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FOS NEWS - *Our clients come first*

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LIFE CHANGES IN AN INSTANT

When the spring edition of this newsletter went to print in mid-February, few imagined that the U.S., much less the rest of the world, would be effectively shut down mere weeks later. Then the novel 2019 coronavirus (COVID-19) pandemic infected our families, our friends, and our businesses.

The economic impacts of the pandemic will be significant and long-lasting. So will the legal effects. Supply-chain disruptions, cancelled or breached contracts, employee safety measures, employer viability and insurance coverages are just some of the many issues which have already arisen as a result of the pandemic. More will certainly follow.

To best inform our readers, this issue of the *FOS News* is devoted to COVID-19's legal impacts on business transactions, employment relationships, tax filings and related matters.

From eblasts to postings on our website (http://foslaw.com/legal-services/covid19-coronavirus-information/) and social media, FOS has provided, and will continue to provide, up-to-date analyses of the remedial legislation enacted and the legal issues arising in response to the pandemic.

Our attorneys and staff are here for you, your business, and your family. To receive future eblasts, or if you have any questions regarding COVID-19 or any legal issue, contact FOS at info@foslaw.com or 414-273-3939.

Be well.

EMPLOYEE SICK AND FAMILY LEAVE UNDER THE PANDEMIC

The COVID-19 pandemic's impact on the workplace was immediate, and unfortunately continues today.

Employees were or are sick, or have had to take care of sick family members or children home from school.

To provide relief to such employees, Congress enacted the Families First Coronavirus Response Act (the Act).

The Act primarily addresses the issues of paid sick leave and additional leave under the federal Family and Medical Leave Act (FMLA).

The Act, which took effect April 1, 2020, applies to leave taken between April 1 and December 31, 2020.

It applies to private employers with fewer than 500 employees, based on aggregated locations, and certain public employers.

Following are highlights of the Act.

Expanded FMLA Leave. The Act provides additional benefits beyond those contained in the FMLA, and covers employers with fewer than 50 employees.

The Act provides additional leave for employees who(se):

- Have been employed for 30 days;
- Cannot work (or telework) due to the need for leave to care for the employee's minor child; and
- Elementary or secondary school, or place of care for such child, has been closed, or whose child care provider for such child is unavailable, due to a public health emergency.

Note that an employer must only provide qualified employees with 12 total weeks of FMLA leave.

Of these 12 weeks, the first two work weeks (usually 10 days) may be unpaid.

The remaining leave must be paid at a rate of not less than 2/3 of the subject employee's normal rate of pay, capped at $200 per day and $10,000 in total.

Emergency Paid Sick Leave. Under the Act, an employer must provide up to two weeks (80 hours) of paid sick leave to an employee who is:

- Subject to a quarantine order;
- Advised by a healthcare provider to self-quarantine;
- Experiencing and seeking a diagnosis

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FEDERAL GUIDELINES ON COVID-19 AND THE WORKPLACE

At this point in the COVID-19 pandemic, some businesses are "open" while others remain shuttered. All employers, however, are wrestling with how to best protect employees' health when operating their businesses.

The federal government has adapted its workplace guidelines, issued during the H1N1 pandemic, to COVID-19.

These guidelines apply to employers, with 15 or more employees, that are subject to the federal Americans With Disabilities Act (ADA) and Rehabilitation Act.

Under these guidelines, an employer may ask an employee the reason for a work absence if the employer suspects it is for a medical reason. This not a disability-related inquiry.

When an employee calls in sick, the employer, to protect its remaining workforce, may ask whether the employee is experiencing COVID-19 symptoms. These include fever, chills, sore throat, cough and shortness of breath. The employer must maintain this information as a confidential medical record under the ADA.

Because the CDC and other health authorities have recognized and issued precautions against COVID-19 community spread, employers may take employees' body temperatures. This is an ADA medical examination subject to ADA confidentiality requirements.

Consistent with CDC recommendations, employers may require that employees ill with COVID-19, or displaying COVID-19 symptoms, leave the workplace.

Employers may require that employees returning to work after an illness provide a doctor's note certifying that the employee is fit for work and does not have COVID-19.

Doctors may be too busy to provide formal notes. If so, they will need to rely on local clinics to provide stamps, forms, or emails on behalf of the employee.

An ADA-covered employer generally may not ask employees who do not have COVID-19 symptoms to disclose whether they have a medical condition that the CDC considers could make them especially vulnerable to COVID-19.

An inquiry may be made under limited objective circumstances. Given this issue's complexity, employers should contact their FOS attorneys before communicating with employees regarding this issue.

If an employee, without prompting, discloses a specific medical condition or disability putting the employee at increased risk of COVID-19, that information must be kept confidential.

Upon being told this information, the employer may ask the employee what, if any, assistance (such as telework or leave for medical appointments) is needed.

An employer may require employees to adopt infection -control practices at the workplace. Hand washing is an essential but not exclusive tool. An employer may provide and require employees to wear personal protective equipment, such as face masks, gloves, or gowns, designed to reduce COVID-19's transmission.

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DOES BUSINESS INTERRUPTION INSURANCE APPLY TO COVID-19 LOSSES?

To remedy the economic damage caused by business closures, supply chain disruptions, and other losses due to the COVID-19 pandemic, many businesses have turned to insurance policies which they obtained to cover business interruption losses.

Whether these policies cover economic losses from the pandemic will depend on their specific coverage and exclusion language.

Traditional commercial property insurance policies usually include two types of relevant coverage.

Business interruption coverage insures against losses resulting when the insured's business operations are directly affected by an occurrence.

Contingent business interruption coverage insures against indirect losses, such as disruptions in an insured's supply or customer chain.

In a traditional commercial property insurance policy, business interruption claims are triggered by a physical loss or damage to property.

However, insurers have argued that the COVID-19 pandemic would not cause "property damage," as that term is customarily defined in property insurance policies.

They have taken the position that most commercial property insurance policies would not cover business interruption losses from the outbreak.

Under some policies, proof that contamination, such as from bacteria, gases, and fumes, rendered a property temporarily or permanently unusable or uninhabitable, may support a finding of physical property loss.

After the 2003 SARS epidemic, insurers modified their policy forms to attempt to exclude health-related epidemics. These policies excluded coverage for virus agents, biologic pollution, biologic agents or contamination.

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IRS GUIDANCE RE: NON-DEDUCTIBILITY OF PPP LOAN EXPENSES

Many businesses have obtained loans under the Paycheck Protection Program (PPP).

PPP was established under the CARES Act (the Act), to provide loans (PPP Loans) to businesses adversely affected by the COVID-19 pandemic.

The Act provides that all or a part of such loans may be forgiven if used to fund payroll costs, mortgage interest payments, rent, or covered utilities.

Generally, the forgiveness of a loan is treated as income for tax purposes. The Act, however, provides that any amount of a PPP Loan that would otherwise be treated as income as a result of loan forgiveness shall be excluded from gross income for federal income tax purposes.

If that amount of a PPP Loan which is forgiven is not reportable for federal income tax purposes, are the otherwise deductible expenses incurred in connection with a PPP Loan still deductible?

The Act itself does not expressly answer this question. The IRS, however, has issued Notice 2020-32 on this issue.

It "clarifies" that no deduction is allowed for an otherwise deductible expense funded with the proceeds of a PPP Loan to the extent of any loan forgiveness.

This means that businesses which use their PPP Loans on expenses which qualify for forgiveness will not be able to deduct such expenses on their taxes.

The rationale for the Notice's conclusion is that expenses allocable to tax-exempt income are not deductible. PPP Loans that are forgiven constitute a class of tax-exempt income. Because PPP Loan forgiveness is directly tied to the payment of certain expenses, those expenses are allocable to the tax-exempt income. Therefore, the expenses are not deductible.

This treatment prevents a taxpayer from enjoying a double benefit—loan forgiveness and a tax deduction for the expenses giving rise to the loan forgiveness.

While the Notice applies only to federal income taxes, states are likely to follow it.

The Notice has drawn opposition, including from Senate Finance Committee Chairman Senator Chuck Grassley. The Notice remains effective, however, unless or until the IRS withdraws it or Congress legislatively overrides it. A new bill clarifying this issue is expected. Stay tuned.

FOS IS HERE FOR YOU

While we social distance, work remotely, and defer gatherings, our personal and business lives continue. We get married, buy homes, have babies, "welcome" our children back home, and retire to our "second phase."

We start businesses, negotiate contracts and leases, and track payables and receivables.

Yes, we need legal advice regarding COVID-19's impact. But we also need legal advice regarding commercial issues, real estate transactions, estate planning, family law matters, and litigation disputes.

FOS is here for you, regarding COVID-19 and any legal issue you may have.

Contact us at info@foslaw.com or 414-273-3939.

Sick/Family Leave, cont. from page 1

of COVID-19 symptoms;

- Caring for a qualified individual subject to a quarantine order or who has been ordered to self-quarantine;
- Caring for the employee's minor child, if the child's school or place of care has been closed, or the child's childcare provider is unavailable, due to COVID-19 precautions; or
- Experiencing a substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Departments of Treasury and Labor.

The total leave generally required for a part-time employee is the number of hours the employee works, on average, over a two-week period.

An employee taking leave for the employee's own symptoms or exposure must be paid his or her regular rate of pay. That paid sick time is capped at $511 per day and $5,110 total.

An employee using leave to care for an individual affected by COVID-19 or the employee's child due to school closing or the unavailability of childcare must be paid 2/3 his or her regular rate of pay. That paid leave time is capped at $200 per day and $2,000 in total.

The entire 80 hours of paid sick leave is available immediately, without any accrual rate or period. Leave cannot be carried over to the next year.

Emergency paid sick leave under the Act is *in addition to*, not instead of, any other paid leave provided by an employer.

Employers may receive tax credits for payments made under the Act.

An employer with less than 50 employees may seek to be exempt from the Act, if leave has been requested for allowable reasons and providing it would jeopardize the business' viability as a going concern.

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CONTRACT PERFORMANCE ISSUES AND COVID-19

The COVID-19 pandemic is causing major disruptions to commercial supply chains, resulting in delays, reduced fulfillments, and even cancellations of contractual orders and requirements.

Many disruptions may be resolved through negotiations resulting in the modification or negation of various contract requirements.

When negotiations fail, however, the following legal doctrines may apply.

FORCE MAJEURE. Many contracts contain force majeure clauses, under which the parties are excused from performance when certain unforeseeable and severe circumstances occur.

Specific provisions may vary from contract to contract.

Some contracts may refer generally to "Acts of God" or war as excused causes of nonperformance.

Others may refer to specific natural catastrophes, such as fires or floods, or other actions such as strikes.

Others may more broadly excuse performance for circumstances beyond the parties' reasonable control.

Whether a force majeure clause will be enforceable in the COVID-19 context depends on the contract language and the factual circumstances underlying the force majeure event (COVID-19 pandemic), including:

- The clause's precise language;
- Whether the event was unforeseeable;
- Whether the event caused the nonperformance; and
- Whether the event's effects are so severe that contract obligations cannot be performed.

Because existing force majeure provisions will likely not refer to a "pandemic," those clauses should be reviewed with other contract provisions involving default, liquidated damages, limitation of liability and termination.

IMPOSSIBILITY OR IMPRACTICABILITY OF PERFORMANCE. Where a contract does not contain a force majeure provision, the doctrines of impossibility or impracticability of performance may apply.

The impossibility doctrine excuses one contracting party from performing, when doing so would be "excessively burdensome" due to an unforeseeable event out of that party's control.

The event leading to nonperformance (COVID-19 pandemic) must be so unlikely that a reasonable party would not have included protections against it in the contract.

Under the Uniform Commercial Code, which applies to the sale of goods:

- The seller must not have assumed the risk of some unknown contingency;
- The contingency's nonoccurrence must have been a basic assumption of the contract; and

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Guidelines, cont. from page 2

Absent an undue hardship, an employer must also provide a disabled employee with needed reasonable accommodations at the workplace or for telework.

These include non-latex gloves and gowns designed to be used with wheelchairs.

During this pandemic, employers should be particularly wary of taking adverse action against employees with disabilities.

Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can the employer lawfully exclude that employee from employment or employment-related activities.

In addition to these federal guidelines, state employment laws also apply.

Be mindful of state and federal discrimination laws protecting employees of certain national origins. Employers should take no actions due to unsubstantiated fears that such employees have been exposed to COVID-19.

YOU STILL HAVE TO FILE YOUR TAXES!

The good news—the Internal Revenue Service (IRS) and Wisconsin Department of Revenue (DOR) extended the April 15, 2020 tax return filing deadlines due to the COVID-19 pandemic.

The bad news—as this newsletter goes to print, you still have to file your Wisconsin and federal tax returns and estimates by July 15, 2020. Further extensions may be coming.

The new deadline applies to all taxpayers, including employed individuals, those paying self-employment tax, trusts and estates, corporations and other non-corporate tax filers.

The original extension applied to tax filings due on April 15, 2020. The IRS and DOR later expanded the extension to basically all taxpayers who have a filing or payment deadline between April 1, 2020, and July 15, 2020.

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SBA CREATES $2 MILLION SAFE HARBOR FOR PPP LOAN CERTIFICATIONS

Especially for small businesses, one would expect that the approval of an application for a loan (PPP Loan) under the Paycheck Protection Program (PPP) means that the business qualified for its PPP Loan.

Early guidance from the Small Business Administration ("SBA"), however, called into question whether the fact that an applicant received a PPP Loan means that the application necessarily *qualified* for that loan.

The PPP, which was intended to aid small and medium business owners, requires all borrowers to certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

In PPP's early days, outrage followed the disclosure that loans were issued to apparently financially strong large and publicly-traded companies.

In response, the Treasury Department announced that it will review all loans *in excess of $2 million*, *in addition to other loans as appropriate.*

The announcement raised concerns that PPP Loans and applications for forgiveness would be given greater scrutiny than the scrutiny given to prior applications.

Many businesses can now breathe a sigh of relief, as new SBA guidance establishes *a "good faith" certification safe harbor for PPP Loans up to and including $2 million.*

The guidance makes clear that "[a]ny borrower that, together with its affiliates, 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."*

The SBA's rationale is that borrowers with loans below $2 million are generally less likely in the COVID-19 pandemic to have access to adequate sources of liquidity, than borrowers with larger loans.

This good news for recipients of PPP Loans of $2 million or less is not necessarily bad news for recipients of PPP Loans over $2 million.

After all, the new $2 million safe-harbor threshold is consistent with prior SBA guidance that all PPP Loans *over* $2 million will be subject to audit.

Audits, moreover, do not automatically mandate loan clawbacks. The SBA acknowledges these large borrowers may have adequate bases for good-faith certifications that their PPP Loans are necessary.

Even if the SBA ultimately determines that a borrower lacked an adequate basis to make the required certification of a PPP Loan's necessity, the SBA's guidance provides that it will not pursue additional enforcement or referrals to other agencies if the borrower repays the loan.

Guidance on the PPP is evolving and will continue to evolve for some time. Your FOS attorney can help you with questions regarding the PPP, PPP Loans, and PPP Loan forgiveness.

Insurance, cont. from page 2

A limited number of commercial property insurance policies do contain coverage language which might provide restricted coverage, usually with low limits, in circumstances such as the COVID-19 pandemic.

Such language might expressly cover losses from "interruption by communicable disease," or losses from an order by a "competent federal, state or local civil or martial authority" restricting access to or closing a business.

Even if coverage is unlikely, it may be advisable to make a claim under your policy for your business losses from the COVID-19 pandemic.

Any claim must be filed by the deadline and in the manner required in your policy, and include documentation of specific claimed losses, if known, at the time of filing.

The Wisconsin Commissioner of Insurance's website posted a notice regarding business interruption insurance and COVID-19. The notice suggests filing a claim if uncertainty exists as to coverage, and links to a one-page guide acknowledging the physical property damage requirement. https://oci.wi.gov/Pages/PressReleases/20200326BusinessInterruption.aspx

Contracts, cont. from page 4

- The contingency's occurrence must have made performance commercially impossible/impracticable.

Simply incurring additional costs, or being hurt by market conditions, may not support the doctrines' invocation.

Nonetheless, the COVID-19 pandemic is a unique circumstance which may be given a unique construction under these doctrines.

FRUSTRATION OF PURPOSE. The frustration of purpose doctrine, which applies to contracts for goods and services, does not directly involve a party's inability to perform a contract.

Instead, it involves an event or circumstance (COVID-19 pandemic) which fundamentally changes a contract's purpose.

Under the doctrine, if the contract's principal purpose is frustrated, through no fault of a contracting party, the doctrine may apply to excuse contract performance.

Supply contracts are often multi-state, and even multi-country, agreements.

As a result, when performance issues arise, businesses should review the law in all jurisdictions relevant to their contracts.

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REMOTE NOTARIZATION COMES TO WISCONSIN

Despite the social distancing required by the COVID-19 pandemic, life continues.

Individuals are buying homes, often under contracts entered into before the pandemic.

Financial institutions are issuing loans, including small business loans under legislation enacted to remedy the pandemic's adverse economic effects.

Documents effectuating such transactions must be notarized in the physical presence of one signing a document.

Acknowledging recent technological advances, effective May 1, 2020, the Wisconsin legislature, joining more than 20 other states, enacted legislation allowing "real time" notarization of documents via remote access.

Such remote access must occur with the assistance of a provider of communication technology, such as DocVerify, which has been approved by the Wisconsin Department of Financial Institutions (DFI).

A document may be notarized by a DFI-approved notary located in this state for a remotely located individual who is not in the physical presence of the notary who performs the notarial act.

The remotely located individual can be located in this state, in another state, or outside of the United States.

For a remote notarization to be effective, the notary and signer must have an internet audio and visual connection through which they can communicate with each other in real time.

In addition, both an audio and video recording must be made of the signing and notarial act.

Remote notarizations may only be performed by notaries approved by the state after undergoing special training through a DFI-approved provider of communication technology.

The new law prohibits the remote notarization of certain documents, wills and testamentary trusts, living trusts, powers of attorney, marital property agreements, authorizations for disclosure of health care information, health care powers of attorney, and living trusts.

There may be circumstances when remote notarization may be deemed to create issues regarding the protection of electronic information, or as to whether the remote notarial act is knowingly or voluntarily made.

If so, traditional in-person notarization, if possible, may remain the preferred long-term approach.