduced weekly benefit depending on his/her earnings during the claimed week. In any week the claimant's earnings equal or exceed 1.5

times the claimant's weekly unemployment benefit amount, the claimant will not receive a benefit payment for that week.

3. Which employees will be eligible to receive the additional federal $600 unemployment benefit?

The CARES Act provides for a temporary emergency increase in unemployment compensation benefits, termed Federal Pandemic Unemployment Compensation (FPUC). This program provides an additional $600 per week to individuals who are collecting unemployment, including individuals who receive benefits through the Work Share program or underemployment. If the individual is eligible to receive at least one dollar ($1) of underlying benefits for the claimed week, the individual will receive the full $600 FPUC.

This means that individuals who typically receive underemployment benefits will not be eligible for FPUC in any claimed week in which they earn too much to qualify for the underlying underemployment benefit.

4. What must Michigan employers provide to separated employees when conducting layoffs?

If the separated employee is eligible for unemployment benefits, employers should provide an Unemployment Compensation Notice to Employees upon separation. This notice is Michigan UIA Form 1711 and was updated in March 2020 with information specific to the COVID-19 pandemic. For questions about whether Worker Adjustment and Retraining Notification Act protections may apply to your workplace, please contact any member of Varnum's labor and employment team.

5. May employers contest unemployment claims made by employees?

Yes. Employers may contest unemployment claims if the employer believes that the employee should not receive benefits. Protest instructions are located on the monetary determination letter the employer receives informing of the claimant name and amount of weekly benefit.

6. Are employees on layoff or furlough entitled to sick or family leave benefits under the Families First Coronavirus Response Act (FFCRA)?

No. Employees who are no longer able to work because they have been furloughed or laid off, or because their worksite is closed, are not entitled to take paid sick leave or expanded family and medical leave under the FFCRA. Similarly, if an employee's work hours have been reduced because there is not enough work for him or her to perform, the employee may not use paid sick leave or expanded family and medical leave for the hours that he or she is no longer scheduled to work.

However, if an employer recalls such employees to work before the December 31, 2020 expiration of the FFCRA, and they meet one of the criteria to receive paid sick leave or expanded family and medical leave, they may be entitled to these benefits. Employers should review all documentation provided by the employee in order to approve such request.

Please contact any member of Varnum's labor and employment team to discuss how these regulations may apply in your workplace.

VARNUM
ATTORNEYS AT LAW

Best Practices for Employers' COVID-19 Preparedness and Response Plans

AUTHORS

Luis E. Avila

Eric R. Post

Ethan J. Beswick

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Law Advisory
April 16, 2020

The coronavirus outbreak has caused many employers to rethink their ability to respond to widespread pandemic affecting their employees and workplace operations. Specifically, the outbreak has caused employers to scramble to develop and adopt policies and procedures to ensure the health and safety of their workers during times of unprecedented uncertainty. Additionally, Gov. Gretchen Whitmer's Executive Order 2020-42 requires businesses, operations and government agencies that are continuing in-person work to adhere to social distancing practices and measures, which include developing a COVID-19 preparedness and response plan consistent with recommendations provided by the Occupational Health and Safety Administration. One portion of this plan is to develop a confirmed coronavirus case procedure by which an employer can ensure prompt identification and isolation of sick employees, while maintaining a safe work environment. The below outlined case procedure generally addresses these concerns.

1. Employees should self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure.
2. When an employee reports signs or symptoms of COVID-19, the employee should not show up to conduct in-person work and should notify their direct supervisor immediately.
3. If an employee is diagnosed with COVID-19, he/she should notify the HR director (or other applicable individual) immediately.
4. The HR director (or other applicable individual) should inquire into the following areas of the employees situation:
    - Ask about current health status.
    - Ask about emotional state.
    - Answer health insurance questions.
    - Answer other benefits related questions.
    - Ask about other resources or assistance employer can provide.
    - Ask for information about when and where the employee had been in the past several days and for a list of other personnel with whom he/she has had contact.

5. Employer should notify all relevant personnel, including employees, customers, vendors, etc., with whom the diagnosed employee has come in close contact. Employer should request all personnel who have been in close contact with the employee self-quarantine for 14 days.
6. Employer should notify all employees of the fact that an employee (who shall remain anonymous) has tested positive for COVID-19. This message shall include the following:
    - Reminder to all employees of CDC and local health department testing guidelines.
    - Reminder to all employees of policies and procedures that have been put in place to combat the spread of COVID-19.
    - Acknowledgement of the emotional impact this news and all COVID-19 news is having on members of employer's organization, and encourage employees to contact their supervisors with any questions or concerns.
7. Employer should arrange for a thorough cleaning of the areas of employer's facilities that the employee with a confirmed case inhabited. Such cleaning should follow all applicable CDC guidelines and cleaning standards.

If you have questions regarding the confirmed coronavirus case procedure or wish to discuss the development of a COVID-19 preparedness and response plan, please reach out to your Varnum attorney.

VARNUM
ATTORNEYS AT LAW

Governor Whitmer Signs Executive Order with Special Provisions for Workers

AUTHORS

David E. Khorey

Elizabeth Wells Skaggs

Ashleigh E. Draft

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
April 6, 2020

On April 3, 2020 Governor Whitmer signed an executive order prohibiting employers from discharging, disciplining or otherwise retaliating against an employee for staying home from work if they or one of their close contacts are exhibiting symptoms of COVID-19 or tests positive for the disease. The executive order is effective immediately and will remain in place until the end of the governor's declared state of emergency or the order is otherwise rescinded.

The governor's order states that:

- Individuals who test positive for COVID-19 or who display one or more of the symptoms of the disease should remain in their homes until three days have passed since their symptoms have resolved and seven days have passed since their symptoms first appeared or since they were swabbed for a test that yielded the positive result.
- All people who have had close contact with an individual who tests positive for COVID-19 or with an individual who displays symptoms of the virus should remain at their homes until either 14 days have passed since the last close contact or the symptomatic individual receives a negative COVID-19 test. This section does not apply to health care professionals, workers at a health care facility, first responders, child care workers and correctional facilities.
- When symptomatic people and their close contacts must leave the home, they should wear some form of covering over their nose and mouth, such as a homemade mask, bandana or scarf. For now, supplies of N95 masks and surgical masks should generally be reserved for health care professionals and first responders.

An employer may not discharge or discipline an employee who is staying home from work in compliance with the policies laid out above. The order specifies that:

- Employers must allow employees to stay home from work for the periods described above. Employers may not retaliate against employees for taking such leave.
- Employers must treat such an employee as if he/she were taking medical leave under Michigan's Paid Medical Leave Act, MCL 408.961.

- If the employee has no paid leave, the leave may be unpaid. Employers are permitted, but not required, to debit the hours from the employee's accrued leave.
- Employers may not discharge, discipline or retaliate against such employees for failing to comply with a requirement to document that the employee or his/her close contact has one or more of the primary COVID-19 symptoms.
- For businesses under 500 employees covered by the Families First Coronavirus Response Act (FFCRA), Emergency Paid Sick Leave (EPSL) may also be available to cover the employee's absence if the requirements of FFCRA have been met. Please see Varnum's client advisory on FFCRA for more information.

Please contact any member of Varnum's labor and employment team for assistance in understanding how this new executive order may apply to your workplace. As always, Varnum will continue to monitor this developing situation and provide updates as appropriate.

VARNUM
ATTORNEYS AT LAW

New Michigan Executive Order Sets Forth Rules for Handling Employee Absences From Work Due to Potential Risk of Infecting Others

AUTHORS

Stephanie R. Setterington

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
April 3, 2020

On April 3, 2020 Michigan Governor Gretchen Whitmer issued Executive Order No. 2020-36, "protecting workers who stay home, stay safe when they or their close contacts are sick," which sets forth requirements and restrictions for how employers must treat situations in which an employee is off work due to symptoms or other particular risk of infecting others with COVID-19.

Our Michigan-based clients should take note of these new obligations that are immediately in effect, continuing until the end of the declared states of emergency and disaster.

For further information or questions, please contact any member of Varnum's labor and employment team. Our team is analyzing this order closely and will provide further guidance in due course.

VARNUM
ATTORNEYS AT LAW

DOL Clarifies the Families First Coronavirus Response Act Small Business Exemption

AUTHORS

Stephanie R. Setterington

Elizabeth Wells Skaggs

Barbara A. Moore

Tiffany K. Snow

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
April 3, 2020

On April 1, 2020 the U.S. Department of Labor (USDOL) announced that the Department's Wage and Hour Division posted unpublished regulations on the recently-enacted Families First Coronavirus Response Act (FFCRA). The published version of the regulations is scheduled to be available on April 6, 2020. The long-awaited regulations will provide covered employers with additional clarity on their obligations to provide Expanded Family and Medical Leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) and Paid Sick Leave under the Emergency Paid Sick Leave Act (EPSLA). The regulations to the FFCRA will remain in effect from April 1, 2020 to December 31, 2020.

Significantly, the FFCRA regulations explain how small business employers may elect an exemption from certain provisions of the FFCRA. This exception for small businesses is only an exception from the obligation to provide paid leave to an employee who requests leave due to school or childcare closures. Small businesses are still obligated to provide Emergency Paid Sick Leave under the FFCRA to employees who need leave because: they themselves are subject to a quarantine or an isolation order; they have been advised by a health care provider to self-quarantine; they are experiencing COVID-19 symptoms and are seeking a medical diagnosis; or they are caring for an individual who is subject to a quarantine order or has been advised to quarantine. There is no exception for small businesses from this requirement.

In order to take advantage of the exemption, an officer of the employer must document that he or she has determined that providing leave to care for a child would jeopardize the viability of the business as a going concern because:

- the requested leave would result in the small business's expenses and financial obligations to exceed available business revenues and cause the small business to cease operating at minimal capacity; or
- the absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business or responsibilities; or

- there are not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave, and those labor or services are needed for the small business to operate at minimal capacity.

In its preliminary discussion of the regulations, the USDOL indicates that "the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively." This suggests that small business employers who wish to utilize the exemption must determine its availability on a case-by-case basis.

Moreover, the regulations also state that regardless of whether a small business employer exempts one or more employees, the small business employer is still required to post the FFCRA notice. This is consistent with the preliminary discussion indicating that the exemption is to be determined on a case-by-case basis and limited to the leave types for which the exemption is available.

While use of the exemption must be made on an individual basis, these regulations also make clear that a small business employer will not be required to apply for the exemption each time it is used. Instead of sending documentation to the USDOL, the employer's officer must prepare documentation explaining that one of the above-listed criteria has been met. An employer should only use the small business exemption based upon good faith and a carefully made determination that it qualifies. Any documentation prepared in support of the election must be retained for at least four years.

In determining when and how to elect this exemption, small business employers should keep a close eye on the number of employees they employ. As business conditions improve and employers cross the 50 employee threshold, the employer no longer qualifies for the small business exemption.

For further information on how to elect the small business exemption from the obligation to provide paid leave due to school or childcare closures, please contact any member of Varnum's labor and employment team.

VARNUM
ATTORNEYS AT LAW

Families First Coronavirus Response Act Effective Date and Additional Guidance from the U.S. Dept. of Labor

AUTHORS

David E. Khorey

Maureen Rouse-Ayoub

Stephanie R. Setterington

Elizabeth Wells Skaggs

Ashleigh E. Draft

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Labor and Employment Advisory
March 26, 2020

On March 24, 2020 the U.S. Department of Labor (DOL) published additional guidance related to the Families First Coronavirus Response Act (the Act). The new guidance and accompanying FAQ included information that the Act's effective date will be **Wednesday, April 1, 2020**. Under the Act, the DOL was required to set an effective date no later than 15 days following the date of enactment, which occurred on March 18.

A 30-day non-enforcement period to enable employers to comply with the Act was announced by the DOL, Treasury Department and the IRS on March 20. During this time, employers must continue to act reasonably and in good faith to comply with the Act. Conflicting materials issued by the DOL have made it unclear whether the DOL's 30-day period of non-enforcement will begin on April 1 or start on March 18.

Another section of the new guidance appears to conflict with the March 20 joint announcement stating that employers could immediately begin taking advantage of the tax credits under the Act. The U.S. DOL FAQ states that paid sick time provided before April 1 for a qualifying purpose does not count against the employee's leave entitlement under the Act. The position of the IRS regarding the status of tax credits it had previously announced were immediately available on March 20 is unknown. Varnum has reached out to agency contacts in an effort to clarify the confusion created by conflicting documents and will continue to update as more information becomes available.

The new guidance also addresses how to count employees toward the Act's 500-employee threshold. The leave provisions of the Act only apply to private employers with fewer than 500 employees, and the guidance clarifies that temporary employees, employees on leave and employees of joint or integrated employers should be counted toward the 500-employee threshold. Please contact any member of Varnum's labor and employment team with questions about how these rules apply to your specific situation.

On March 25, the DOL also made available a poster that will fulfill the Act's notice requirement. A notice for federal employees is also available. Each covered employer must post a notice of the Families First Coronavirus

Response Act requirements in a conspicuous place on its premises. An employer may also satisfy this requirement by mailing the notice to employees or posting the notice on the employer's internal or external website. The notice only needs to be given to current employees and does not need to be shared with recently laid-off individuals.

More guidance from the DOL is anticipated in the coming days, and the DOL will be developing more formal regulations that address these and other questions. As always, Varnum will continue to monitor these developments and provide updates as appropriate.

VARNUM
ATTORNEYS AT LAW

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

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

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.

VARNUM
ATTORNEYS AT LAW

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

RELATED PRACTICES

Coronavirus Task Force

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.

VARNUM
ATTORNEYS AT LAW

President Trump Signs the Families First Coronavirus Response Act

AUTHORS

David E. Khorey

Maureen Rouse-Ayoub

Ashleigh E. Draft

Barbara A. Moore

RELATED PRACTICES

Coronavirus Task Force

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.

VARNUM
ATTORNEYS AT LAW

Labor and Employment: COVID-19 Bulletin

AUTHORS

David E. Khorey

Maureen Rouse-Ayoub

Ashleigh E. Draft

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

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.

VARNUM
ATTORNEYS AT LAW

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

AUTHORS

Ethan J. Beswick

David E. Khorey

Maureen Rouse-Ayoub

Stephanie R. Setterington

RELATED PRACTICES

Coronavirus Task Force

International Business Law

Labor and Employment

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)

COVID-19 and Executive Orders: When State Action Impedes Performance

AUTHORS

John J. Rolecki

Michael J. Roth

Olayinka A. Ope

RELATED PRACTICES

Coronavirus Task Force

Litigation and Trial

Litigation Advisory
April 6, 2020

The federal government and states across the nation have taken unprecedented action to prevent the spread of COVID-19. On March 21, 2020 Michigan Governor Gretchen Whitmer issued Executive Order 2020-20, which closed a number of restaurants, theaters, performance venues, gymnasiums and other places of public accommodation. On March 23, Gov. Whitmer issued Executive Order 2020-21, which ordered individuals to stay in their residences (subject to several exceptions).

These and other similar governmental actions are clearly disruptive to commerce and contractual relations. Could these actions create important rights for a business or individual who cannot fulfill a contract without violating one or more of these orders? It depends.

If a contract does not have applicable force majeure terms or another governing clause specifically allocating rights in this situation, the parties have to consider whether further performance under the contract could be excused due to a supervening impossibility. Under Michigan law, in this analysis "[t]he important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract."[1] In other words, did any party to the contract think about the possibility of the disruption that occurred when they signed the contract – and if no one did, should they have?

Similarly, several Michigan cases establish that if performing a contract results in violating clearly-stated public policy, the contract is void and unenforceable.[2] However, as is often the case, this rule is subject to a number of exceptions that may require performance even if doing so violates public policy.

The stakes here are high. Performance could be excused if there is a supervening impossibility, or it violates public policy. However, failure to perform may not be excused if one of the exceptions to the public policy rule applies, exposing the non-performing party to any resulting damages, which could be substantial. The analysis is guided by a detailed examination of the facts including the nature of the public policy supposedly violated, whether the legislature expressly provided for damages in the event of a violation, and, in some instances, an analysis of

the parties' states of mind when they entered into the contract.

To further complicate the analysis, Michigan law is silent as to whether the public policy doctrine will serve to void a contract if the state adopted the public policy *after* the parties enter the contract. This doctrine will, however, doubtlessly develop to address the issues arising in these unprecedented times.

Governmental actions nationwide in response to the COVID-19 crisis have fundamentally disrupted businesses of every size and scope. This disruption has both caused serious, significant issues regarding the fulfillment of contracts and created an environment within which entities might claim that they are entitled to be excused from further performance when no such grounds exist. If you are concerned about your rights and obligations in a disrupted business relationship, Varnum attorneys stand ready to assist.

[1] *Bissell v. L.W. Edison Co.*, 9 Mich. App. 276, 285, 156 N.W.2d 623, 627 (1967) (citing 6 Williston, Contracts (Rev. ed.) § 1931).

[2] *Johnson v QFD, Inc.*, 292 Mich. App. 359, 807 N.W.2d 719 (2011).

VARNUM
ATTORNEYS AT LAW

Litigating in Michigan: A Guide for General Counsel on Court Closures and New Orders

AUTHORS

Regan A. Gibson

Timothy P. Monsma

Michael J. Roth

RELATED PRACTICES

Coronavirus Task Force

Litigation and Trial

Litigation Advisory
April 1, 2020

The COVID-19 pandemic has caused every one of us to face delays, cancellations and postponements in our daily lives. During this period of unprecedented disruption, those with matters pending before the courts face additional uncertainties. As the response to the pandemic and government restrictions on business operations and public gatherings continue to evolve, the courts have had to balance the importance of protecting public health and safety with the need to conduct their essential functions that have profound effects on the rights, property and liberty of the citizens within their jurisdiction.

On March 18, 2020 the Michigan Supreme Court issued Administrative Order 2020-2, which requires Michigan trial courts to limit access to courtrooms and offices, as well as restrict court activity to essential functions. While that order superseded previous orders issued by Michigan trial courts, the trial courts have continued to issue individual orders and announcements with varying instructions as to how they will carry out their essential functions, and how litigants and their attorneys should operate during the crisis. Many courts have adjourned all non-emergency civil, criminal, domestic relations and probate matters, while other courts are making efforts to conduct business, including trials, via video or teleconference technology.

This summary outlines the instructions provided by the Michigan Supreme Court, Michigan Court of Appeals, circuit courts and probate courts regarding their operations during the COVID-19 emergency. It further outlines the operations of the U.S. District Court for the Eastern and Western Districts of Michigan and the U.S. Court of Appeals for the Sixth Circuit. This list will be updated as courts provide additional instruction in response to this evolving crisis. Please reach out to a Varnum attorney to discuss any concerns you may have regarding the status of a pending or future matter.

VARNUM
ATTORNEYS AT LAW

Michigan Supreme Court Extends Filing Deadlines in the Face of COVID-19 Pandemic

AUTHORS

Timothy P. Monsma

Michael J. Roth

Regan A. Gibson

RELATED PRACTICES

Coronavirus Task Force

Litigation and Trial

Litigation Advisory
March 26, 2020

The COVID-19 pandemic has brought significant, unprecedented uncertainty to many aspects of our day-to-day lives. Yet in the face of these challenging times, legal disputes continue to arise. The Michigan Supreme Court recently issued several orders designed to ensure continuity of legal services. These measures are aimed at protecting the health of litigants, court employees and the public—such as prospective jurors—while also preserving the judicial process to the maximum extent possible and minimizing disruptions.

While current circumstances will likely result in some delays to many proceedings, the court has expressed its desire to ensure continued access to the courts. To that end, on March 23, 2020 the Supreme Court issued Administrative Order No. 2020-3 (Order), tolling the deadline for commencement of certain legal proceedings as well as the deadlines to file responsive pleadings during the crisis. Pursuant to the Order, any statutory prerequisites for filing a complaint or a responsive pleading are suspended during the state of emergency declared by Governor Whitmer. The filing timeline for such pleadings will resume when the state of emergency ends.

Notably, the Order does not preclude courts from ordering an expedited response to a complaint or motion in order to hear and resolve an emergency matter requiring immediate attention. Similarly, while many local courts have delayed legal proceedings, the Order does not prohibit litigants from commencing proceedings when they choose, and the Order encourages courts to conduct hearings and other proceedings remotely. Many courts are issuing their own guidelines for doing so.

The Order has a significant impact on the deadlines for filing claims and asserting defenses in Michigan, and timing may be critical. To ensure your legal rights are protected, please contact a Varnum attorney to discuss the shifting legal landscape and the best ways to preserve your rights as a potential plaintiff or defendant.

VARNUM
ATTORNEYS AT LAW

Michigan Trial Courts Impacted by Coronavirus Precautions

AUTHORS

Richard T. Hewlett

Michael J. Roth

RELATED PRACTICES

Coronavirus Task Force

Litigation and Trial

Litigation Advisory
March 26, 2020

In response to restrictions imposed on social gatherings due to the coronavirus, the Michigan Supreme Court has issued an administrative order outlining how Michigan court facilities will ensure that the public and court personnel are protected from the outbreak.

Among other things, the order limits courtroom access to no more than 10 people (including staff) and limits court activity to essential functions. While a significant amount of court activity can be conducted via remote means, those who are party to a lawsuit should contact their attorney to determine what impact the order may have on their case.

Those contemplating the filing of a lawsuit may contact any member of the Varnum trial and litigation team for help navigating the additional requirements stemming from the new order. Varnum continues to adapt to ensure both continuous service to our clients and a safe, healthy workplace for our attorneys and staff. While many of our attorneys and staff are providing service from a remote location, our offices remain open, and we are committed to meeting your needs.

VARNUM
ATTORNEYS AT LAW

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.

VARNUM
ATTORNEYS AT LAW

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

SBA Issues New Interim Final Rule Simplifying PPP Loan Forgiveness

AUTHORS

Mary Kay Shaver

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
October 9, 2020

On October 8, 2020, the Small Business Administration (SBA) issued an Interim Final Rule (IFR) and a new Paycheck Protection Program (PPP) loan forgiveness application, Form 3508S, greatly simplifying the PPP loan forgiveness process for borrowers with PPP loans of $50,000 or less (except for borrowers that together with their affiliates received PPP loans of $2 million or more). Importantly, borrowers that can use Form 3508S are exempt from the workforce (FTE) and wage and salary reductions to forgiveness.

Form 3508S and the instructions are available at: https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses.

VARNUM
ATTORNEYS AT LAW

SBA Issues Guidance on Change of Ownership for PPP Borrowers

AUTHORS

Seth W. Ashby

Mary Kay Shaver

John N. Titley

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
October 6, 2020

On Friday, October 2, 2020, the Small Business Administration (SBA) issued a Procedural Notice (the "Notice") explaining required procedures when an entity that has received a Paycheck Protection Program loan (a "PPP Borrower") experiences a change in ownership. In particular, the Notice sets forth the circumstances in which SBA consent is required prior to a change in ownership and the steps PPP Borrowers and lenders must take to avoid defaulting on PPP loans as a result of a change in ownership.

Change in Ownership

The Notice defines a “change of ownership” as the occurrence of any of the events described below:

- At least 20 percent of the common stock or other ownership interest of a PPP Borrower is sold or otherwise transferred, whether in one or more transactions, including to an affiliate or an existing owner of PPP Borrower.
- A PPP Borrower sells or otherwise transfers at least 50 percent of its assets (measured by fair market value), whether in one or more transactions.
- A PPP Borrower is merged with or into another entity.

Note that a PPP Borrower must aggregate all sales and other transfers occurring since the date of approval of the PPP loan to determine whether the relevant threshold has been met. For publicly-traded PPP Borrowers, only sales or other transfers that result in one person or entity holding or owning at least 20 percent must be aggregated.

There are no restrictions on a change of ownership if, prior to the closing of the applicable transaction, either (i) the PPP loan has been repaid in full or (ii) forgiveness of the PPP loan has been determined, the SBA has remitted funds to the PPP lender under its guaranty, and the PPP Borrower has repaid any unforgiven balance.

For all other change of ownership transactions, regardless of whether SBA consent is required, a PPP Borrower is required to provide prior notice to the PPP lender in writing of the contemplated transaction and provide the

PPP lender with a copy of the proposed agreements or other documents that would effectuate the proposed change of ownership transaction.

SBA Consent Not Required; PPP Lender Approval

SBA consent is not required for (i.e., the PPP lender may unilaterally approve) the following change of ownership transactions:

- A sale or transfer of stock or other ownership interest or merger in which: (a) 50 percent or less of the PPP Borrower's stock / ownership is sold or transferred; or (b) the PPP Borrower completes a loan forgiveness application reflecting its use of all loan proceeds and submits it to the PPP lender and deposits the outstanding balance of the PPP loan in an interest-bearing escrow account controlled by the PPP lender.
- A sale of 50 percent or more of a PPP Borrower's assets in which the PPP Borrower completes a loan forgiveness application reflecting its use of all loan proceeds and submits it to the PPP lender and deposits the outstanding balance of the PPP loan in an interest-bearing escrow account controlled by the PPP lender.

For transactions that involve a sale of all or substantially all the assets of, or ownership interests in, a PPP Borrower: (a) the parties may not proceed to closing without the approval of the PPP lender (which it is now expressly empowered to give by virtue of the Notice), (b) the parties must ensure that the PPP Borrower's loan forgiveness application is properly submitted prior to closing, and (c) the parties must establish and fund an escrow account controlled by the PPP lender at closing. While this does not significantly change a PPP Borrower's obligations with respect to its PPP loan, buyers now have potential risk and should adhere to the Notice's requirements to minimize any assumption of liability. Also, the Notice does not prescribe a time period within which a PPP lender must make its determination.

SBA Consent Required

For any change of ownership transaction not described above, a PPP Borrower must obtain SBA consent prior to closing. To obtain the SBA's consent, the PPP lender must submit to the SBA a request for approval including: (i) the reason that the PPP Borrower cannot fully satisfy the PPP loan prior to closing or escrow funds as described above, (ii) the details of the transaction, (iii) a copy of the PPP note, (iv) copies of any letter of intent

and the purchase or sale agreement setting forth the responsibilities of the PPP Borrower, seller (if different from the PPP Borrower), and buyer, (v) disclosure of whether the buyer has an existing PPP loan and, if so, the SBA loan number and (vi) a list of all 20 percent or greater owners of the buyer. The SBA will review the documents submitted by the PPP lender and provide a decision within 60 days of receipt of a complete request. If applicable, this process could place significant conditionality on a closing.

The SBA may condition its consent on additional risk mitigation measures. Additionally, SBA consent to any change of ownership involving the sale of 50 percent or more of a PPP Borrower's assets (measured by fair market value) will be conditioned on the buyer assuming the PPP loan and responsibility for compliance with its terms. In such cases, the purchase or sale agreement must include appropriate language regarding the assumption of the PPP Borrower's obligations under the PPP loan by the buyer, or a separate assumption agreement must be submitted to the SBA.

Despite the occurrence of a change of ownership, a PPP Borrower remains responsible for: (1) continued performance of all obligations under the PPP loan; (2) certifications made under the PPP loan application, including the certification of economic necessity; and (3) continued compliance with all other PPP loan requirements. The PPP Borrower will also remain responsible for obtaining, preparing, and retaining all required forms and documentation and providing these forms and documents to the PPP lender, servicer, or SBA upon request.

A PPP Borrower will remain liable for any unauthorized uses of PPP loan proceeds by the new owner or successor following a change in ownership transaction. If the new owner or successor also has a PPP loan, each PPP loan must be segregated and properly allocated among the two borrowers.

Retroactive Effect

While the Notice provides some sorely needed guidance for parties in the context of M&A transactions, it remains unclear as to whether transactions that closed prior to the date of the Notice could be subject to its requirements. As indicated above, we think this likely has potential impact on buyers, irrespective of how they contract for a PPP Borrower's liability within the definitive agreements. Varnum will continue to monitor this issue as well as any additional guidance issued by the SBA.

VARNUM
ATTORNEYS AT LAW

SBA Issues Update on Treatment of Owners and Certain Non-Payroll Costs with Regard to PPP Loan Forgiveness

AUTHORS

Mary Kay Shaver

John D. Arendshorst

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
September 2, 2020

The Small Business Administration (SBA) began accepting lender loan forgiveness submissions for the Paycheck Protection Program (PPP) on August 10, 2020. Since then, the SBA has provided additional guidance concerning the ownership percentage that triggers the applicability of the 5 percent owner compensation rule and limitations on the eligibility of certain non-payroll costs for forgiveness.

The highlights from the new guidance:

- Owner-employees with less than a 5 percent ownership stake in a C-corporation or S-corporation are not subject to the owner-employee compensation rule (previous guidance had not established any exception from the rule based on percentage of ownership).
- The amount of non-payroll costs for which forgiveness is requested may not include any amount attributable to the business operations of a tenant or sub-tenant of the borrower. For example, if a borrower rents an office building for $10,000 per month, and subleases out a portion of the space for $2,500 per month, only $7,500 per month is eligible for forgiveness. Alternatively, if a borrower shares a rented space with another business, the borrower must prorate rent and utility payments in the same manner as on its 2019 tax filings (or 2020 tax filings for new businesses).
- Rent payments to a related party are eligible for loan forgiveness if (1) the amount of forgiveness requested for the rent payments is no more than the amount of mortgage interest owed on the property during the covered period that is attributable to the space being rented by the borrower, and (2) the lease and mortgage were entered into prior to February 15, 2020. Rent and lease payments to a related party may be eligible for forgiveness under this rule, but mortgage interest payments to a related party are not eligible for forgiveness.

VARNUM
ATTORNEYS AT LAW

SBA Issues FAQs on Forgiveness of Paycheck Protection Program Loans

AUTHORS

Mary Kay Shaver

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
August 5, 2020

The Small Business Administration (SBA) released its Frequently Asked Questions (FAQs) on PPP Loan Forgiveness on August 4, 2020 which provide further clarification on loan forgiveness of Paycheck Protection Program (PPP) loans, including the following:

- A borrower will not have to make any payments (principal or interest) for the portion of the PPP loan that is forgiven so long as the borrower timely submits its forgiveness application;
- Payroll costs incurred before, but paid during, the covered period (or alternative payroll covered period, if applicable) are eligible for forgiveness;
- Gross amounts should be used when calculating the cash component of payroll costs;
- Tips, commissions, bonuses and hazard pay are eligible payroll costs;
- Expenses for group health benefits and employee contributions for retirement benefits accelerated from periods outside the covered period (or alternative payroll covered period, if applicable) are *not* eligible for forgiveness;
- Interest on unsecured credit is *not* eligible for forgiveness;
- Rent payments on leases that were renewed and interest payments on mortgage loans that were refinanced are eligible for forgiveness if the original lease and mortgage loan was in existence prior to February 15, 2020;
- Covered utility payments for transportation only includes transportation utility fees assessed by state and local governments;
- The FTE Reduction Exception in Table 1 of the PPP Schedule A Worksheet can include employees listed in Table 2 of the PPP Schedule A Worksheet (those making more than $100,000 in 2019).

VARNUM
ATTORNEYS AT LAW

SBA Issues Additional Interim Final Rules for PPP Loan Forgiveness and Loan Review Procedures

AUTHORS

John D. Arendshorst

Mary Kay Shaver

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
June 25, 2020

Earlier this week, the Small Business Administration (SBA) issued Interim Final Rule – Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures Interim Final Rule. This Interim Final Rule included additional guidance relating to loan forgiveness of Paycheck Protection Program (PPP) loans, including the following:

- Allows a borrower to file **before** the end of the applicable covered period if the borrower has used all of the loan proceeds for which the borrower is requesting forgiveness
  - If there are reductions of salaries or wages in excess of 25 percent during the applicable covered period, the borrower must account for the excess reduction through the end of the applicable covered period
    - Safe harbor to restore salaries and wages by date of application remain
- Clarifies that deferral of interest and principal ends if the SBA determines that the loan is not eligible for forgiveness (in whole or in part)
  - Requires payment of principal and interest
  - Lender is required to notify the borrower of the date of the first payment
- Limits forgiveness amount available for owner-employees and self-employed individuals' own payroll compensation.
  - For borrowers who use a 24-week covered period, forgiveness for owner-employees' payroll compensation is capped at the lower of 2.5 months' worth of 2019 compensation or $20,833
- Extends exemption from forgiveness reduction arising from a reduction in the number of FTEs due to compliance requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the CDC, HHS or OSHA to state or local government shutdown orders that are based on such guidance

Additional PPP Advisories

SBA Issues Final Rules for PPP Loan Forgiveness and Loan Review Procedures
Public Finance Advisory, May 27, 2020

SBA Issues PPP Forgiveness Application and New Interim Rule on Eligibility
Public Finance Advisory, May 18, 2020

SBA Issues New Guidance on Certification Relating to PPP Necessity
Public Finance Advisory, April 23, 2020

SBA Issues Interim Rules on and Final Application for the $349 Billion Paycheck Protection Program
Public Finance Advisory, April 3, 2020

Paycheck Protection Program, a SBA Loan Program Expanded in CARES ACT
Public Finance Advisory, March 27, 2020

VARNUM
ATTORNEYS AT LAW

President Signs the Paycheck Protection Flexibility Act: What You Need To Know

AUTHORS

Mary Kay Shaver

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
June 5, 2020

On June 5, 2020 President Trump signed the Paycheck Protection Program Flexibility Act (the PPP Flexibility Act). Importantly, for existing PPP loans, the PPP Flexibility Act provides the following:

- Extends the period for PPP loans to December 31, 2020 (extended from June 30, 2020)
- Extends the forgiveness covered period to the earlier of 24 weeks after the date of the loan (increased from eight weeks) or December 31, 2020
  - A borrower under an existing PPP loan can elect to use the eight-week period
- Extends the rehire exemption date to December 31, 2020 (extended from June 30, 2020)
- Adds exemptions to the forgiveness reductions due to workforce reductions if the borrower can in good faith document:
  - An inability to rehire employees and hire similarly qualified employees for unfilled positions on or before December 31, 2020; or
  - An inability to return to the same level of business activity as such business was operating on February 15, 2020 due to compliance with governmental restrictions imposed March 1, 2020 through December 31, 2020
- Requires at least 60 percent of the forgiveness amount to be attributable to payroll costs (decreased from 75 percent) and allows up to 40 percent to be attributable to non-payroll costs (increased from 25 percent)
- Extends the deferral period for payments of principal, interest and fees to the date on which the forgiveness amount is remitted to the lender
  - A borrower must apply for forgiveness within 10 months after the forgiveness covered period or the deferral period will end

For new PPP loans, the PPP Flexibility Act provides for a minimum maturity of a PPP of five years.

Additional PPP Advisories

SBA Issues Final Rules for PPP Loan Forgiveness and Loan Review Procedures
Public Finance Advisory, May 27, 2020

SBA Issues PPP Forgiveness Application and New Interim Rule on Eligibility
Public Finance Advisory, May 18, 2020

SBA Issues New Guidance on Certification Relating to PPP Necessity
Public Finance Advisory, April 23, 2020

SBA Issues Interim Rules on and Final Application for the $349 Billion Paycheck Protection Program
Public Finance Advisory, April 3, 2020

Paycheck Protection Program, a SBA Loan Program Expanded in CARES ACT
Public Finance Advisory, March 27, 2020

VARNUM
ATTORNEYS AT LAW

SBA Issues Final Rules for PPP Loan Forgiveness and Loan Review Procedures

AUTHORS

Mary Kay Shaver

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
May 27, 2020

On May 22, the SBA issued interim final rules on loan forgiveness and loan review procedures for borrowers and lenders using the Paycheck Protection Program (PPP). This summary is not a full and complete recitation of such rules and has been prepared in an effort to highlight key provisions of the rules in an abbreviated format, not to replace them. Please refer to the published rules for full and complete recitations.

Loan Forgiveness

Process

Lenders are to submit the Loan Forgiveness Application (SBA Form 3508 or lender equivalent) to the lender (or the servicing lender), who will review the application and issue a decision to the SBA within 60 days of receiving the complete application. If borrowers previously received funds under the Economic Injury Disaster Loan (EIDL) advance program, that amount will be deducted from the forgiveness amount.

The SBA will review the application and may also review the borrower's eligibility (including certifications) and loan amount to determine if all or a portion of the loan is ineligible for forgiveness. (See below SBA Loan Review Procedures and Related Borrower and Lender Responsibilities.) The lender is responsible for notifying the borrower of the forgiveness amount. Any unforgiven amount must be repaid on or before the two-year maturity of the loan.

Payroll Costs Eligible for Loan Forgiveness

Payroll costs paid **or** incurred during the eight-week (56 days) applicable period are eligible for forgiveness. For payroll costs, a borrower may seek forgiveness for the eight-week (56 days) period beginning on either:

- the date the borrower received the PPP loan proceeds (i.e., the covered period); or
- the first day of the first payroll cycle in the covered period (the alternative payroll covered period).

Borrowers should review the Loan Forgiveness Application (SBA Form 3508 or lender equivalent) for required applications of the alternative payroll covered period if they have chosen that option.

Payroll costs are "paid" on the day that paychecks are distributed or ACH credit transactions are originated. Payroll costs are "incurred" on the day the employee's pay is earned (i.e., on the day the employee worked). To be eligible for forgiveness, payroll costs incurred during the borrower's last pay period of the covered period (or alternative payroll covered period) must be paid on or before the next regular payroll date.

Payroll costs that were both paid and incurred during the covered period (or alternative payroll covered period) may only be counted once. For furloughed employees, payroll costs are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work).

Salary, Wages or Commission Payments to Furloughed Employees; Bonuses; Hazard Pay

Payments of salary, wages or commissions to furloughed employees during the covered period (or alternative payroll covered period) are eligible for forgiveness so long as such payments do not exceed $100,000 on annualized basis (i.e., $15,385 during the applicable period). Hazard pay and bonuses are eligible for loan forgiveness if an employee's total compensation does not exceed $100,000 on an annualized basis (i.e., $15,385 during the applicable period).

Caps on the Amount of Loan Forgiveness Available for Owner-Employees and Self-Employed Individuals' Own Payroll Compensation

For owner employees and self-employed individuals, the payroll compensation cap on loan forgiveness amounts is the lesser of 8/52nds of their 2019 compensation or $15,385 per individual in total across all businesses. (See 85 FR 21747, 21750.)

- Owner-employees are capped by the amount of their 2019 employee cash compensation, and employer retirement and health care contributions made on their behalf.
- Schedule C filers are capped by the amount of their owner compensation replacement, calculated based on 2019 net profit.
- General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense

deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235.

No additional forgiveness is provided for retirement or health insurance contributions for self-employed individuals, including Schedule C filers and general partners, as such expenses are paid out of their net self-employment income.

Non-payroll Costs Eligible for Loan Forgiveness

A non-payroll cost is eligible for forgiveness if it was paid during the covered period or incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period. The incurred amount is prorated through the end of the covered period.

Advance payments of interest on mortgage obligations are not eligible for loan forgiveness. Principal on mortgage obligations is not eligible for forgiveness.

Reductions to Loan Forgiveness Amount

(See the Loan Forgiveness Application [SBA Form 3508 or lender equivalent] and its instructions for statutory forgiveness reduction formulas and calculations.)

Exemption for Employees Who Refuse to Come Back to Work

Employees whom a borrower offered to rehire are generally exempt from the loan forgiveness reduction calculation if:

- the borrower made a good faith, written offer to rehire such employee during the covered period (or the alternative payroll covered period);
- the offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;
- the offer was rejected by such employee;
- the borrower maintains records documenting the offer and its rejection;
- the borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the employee's rejection of the offer.

Effect of a Reduction in Full-Time Equivalent (FTE) Employees on the Forgiveness Amount

A reduction in FTE employees during the covered period (or the alternative payroll covered period) reduces the loan forgiveness amount by the same percentage as the percentage reduction in FTE employees. The borrower should select a reference period of one of the following:

- February 15, 2019 through June 30, 2019;
- January 1, 2020 through February 29, 2020; or
- in the case of a seasonal employer, either of the two preceding methods or a consecutive 12-week period between May 1, 2019 and September 15, 2019.

The borrower must calculate the average FTE employees during the selected reference period and the covered period (or the alternative payroll covered period). The borrower must then divide the average FTE employees during the covered period (or the alternative payroll covered period) by the average FTE employees during the selected reference period, resulting in the reduction quotient. The total eligible expenses available for forgiveness are reduced proportionally by the reduction quotient.

If a borrower eliminates any reductions in FTE employees occurring during February 15, 2020 and April 26, 2020 by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in FTE employees.

Full-time equivalent employee means an employee who works 40 hours or more, on average, each week. Hours of employees who work less than 40 hours are calculated as proportions of a single full-time equivalent employee and aggregated. To calculate the number of full-time equivalent (FTE) employees, divide the average number of hours paid for each employee per week by 40, capping this at 1.0 (an employee paid for 48 hours per week would 1.0 FTE).

For employees who were paid for less than 40 hours per week, borrowers may choose to calculate the FTE by either:

- calculating the average number of hours a part-time employee was paid per week during the covered period (an employee would be considered to be 0.75 FTE if paid for 30 hours per week on average and 0.25 FTE if paid for 10 hours per week on average); **or**

- electing to use 0.5 FTE for each part-time employee.

A borrower may select only one method and must apply that method consistently to the covered period (or the alternative payroll covered period) and the selected reference period. The borrower should then aggregate the total of FTE employees for both the selected reference period and the covered period (or the alternative payroll covered period).

No Penalty for an Employee that is Fired for Cause, Voluntarily Resigns or Voluntarily Requests a Schedule Reduction

There is no penalty for employees who are fired for cause, voluntarily resign or voluntarily request a schedule reduction. Such employees are exempted from the calculation of the FTE reduction penalty. The borrower may count such employee at the same FTE level as before the FTE reduction event when calculating the FTE employee reduction penalty. Borrowers must maintain records demonstrating that each such employee was fired for cause, voluntarily resigned or voluntarily requested a schedule reduction, providing such documentation upon request.

Effect of a Reduction in Employees' Salary/Wages on the Loan Forgiveness Amount

A reduction in certain employees' salary/wages in excess of 25 percent will result in a reduction in the loan forgiveness amount. This rule applies to each new employee in 2020 and each existing employee who was not paid more than the annualized equivalent of $100,000 in any pay period in 2019.

The borrower must reduce the total forgiveness amount by the total dollar amount of the salary/wage reductions that are in excess of 25 percent of base salary/wages between January 1, 2020 and March 31, 2020 subject to certain exceptions. The reduction is applied on a per employee basis, not in the aggregate.

If a borrower eliminates wage/salary reductions made during February 15, 2020 and April 26, 2020 by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in salaries and wages.

To avoid a double penalty, the salary/wage reduction applies only to the portion of the decline in employee salary/wages that is **not** attributable to the FTE reduction.

Documentation Required for Forgiveness of PPP loans

See the Loan Forgiveness Application (SBA Form 3508 or lender equivalent) for details on

- documentation to be submitted with an application
- documentation required to be maintained and available upon request
- documentation which may voluntarily be submitted with an application

SBA Loan Review Procedures and Related Borrower/Lender Responsibilities

The SBA may review loans of any size at its discretion. Borrowers must retain PPP documentation for six years after the date the loan is forgiven or repaid in full. Borrowers will have an opportunity to respond to the SBA's questions under review.

The SBA review may include the following:

- borrower eligibility (including certifications)
- loan amount and use of proceeds
- loan forgiveness amount

If a borrower is ineligible for a PPP loan, the SBA will direct the lender to deny the loan forgiveness application. If the SBA determines that the borrower is ineligible for the loan amount or loan forgiveness amount, the SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate. The SBA may also seek repayment of the outstanding PPP loan balance or pursue other available remedies.

Borrowers may appeal a SBA decision of PPP loan ineligibility or loan forgiveness ineligibility. The SBA intends to issue a separate interim final rule addressing this process.

Lenders are responsible for reviewing the loan forgiveness applications and must confirm:

- receipt of the borrower's certifications contained in the application
- receipt of the documentation submitted to verify payroll and non-payroll costs
- the borrower's calculations, including the dollar amount of the:

- cash compensation, non-cash compensation and compensation to owners claimed on PPP Schedule A;
- business mortgage interest payments, business rent or lease payments, and business utility payments claimed on the PPP loan forgiveness calculation form.

- the borrower properly attributed at least 75 percent of the forgiven amount to eligible payroll costs

Additional PPP Advisories

SBA Issues PPP Forgiveness Application and New Interim Rule on Eligibility
Public Finance Advisory, May 18, 2020

SBA Issues New Guidance on Certification Relating to PPP Necessity
Public Finance Advisory, April 23, 2020

SBA Issues Interim Rules on and Final Application for the $349 Billion Paycheck Protection Program
Public Finance Advisory, April 3, 2020

Paycheck Protection Program, a SBA Loan Program Expanded in CARES ACT
Public Finance Advisory, March 27, 2020

VARNUM
ATTORNEYS AT LAW

SBA Issues PPP Forgiveness Application and New Interim Rule on Eligibility

AUTHORS

Mary Kay Shaver

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
May 18, 2020

The application for forgiveness of loans made under the Payroll Protection Program (PPP) was released by the Small Business Administration (SBA) late May 15, 2020. Businesses that received loans under the program may now access the application to calculate how much of their loan may be forgiven.

The application also provides further guidance and clarification on forgiveness.

Among the noteworthy information included, the application provides:

- Flexibility to select a slightly different eight-week period for purposes of calculating payroll costs. This is called the Alternative Payroll Covered Period. If selected, this Alternative Payroll Covered Period must be used consistently for payroll and FTE issues.
- Flexibility to include costs actually paid during the applicable covered period OR incurred during the applicable covered period and paid on or before the next due date.
- Clarification on how to calculate FTEs from full-time and part-time employees.
- Allow exceptions to FTE reductions based on employees that refused to come back to work, were fired for cause, voluntarily resigned or voluntarily requested and received a reduction of their hours.

Also, the SBA issued an interim rule on May 18 clarifying that for purposes of determining eligibility for the PPP, a company must include employees of all U.S. and foreign affiliates. There had been confusion as to whether a company could be eligible if it had no more than 500 employees whose principal place of residence is in the U.S., regardless of the employees of its foreign affiliates. However, the SBA also stated that it would not find any borrower that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the company's exclusion of non-U.S. employees from the company's calculation if the company (together with its affiliates) had no more than 500 employees whose principal place of residence is in the U.S. The SBA concluded the rule prohibiting the use of PPP loan proceeds to support non-U.S. workers or operations.

Additional PPP Advisories

SBA Issues New Guidance on Certification Relating to PPP Necessity
Public Finance Advisory, April 23, 2020

SBA Issues Interim Rules on and Final Application for the $349 Billion Paycheck Protection Program
Public Finance Advisory, April 3, 2020

Paycheck Protection Program, a SBA Loan Program Expanded in CARES ACT
Public Finance Advisory, March 27, 2020

VARNUM
ATTORNEYS AT LAW

SBA Issues New Guidance on Certification Relating to PPP Necessity

AUTHORS

Mary Kay Shaver

Justin L. Fitzgerald

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
April 23, 2020

***UPDATE**: Late on May 13, 2020 the SBA added Question 47 to its FAQs which extends the deadline to pay back the PPP loan to May 18, 2020.*

> *47. **Question:** An SBA interim final rule posted on May 8, 2020 provided that any borrower who applied for a PPP loan and repays the loan in full by May 14, 2020 will be deemed by SBA to have made the required certification concerning the necessity of the loan request in good faith. Is it possible for a borrower to obtain an extension of the May 14, 2020 repayment date?*
>
> ***Answer:** Yes, SBA is extending the repayment date for this safe harbor to May 18, 2020, to give borrowers an opportunity to review and consider FAQ #46. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor.*

***UPDATE:** On May 13, 2020 the SBA issued revised FAQs to provide guidance on the needs certification. Importantly, the deadline of May 14, 2020 has not changed, but affiliated borrowers with loans of less than $2 million are deemed to have made the certification in good faith. Also, for loans of $2 million or more, the SBA will not pursue administrative enforcement or referrals to other agencies if it later determines the certification was not met.*

> *46. **Question:** How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?*
>
> ***Answer:** When submitting a PPP application, all borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: Any borrower that, together with its affiliates,[20] received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.*

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than $2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of $2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

[20] *For purposes of this safe harbor, a borrower must include its affiliates to the extent required under the interim final rule on affiliates, 85 FR 20817 (April 15, 2020).*

***UPDATE**: On May 5, 2020 the SBA added Question 43 to its FAQs. Importantly, this extends the safe harbor relating to the needs certification to May 14, 2020.*

*43. **Question**: FAQ #31 reminded borrowers to review carefully the required certification on the Borrower Application Form that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA guidance and regulations provide that any borrower who applied for a PPP loan*

prior to April 24, 2020 and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith. Is it possible for a borrower to obtain an extension of the May 7, 2020 repayment date?

***Answer**: SBA is extending the repayment date for this safe harbor to May 14, 2020. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor. SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.*

***ORIGINAL ADVISORY:** April 23, 2020*

Following extensive publicity regarding large or publicly-traded businesses that have received loans under the Paycheck Protection Program (PPP), on April 23, 2020 the SBA added a new question and answer to its Frequently Asked Questions relating to the PPP. Recipients of PPP funds should carefully review the newly-added Question 31 as detailed below.

*31. **Question:** Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?*

***Answer:** In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.*

Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

The answer applies to **all** borrowers. Even though the example applies to public companies, all borrowers are required to take into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.

We expect that the forgiveness portion of the loan will include an audit of the loan amount, eligibility and now necessity for the loan. It is unclear how the SBA will interpret "access to other sources of liquidity" and "not significantly detrimental to the business." Taking an aggressive position, the SBA could interpret these terms to require borrowers to draw on lines of credit or obtain funds from liquid parents before applying for a PPP.

Importantly, Question 31 allows a borrower that has obtained a PPP loan prior to today's date to repay the loan by May 7, 2020.

Please contact your Varnum attorney if you have questions on how this new guidance impacts your business.

Additional PPP Advisories

SBA Issues Interim Rules on and Final Application for the $349 Billion Paycheck Protection Program
Public Finance Advisory, April 3, 2020

Paycheck Protection Program, a SBA Loan Program Expanded in CARES ACT
Public Finance Advisory, March 27, 2020

VARNUM
ATTORNEYS AT LAW

SBA Issues Interim Rules on and Final Application for the $349 Billion Paycheck Protection Program

AUTHORS

Mary Kay Shaver

Justin L. Fitzgerald

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
April 3, 2020

On April 2, 2020 the SBA issued an interim final rule regarding the Paycheck Protection Program (PPP) that contains material changes and additional guidance that borrowers must be aware of in order to properly apply for the PPP. Consistent with this rule, the SBA also released the final application for the PPP.

As detailed in the relevant excerpts of the interim rules provided below, notable components of this new guidance relate to:

- calculating a loan amount
- clarifying what can and cannot be included in payroll costs (independent contractors cannot)
- stating the interest rate at 1 percent
- clarifying that at least 75 percent of the loan amount, forgiveness amount and use of proceeds must be attributable to payroll

These rules apply to all applications filed for the PPP, and it is critical for borrowers to review their applications, including those that may already be filed with their lender, to ensure compliance with this important new guidance.

Excerpts From 13 CFR Part 120 Business Loan Program Temporary Changes; Paycheck Protection Program

How do I calculate the maximum amount I can borrow?

The following methodology, which is one of the methodologies contained in the act, will be most useful for many applicants.

Step 1: Aggregate payroll costs (defined in detail below) from the last 12 months for employees whose principal place of residence is the United States.

Step 2: Subtract any compensation paid to an employee in excess of an annual salary of $100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of $100,000 per year.

Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).

Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.

Step 5: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

The examples below illustrate this methodology.

Example 1 – No employees make more than $100,000

Annual payroll: $120,000
Average monthly payroll: $10,000
Multiply by 2.5 = $25,000
Maximum loan amount is $25,000

Example 2 – Some employees make more than $100,000

Annual payroll: $1,500,000
Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000
Average monthly qualifying payroll: $100,000
Multiply by 2.5 = $250,000
Maximum loan amount is $250,000

Example 3 – No employees make more than $100,000, outstanding EIDL loan of $10,000

Annual payroll: $120,000
Average monthly payroll: $10,000
Multiply by 2.5 = $25,000
Add EIDL loan of $10,000 = $35,000
Maximum loan amount is $35,000

Example 4 – Some employees make more than $100,000, outstanding EIDL loan of $10,000

Annual payroll: $1,500,000
Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000
Average monthly qualifying payroll: $100,000
Multiply by 2.5 = $250,000
Add EIDL loan of $10,000 = $260,000
Maximum loan amount is $260,000

What qualifies as payroll costs?

Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income or net earnings from self-employment or similar compensation.

Is there anything that is expressly excluded from the definition of payroll costs?

Yes. The act expressly excludes the following:

- Any compensation of an employee whose principal place of residence is outside of the United States;
- The compensation of an individual employee in excess of an annual salary of $100,000, prorated as necessary;
- Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee's and employer's share of FICA (Federal Insurance Contributions Act), Railroad Retirement Act taxes and income taxes required to be withheld from employees; and
- Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Public Law 116–127).

Do independent contractors count as employees for purposes of PPP loan calculations?

No. Independent contractors have the ability to apply for a PPP loan on their own, so they do not count for purposes of a borrower's PPP loan calculation.

What is the interest rate on a PPP loan?

The interest rate will be 100 basis points or one percent.

What will be the maturity date on a PPP loan?

The maturity is two years.

Can I apply for more than one PPP loan?

No.

Can I use e-signatures or e-consents if a borrower has multiple owners?

Yes. E-signature or e-consents can be used regardless of the number of owners.

Is the PPP first-come, first-served?

Yes.

When will I have to begin paying principal and interest on my PPP loan?

You will not have to make any payments for six months following the date of disbursement of the loan.

Can my PPP loan be forgiven in whole or in part?

Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020; rent payments on leases dated before February 15, 2020; and utility payments under service agreements dated before February 15, 2020 over the eight-week period following the date of the loan. **However, not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs.**

Do independent contractors count as employees for purposes of PPP loan forgiveness?

No. Independent contractors have the ability to apply for a PPP loan on their own, so they do not count for purposes of a borrower's PPP loan forgiveness.

How can PPP loans be used?

The proceeds of a PPP loan are to be used for:

- payroll costs (as defined above);
- costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums;
- mortgage interest payments (but not mortgage prepayments or principal payments);
- rent payments;
- utility payments;
- interest payments on any other debt obligations that were incurred before February 15, 2020; and/or
- refinancing a SBA EIDL loan made between January 31, 2020 and April 3, 2020. If you received a SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. **If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan.** Proceeds from any advance up to $10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

However, at least 75 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness.

What happens if PPP loan funds are misused?

If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability, such as charges for fraud. If one of your shareholders, members or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member or partner for the unauthorized use.

VARNUM
ATTORNEYS AT LAW

Paycheck Protection Program, a SBA Loan Program Expanded in CARES ACT

AUTHORS

Mary Kay Shaver

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Public Finance Advisory
March 27, 2020

On March 27, the Coronavirus Aid, Relief and Economic Security (CARES) Act was signed into law, providing an unprecedented level of emergency assistance for individuals, families and businesses affected by the coronavirus epidemic.

The legislation includes a new loan program – the Paycheck Protection Program administered through the SBA – that provides up to $349 billion in loans to eligible entities, with such loans being subject to forgiveness under certain circumstances. The 100 percent federally-guaranteed loans are available under a new subsection 36 of Section 7(a) of the Small Business Act.

The loans may be used for a variety of purposes, including payroll costs (as described below), rent, utilities, mortgage interest (not principal) and interest on debt existing prior to February 15, 2020.

Eligibility

Eligible entities are those with less than 500 employees, including the following:

- Businesses
- 501(c)(3) nonprofit organizations
- Veterans organizations
- Certain tribal business concerns
- Eligible self-employed individuals
- Independent contractors
- Sole proprietorships
- Businesses in the accommodation and food services industry (NAICS 72) that have less than 500 employees per physical location

For the purposes of determining the 500 employee threshold, applicants should include full time, part-time and other basis employees. General SBA affiliations apply except such rules are waived with respect to:

- Businesses in the accommodation and food services industry (NAICS 72),
- Franchises assigned a franchise identifier code
- Business licensed under Section 301 of the Small Business Investment Act

Maximum Loan Amount

Loans are available for the lesser of the average monthly payroll costs times 2 1/2 plus any EIDL received after January 31, 2020 that are refinanced under subsection 36 or $10 million. Average monthly payroll costs are calculated based on the one-year period prior to the loan disbursal date except for seasonal employers and employers not in business between February 15, 2019 and July 30, 2019.

In the case of seasonal employers, the employer may choose to calculate the average monthly payroll costs based on the 12-week period starting February 15, 2019 or the period starting March 1, 2019 through June 30, 2019.

In the case of new employers not in business between February 15, 2019 and July 30, 2019, the average monthly payroll costs is calculated based on the period beginning January 1, 2020 through February 29, 2020.

Payroll costs include: employee salary, wages and commissions; payment of cash tips; payment of vacation; parental, family, medical or sick-leave; allowance for dismissal or separation; payment required for group health benefits (including insurance premiums); payment of retirement benefits; or payment of state or local tax assessed on employee compensation; and sole proprietor income or independent contractor compensation not in excess of $100,000.

Payroll costs **exclude**: compensation of an individual person in excess of $100,000 (as prorated for the period); federal employment taxes imposed or withheld taxes; compensation to an employee whose principal residence is outside of the U.S.; qualified sick leave for which a credit is allowed under Section 7001 of the Families First Coronavirus Response Act; and qualified family leave wages for which a credit is allowed under Section 7001 of the Families First Coronavirus Response Act.

Terms

Loans are available for up to a 10-year term (amortized) at 4 percent interest, with six months (and up to one year) deferral of principal and interest payments. Notably, certain SBA requirements are waived. Loans are available with:

- No personal guaranties of shareholders, members or partners
- No collateral
- No proving recipient cannot obtain funds elsewhere
- No SBA fees (may still have to pay lender processing fee)
- No prepayment fee

Application Process

Eligible entities may file applications with an SBA-approved lender. Lenders have been delegated authority to make loans without SBA review. Eligible applicants will have been in operation on February 15, 2020, and will have paid employees and payroll taxes or independent contractors.

Applicants will need to certify that the loan is necessary, and will be used to retain workers and pay eligible expenses. Applicants will further need to certify that no other application for a loan for the same purpose is pending and that the entity has not received any other loan for the same purposes through December 31, 2020.

Loan Forgiveness

Section 1106 outlines forgiveness of loans obtained under the Act.

The forgiven amount will be equal to the amount actually paid for payroll costs, salaries, benefits, rent, utilities and mortgage interest during the eight weeks following disbursement of the loan. Additional wages paid to tipped employees under Section 3(m)(2)(A) of the Fair Labor Standard Acts may also be forgiven.

The forgiveness amount is subject to reduction if there is a workforce reduction or a reduction in the salary or wages of an employee.

- The amount attributable to a workforce reduction will be equal to the initial forgiven amount multiplied by the quotient of average FTEs during the eight-week period divided by the average FTEs for the period from

February 15, 2019 through June 30, 2019 or January 1, 2020 through February 29, 2020, as determined by the recipient

- The amount attributable to a salary or wage reduction will be the amount of any salary or wage decrease in excess of 25 percent of the total salary or wages during the most recent full quarter such employee was employed before the eight-week period. Only employees who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in excess of $100,000 are included in this calculation.

Reductions in workforce, salaries and wages that occur from February 15, 2020 to April 26, 2020 will be disregarded for purposes of reducing the forgiveness amount so long as the reductions are eliminated by June 30, 2020.

Borrowers must apply for forgiveness with the lender servicing the loan. Lenders have 60 days to review and make a determination. Any portion of the loan that is forgiven will be excluded from gross income.

As is often the case with complex legislation, Varnum anticipates certain technical corrections to the CARES Act, and we are proactively assisting representatives in that work with respect to the Paycheck Protection Program.

VARNUM
ATTORNEYS AT LAW

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

AUTHORS

Mary Kay Shaver

RELATED PRACTICES

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/

VARNUM
ATTORNEYS AT LAW

IRS Confirms PPP-Funded Expenses Are Non-Deductible

AUTHORS

Angelique M. Neal

Eric M. Nemeth

RELATED PRACTICES

Coronavirus Task Force

Public Finance

Tax Planning, Compliance and Litigation

Tax Advisory
November 23, 2020

Literally tens of thousands of businesses received Paycheck Protection Program (PPP) loans under the CARES Act. The legislation was passed very quickly to avert a potential collapse of the U.S. economy at the beginning of the COVID-19 pandemic.

As often happens with legislation passed quickly, questions immediately arose about the tax consequences for PPP loan recipients.

The IRS has released guidance in Rev. Rul. 2020-27 which states that expenses which would otherwise be deductible that were paid with PPP funds cannot be deducted for federal tax purposes. The deductibility limitation applies to the extent of the loan forgiveness.

Essentially, if there is a reasonable expectation of the loan being forgiven in the whole or in part, the associated expenses are not deductible. This rule applies whether the forgiveness application is filed in 2020 or 2021 or when the actual forgiveness occurs.

Taxpayers who are unsuccessful in securing loan forgiveness in whole or in part may amend their 2020 tax return or claim the deduction in 2021.

Stay tuned if Congress may approve legislation modifying the treatment as outlined by the IRS.

VARNUM
ATTORNEYS AT LAW

IRS Unveils New Taxpayer Relief Initiatives

AUTHORS

Angelique M. Neal

RELATED PRACTICES

Coronavirus Task Force

Federal Tax Law

Tax Advisory
November 3, 2020

The IRS is back up and running and they are continuing their efforts to help struggling taxpayers impacted by COVID-19 and natural disasters. On November 2, 2020, the IRS unveiled new changes in the Collection Division which are intended to assist taxpayers facing financial challenges. According to Darren Guillot, IRS Small Business/Self-Employed Deputy Commissioner for Collection: "...this has been a difficult year in many states dealing with both COVID and natural disasters. In times like these, dealing with tax issues can be tough. And we want people to know our employees are committed to continue helping taxpayers wherever possible, including offering many options for those struggling to pay their tax bills."

The IRS is responsible for collecting almost 95 percent of total federal revenue through its compliance and collection activities. Earlier this year, the IRS provided tax relief through implementation of the People First Initiative. While these relief provisions expired on July 15, 2020, the IRS has continued to make changes in collection policies and procedures while resuming critical tax compliance responsibilities.

Highlights of these collection changes are listed below. It is important to note, however, that the changes listed below apply only to cases that are not assigned to a Revenue Officer in Field Collection.

- Short-term extensions of time to pay the tax balance in full have been extended to 180 days (six months). Prior to this change, taxpayers had only 120 days on a short-term extension.
- To avoid taxpayer default on existing installment agreement, the IRS will automatically add certain new tax balances to the agreement.
- Individuals who owe less than $250,000 can set up an installment agreement without having to provide financial statements and substantiation of expenses. For this to apply, the liability must be paid in full within the statute of limitations on collection.
- Individual taxpayers who owe only for 2019 and who owe less than $250,000 may qualify for an installment agreement without the IRS filing a notice of federal tax lien.
- Taxpayers with existing direct debit installment agreements who owe less than $50,000 can propose a lower monthly amount and change their payment due date online.

As noted above, these changes DO NOT apply to cases that are assigned to a Revenue Officer in Field Collection.

An experienced tax attorney can help you understand and resolve your tax problem effectively and efficiently. Having the right attorney representing you and protecting your rights will make a significant difference in your well-being and in the resolution of your case. Contact Angelique Neal at 248/567-7831 or by email at amneal@varnumlaw.com for assistance.

VARNUM
ATTORNEYS AT LAW

IRS Issues Guidance on Deferral of Certain Employee Payroll Taxes

AUTHORS

Angelique M. Neal

Maureen Rouse-Ayoub

RELATED PRACTICES

Coronavirus Task Force

Labor and Employment

Tax Planning, Compliance and Litigation

Tax Advisory
September 2, 2020

On Friday, August 28, the IRS issued Notice 2020-65, providing guidance about the deferral of certain employee payroll taxes under the President's Executive Memorandum issued earlier in August. As has become the norm in these uncertain times, the guidance must be considered fluid and subject to change without notice. The existing guidance leaves many questions unanswered so we will continue to monitor this issue.

What Is the Employee's Portion of the Payroll Taxes Subject to Deferral Under Executive Memorandum and Notice 2020-65?

In addition to income tax withholding, payroll taxes include Federal Insurance Contributions Act (FICA) taxes. FICA taxes include old-age, survivor and disability insurance (OASDI) (Social Security) and hospital insurance (Medicare). These payroll taxes apply at a rate of 15.3 percent for wages up to $137,700 for the 2020 calendar year. The obligation for the FICA taxes are equally divided between employers and employees at 7.65 percent, broken down as follows: 6.2 percent for Social Security and 1.45 percent for Medicare. Accordingly, for purposes of the Executive Memorandum and Notice 2020-65 the amount subject to deferral is 6.2 percent of the Social Security taxes as the employee's share.

What Is Known

- Deferral of the employee's share of Social Security taxes appears to be voluntary by the employer based on the language in this notice, Code Section 7508A, and prior statements made by Secretary Mnuchin. Since the deferral is voluntary, the employer may forgo the deferral and timely withhold and pay over the required taxes.
- The employer is the "Affected Taxpayer" under Notice 2020-65. Thus, an employee cannot require its employer to defer the taxes.
- The option to defer applies to wages paid to an employee on a pay date during the period beginning September 1, 2020 and ending on December 31, 2020.

- The option to defer only applies to employees earning less than $4,000 paid for a bi-weekly pay period.
- The determination of whether the employee earns less than $4,000 per bi-weekly pay period is made on a pay period-by-pay period basis. *Notice 2020-65*
- The employer must withhold and pay the deferred taxes under this notice ratably between January 1, 2021 and April 30, 2021 or interest, penalties, and additions to the tax will begin to accrue on May 1, 2021, with respect to any unpaid applicable taxes. *Notice 2020-65*
- "If necessary, the Affected Taxpayer [Employer] may make arrangement to otherwise collect the total Applicable Taxes from the employee." *Notice 2020-65*. Implies the penalties will be assessed against Employer as the Affected Taxpayer as defined by the guidance.

What Is Not Known

- What if the employee leaves the company?
- What if employee doesn't make enough money to pay the tax back?
- It appears that the obligation to pay the deferred taxes remains with the employer in either situation above.

Absent further guidance or congressional action, the deferred taxes must be withheld from the employee's wages and paid over to the government between January 1, 2021 and April 30, 2021. Employers who are considering allowing employees to defer payment of taxes should consult counsel and develop a plan to implement before ceasing to make deductions. Considerations for the plan should include an employee communication plan developed to address employee payment obligations after the deferral period expires or if the employee becomes no longer employed by the employer. In addition, the plan should take into account whether employees are covered by a collective bargaining agreement that triggers notice and bargaining obligations. Also, keep in mind that Michigan employers must have signed authorization from the employee to make deductions from wages. Employers should consider obtaining written authorization from qualifying employees who elect to defer that includes the plan to repay the deferred taxes and a backup in case the employee ceases to be employed before the taxes are paid.

VARNUM
ATTORNEYS AT LAW

July 15, 2020: What This Date Means to You and to the IRS

AUTHORS

Angelique M. Neal

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
July 10, 2020

As the COVID-19 pandemic rages on, individual and business taxpayers continue to struggle with financial hardships created during these uncertain and unprecedented times. To provide relief to taxpayers during these challenging times, the Secretary of the Treasury and the IRS took a number of actions to provide tax compliance relief to taxpayers, including extending tax return filing and payment deadlines, easing payment guidelines for installment agreements and postponing compliance actions. The relief provided by these measures is scheduled to come to an end on July 15, 2020. Here is what you need to know about this important date.

Income Tax Return Filing and Tax Payments

2019 income tax returns are due by July 15, 2020. If you are unable to complete your return by this extended due date, you can file an request for extension with the IRS that will extend the due date of the return to October 15, 2020. However, an extension of time to file is NOT an extension of time to pay the tax due on an income tax return. So, any income tax due for 2019 must be paid by July 15, 2020 or penalties and interest may apply.

2020 estimated tax payments that were originally due on April 15, 2020 and June 15, 2020 are also due by July 15, 2020. In recent FAQs issued by the IRS with respect to the estimated tax payments due for the first two quarters of 2020, the IRS advises taxpayers to make a single payment in an amount sufficient to cover both the first and the second quarterly estimated tax payments.

More information on filing and payment deadlines can be found at: https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers#filing

IRS Enforcement Actions – Collection of Taxes

Under the IRS's People First Initiative, enforced collection actions, including the filing of federal tax liens and the issuance of levies on income and financial assets, were suspended. That suspension ends on July 15, 2020. Campus and field collection activities will resume after that date. If you owe money to the IRS for current and/or back taxes and want to try to avoid the issuance of federal tax liens and levies, you need to move quickly to resolve your tax problem.

Further, IRS field collection plans to increase its efforts to bring into filing compliance those high-income taxpayers that have not filed returns for 2018 or previous years. The IRS defines "high-income non-filers" as those taxpayers who generally received income in excess of $100,000 during a tax year and did not file a tax return with the IRS. If you fall within this category, it may be best to come into compliance before being contacted by the IRS.

IRS Examination of Returns and Audit Priorities

The IRS's People First Initiative also temporarily suspended the start of new field, office and correspondence audits to July 15, 2020. All types of IRS audits and investigations will resume after that date.

In his testimony to Congress on June 30, IRS Commissioner Charles Rettig set out the following audit priorities:

- Abusive tax shelters, including conservation easements and micro-captive insurance
- Virtual currency
- Tax compliance among high-income non-filers (in excess of $100,000)
- High-income/high-wealth taxpayers and related entities and transactions

However, even if you do not fall within one of these categories, you can still be audited. The IRS is continuing to focus its efforts and resources on taxpayers that are traditionally non-compliant, including small businesses. While IRS audits may not be commonplace, if you are one of the unlucky few to receive an audit notice from the IRS, it will likely cause you stress, worry and panic. With 90 percent of audits resulting in a change to the tax return that was filed, these feelings are understandable.

If you are being audited by the IRS, you should consider hiring a tax professional as soon as you receive the initial audit letter or contact form the IRS. Do NOT try to handle this on your own. The best course of action would be to speak with an experienced tax attorney before contacting the IRS. **Accountants, enrolled agents and tax return preparers do not have attorney/client privilege**. Tax attorneys experienced in IRS audits will be best able to help you prepare for the audit, to clearly communicate your position with the IRS, to protect your rights and to assist you in resolving your tax audit through all stages of the audit process, including audit, appeal and litigation.

An experienced tax attorney can help you understand and resolve your tax problem effectively and efficiently. Having the right attorney representing you and protecting your rights will make a significant difference in your well-being and in the resolution of your case.

As a former senior trial attorney for the IRS Office of Chief Counsel, Angelique Neal has the knowledge and experience to solve your tax problem, including addressing collection actions, federal tax liens, tax levy, effective strategies to reduce the amount you owe and resolve your tax debt, as well as representation in audits, appeals and litigation of your tax matter. Angelique represents clients throughout Southeast Michigan including Oakland, Wayne, Livingston, Washtenaw and Macomb counties, and throughout the Midwest including Indiana, Illinois and Ohio. Contact attorney Angelique Neal at 248/567-7831 or by email at amneal@varnumlaw.com today for assistance.

VARNUM
ATTORNEYS AT LAW

COVID-19: Another Option for Employers Whose Employees are Facing Health and Financial Hardship

AUTHORS

Angelique M. Neal

Eric M. Nemeth

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Insights
June 8, 2020

The COVID-19 pandemic continues to be an ongoing nationwide emergency, with President Trump making an emergency declaration under the Stafford Act. By making such declaration, the opportunity has opened up for employers to provide tax-free assistance to their employees under the provisions of the Internal Revenue Code (Code).

Section 139 of the Code applies to disaster relief payments. Under the provisions of section 139(a), gross income does not include any amount received by an individual as a qualified disaster relief payment. In addition, under section 139(d), qualified disaster relief payments are not treated as net earnings from self-employment, wages or compensation subject to tax. This means that if the employee receives such a payment, that payment is tax-free to the employee. In addition, employers can deduct section 139 payments as ordinary and necessary business expenses under section 162.

What is a qualified disaster relief payment?

For purposes of section 139, the term qualified disaster relief payment means any amount paid to or for the benefit of an individual:

1. to reimburse or pay reasonable and necessary personal, family, living or funeral expenses incurred as a result of a qualified disaster;
2. to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair/replacement of its contents to the extent that the need for such repair, rehabilitation or replacement is attributable to a qualified disaster;
3. by a person engaged in the furnishing or sale of transportation as a common carrier by reason of the death or personal physical injuries incurred as a result of a qualified disaster; or
4. if such amount is paid by a federal, state or local government or agency or instrumentality thereof in connection with a qualified disaster in order to promote the general welfare.

Further, qualified disaster relief payments do not include: (1) payments for expenses that are otherwise paid for by insurance or other reimbursements; or (2) income replacement payments, such as the payment of lost wages, lost business income or unemployment compensation.

As it relates to the COVID-19 pandemic, the reimbursable expenses to which the qualified disaster relief payments are being made must be incurred as result of the COVID-19 pandemic.

What types of employee expenses could the employer reimburse tax-free?

The IRS has not released specific guidance on how section 139 will apply as a result of the COVD-19 pandemic. However, the underlying purpose of this provision reasonably suggests that there are a number of expenses that could be reimbursed. For example, those expenses may include:

- medical expenses not covered by insurance, including co-pays and over-the-counter medicines;
- expenses incurred for child care and tutoring services;
- expenses incurred to allow the employee to work from home, including the cost of equipment, supplies and internet services;
- funeral expenses.

Best Practices

If your business is considering making qualified disaster relief payments to your employees, there are steps to consider that could help if the IRS audits the expense issue on the business income tax return. First, adopt a written plan. It would be beneficial to adopt a written plan for the reimbursement program. That plan should address who is eligible for reimbursement, what types of expenses are subject to reimbursement, procedures to seek reimbursement, etc. Second, keep in mind that the expenses must have been incurred by the employee as a result of the COVID-19 pandemic, and employees should be required to produce documentation in support of this element. Without support, the IRS could reclassify the payments made resulting in the payment being taxable to the employee and not deductible by the employer.

If you are considering taking advantage of section 139 to provide tax-free assistance to your employees, contact Varnum's tax team to work through the details.

Attorneys Angelique Neal and Eric Nemeth have the knowledge and experience to provide sound legal advice and to resolve criminal and civil tax problems. They provide effective resolutions for clients throughout Michigan. Contact Angelique at 248/567-7831 or amneal@varnumlaw.com or Eric at 313/481-7318 or emnemeth@varnumlaw.com for assistance.

VARNUM
ATTORNEYS AT LAW

Michigan Treasury Issues Updates on Sales, Use and Withholding Tax Deadlines

AUTHORS

Thomas J. Kenny

Eric M. Nemeth

Erin M. Haney

John C. Ray

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
June 5, 2020

In light of the ongoing effects of COVID-19, the Michigan Department of Treasury (the Department) has recently issued a number of notices regarding changes to sales, use and withholding (SUW) tax return filing and payment deadlines.

Of primary significance, these notices have provided that businesses required to file monthly SUW returns or make monthly SUW payments originally due on March 20, April 20 and May 20, 2020 may delay these return filings and payments until June 20, 2020 without penalty or interest. Similarly, quarterly filers with first quarter returns and payments originally due on April 20, 2020 may also delay those filings and payments until June 20, 2020. Because June 20, 2020 is a Saturday, this due date is extended to the next business day, resulting in an effective due date of Monday, June 22, 2020.

Accelerated filers are not eligible for these waivers of penalty and interest with respect to delayed return filings and delayed payments.

In addition to the delay of filing and payment deadlines to June 22, the Department has issued further guidance providing a waiver of penalty and interest for SUW payments due on June 22 and paid in equal installments over a period of not more than six months. For both monthly and quarterly filers, the first installment payment must be paid on June 22, 2020 with the filing of the delayed returns. After that, payments may be made via vouchers or online through Michigan Treasury Online (MTO).

Monthly filers will be required to make six installment payments each equal to one-sixth of the total due. Each installment payment will be due on the same date that each of the next five monthly returns are due (i.e., the monthly returns for June through October). These payments must be made separately from the regular monthly payments and must designate February as the tax return period.

Quarterly filers will be required to make three installment payments each equal to one-third of the total due. These installment payments will be due June 22, September 21 and November 20, 2020. They must be designated as first quarter payments covering the period from January through March 2020.

The installment payment option will be automatic for all returns due to be filed by eligible taxpayers on June 22, provided that the returns are filed on that date and the appropriate initial installment payment is remitted with the return. At this time, no additional documentation or application is required. Installment payments will be applied first to the oldest tax period. If a taxpayer has not made full payment of the tax due by the end of the installment period, penalty and interest will begin to accrue, and the amount due will be subject to assessment.

Taxpayers who are able to pay the tax due in full on or before June 22, 2020 will be eligible for the discounts typically provided for early or timely payment, but taxpayers who plan to pay using the installment option should calculate their total due without the discount.

For more information, please contact your Varnum attorney.

Additional Resources

Michigan Department of Treasury Notice: Installment Payment Option Available for Monthly and Quarterly Sales, Use, and Withholding Tax Returns Due on June 22, 2020

Frequently Asked Questions: Sales, Use and Withholding Tax Installment Option

VARNUM
ATTORNEYS AT LAW

Guidance Issued on Extended Deadlines for Property Tax Matters, Including Appeals to Tax Tribunal

AUTHORS

Adam J. Brody

Thomas J. Kenny

Eric M. Nemeth

Deborah Ondersma

Erin M. Haney

RELATED PRACTICES

Coronavirus Task Force

Michigan Property Tax Services and Appeals

Tax Planning, Compliance and Litigation

Tax Advisory
May 18, 2020

Executive Order 2020-87, signed May 14, 2020 and made retroactive to April 6, 2020 provides for a number of extensions with respect to certain duties of county boards of commissioners under the General Property Tax Act, as well as the ability of taxpayers to dispute real and personal property classifications and assessments. This alert summarizes some of the most significant extensions applicable to taxpayers.

First, boards of review that were not able to hear protests in March must meet on the Tuesday following the third Monday in July to hear protests, including protests regarding the classification of a particular parcel. These boards of review must allow resident taxpayers to file protests by letter without a personal appearance. Decisions with respect to protests heard in July must be issued by September 1, 2020 and September 1, 2020 is the deadline by which a board of review decision may be appealed to the State Tax Commission. An appeal to the Michigan Tax Tribunal is required in the form of a written petition filed within 35 days after a final decision by the board of review.

In addition, the deadline for disputing assessments in the Michigan Tax Tribunal with respect to commercial, industrial or developmental real property and commercial, industrial or utility personal property has been extended from May 31, 2020 to July 31, 2020. The existing July 31 deadline for assessment disputes regarding agricultural real property, residential real property, timber-cutover real property or agricultural personal property has not changed.

Finally, it is important to note that the extensions provided in Executive Order 2020-87 do not operate to allow reconsideration or rehearing of matters that were previously denied by a March board of review.

If you have questions regarding real or personal property tax matters, please contact your Varnum attorney.

VARNUM
ATTORNEYS AT LAW

CARES Act: Maximizing Relief

AUTHORS

Angelique M. Neal

Eric M. Nemeth

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
April 21, 2020

On March 27, 2020 the Coronavirus Aid, Relief and Economic Security Act (CARES Act) was enacted to encourage eligible employers to keep employees on their payroll, despite economic hardship caused by COVID-19, by creating Payroll Protection Program loans, providing an employee retention tax credit and permitting certain employment taxes to be deferred. However, eligible employers cannot benefit from all of these relief provisions. So how do eligible employers take full advantage of the relief provided for in the CARES Act?

CARES Act Relief

Payroll Protection Program

This is a new loan program administered through the Small Business Administration that provides up to $349 billion in loans to certain eligible entities with less than 500 employees, with such loans being subject to forgiveness under certain circumstances. The loans may be used for a variety of purposes, including certain payroll costs, rent, utilities, and interest on certain debt existing prior to February 15, 2020.

Employee Retention Credit

Employers whose business is fully or partially suspended by government order due to COVID-19 during the calendar quarter or whose gross receipts are below 50 percent of the comparable quarter in 2019 are eligible to receive a tax credit for wages paid to certain employees. For employers with less than 100 employees on average in 2019, qualifying wages are those paid to all employees, regardless if they worked or not. For employers with over 100 employees on average in 2019, qualifying wages are those paid to employees who were furloughed during the calendar quarter.

Payroll Tax Deferral Summary

All employers are permitted to defer paying the employer portion of Social Security and railroad retirement taxes through the end of 2020, and for self-employed individuals to defer paying half of the taxes required under IRC 1401(a). One half of those deferred payroll taxes are due by December 31, 2021 and the other half by December 31, 2022.

Interactions Between Relief Provisions

These relief provisions provide cash to employers to help them pay their employees, among other things. However, some of the benefits under these programs are mutually exclusive. Utilizing either the employee retention credit or payroll tax deferral will not disqualify employers from qualifying for the Payroll Protection Program. On the other hand, receiving certain benefits from the Payroll Protection Plan will disqualify employers from some or all of the employee retention credit or payroll tax deferral benefits. The interactions between the various relief provisions can be confusing and can lead to the loss of intended benefits. What should employers consider to maximize the benefits under the relief provisions?

Employee Retention Credit vs. Payroll Protection Program

Pursuant to Section 2301(j) of the CARES Act, if an employer who is otherwise eligible for the employee retention credit receives a Small Business Interruption Loan under the Payroll Protection Program, then the employer is disqualified from receiving an employee retention credit. To be clear, the CARES Act does not simply disqualify wages paid by the employer after the employer receives the loan. Rather, according to IRS guidance the employer is completely disqualified from eligibility for the employee retention credit. Moreover, this only applies if the employer receives the loan (merely applying for the loan does not appear to have any disqualifying effect).

For employers who are waiting to hear back from the Small Business Administration, keep in mind that the credits are claimed by reporting the total qualified wages for the calendar quarter on federal employment tax returns (Form 941 for quarterly filers). The CARES Act does not limit the time period during which an employer can claim the employee retention credit for qualifying wages nor does the CARES Act prevent an employer from amending their employment tax returns to later claim the credits. As such, there is no harm in simply applying for the Small Business Interruption Loan first and claiming the employee retention credit if the employer is not approved for the loan.

Payroll Tax Deferral vs. Payroll Protection Program

Pursuant to Section 2302(a)(3) of the CARES Act, if an employer who is otherwise eligible for the payroll tax deferral has had any portion of its Small Business Interruption Loan forgiven, then the employer is not eligible for the payroll tax deferral. The IRS recently provided additional guidance about this disqualification by answering some Frequently Asked Questions.

According to that guidance, employers who have received a Small Business Interruption Loan may continue to defer payroll taxes through the date the lender issues a decision to forgive the loan in accordance with paragraph Section 1106(g) of the CARES Act. Only once the employer receives a decision from its lender that its Small Business Interruption Loan is forgiven is the employer disqualified from the payroll tax deferral. Moreover, the employer is simply disqualified from *further* deferrals of payroll tax. The amount of the payroll taxes deferred up until that point continues to be deferred and will still be due on December 31, 2021 and December 31, 2022.

As a result, applying for and receiving a Small Business Interruption Loan will not disqualify an employer from deferring its payroll tax. Accordingly, all employers should consider working with their payroll provider, payroll departments or payroll software to immediately begin deferring those payroll taxes.

Employee Retention Credit vs. FFRCA Family/Medical Leave

The Families First Coronavirus Response Act (FFCRA) provides tax credits under the Emergency Paid Sick Leave Act (EPSLA) and under the Emergency Family and Medical Leave Expansion Act (FMLA Expansion). Both the EPSLA and FMLA Expansion require employers to provide sick and family leave, respectively, to employees for qualifying purposes related to COVID-19. Generally, employers subject to paid leave requirements are entitled to fully refundable tax credits to cover the cost of the leave required to be paid for the periods of time during which employees are unable to work for various COVID-19 related circumstances.

Employers should carefully monitor the reason employees are paid while not working. The amount of qualified wages for which an eligible employer may claim the employee retention credit does not include the amount of

qualified sick and family leave wages for which the employer received tax credits under FFCRA or code section 45S (and vice versa).

Not only do these tax provisions apply to wages paid during the remaining calendar year, Congress is expected to allocate additional funding to the recently-depleted Payroll Protection Program. So even if an employer missed their chance at a Payroll Protection Program loan, these issues will remain relevant to employers for the foreseeable future. If you are considering these tax credits and/or deferral provisions for your business, contact Varnum's tax team to work through the details.

VARNUM
ATTORNEYS AT LAW

Qualified Opportunity Zones: COVID-19 Deadline Extensions

AUTHORS

Katie K. Roskam

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Qualified Opportunity Zones

Tax Planning, Compliance and Litigation

Qualified Opportunity Zone Advisory
April 20, 2020

Over the last few weeks, the IRS has provided taxpayers with extensions of time to file various tax returns and pay certain taxes. On April 9, 2020 the IRS issued Notice 2020-23, which further expands on past extensions and adds additional time to perform time-sensitive actions. Time-sensitive actions that have been extended include the 180-day period for investing qualified capital gains into a Qualified Opportunity Zone (QOZ) Fund. In addition, certain sections of the Internal Revenue Code already provide taxpayers built-in relief for deadlines if the taxpayer is affected by a presidentially-declared federal disaster. Consequently, by virtue of the president's recent pronouncement that the COVID-19 pandemic is a federal disaster, QOZ businesses utilizing the working capital safe harbor may also have an extended deadline for deployment of capital. The declaration may also impact penalty relief for reasonable cause.

180-Day QOZ Fund Investment Period

Generally, taxpayers have 180 days to reinvest qualifying capital gains into a QOZ Fund pursuant to section 1400Z-2(a)(1)(A) of the Code. The mechanics of how this 180-day period is computed is discussed in prior blog post, and can get somewhat complicated for flow through entities. Now, pursuant to Notice 2020-23, if that 180-day period expires on or after April 1, 2020 and before July 15, 2020, that period does not expire until July 15, 2020. This extension of time is automatic and no election or other filing is required. Individuals, trusts, estates, corporations, partnerships and other non-corporate tax filers qualify for the extra time.

Working Capital Safe Harbor

The QOZ rules provide a QOZ business with a 31-month window in which it can maintain and deploy working capital funds to acquire, construct or rehabilitate tangible business property in the QOZ. The 31-month working capital safe harbor exists because qualifying as an QOZ investment is predicated on engaging in a trade or business inside of a QOZ, and some trades or businesses or startup businesses require a lead time for converting invested capital into assets to be used in the trade or business. If that QOZ business is located in a federally-declared disaster area, the period over which the invested capital is converted into assets could be

delayed for reasons outside the control of the QOZ Fund. Treasury Regulation section 1.1400Z2(d)-1(3)(v)(D) provides the QOZ business an additional 24 months to complete the acquisition, construction and/or rehabilitation of the tangible business property if the QOZ business is located in a federally-declared disaster area. Notably, as of April 3, 2020 every state and most territories are subject to a disaster declaration, so most QOZ businesses should have an additional 24 months added to the working capital safe harbor period.

Reasonable Cause

A QOZ Fund is penalized if at least 90 percent of its assets do not consist of QOZ property. However, these penalties are waived if the QOZ Fund can show that such failure is due to reasonable cause. The related Treasury regulations do not define what constitutes reasonable cause. Other sections of the Code provide similar reasonable cause relief from penalties. In those cases, such relief is generally permitted where the taxpayer can show that the penalized failure was due to circumstances outside the control of the taxpayer. A failure to maintain the 90 percent investment standard for reasons related to COVID-19 may potentially qualify for this reasonable cause penalty relief.

If your QOZ Fund is experiencing any delays due to COVID-19, contact Varnum's tax team to determine how that delay may impact the QOZ Fund's qualifications.

VARNUM
ATTORNEYS AT LAW

Update II: Due Dates for Tax Payments, Returns and Other Documents Postponed Due to COVID-19

AUTHORS

Angelique M. Neal

Eric M. Nemeth

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
April 14, 2020

In prior advisories, Varnum's tax team explained previous IRS announcements that resulted in the deferral of certain required payments and returns which had original due dates of April 15, 2020 to the extended due date of July 15, 2020. See IRS Notice 2020-17, Notice 2020-18 and Notice 2020-20. These notices, however, resulted in additional questions and concerns regarding the types of returns and payments not specifically addressed.

On April 9, 2020 the IRS issued Notice 2020-23, which further expands relief noted above to additional returns, tax payments and other actions. As a result, the extensions generally now apply to all taxpayers that have a filing or payment deadline falling on or after April 1, 2020 and before July 15, 2020. Individuals, trusts, estates, corporations and other non-corporate tax filers qualify for the extension. This also applies to any schedules, returns and other forms that are filed as attachments to any of the forms covered by this relief.

The relief is **automatic**, and no election or other filing is required. However, taxpayers who need additional time to file may choose to file the appropriate form by July 15, 2020 to obtain an extension to file their return, but the extension date may not go beyond the original statutory or regulatory extension date. Notably, filing an extension of time to file a return does not extend the due date for a tax payment beyond July 15, 2020.

The following is a summary of the most important aspects of Notice 2020-23.

Tax Returns and Payments

Tax returns, and related tax payments, related to the following are not due before July 15, 2020:

- **Individuals:** IRS Form 1040 and its variants filed by seniors (1040-SR), nonresident aliens (1040-NR and 1040-NR-EZ), self-employed individuals in the U.S. and Puerto Rico (1040-SS and 1040-PR, respectively).

- **Corporations:** IRS Form 1120 and its variants filed by S corporations (1120-S), cooperative associates (1120-C), foreign corporations (1120-F), foreign sales corporations (1120-FSC), homeowners associations (1120-H), life insurance companies (1120-L), nuclear decommissioning funds (1120-ND), property and casualty insurance companies (1120-PC), political organizations (1120-POL), real estate investment trusts (1120-REIT), regulated investment trusts companies (1120-RIC), and settlement funds (1120-SF).
- **Partnerships:** IRS Form 1065 and IRS form 1066 for U.S. real estate mortgage conduits (REMICs).
- **Exempt Organizations:** IRS Form 990-T
- **Estates and Trusts:**
  - IRS Form 1041 and its variants for electing Alaska native settlement trusts (1041-N) and qualified funeral trusts (1041-QFT).
  - IRS Form 706 (including a filing pursuant to Rev. Proc. 2017-34 to elect portability) and its variants for nonresident alien decedents (706-NA), additional estate tax on certain qualified real property (706-A), qualified domestic trusts (706-QDT), generation-skipping transfers resulting from trust terminations (706-GS(T)), generation-skipping transfers resulting from trust distributions (706-GS(D) and 706-GS (D-1)).
  - IRS Form 709
  - IRS Form 8971, reporting property acquired from an decedent.
- **Private Foundations:** IRS Form 990-PF and IRS Form 4720 related to certain excise taxes.
- **Quarterly Estimated Taxes:**
  - IRS Form 1040-ES and its variants for nonresident aliens (1040-ES (NR)) and self-employed individuals in Puerto Rico (1040-ES (PR))
  - IRS Form 1120-W for corporations
  - IRS Form 990-W for exempt organizations
  - IRS Form 1041-ES for estates and trusts

Time-Sensitive Actions

All of the following actions which must be performed on or after April 1, 2020 and before July 15, 2020 are not due before July 15, 2020:

- Filing a petition with the tax court or for review of a decision rendered by the tax court;

- Filing a claim for credit or refund of any tax;
- Bringing suit upon a claim for credit or refund of any tax;
- Time-sensitive acts that may be postponed time for taxpayers affected by a federally-declared disaster, a terroristic or military action, or individuals serving in a combat zone described in IRC 7508, IRC §7508A, and Rev. Proc. 2018-58; and
- Electing to defer gain invested within 180 days into a Qualified Opportunity Zone.

The relief described herein is limited to the relief explicitly provided in these notices and does not apply with respect to any other type of federal tax or federal tax return, or any other time-sensitive act.

VARNUM
ATTORNEYS AT LAW

Michigan Treasury Issues Income Tax Deadline FAQs

AUTHORS

Thomas J. Kenny

Eric M. Nemeth

Erin M. Haney

John C. Ray

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
April 10, 2020

The Michigan Department of Treasury has released several Frequently Asked Questions (FAQs) with respect to Executive Order 2020-26, which extended the state and city income tax filing deadlines for many Michigan taxpayers. The April 2, 2020 FAQs are available here.

Highlights include:

- A taxpayer need not be sick, quarantined or experiencing other impacts from COVID-19 in order to qualify for the July 15 or July 31, 2020 extended deadlines. Nothing is required to be filed with the return in order to claim the extension.
- For taxpayers requesting the customary six- or eight-month filing extensions, the extended filing deadlines will remain the same (the extended due date for individual income tax returns is October 15, 2020 and the extended due date for calendar-year corporate income tax returns is December 31, 2020). Any tax due must be paid by the applicable July 15 or July 31, 2020 deadline.
- The extended deadlines do not apply to 2015 state income tax refund claims that are due by April 15, 2020 nor do they apply to second quarter 2020 estimated income tax payments, withholding taxes, sales and use taxes, or any other tax not administered under the Michigan Income Tax Act (MCL 206.1 et seq.) or the City Income Tax Act (MCL 141.501 et seq.).
- The extended deadlines do not apply to any taxpayer with a filing or payment due date other than April 15, 2020 or April 30, 2020.

If you have questions about your Michigan income tax filing obligations, please contact your Varnum attorney.

VARNUM
ATTORNEYS AT LAW

Economic Impact Payments – What You Need to Know

AUTHORS

Angelique M. Neal

Eric M. Nemeth

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
April 8, 2020

The Treasury Department and the IRS have announced that distribution of economic impact payments will begin in April 2020. No action will be required for most people. But for those who do not typically file returns and for those that have not filed returns for 2018 or 2019, questions remain about how these taxpayers will be able to receive their payment. Here is what taxpayers need to know.

General Rules Regarding Economic Impact Payments

Eligibility for the Economic Impact Payment

Tax filers with adjusted gross income up to $75,000 for individuals and up to $150,000 for married couples filing joint returns will receive the full payment. For filers with income above those amounts, the payment amount is reduced by $5 for each $100 above the $75,000/$150,000 thresholds. This reduction applies to the economic impact payment for a qualifying child. Single filers with income exceeding $99,000 and $198,000 for joint filers with no children are not eligible. Social Security recipients and railroad retirees who are otherwise not required to file a tax return are also eligible and will not be required to file a return (see below for more details.)

Some taxpayers may not qualify for an economic impact payment. Taxpayers will not qualify if: 1) they have income in excess of the income thresholds; 2) the taxpayer can be claimed as a dependent on someone else's return; 3) the taxpayer does not have a valid Social Security number (a taxpayer with an ITIN will NOT qualify); 4) the taxpayer is a nonresident alien; or 5) the taxpayer filed Form 1040-NR or Form 1040NR-EZ, Form 1040-PR or Form 1040-SS for 2019.

Amount of the Economic Impact Payment

Eligible taxpayers who filed tax returns for either 2019 or 2018 will automatically receive an economic impact payment of up to $1,200 for individuals or $2,400 for married couples and up to $500 for each qualifying child. As noted above, the payment amount will phase out based

on income thresholds.

Issuance of the Economic Impact Payment

The vast majority of people do not need to take any action. The IRS will calculate and automatically send the economic impact payment to those eligible. For people who have already filed their 2019 tax returns, the IRS will use this information to calculate the payment amount. For those who have not yet filed their return for 2019, the IRS will use information from their 2018 tax filing to calculate the payment.

Taxpayers may want to consider filing a 2019 tax return as soon as possible if the filing of that return would result in an increased economic impact payment. For example, if the taxpayer is able to claim a qualifying child for the 2019 tax year that they were unable to claim for 2018, filing the 2019 return as soon as possible could result in an increased payment. Another example would be if the taxpayer's income level for 2019 was less than 2018, resulting in the taxpayer falling within the income thresholds.

The economic impact payment will be deposited directly into the same banking account reflected on the return filed. If a banking account is not reflected on the return, paper checks will be mailed to the address on return.

The Treasury Department plans to develop a web-based portal for individuals to provide their banking information to the IRS online, so that individuals can receive payments immediately as opposed to checks in the mail.

If a taxpayer is not typically required to file a tax return, they can still receive the economic impact payment.

Social Security and Railroad Retirement recipients who are not typically required to file a tax return need to take no action. The IRS will use the information on the Form SSA-1099 and Form RRB-1099 to generate economic impact payments of $1,200 to these individuals even if they did not file tax returns in 2018 or 2019. Social Security Disability Insurance (SSDI) recipients are also part of this group who do not need to take action.

Recipients will receive these payments as a direct deposit or by paper check, just as they would normally receive their benefits. For Social Security, railroad retirees and SSDI recipients who have qualifying children, additional steps can be taken to receive $500 per qualifying child.

Other individuals, such as low-income workers and certain veterans and individuals with disabilities who are not required to file a tax return, are still eligible for the economic impact payment. This may require these taxpayers who would not typically file a tax return to file a return for 2018 or 2019. The IRS will soon provide guidance for these individuals on the steps to take to get their payment as soon as possible.

If a taxpayer has a filing obligation but has not filed a tax return for 2018 or 2019, they can still receive the economic impact payment.

The IRS urges anyone with a tax filing obligation who has not yet filed a tax return for 2018 or 2019 to file as soon as they can to receive an economic impact payment. Taxpayers should include direct deposit banking information on the return so that the they can receive the payment more quickly than by mailing a paper check.

According to the IRS, economic impact payments will be available throughout the rest of 2020. However, the sooner the taxpayer can file their 2018 or 2019 returns, the sooner they will be issued the payment.

Watch out for scammers and fraudsters.

As our previous guidance indicated, IRS Criminal Investigation and U.S. attorneys from around the country have assembled a task force to identify and prosecute anyone attempting to use the COVID-19 relief payments as an opportunity to defraud people. The IRS is cautioning people to be on the lookout for scammers and fraudsters trying to use economic impact payments as an opportunity to steal the taxpayer's personal information and financial assets. The IRS specifically stated that it will not call, text, send emails or contact taxpayers on social media, asking for personal or bank account information. The IRS further cautions taxpayers to watch out for emails with attachments or links claiming to have information related to the economic impact payment.

For security reasons, the IRS plans to mail a letter about the economic impact payment to the taxpayer's last known address within 15 days after the payment is paid. The letter will provide information on how the payment was made and how to report any failure to receive the payment. If a taxpayer is unsure they are receiving a legitimate letter, the IRS urges taxpayers to first visit www.IRS.gov to protect against scam artists.

Developments in the issuance of the economic impact payments are still evolving. Varnum's tax team will provide updates as they evolve. Because of the importance of these economic impact payments, please feel free to share this advisory with your employees, family members or any other person you feel could benefit from this information.

VARNUM
ATTORNEYS AT LAW

Tax Fraud Alert: COVID-19 Relief Payments

AUTHORS

Angelique M. Neal

Eric M. Nemeth

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
April 6, 2020

The proverbial ink had no sooner dried on the Coronavirus Aid, Relief and Economic Security Act (CARES Act) when the scammers and fraudsters began angling for ways to cheat recipients of the checks ranging from $1,200 (individuals) to $2,400 (couples) and $500 for each qualifying child. All payments are subject to income limitations.

In response, IRS Criminal Investigation and U.S. attorneys from around the country have assembled a task force to identify and prosecute anyone attempting to use the COVID-19 relief payments as an opportunity to defraud people.

The IRS is cautioning people to be wary of anyone soliciting bank information as an excuse to speed up or deliver the relief payment. The IRS specifically stated that it would not be calling or emailing anyone for account information.

VARNUM
ATTORNEYS AT LAW

Claiming Tax Credits under FFCRA and CARES Act

AUTHORS

Angelique M. Neal

Eric M. Nemeth

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
April 3, 2020

On March 18, 2020 the Families First Coronavirus Response Act (FFCRA) was enacted, providing small and midsize businesses with refundable tax credits to reimburse them for the costs of paid sick and family leave wages to their employees for COVID-19 related leave. On March 27, the Coronavirus Aid, Relief and Economic Security Act (CARES Act) was enacted to encourage eligible employers to keep employees on their payroll, despite economic hardship caused by COVID-19, by providing eligible employers with an employee retention tax credit. Eligible employers may be entitled to tax credits under both FFCRA and the CARES Act but not for the same wages. So how do eligible employers take advantage of the tax credits provided for in these acts?

Tax Credits under the FFCRA

The FFCRA provides tax credits under the Emergency Paid Sick Leave Act (EPSLA), and the Emergency Family and Medical Leave Expansion Act (FMLA Expansion). EPSLA generally requires certain employers to provide up to 80 hours of qualified sick leave wages to employees for qualifying purposes. The amount of qualified sick leave wages paid under the EPSLA are capped at $511 per day, or up to $5,111 in the aggregate ($200 per day, or up to $2,000 in the aggregate, if the leave is for caring for a child or family member), for each employee. FMLA Expansion generally requires certain employers to provide up to 12 weeks of qualified family leave wages to employees for qualifying purposes, though the first two weeks may be unpaid. The amount of qualified family leave wages paid under FMLA Expansion are capped at $200 per day for each individual, up to $10,000 in the aggregate for each employee. For purposes of these acts, the wages must be paid between April 1, 2020 and December 31, 2020.

Generally, employers subject to paid leave requirements under these acts are entitled to fully refundable tax credits to cover the cost of the leave required to be paid for the periods of time during which employees are unable to work for various COVID-19 related conditions. The credit is allowed against the employer's portion of Social Security taxes and is equal to 100 percent of the qualified sick leave wages paid under the EPSLA and/or 100 percent of the qualified family leave wages paid under FMLA Expansion. In addition to the qualified sick leave wages paid and the

qualified family leave wages paid, the credit is increased by the employers' share of the Medicare taxes imposed on those wages and any qualified health plan expenses allocable to those wages.

Guidance provided by the IRS in COVID-19-Related FAQs sets forth the information and documentation required in order for the employer to substantiate its eligibility for the tax credits for qualified leave wages. See FAQs 44-46. The FAQs provide guidelines for substantiation to be received from the employee, as well as additional documentation that should be maintained by the employer for at least four years.

To claim the credits, the eligible employers report their total qualified leave wages (and allocable health plan expenses and the employer's share of Medicare tax on the qualified leave wages) for the calendar quarter on their federal employment tax returns (Form 941 for quarterly filers). However, in anticipation of receiving the credits, eligible employers can fund qualified leave wages by first accessing the federal employment taxes that are set aside for deposit with the IRS. Employment taxes subject to retention include federal income tax withheld from employees, the employees' share of Social Security and Medicare taxes, and the employer's share of Social Security and Medicare taxes with respect to all employees. This means that the eligible employer can reduce the amount of federal employment taxes it would otherwise be required to deposit for that quarter before it is required to make the federal tax deposit. If certain requirements are met, federal tax deposit penalties under IRC 6656 will not apply. Penalty relief provisions are set forth in Notice 2020-22.

Advance payment of the credit is also available. If the employment tax deposits are not sufficient to cover the credit, the employer can submit Form 7200, Advance Payment of Employer Credits Due to COVID-19 to receive an advance payment from the IRS. This form must be submitted by fax.

For more information and details on the tax credits for required paid leave, see the COVID-19-Related FAQs provided by the IRS.

Tax Credits under the CARES Act

The CARES Act provides many businesses with the opportunity to claim an Employee Retention Credit (ERC) if the business was financially impacted by COVID-19. The ERC was designed to assist businesses in keeping employees on their payroll during the pandemic. On March 31, the IRS issued IR-2020-62 to provide additional information regarding ERC.

ERC is available to all employers with two exceptions. State and local governments, along with their instrumentalities, are not entitled to ERC nor are small businesses who take small business loans under the Payroll Protection Program. In addition, qualifying employers for ERC must fall into one of two categories:

1. the employer's business is fully or partially suspended by government order due to COVID-19 during the calendar quarter;
2. the employer's gross receipts are below 50 percent of the comparable quarter in 2019.

The amount of ERC is 50 percent of qualifying wages paid up to $10,000 (maximum credit of $5,000 per employee) for wages paid after March 12, 2020 and before January 1, 2021. Included in the calculation of qualifying wages is a portion of the cost of employer-provided health care allocable to the wages.

Qualifying wages are based on the average number of employees in 2019. For employers with less than 100 employees on average in 2019, ERC is based on the wages paid to all employees, regardless if they worked or not. For employers with over 100 employees on average in 2019, ERC is based only on the wages paid to employees who did not work during the calendar quarter.

To claim the credit, the eligible employer reports their total qualified wages and the related credits for the calendar quarter on their federal employment tax returns (Form 941 for quarterly filers). However, in anticipation of receiving the credits, eligible employers can fund qualified wages by first accessing the federal employment taxes that are set aside for deposit with the IRS. This means that the eligible employer can reduce the amount of federal employment taxes it would otherwise be required to deposit for that quarter before it is required to made the federal tax deposit. If certain requirements are met, federal tax deposit penalties under IRC 6656 will not apply. Penalty relief provisions are set forth in Notice 2020-22.

Advance payments of ERC are also available. If the employment tax deposits are not sufficient to cover the credit, the employer can submit Form 7200, Advance Payment of Employer Credits Due to COVID-19 to receive an advance payment from the IRS. This form must be submitted by fax.

Updates on the implementation of the tax credits under the FFCRA and the CARES Act are anticipated, and Varnum's tax team will provide further updates as they evolve.

VARNUM
ATTORNEYS AT LAW

IRS Response to COVID-19 – Changes in Procedures Regarding Signatures and Use of Email

AUTHORS

Angelique M. Neal

Eric M. Nemeth

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
April 1, 2020

Due to the situation created by the coronavirus, the IRS has made temporary changes to its procedures to allow its mission critical functions to continue. These changes are meant to facilitate operations for the IRS, taxpayers and their representatives during the current remote working environment. Accordingly, the following temporary deviations from IRS procedures are now in place:

1. The IRS will accept images of signatures (scanned or photographed);
2. The IRS will accept digital signatures that use encryption techniques to provide original and unmodified documentation;
3. IRS employees can now receive documents from taxpayers via email if the steps taken in the memorandum are taken;
4. IRS employees can now transmit documents to taxpayers using SecureZip or other IRS established, secured messaging systems.

With respect to the transmission and receipt of electronically transmitted documents, the choice to transmit documents to the IRS is solely that of the taxpayer, and the taxpayer must consent to the receive electronic transmissions from the IRS.

More information is available in this March 27, 2020 memorandum from the IRS.

This is an unprecedented situation, and Varnum's tax team will provide further updates as they evolve.

VARNUM
ATTORNEYS AT LAW

Tax Relief for Businesses Under the CARES Act

AUTHORS

Angelique M. Neal

Eric M. Nemeth

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
March 30, 2020

To mitigate the economic effects of COVID-19, on March 27, 2020 Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). This is the third in a series of bills that addresses concerns related to COVID-19. Sections of the CARES Act contain tax relief provisions for businesses. These sections are summarized herein.

Employee Retention Credit

A refundable payroll tax credit is available for employers if paid by eligible employers to certain employees during the COVID-19 crisis. The credit is for 50 percent of the first $10,000 in wages (including health benefits) per qualifying employee paid after March 12, 2020 and before January 1, 2021. The credit is calculated on a quarterly basis, but the aggregate amount of qualified wages for all quarters for each employee may not exceed the $10,000 threshold.

The credit is available to the following employers (which includes nonprofits but not governmental entities):

1. employers whose operations have been fully or partially suspended as a result of a government order limiting commerce, travel, or group meetings; and
2. employers who have experienced a greater than 50 percent reduction in quarterly receipts, measured on a year-over-year basis.

The employees covered by this credit vary depending on the number employed by the employer. For employers who had an average number of full-time employees in 2019 of 100 or fewer, all employee wages are eligible, regardless of whether the employee is furloughed. For employers who had more than 100 full-time employees on average in 2019, only the wages of employees who are furloughed or face reduced hours as a result of their employers' closure or reduced gross receipts are eligible for the credit.

The CARES Act includes anti-abuse measures that prevent employers from double-counting wages used to determine the employee retention credit in the calculation of other credits such as the Work Opportunity Tax Credit and the Employer Credit for Paid Family and Medical Leave. In addition, the credit is not available to employers receiving small business loans under

the Paycheck Protection Program, so employers need to weigh the merits of these two courses of action.

The IRS is granted authority to advance payments to eligible employers and to waive applicable penalties for employers who do not deposit applicable payroll taxes in anticipation of receiving the credit.

Delay of Payment of Employer Payroll Taxes

Employers are required to withhold employment taxes related to Social Security and Railroad Retirement from wages paid to employees. Self-employed individuals are subject to self-employment tax and essentially pay the employer and employee portions of Social Security.

The CARES Act allows taxpayers to defer paying the employer portion of Social Security and Railroad Retirement taxes through the end of 2020, and for self-employed individuals to defer paying half of their self-employment taxes. One half of those deferred payroll taxes are due by December 31, 2021 and the other half by December 31, 2022.

Net Operating Losses for Corporate Taxpayers

Generally, a net operating loss (NOL) deduction is limited to 80 percent of taxable income (computed without regard to the NOL deduction) for tax years beginning after December 31, 2017, and an NOL for any tax year may not be carried back but may be carried forward indefinitely.

The CARES Act permits an NOL deduction to temporarily offset 100 percent of taxable income and provides that NOLs arising in a tax year beginning after December 31, 2017 and before January 1, 2021 can be carried back to each of the five tax years preceding the tax year of such loss. In addition, these changes will allow companies to utilize losses and amend prior year returns to request refunds, which should provide critical cash flow and liquidity.

Loss Limitations for Non-Corporate Taxpayers

For tax years beginning after December 31, 2017 and ending before Jan. 1, 2026 these non-corporate taxpayers cannot deduct excess business losses. Excess business losses are the excess of the taxpayer's aggregate trade or business deductions for the tax year over the sum of the taxpayer's aggregate trade or business gross income or gain plus $250,000 (as adjusted for inflation). In other words, non-corporate taxpayers could only deduct up to $250,000 in excess of their business net income, which can be used to offset nonbusiness income.

The CARES Act retroactively removes this loss limitation for non-corporate taxpayers for 2018, 2019 and 2020. Non-corporate taxpayers that were previously subject to the excess business loss limitation in those years will enable those taxpayers to amend their tax returns to claim the additional loss and receive a refund.

Corporate Minimum Tax Credit

Corporations used to be subject to the alternative minimum tax (AMT). The AMT was repealed for tax years after 2017, but corporate taxpayers may still have outstanding AMT credits to use. Corporate taxpayers may claim outstanding MTCs (subject to limits) for tax years before 2021, and in 2021 any remaining MTC may be claimed as fully refundable.

The MTC is refundable for any tax year beginning in 2018, 2019, 2020 or 2021 in an amount equal to 50 percent (100 percent for tax years beginning in 2021) of the excess MTC for the tax year, over the amount of the credit allowable for the year against regular tax liability.

The CARES Act changes the tax years in which MTC is refundable to just 2018 and 2019, and makes them 100 percent refundable in 2019. So the CARES Act allows corporations to claim 100 percent of AMT credits in 2019. Moreover, the CARES Act also provides for an election to take the entire refundable credit amount in 2018.

Interest Expense Limitation

The Tax Cuts and Jobs Act of 2017 generally limited the amount of business interest allowed as a deduction to 30 percent of adjusted taxable income. The CARES Act temporarily and retroactively increases this limitation to 50 percent for tax years beginning in 2019 and 2020.

Taxpayers may elect out of the increase for any tax year in the time and manner the IRS prescribes. Once made, the election can be revoked only with IRS consent. For partnerships, the election must be made by the partnership and can be made only for tax years beginning in 2020.

In addition, taxpayers can elect to calculate the interest limitation for their tax year beginning in 2020 using the adjusted taxable income for their last tax year beginning in 2019 as the relevant base.

Qualified Improvement Property

The Tax Cuts and Jobs Act of 2017 (TCJA) amended the depreciation rules to allow 100 percent additional first-year depreciation deductions (100 percent bonus depreciation) for certain qualified property. It also eliminated pre-existing definitions for (1) qualified leasehold improvement property, (2) qualified restaurant property, and (3) qualified retail improvement property. It replaced those definitions with one category called qualified improvement property (QI property). A general 15-year recovery period was intended to have been provided for QI property. However, that specific recovery period failed to be reflected in the statutory text of the TCJA. Under the TCJA, QI property falls into the 39-year recovery period for nonresidential rental property. That makes the QI property category ineligible for 100 percent bonus depreciation.

The CARES Act provides a technical correction to the TCJA and specifically designates QI property as 15-year property for depreciation purposes, which makes QI property a category eligible for 100 percent bonus depreciation.

Excise Tax for Alcohol Used to Produce Hand Sanitizer

For any breweries/distilleries that have transitioned to hand sanitizer production, the provision waives the federal excise tax on any distilled spirits used for or contained in hand sanitizer that is produced and distributed in a manner consistent with guidance issued by the Food and Drug Administration and is effective for calendar year 2020.

Implementation of the provisions of the CARES Act is continuing to develop, and Varnum's tax team will provide updates as they become available.

VARNUM
ATTORNEYS AT LAW

Michigan Income Tax Filing Deadlines Automatically Extended

AUTHORS

Thomas J. Kenny

Eric M. Nemeth

Erin M. Haney

John C. Ray

RELATED PRACTICES

Coronavirus Task Force

State and Local Tax Law

Tax Planning, Compliance and Litigation

Tax Advisory
March 30, 2020

On March 27, 2020 Michigan Governor Gretchen Whitmer signed Executive Order No. 2020-26, Extension of April 2020 Michigan income tax filing deadlines. This executive order provides relief to Michigan taxpayers by implementing the following:

State Income Taxes

- Annual state income tax returns and state income tax payments otherwise due April 15, 2020 will be due July 15, 2020. This extension will apply to calendar-year individuals and trusts.
- Annual state income tax returns and state income tax payments otherwise due April 30, 2020 will be due July 31, 2020. This extension will apply to calendar-year Corporate Income Tax (CIT) and Michigan Business Tax (MBT) taxpayers.
- Estimated state income tax payments due April 15, 2020 will be due July 15, 2020. This extension will apply to individuals and business taxpayers who must make quarterly estimated tax payments.

City Income Taxes

The order also provides deadline extensions to taxpayers subject to taxes imposed under the City Income Tax Act.

- Annual city income tax returns and city income tax payments due April 15, 2020 will be due July 15, 2020. This extension applies to city income taxes administered by the Michigan Department of Treasury; at this time, the only city income tax administered by the Michigan Department of Treasury is the City of Detroit Income Tax.
- Annual city income tax returns and city income tax payments due April 30, 2020 will be due July 31, 2020. This extension applies to city income taxes imposed by any Michigan city other than Detroit.
- Estimated city income tax payments due April 15, 2020 will be due July 15, 2020 and estimated city income tax payments due April 30, 2020 will be due July 31, 2020.
- Estimated city income tax extension payments due April 15, 2020 will be due July 15, 2020 and estimated city income tax extension payments

due April 30, 2020 will be due July 31, 2020.

Penalties and interest related to a failure to file a state or city income tax return or pay state or city income taxes will not begin to accrue until July 16, 2020 and August 1, 2020, respectively. However, additional interest will not be added to refunds until the later of 45 days after the tax return claiming the refund is filed or 45 days after the new due dates provided under this executive order.

These extensions are automatic and no forms are required to qualify.

These provisions are in addition to the March 17, 2020 notice issued by the Department of Treasury waiving penalty and interest for the late payment of sales, use and withholding taxes due March 20, 2020 or the late filing of the corresponding sales, use and withholding tax returns.

If you have questions regarding Michigan tax matters, please contact your Varnum attorney.

VARNUM
ATTORNEYS AT LAW

CARES Act: Tax Relief for Individuals

AUTHORS

Angelique M. Neal

Eric M. Nemeth

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
March 30, 2020

On March 27, 2020 Congress enacted the Coronavirus Aid, Relief and Economic Security Act (CARES Act). This legislation contains provisions designed to provide relief to individuals and business. The focus for this advisory is on the tax relief provided to individuals.

Refundable Income Tax Credit

Individuals, other than nonresident aliens and individuals who can be claimed as dependents (whether or not they were claimed as such) who have a Social Security number, are eligible for a one-time refundable federal income tax credit.

The tax credit is $1,200 ($2,400 for individuals filing jointly) plus $500 for each dependent, which could be a child of the taxpayer or other qualifying relative. Each individual who qualified in 2019 will be treated as having made a tax payment in the amount of the credit, which will reduce the amount of 2019 federal income tax liability and create a potential refund that the CARES Act directs to be processed as rapidly as possible.

The amount of this credit is reduced and phased out for taxpayers with more than a threshold adjusted gross income (AGI). The amount of the credit is reduced (but not below zero) by five percent of the taxpayer's AGI in excess of: (1) $150,000 for a joint return; (2) $112,500 for a head of household; and (3) $75,000 for all other taxpayers. For example, the credit is completely phased out at $198,000 of AGI for a joint filer with no dependents.

The IRS may pay the credit electronically to any account to which the taxpayer authorized on or after January 1, 2018 for the delivery of a refund of federal taxes or other federal payment. Within 15 days after distributing a rebate payment, the IRS will mail a notice to the taxpayer's last known address indicating how the payment was made, the amount of the payment and the IRS phone number for reporting any failure to receive the payment.

Retirement Account Distributions, Loans and Required Minimum Distributions

The rules for distributions and loans from retirement accounts have been relaxed to permit individuals access to their retirement funds for a wide variety of reasons related to COVID-19. Qualifying taxpayers are those who certify to the plan administrator that one or more of the following circumstances has occurred:

- The individual has been diagnosed with the virus SARS-CoV-2 or COVID-19 by a test approved by the Centers for Disease Control and Prevention (CDC);
- The individual's spouse or dependent has been diagnosed with such virus or disease by such a test; or
- The individual experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury.

Any distribution of up to $100,000 made on or after January 1, 2020 and before December 31, 2020 from a qualified retirement account (e.g., a 401 (k), IRA, certain deferred compensation plans, or other tax-deferred retirement plan) made by a qualifying individual will not be subject to the 10 percent early withdrawal penalty. In addition, the distribution will be subject to federal income tax ratably over the three tax years following the distribution and those distributions can be contributed back to the retirement plan any time during the three-year period beginning on the day after the distribution was received.

The amount of loans that may be taken from such a retirement account has been increased, and if the due date for any repayment of an outstanding loan falls after enactment of the CARES Act and before January 1, 2021, then that due date is deferred by one year.

Lastly, the CARES Act also waives the requirement that qualifying plans make their required minimum distributions during calendar year 2020. This is great news to retirees whose required minimum distribution amount for 2020 was calculated based on the value of the market at December 31, 2019.

Charitable Contributions

The CARES Act has also expanded the charitable contribution deduction for both individual and corporate taxpayers if those donations are made in cash during 2020 to 501(c)(3) charities (except supporting organizations, which carry out their exempt purposes by supporting other charities, and donor advised funds) [qualified contributions].

First, a $300 above-the-line deduction has been added so individuals who do not elect to itemize their deductions can deduct qualified contributions made in 2020.

Second, the 60 percent of AGI limitation on charitable contribution deductions for individuals is increased to 100 percent of AGI for qualified contributions, and the 10 percent taxable income limitation on charitable contribution deductions for corporations is increased to 25 percent of taxable income for qualified contributions. Any qualified contributions by an individual or corporation in excess of the new limit can be carried forward under the normal rules.

In addition, the limitation on charitable contribution deductions for donations of food inventory to a charitable organization that will use it for the care of the ill, the needy or infants is increased. Such donations are generally deductible in an amount up to basis plus half the gain that would be realized on the sale of the food (not to exceed twice the basis).

In the case of a C corporation, the deduction generally cannot exceed 15 percent of the corporation's income. In the case of a taxpayer other than a C corporation, the deduction generally cannot exceed 15 percent of aggregate net income of the taxpayer for that tax year from all trades or businesses from which those contributions were made, computed without regard to the taxpayer's charitable deductions for the year. For 2020, those limitations are increased to 25 percent.

Student Loan Repayments

Generally, an employee's gross income does not include up to $5,250 per year of employer payments, in cash or kind, made under an educational assistance program for the employee's education (but not the education of spouses or dependents). The CARES Act adds eligible student loan repayments made before January 1, 2021 to the types of educational payments that are excluded from employee gross income.

Eligible student loan repayments are payments by the employer, whether paid to the employee or a lender, of principle or interest on any qualified higher education loan for the education of the employee (but not of a spouse or dependent). The payments are subject to the overall $5,250 per employee limit for all educational payments.

Implementation of the provisions of the CARES Act is continuing to develop, and Varnum's Tax Team will provide updates as they become available.

VARNUM
ATTORNEYS AT LAW

Update: Due Dates for Income Tax Payments Postponed Due to COVID-19

AUTHORS

Angelique M. Neal

Eric M. Nemeth

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
March 25, 2020

On March 17, 2020 Secretary of Treasury Mnuchin announced that tax payments due to the IRS by April 15, 2020 will be deferred and issued Notice 2020-17 to implement the payment deferral.

On March 23, 2020 the IRS issued Notice 2020-18 to expand (and supersede) the relief provided by the previous notice. Notice 2020-18 provides both an automatic extension of time to file federal income tax returns and pay federal income tax, self-employment tax or estimated tax due on April 15, 2020.

The new due date for both is now July 15, 2020. In addition, the IRS has posted FAQs on its website at www.irs.gov/coronavirus that clarify how this tax reporting and payment deferral will be implemented.

The following is a summary of the most important aspects of Notice 2020-18 and the new FAQs:

1. Any individual, trust, estate, corporation or any type of unincorprated business entity whose federal income tax return or payment is due on April 15, 2020 is eligible for the extension of time to file and deferral of tax payment.
2. The federal income tax deferral applies to federal income taxes due for the tax year 2019 (including payments on self-employment income and installment payments) and any 2020 estimated federal income tax payments.
3. No extension is available for any tax returns or tax payments due on any other date, including March 16, 2020 (the due date for partnership and S-corporation federal income tax returns) and May 15 (the due date for nonprofit organizations reporting unrelated business income tax).
4. No deferral is available for any payment or deposit of any other type of federal tax or for the filing of any federal information return, including payroll and excise tax returns and payments.
5. There is no cap on the amount of taxes that may be deferred, and the deferral is not dependent on the taxpayer suffering from symptoms of, or direct repercussions from, COVID-19 or any related quarantine.

6. This due date is automatically extended; neither IRS Forms 4868 nor 7004 need to be filed to request the extension.
7. During the period between April 15 and July 15, 2020 no penalties or interest will accrue. This applies even if you have already filed your federal income tax return but have not yet paid the tax due. However, if you have already filed and scheduled your payment to be made on April 15, 2020 through IRS direct pay, electronic federal tax payment system or through your credit/debit card, the payment will not automatically be rescheduled without action by the taxpayer to cancel or reschedule it.
8. Notice 2020-18 has no effect on state income tax filing and payment due dates.

While Notice 2020-18 does provide clarification on the filing and payment relief provisions, questions on this program still remain. Varnum's Tax Team will provide updates as they evolve.

VARNUM
ATTORNEYS AT LAW

IRS Unveils New People First Initiative

AUTHORS

Angelique M. Neal

Eric M. Nemeth

Thomas J. Hillegonds

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

Tax Advisory
March 25, 2020

Just like businesses, individuals and local government entities across the nation, the IRS is also taking steps to protect its employees, taxpayers and partners. On March 25, 2020 the IRS unveiled the new People First Initiative to help taxpayers facing COVID-19 challenges. According to IRS Commissioner Chuck Rettig, it provides immediate relief to help people facing uncertainty over taxes and temporarily adjusts IRS processes to help people and businesses during these uncertain times. Rettig added, "We are facing this together, and we want to be part of the solution to improve the lives of all people in our country."

Specifics about the provisions of the initiative will be released soon. However, highlights include:

1. Installment Agreements

Payments due on existing installment agreements between April 1 and July 15, 2020 are suspended. If taxpayers are unable to comply with the terms of a regular or direct debit installment agreement, they may suspend payments during this period. In addition, taxpayers can still set up new installment agreements online or over the telephone.

2. Offers in Compromise (OIC)

1. IRS will allow an extension until July 15 to provide additional information in support of a pending offer. No pending OICs will be closed before July 15 without the taxpayer's consent.
2. Taxpayers have the option to suspend all payments on accepted OICs until July 15, though interest will continue to accrue.
3. IRS will not default an OIC for taxpayers who are delinquent in filing their 2018 tax return, so long as the 2018 return (and the 2019 return) is filed by July 15.
4. New OIC submissions can still be submitted.

3. Field Collection Activities

1. Liens and levies initiated by field revenue officers will be suspended for most taxpayers.

2. Revenue officers will continue to pursue high-income non-filers and will perform other similar activities where warranted.

4. Field, Office and Correspondence Audits

1. IRS will generally not start new field, office or correspondence audits during this period, unless necessary to preserve the applicable statute of limitations.
2. In-person meetings on current field, office and correspondence audits will be suspended. However, audits will be continued remotely.

5. Practitioner Priority Service

Telephone service is available but longer wait times may result from limitations on staffing levels.

6. Responses

Responses to taxpayer correspondence will be very limited. The IRS advises that taxpayers who mail correspondence to the IRS should expect to wait longer for a response. The IRS anticipates that delayed responses will continue after return to normal operations due to correspondence backlog.

7. IRS Office of Chief Counsel

Chief counsel will continue to work to resolve cases in litigation, and will continue to support and advise IRS operating divisions on examinations and collection matters.

8. IRS Independent Office of Appeals

Staff will continue to work cases. Conferences will be held via telephone or video conferencing. Taxpayers should respond promptly to requests for information.

9. Taxpayer Advocate Service

The service will be open to take calls and work cases, but walk-in service is unavailable. NOTE – if calling in to TAS, taxpayers and representatives need to use the local numbers. The toll-free centralized number is unavailable until further notice.

The IRS plans to monitor issues relating to COVID-19 and will make changes to its operations and functions as appropriate. Varnum's Tax Team will provide updates on IRS operations, functions and procedures as they evolve.

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.

VARNUM
ATTORNEYS AT LAW

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

AUTHORS

Angelique M. Neal

Eric M. Nemeth

RELATED PRACTICES

Coronavirus Task Force

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.

VARNUM
ATTORNEYS AT LAW

Coronavirus Update: Important Guidance for IRS Tax Filers

AUTHORS

Angelique M. Neal

Eric M. Nemeth

RELATED PRACTICES

Coronavirus Task Force

Tax Planning, Compliance and Litigation

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.