



BUCKLEY KING

CORONAVIRUS: MORE BUSINESS “UNUSUAL”

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Coronavirus: More Business "Unusual"

AGENDA

- What is an Essential Business and What is Required
- Guidelines for Employers
- Insurance and COVID-19
- SBA: Paycheck Protection and Economic Disaster Loans

Are We or Are We Not an “Essential” Business

“Stay-at-Home” Orders continue to grow, so do the questions about definitions

- Adding to the 20 or so states issues these Orders, in other instances cities including Dallas, St. Louis, Nashville
- Closures include and restrictions placed upon:
 - Schools
 - Bars
 - Restaurants
 - Entertainment venues
 - Group congregation
- But, many have asked, but not yet ordered, “non-essential” businesses to close

Are We or Are We Not an “Essential” Business

So the question becomes “*are we or are we not a non-essential business?*”

- Some states have adopted the CISA Guidance on Essential Critical Infrastructure Workers issued by the Federal government
- Because jurisdictions have edited definitions, the definitions vary from state to state, and city to city

Are We or Are We Not an “Essential” Business

Companies need to identify where their locations are located, what critical work is done at each, and what parts of the workforce can work remotely

- Companies are free to reach out to the government
- As part of this, companies need to stay current on employment law changes
- Violations of Order are typically misdemeanor offenses

Are We or Are We Not an “Essential” Business

So, what should a business do?

- If you are designated an “essential” business and continue operations:
 - Talk with counsel on employment and other mandatory compliance issues
 - “Essential service” letter
 - Problems to look out for
- Ohio has adopted the “Guidance on the Essential Critical Infrastructure Workforce” issued by the federal government
- It also has added components of the State of Illinois’ Order

OSHA's General Duty Clause

OSHA'S GENERAL DUTY CLAUSE

SEC. 5. Duties

- (a) Each employer --
 - (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

OSHA

EXPOSURE TO CONTAGIONS (CoV)

General guidance for workers and employers

- Employers should follow recognized good infection control practices (including standard precautions) to prevent or minimize transmission of infectious agents (i.e., MERS), and must comply with applicable requirements in the Bloodborne Pathogens ([29 CFR 1910.134](#)), Personal Protective Equipment ([29 CFR 1910.132](#)), general requirements) and the Respiratory Protection ([29 CFR 1910.134](#)) standards, among other OSHA requirements.
- Hand hygiene consists of washing with soap and water or using alcohol-based hand rubs containing at least 60% alcohol.
- Regular cleaning and disinfecting work environment (*be mindful of using caustic or harmful cleaning solvents that may expose workers to different risks*)
- Provide appropriate PPE
- Report illness:
 - If the exposed worker was admitted as an in-patient to a hospital, [report the case to OSHA](#).
 - Workers may continue working during the 14-day post-exposure period if there are no symptoms of fever or respiratory illness.

OSHA

OSHA FACT SHEETS

PROTECTING WORKERS DURING A PANDEMIC

- <https://www.osha.gov/Publications/OSHA3747.pdf>

OSHA & COVID 19

- <https://www.osha.gov/SLTC/covid-19/>

GUIDANCE ON PREPARING WORKPLACES FOR COVID-19

- <https://www.osha.gov/Publications/OSHA3990.pdf>

HIPAA

A WORD ABOUT HIPAA

The HIPAA Privacy Rule establishes national standards to protect individuals' **medical records** and other **personal health information**.

HIPAA applies to (COVERED ENTITIES):

- HEALTH PLANS
- HEALTH CARE CLEARINGHOUSES
- HEALTH CARE PROVIDERS that conduct certain health care TRANSACTIONS ELECTRONICALLY.

HIPAA

A WORD ABOUT HIPAA

HIPAA's Privacy Rule does not protect employee employment records, even if the information in those records is health-related.

In most cases, the Privacy Rule does not apply to the actions of an employer.

Employers are generally NOT Covered Entities under the Act.

W.A.R.N. Implications

The Worker Adjustment Retraining Notification Act (“W.A.R.N.”) requires employers with at least 100 employees to provide notice of mass lay-off, at least 60 DAYS before the layoff.

EXCEPTIONS TO THE 60-DAY NOTICE

Notice must be provided as soon as is practicable even when these exceptions apply, and the employer must provide a statement of the reason for reducing the notice requirement in addition to fulfilling other notice information requirements.

Unforeseeable business circumstances: When the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required(i.e., a business circumstance that is caused by some sudden, dramatic, and unexpected action or conditions outside the employer's control, like the unexpected cancellation of a major order); or

Natural disaster: When a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature. In this case, notice may be given after the event.

Ohio Requirements – *Essential Business*

CREATE A BUSINESS JUSTIFICATION STATEMENT

ITEM 12 – Identify Exempted Business

- Create statement of how business is exempted

Include:

Item 18: COVID-19 Information and Checklist for Businesses/Employers.

Ohio Requirements – *Essential Business*

CREATE A BUSINESS JUSTIFICATION STATEMENT

Item 18: COVID-19 Information and Checklist for Businesses/Employers:

- Allow employees to work from home
- Encourage sick employees to stay home fever free for 72 hours and no longer have symptoms
- Ensure sick leave policies are up-to-date and permit non-punitive leave
- Prohibit workers with acute respiratory symptoms from reporting to work
- Reinforce hygienic practices
- Frequently perform enhanced cleaning of facility
- Be prepared to change business practices in order to maintain critical operations

Ohio Requirements – *Essential Business*

SOCIAL

DISTANCE



Ohio Requirements – *NON-Essential Business*

WORKFORCE ISSUES / UNEMPLOYMENT

COVID-19-RELATED UNEMPLOYMENT BENEFITS

EFFECTIVE MARCH 16, 2020

- Permits employees who lose their jobs or ability to work due to coronavirus closings or loss of production layoffs to expedited benefits.
- Includes workers who have been recommended by a medical professional, local health authority, or employer to be isolated or quarantined as a consequence of COVID-19, even if not actually diagnosed with COVID-19;
- Eligible employees will not be required to serve a waiting period before receiving benefits;
- Waiver of work search requirements shall include those individuals requested by a medical professional, local health authority or employer to be isolated or quarantined as a consequence of COVID-19 even if not actually diagnosed with COVID-19.
- Benefits are payable at 50% of wages, not to exceed \$480 per week
- An “eligible employee” must have worked 20 weeks and have an average weekly wage of at least \$269 per week.

Ohio Requirements – *NON-Essential Business*

WORKFORCE ISSUES / UNEMPLOYMENT

COVID-19-RELATED UNEMPLOYMENT BENEFITS

How are employers affected by this executive order?

- Any benefit paid on these unemployment claims shall not be charged to the account of the employer who otherwise would have been charged but instead shall be charged to the mutualized account, except reimbursing employers, who will follow existing charging requirements;
- Penalties for late reporting and payments will be waived for employers affected by COVID-19.

Ohio Requirements – *NON-Essential Business*

FEDERAL SUPPLEMENTAL UNEMPLOYMENT INSURANCE

Keep American Workers Paid And Employed Act.

- Stimulus bill would significantly boost unemployment benefits, expanding eligibility and offering workers up to an additional \$600 a week for four months;
- Extends unemployment compensation an additional 13 weeks. In Ohio, workers would be entitled to up to 39 weeks of unemployment compensation (26 under Ohio law plus 13 under Act);
- Applies to workers who were eligible for unemployment benefits on January 27, 2020 through December 31, 2020;
- Those eligible include: (1) self-employed; (2) part-time workers; (3) those diagnosed, seeking a diagnosis or caring for family members who have been diagnosed with COVID-19; (4) those caring for children who cannot return to school, daycare or any facility; (5) those caring for another family member or an elderly parent; (6) those who must self-quarantine; (7) those who were about to start a new job or who have less than the amount of time normally needed for eligibility; and (8) those who live in a household where the breadwinner has died of COVID-19;
- Those ineligible include: (1) those receiving Emergency Paid Sick Time or Paid Family Leave; (2) workers who are able to work from home; (3) those who quit (or want to quit) because they fear that continuing to work puts them at risk of contracting coronavirus; and (4) new entrants to the workforce that cannot find jobs.

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Ohio Requirements – *Essential Business* Paid Leave Under the FFCRA

Employees Who Cannot Work Because They:

- HAVE COVID-19
- CARE for someone with COVID-19
- Are AWAITING Test for COVID-19
- Have Been Instructed To
QUARANTINE
- CARE for someone who has been
instructed to Quarantine
- HAVE a condition similar to COVID-
19 as designated by HHS

EMERGENCY
PAID
SICK
LEAVE

Ohio Requirements – *Essential Business*

PAID LEAVE UNDER THE FFRCA

WHAT IS EMERGENCY PAID SICK LEAVE UNDER THE FFRCA?

- 2 weeks full salary
- Paid by employer
- Cannot be substituted for PTO and Employee cannot be required to exhaust PTO before using EPL
- Available to Part-Time and GIG workers
- Available to any employee who has worked the past 30 days
- Employee has right to return to former job
- Employer exemptions may be available for those with less than 50 employees upon petition to the Secretary of Labor
- Becomes effective April 1, 2020
- Rights expire on December 31, 2020
- Employers will be reimbursed for entire amount through deduction from payroll taxes

Ohio Requirements – *Essential Business* EMERGENCY AND FAMILY MEDICAL LEAVE EXPANSION ACT

What is Available:

Employees unable to **work or telework** because they must **care for children** whose schools are closed or whose child care provider is unavailable because of COVID-19.

- Up to 2/3 of regular pay - not to exceed \$211 per day or \$10,000 total benefit
- 1st 10 days can be unpaid
- Employee's job must be protected
- Availability expires 12/31/2020
- Not retroactive
- Employee must have been employed for last 30 calendar days prior to beginning of leave

Employers will be reimbursed for entire amount through deduction from payroll taxes

Ohio Requirements – *Essential Business* EMERGENCY AND FAMILY MEDICAL LEAVE EXPANSION ACT

Employees Who
Cannot Work Because
They:

Employees unable
to **work or telework**
because they must
care for children
whose schools are
closed or whose
child care provider is
unavailable because
of COVID-19.

EXCEPTIONS:

Employers with less than 25
employees do not need to
protect employment IF:

- The position no longer exists due to changes in the employers' operations that were caused by the COVID-19 emergency;
- The employer made “REASONABLE EFFORTS” to return the individual to an equivalent position
- The employer makes “REASONABLE EFFORTS” to contact the employee when an appropriate position becomes available

Ohio Requirements – *Essential Business* Employees With Other “Serious Health Conditions” or “Disabilities”

FMLA (At Least 50 Employees)

- Employee must have been employed for 1 year and worked 1,250 hours
- Must have a “Serious Health Condition” or care for family member with “Serious Health Condition” or have had a child
- Entitled to 12 weeks UNPAID leave but job protection
- FMLA IS A RIGHT – cannot require them to work remotely or come in
- CAN require them to take all PTO
- Must maintain job
- Maintain health insurance at employee cost

ADA (At Least 4 Employees)

- Must have a condition which affects a Major Life Function
- Employer must “reasonably accommodate”
- Remote work?
- Lay off with job protection?
- May need to maintain health insurance and job

Ohio Requirements – *Essential Business*

“I DON’T WANT TO COME TO WORK”

- Essential Business Compliance
- OSHA Compliance
- Require Medical Documentation if complaints they may be “protected”
- “Replace” vs. “Terminate”
- Not required to maintain health insurance

INSURANCE COVERAGE FOR COVID-19 RELATED BUSINESS LOSSES

What Coverages Provide Indemnification for Your Business Losses?

- Property insurance policies typically provide insurance for certain economic losses from the complete or partial suspension of business operations due to forms of:
 - [direct] physical loss of or damage to covered property of the policyholder/insured; or
 - [physical] damage to covered property a supplier or customer of the policyholder/insured.

What Coverages Provide Indemnification for Your Business Losses?

Business Interruption Insurance may cover economic losses:

- Due to disruption to business operations
- Triggered by “direct physical loss of or damage to property at premises which are described in the Declarations.”
- The general purpose of business interruption insurance is to protect the earnings the insured would have enjoyed had no interruption occurred.
- This coverage part may also provide coverage for Extra Expenses incurred to mitigate or minimize losses of earnings.

More . . .

- ***Contingent Business Interruption Insurance*** may cover economic losses triggered by physical damage to the covered property of a supplier or customer.
- ***Civil Authority Insurance*** may cover economic losses when an order of a civil authority prevents access to the covered property of the policyholder due to physical loss of or damage to other property based on the policy language, the scope and terms of the governmental authority, and the facts of the claim.
- ***Event Cancellation Insurance*** may cover economic losses resulting from the cancellation, postponement, or relocation of an event for reasons beyond the control of the event holder.

More . . .

The Grant of Coverage Requirement of Physical Loss of or Damage to Property

Most policies do not define “[direct] physical loss of or damage to property.”

The law tends to favor the insurer position that coronavirus contamination does not satisfy this trigger of coverage, but this issue is not well-settled in many jurisdictions.

THE VIRUS OR BACTERIA EXCLUSION

- The “Catch-22” for policyholders is the inclusion of a Virus or Bacteria Exclusion.
- Fifteen years ago ISO developed Form CP 01 40 07 entitled “Exclusion for Loss Due to Virus or Bacteria, which applies to “business income” and provides in relevant part:
- We will not pay for loss or damage caused by or resulting from any virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

WHAT SHOULD BUSINESS DO?

Businesses should consider undertaking the following steps:

- ***Policy Review.*** Businesses should ask an insurance coverage professional to assist with the review of their insurance policies.
- ***Notify Your Insurer.*** Identify and carefully review the policy requirements to provide notice of a claim to your insurer. The failure to provide timely notice may provide a basis for the insurer to deny your claim. Your insurance broker can assist with providing notice of your claim.
- ***Document Claimed Losses.*** Property insurance policies have proof of claim or loss provisions, which should be followed. Maintain a careful record of all economic losses and the supporting documentation needed to establish and calculate your business losses.

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CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES) SMALL BUSINESS PROVISIONS

- NEW PAYCHECK PROTECTION PROGRAM UNDER 7(A)
- EXPANDED ECONOMIC INJURY DISASTER LOAN PROGRAM
 - EMERGENCY GRANT PROGRAM

WARNING: CARES HAS NOT YET BEEN SIGNED INTO LAW AND MAY CHANGE



U.S. Small Business
Administration



Presented by Frank Nagorney
March 27, 2020

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SPECIFICS OF PAYCHECK PROTECTION PROGRAM

- **LOANS ORIGINATED THROUGH EXISTING 7(A) LENDER NETWORK**
- **FORGIVABLE LOANS UP TO \$10,000,000 PER COMPANY**
- **PURPOSE: CASH FLOW ASSISTANCE TO EMPLOYERS TO MAINTAIN PAYROLL**
- **ELIGIBLE BUSINESSES:**
 - **500 EMPLOYEES OR LESS (WITH EXCEPTIONS)**
 - **SOLE PROPRIETORSHIPS**
 - **INDEPENDENT CONTRACTORS**
- **UNDERWRITING:**
 - **LENDERS ARE NOT TO DETERMINE REPAYMENT ABILITY**
 - **WAS THE BUSINESS OPERATIONAL ON FEB 15, 2020?**
 - **DID THE BUSINESS HAVE PAID EMPLOYEES OR INDEPENDENT CONTRACTORS ON THAT DATE?**

PAYCHECK PROTECTION LOAN TERMS

- **SBA GUARANTEES COVERED LOANS DURING COVERED PERIOD (FEB 15 TO JUN 30, 2020)**
- **LOAN AMOUNT**
 - **AVERAGE TOTAL MONTHLY PAYROLL COSTS IN THE ONE-YEAR PERIOD BEFORE THE LOAN IS MADE**
 - **(OR SHORTER PERIOD IF A NEW BUSINESS)**
- **“PAYROLL” INCLUDES SALARY, WAGES, CASH TIPS, PAID TIME-OFF, SEVERANCE, HEALTH CARE BENEFITS, MORE**
- **CAPPED AT \$100,000 PER EMPLOYEE, PROPRIETOR, INDEPENDENT CONTRACTOR**

MAXIMUM INTEREST RATE IS 4%

LOAN USES

- **PAYROLL AND BENEFITS**
- **MORTGAGE PAYMENTS**
- **OTHER DEBT OBLIGATIONS**

- **LOAN FORGIVENESS**
 - ***100% RELIEF IF EMPLOYER MAINTAINS PAYROLL DURING THE COVERED PERIOD (FEB 15 TO JUN 30, 2020)***

EXPANSION OF ECONOMIC INJURY DISASTER LOAN PROGRAM

APPLICATION PROCESS ON-LINE DIRECT TO SBA

<https://disasterloan.sba.gov/ela>

- **\$2,000,000 LOAN LIMIT**
- **3.75% INTEREST RATE IS 3.75%**
- **TERM UP TO 30 YEARS**
- **NO PERSONAL GUARANTEE ON ADVANCES AND LOANS BELOW \$200,000**
- **ONE YEAR IN BUSINESS REQUIRED**
- **NO OTHER CREDIT AVAILABLE**
- **UNDERWRITING CAN BE BASED SOLELY ON APPLICANT'S CREDIT SCORE OR ALTERNATIVE METHOD REGARDING ABILITY TO REPAY**
- **EMERGENCY GRANT FOR \$10,000 ADVANCE TO ELIGIBLE APPLICANTS**

EXPANSION OF ECONOMIC INJURY DISASTER LOAN PROGRAM

USES:

- **PAYROLL**
- **FIXED DEBTS, ACCOUNTS PAYABLE**
- **OTHER BILLS**

EXPANSION OF ECONOMIC INJURY DISASTER LOAN PROGRAM

APPLICATION IS ON-LINE

- **Eligibility**—must be up to date on tax returns and tax payments
- **Underwriting**—reasonable expectation of repayment
- **Acceptable credit history**
- **Collateral may be required**
- **NOTE:** If the borrower has existing secured debt, *consent from the senior lender is necessary*

EXPANSION OF ECONOMIC INJURY DISASTER LOAN PROGRAM

APPLICATION IS ON-LINE

Documentation:

- **SBA Form 5 Application**
 - Company information required
 - Owner information required for 20% shareholders
 - Consent to release tax transcripts Form 4506-T
 - Support for Loan--Sales and cost of goods history for 12 months
 - Year-end and current financial statements
 - Recent tax returns
 - Personal financial statements for 20% owners and affiliates (SBA Form 413)
 - List of liabilities (SBA Form 2202 may be used)
 - Description of need for loan and projected budget
 - monthly projections for six months recommended
 - detail must show the operating expenses that are in jeopardy

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