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A new section has been added beginning on page 12. Otherwise any significant change from the previous edition has been highlighted.



Responding to the COVID-19 Pandemic

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The information in this publication is general in nature. It cannot—and should not—replace consultation with a competent legal professional. Nothing in this document should be considered rendering legal advice. On this subject, the laws are changing on a **daily basis**, and there is need to contact legal counsel for specifics.

As employers currently reel from the coronavirus pandemic, the **Lanier Ford COVID-19 Task Force** stands ready to help employers respond in practical and legal ways. Indeed, Lanier Ford’s employment lawyers have already provided guidance to multiple employers to assist them in responding to this unprecedented event.

As a full-service law firm, Lanier Ford is ready and able to assist with any legal needs our clients may have during this unprecedented time. If we can be of any assistance to you, please do not hesitate to contact us. The members of our COVID-19 Task Force are the following:

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To help you keep up with the latest developments, our employment and business lawyers are posting to the firm's blog:

www.ThirdShiftBlog.com

We have prepared this summary of developments to help as well. It addresses the following topics:

- Requirements of the Families First Coronavirus Response Act (FFCRA or Families First Act). This act became effective on April 1, 2020, and can be subdivided into two components: (1) the Emergency Paid Sick Leave Act and (2) the Emergency Family Medical Leave Expansion Act.
- **Business-interruption insurance coverage.**
- Loans available from the Small Business Administration (SBA).
- COVID-19 and the ADA.
- COVID-19 and workers' compensation.
- OSHA safety guidance.

Families First Coronavirus Response Act

On March 18, 2020, Congress passed and President Trump signed the Families First Coronavirus Response Act (FFCRA or Families First Act).¹ This act expands the Family Medical Leave Act (FMLA) to a new group of employees and employers. It also provides for paid leave for those who are experiencing coronavirus symptoms, diagnosed with the illness, or caring for certain individuals who are affected. Importantly, sections of the new law require employers to provide paid sick leave to care for a child if the child's school or daycare is closed due to COVID-19. These financial outlays are to be reimbursed to the employer through a series of tax credits. You can download copy of the law here:

<https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf>

In broad summary, the law provides two different types of paid leave to certain employees experiencing a need to care for themselves or others. These two different entitlements are broken down into two separate laws within the act: (1) the Emergency Paid Sick Leave Act (Sick Leave Act) and (2) the Emergency Family Medical Leave Expansion Act (FMLA Expansion Act).

Both of these laws provide for some measure of paid leave, with money fronted by the employer and later reimbursed to the employer through payroll tax credits. The economic impact on covered employers could be substantial.

Emergency Paid Sick Leave Act

The Sick Leave Act requires **all governmental employers**² in America and **all private employers** with fewer than 500 employees to provide 80 hours of paid sick time for full-time employees (or, for part-time employees, an amount equivalent to their average hours over 2 weeks) under certain defined circumstances. The triggers for paid leave are listed in Section 5102(a) of the law, as follows:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.

¹ On April 6, 2020, the U.S. Department of Labor (DOL) published its temporary regulations for the Families First Act in the Federal Register:

<https://www.govinfo.gov/content/pkg/FR-2020-04-06/pdf/2020-07237.pdf>

² Governmental employers include the U.S. Government, state governments, political subdivisions of state governments, which include both county governments and municipal governments.

3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in paragraph 1 or has been advised as described in paragraph 2.
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The Sick Leave Act is the easiest to understand, though it's a whopper in and of itself. It includes exceptions under which employees who are able to telework are **ineligible** for the paid sick leave. This will comfort many employers who have struggled mightily over the past few weeks to achieve telework solutions for their employees. Those employers can rest assured that if their employees are teleworking (and presumably not themselves overcome with the virus in a way that would prevent telework), the law's paid-sick-leave provision should **not** apply.

Potential Exemptions

Under the law, the Secretary of Labor has the authority to issue regulations "for good cause" to exclude certain healthcare providers and emergency responders from the list of those employees eligible for leave. The U.S. Department of Labor (DOL) has issued temporary regulations³ that define a healthcare provider⁴ as—

- Anyone employed at any doctor's office, hospital, healthcare center, clinic, post-secondary educational institution offering healthcare instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home healthcare provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.
- Any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility.
- Anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

³ § 826.30(c)(1).

⁴ Also see answers to questions 56 and 57 of the DOL's question-and-answer web page about the First Families Act: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. To minimize the spread of the virus associated with COVID-19, the DOL has encouraged employers to be judicious when using this definition to exempt healthcare providers from the provisions of the FFCRA.

- Any individual that the highest official of a state or territory, including the District of Columbia, determines is a healthcare provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

The regulations⁵ define an emergency responder as—

- An employee who is necessary for the provision of transport, care, health-care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19.
- Members of the military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency.
- Individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
- Any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

The Secretary of Labor also has also issued regulations⁶ governing exempting small businesses with fewer than 50 employees where the imposition of these requirements would jeopardize the viability of the business. This exemption only applies to **child-care leave**. For a small business to be exempt and therefore refuse paid time off or expanded FMLA leave to an employee, the employee must have a child whose school has closed, place of care is closed, or childcare provider is unavailable. The closure or unavailability must be related to COVID-19. Finally, the business owner (or one of its officers) must be able to truthfully certify that **at least one** of the following conditions is true:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity.
- The absence of the employee or employees requesting paid sick leave or expanded FMLA leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities.

⁵ § 826.30(c)(2).

⁶ § 826.20(a)(6).

- 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 paid sick leave or expanded FMLA leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The new regulations also explain how a business is to determine its number of employees and the process is very different from the regular FMLA.⁷ As provided by the regulations,⁸ for purposes of the Families First Act, the number of employees is determined by counting the number of full-time and part-time employees at the time the employee would take leave. The number of employees also includes employees on leave as well as joint employees and day laborers. The number does not include independent contractors or workers who have previously been laid off or furloughed.

Because of the terms *joint employer* and *independent contractor* are not simple to define, we strongly recommend you seek specific legal advice if you think that you might have fewer than 50 employees.

How much do employers have to pay employees?

Divining exactly how much employers are to pay affected workers is painstaking.⁹ There is a general rule, but it is subject to several caps and exceptions. The general rule is that employees are entitled to be paid at their “regular rate” as defined by the Fair Labor Standards Act (FLSA) (i.e., their hourly rate or its equivalent for salaried workers) for the duration of the leave. (There are special procedures in the act for calculating the appropriate compensation for part-time employees with irregular schedules.) However, this “regular rate” general rule is subject to multiple different and highly important clarifications.

Section 3602 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) identifies limitations on the two types of paid leave provided for by the Families First Coronavirus Response Act.

- First, the act provides that the paid sick leave shall “in no event” exceed \$511 per day—i.e., \$5,110 in the aggregate—for a use described in paragraph 1, 2, or 3 of section 5102(a). Section 5102 is the lengthy section that describes the various triggers for receiving pay. The reference to the first three sections means that the full amount of the potential compensation is only available for individuals who are—

⁷ The FMLA asks whether an employer has 50 or more employees not just at a moment in time, but over 20 or more calendar weeks in the current or preceding calendar year.

⁸ § 826.40(a)(1).

⁹ § 826.25.

- Subject to a quarantine or isolation order.
 - Advised by a healthcare provider to self-quarantine.
 - Experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- For the remainder of workers who are potentially eligible for paid sick leave under the Sick Leave Act, the total compensation available is not to exceed \$200 per day, or \$2,000 in the aggregate. Eligible employees are those covered by a circumstance identified in paragraph 4, 5, or 6 of section 5102(a). In other words, those eligible for the \$200 maximum are those who are—
 - Caring for an individual who is subject to a quarantine or isolation order.
 - Caring for a child whose school or place of care has been closed or whose provider is unavailable due to precautions.
 - Experiencing “any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.”

We do not know at this time just what those “substantially similar conditions” might be, but regulations may be issued in the future.

- Further, where an employee’s required compensation is to be used to care for family members under Section 5102(a), not only is it capped at \$200 a day (\$2,000 in the aggregate), but the compensation is also limited to no greater than two-thirds of the employee’s regular rate, computed as set out above.

So in summary, those who are directly affected by a health concern or quarantine related to the virus are eligible to earn their regular rate of up to \$500 a day for 2 weeks. Parents who lose their childcare are eligible to earn their regular rate of up to \$200 a day (\$2,000 in the aggregate), subject to a general proviso that their compensation should never exceed two-thirds of their regular rate.

Employers should be forewarned that this law has teeth. The law provides that it shall be a violation of the FLSA (which provides for doubling of damages and attorneys’ fees) to “discharge, discipline, or in any manner discriminate” against any employee who takes leave under the act or engages in any protected activity (defined in the traditional sense of filing a complaint, instituting a proceeding, or cooperating in an investigation under the act).

In terms of how the leave is to be taken and when, the law has a sunset provision of December 31, 2020. Therefore, any leave must be taken this year. Beyond that, it appears to be the employee’s choice, or at least there is nothing in the **law** providing the employer any discretion or ability to schedule leave to minimize disruptions. But the **regulations** do allow the employer to control when the employee takes intermit-

tent leave.¹⁰ In general, the law provides that the employer “may not require an employee to use other paid leave provided by the employer to the employee **before** the employee uses the paid sick time.”¹¹ The exception is when the employee takes leave to care for a son or daughter. In that case, the regulations do allow the employer to require the employee to use employer-provided leave **concurrently** with the emergency paid sick leave.¹² In other words, except for leave to take care of a son or daughter, an employer cannot require exhaustion of accrued paid leave. Employees are entitled to immediately take the available sick-pay leave and may then use any accrued leave if they desire.

The entire intent of the law appears to permit employees to take their leave when they need it, provided the relevant triggers are met, with no barrier to taking of that leave. Of course, the law does provide that none of its mandates shall be interpreted to require financial or other reimbursement to employees who simply fail to take the leave allotted to them.

Emergency FMLA Expansion Act

On top of the foregoing requirement of paid leave for 2 weeks, the Families First Act temporarily amends and, for that period, significantly expands, the federal Family Medical Leave Act of 1993. The temporary amendment to the FMLA will provide an additional period of paid and unpaid leave for affected employees, over and above what is provided by the Sick Leave Act. This is the component of the law referred to as the FMLA Expansion Act. This law will also expire on December 31, 2020.

Small employers must pay attention to this law. Until its expiration date, the expanded FMLA will be far more robust than in the past. First and foremost, the law now applies to all government employers and all private employers with fewer than 500 employees (whereas previously, it exempted all employers with less than 50 employees within 75 miles of a worksite). In addition, the traditional FMLA rule under which employees are not eligible for leave until they have completed 12 months of service with their employer—in essence, a waiting period—is suspended. The FMLA provisions now cover all employees who have worked for covered employers for just 30 days.

Carve-out for small businesses

The new law carved out an exemption for “small businesses with fewer than 50 employees” from the requirements of the law, but only where “imposition of such

¹⁰ § 826.50.

¹¹ FFCRA § 5102(c)(2)(B).

¹²§ 826.23©.

requirements would jeopardize the viability of the business as a going concern.” The requirements for exemption under the FMLA Expansion Act are the same as those for the Sick Leave Act. (See page 5.)

Limited reinstatement requirements

However, even without awaiting regulatory guidance, the law does soften the blow for certain very small employers by providing that if an employer has fewer than 25 employees, it still must provide leave but its restoration requirements are limited. Under this provision, if an employee of a very small employer takes the leave but the employee’s job is then eliminated due to the coronavirus emergency, the employer will be off the hook for any reinstatement so long as it continues to reach out to the employee for a defined one-year period if any equivalent position becomes available.

With these introductory matters out of the way, what the law says about the leave entitlement is actually fairly simple. The law amends section 102 of the existing FMLA (which already provides leave entitlements for the birth of a child, a serious health condition of the employee or a close family member, etc.) to tack on an additional leave category.

That additional leave category is entitled “qualifying need related to a public health emergency.” The provision states that this term “means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the childcare provider of such son or daughter is unavailable, due to a public health emergency.” In turn, the term “public health emergency” simply means “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.”

New category of FMLA leave available to parents only

As explained by the DOL on its web page¹³, the only new category of leave available under the law is for parents who are affected by a school closure or loss of childcare and who are unable to telework. Apparently, being subject to a mandatory quarantine or isolation order or suffering from COVID-19 itself is not sufficient to trigger FMLA leave under this new law, which means employers will simply have to decide whether an employee in such a situation would otherwise qualify for leave under the original FMLA.

Our guess is that an employee who complains of significant COVID-19 symptoms would be regarded as suffering from a serious health condition as defined by the original FMLA, though this would be case by case. An employee merely subject to an isolation order or quarantine may not necessarily qualify for leave under Section 102

¹³ See answers to questions 47, 58, and 59 here:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

of the FMLA, though their job may be protected as a matter of public policy—a complex question that employers should carefully explore if the situation arises.

Returning to the FMLA Expansion Act, for those parents who do qualify for the leave, the potential leave period is the same as the FMLA—up to 12 weeks. Of that 12 weeks, the initial 10 days of leave for the above reasons will be unpaid. (Note that the 10-day elimination period does not extend the total 12 weeks of available leave; it merely distinguishes those first 10 days from the remainder of any leave). During this 10-day period of unpaid leave, employers may require employees to use any accrued leave if they have it, but must pay the employee the full amount the employee is entitled to receive under the employer’s leave policy.¹⁴

Following the first 10 days of leave, the new law provides that the employer must provide paid leave “for each day of leave . . . that an employee takes,” up to the existing statutory maximum of 12 weeks. However, the law clarifies that the employee’s paid leave can only be “two-thirds of an employee’s regular rate of pay” for the number of hours the employee would otherwise work (for salaried employees, presumably 40 hours a week). Even this two-thirds number is actually subject to a cap. The statute provides that “in no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate.”

So in summary, the FMLA Expansion Act is of fairly limited scope. It will apply to parents only, and as to such parents, it will provide for a partial wage replacement of no more than two-thirds salary after a 10-day elimination period, subject then to daily and aggregate caps, all to be reimbursed to the employer later through the tax credits discussed below.

As with the Sick Pay Act, the Secretary of Labor is given the express authority to “exclude certain healthcare providers and emergency responders from the definition of eligible employee.” (See the earlier definition of these terms on pages 4 and 5.)

Violations of the FMLA Expansion Act will be enforceable in the same manner as the original FMLA—enforcement actions by the Department of Labor and private lawsuits for back pay and attorneys’ fees. In addition to mandatory leave provisions, the FMLA contains anti-interference and anti-retaliation provisions that employers should bear in mind.

Tax credits for certain employers and individuals

The Families First Act will reimburse **private employers** for the above-described paid-leave entitlements (both under the Sick Leave Act and under the FMLA Expan-

¹⁴ Question 33 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

sion Act) through a quarterly tax credit to employers.¹⁵ Because the reimbursement is a tax credit, the reimbursement will not be immediate. But because the credit comes in the form of a Social Security payroll tax credit, employers will see the benefit of it in upcoming paychecks (through reduced payroll taxes) and will not have to wait until next year. Regardless, an initial financial outlay by small businesses appears likely as a result of this law.

The news is worse for **government employers**. The act specifically states that Federal, State, and local governments and agencies are not entitled to the tax credit, meaning there is no anticipated reimbursement for the mandated wages.

However, there is some good news for those who are self-employed. The tax credit portion of the law (Sections 7002 and 7004) provides that in the case of an eligible self-employed individual, a tax credit is available in an amount equal to the qualified sick-leave entitlement and qualified FMLA sick-leave entitlement of the individual, to the same extent as if the person worked for a covered employer.

Documentation requirements

Proper documentation of paid sick leave and expanded FMLA leave is required (1) to comply with Families First Act and (2) to be eligible for tax credits. These documentation requirements are discussed in this blog posting:

<https://thirdshiftblog.com/entry/documentation-requirements-for-emergency-paid-sick-leave-and-expanded-fmla-leave>

Summary and Effective Date

The big takeaway from this huge piece of legislation is that between the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act, many if not most employees in America will be entitled to 80 hours of paid leave, and some parents will receive additional allotment of up approximately 10 weeks of additional partially paid leave (at two-thirds of regular wages).

¹⁵ More information is available here:

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

The law went into effect on April 1.¹⁶ The DOL made a required notice available for posting as required by the law and can be downloaded here:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

For more assistance with the Families First Act, contact the following Lanier Ford attorneys:

- David Canupp, DJC@LanierFord.com, 256-713-2205 or 256-457-5200.
- Lauren Smith, LAS@LanierFord.com, 256-713-2235.

Business-Interruption Insurance Coverage

The COVID-19 pandemic has clearly led to disruption of the economic landscape for businesses. This disruption had made many business owners question whether their insurance will cover resulting losses (income loss due to closures, supply chain interruptions, and decreased demand due to the social distancing). Below is a summary of some of the key factors in analyzing business-interruption coverage in the wake of COVID-19.

First, it's important to remember that an insurance policy is simply a contract under which the policyholder (the insured), in exchange for a premium payment, receives benefits if the insured sustains damages caused by the "occurrence" of a risk covered under the policy. The key elements of any insurance policy are the risks covered, the risks excluded, and the method of determining compensable and reimbursable damages.

Most businesses carry commercial property coverage to insure against a variety of losses, including the loss of business income; i.e., business-interruption coverage. Business-interruption coverage is offered in several forms with the type of policy and coverage terminology of the policy varying greatly. Most business-interruption provisions cover business losses directly or indirectly caused by a covered peril (loss of profits, operating expenses which are incurred during the period of interruption, costs of remedying the interruption or mitigating the loss, and other reasonable expenses necessary for the business to continue operation).

¹⁶ Additional information is available here:

<https://www.thirdshiftblog.com/entry/dol-announces-april-1-2020-as-effective-date-for-families-first-act>

Standard commercial property policies most likely do not include coverage for viruses or bacteria, such as COVID-19. However, if the policy is an “all-risk” policy (which means it covers all risks except those specifically excluded), damages related to COVID-19 *may be* covered. Obviously, this makes gaining coverage for these losses crucial for businesses, and this is evidenced by the lawsuits across the nation already filed on this issue.

Understanding the legal significance and interaction of certain policy terms is critical in evaluating whether coverage exists for the interruption of business due to COVID-19. The analysis of business-interruption coverage involves a detailed review of the policy itself and any modifications to the policy created by endorsements. It also involves evaluation of the facts which have created the risk, such as the interruption of business due to governmental actions, etc. Finally, it requires interpretation of the policy using legal rules for construing and interpreting policy language which are established by case authority in each state. Legal analysis of policy coverage is thus a complex and intricate process of evaluating policy language and relevant facts to reach a legal determination as to whether coverage is owed.

Understandably, insurance companies and their insureds often reach different conclusions as to whether coverage is owed, and if so, the damages for which an insured is due to be reimbursed under the policy. **This is why a pronouncement by an insurance agent, broker, or insurance company that coverage is not owed is *not always* an accurate assessment. An insured has the legal right to have the issue of coverage legally evaluated, which would include an evaluation of the factors below.**

Virus exclusions

You may ask how a “novel” virus like COVID-19 can be excluded from coverage since it didn’t exist until this year. While COVID-19 itself may not have been anticipated by insurance carriers, the bad news is that after previous public-health crises (rotavirus, SARS, avian flu, anthrax, and legionella), carriers began placing exclusions specifically for viruses or bacteria into all-risk policies. One standard exclusion is ISO form CP 01 40 07 06 titled “Exclusion for Loss Due to Virus or Bacteria” which in relevant part states, “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

In its filing with state regulators at the time it proposed the above exclusion, ISO stated:

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission

of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent. In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

This being said, there are creative arguments being made by attorneys on behalf of businesses in an effort to sidestep the virus exclusion for COVID-19 claims. The ability to argue around a virus exclusion will depend heavily of the individual facts surrounding the business' losses.

Requirement of physical damage or loss

Even if there is no virus exclusion, the determination of coverage will generally hinge on whether the premises sustained “actual physical damage or loss.” The definition of “physical damage,” whether defined in the policy or interpreted in the courts, is important in these cases. For instance, what if a business remains technically habitable, but was closed due to an effort to protect against a *threat* of contamination, but is never actually contaminated? In that case, it is possible the premises suffered no direct physical loss. Some case authority interprets “direct physical loss” as even non-structural damage, so long as the damage renders the premises unfit for its intended use.

Regarding COVID-19 specifically, lawsuits have already been filed arguing that the physical-damage requirement has been met because the virus contaminates surfaces and will remain there for days without proper cleaning, resulting in a direct physical loss that requires action to remedy the damage.

Civil-authority provisions

A civil-authority provision generally provides coverage for business interruption losses which arise when a civil authority (federal, state, local government) issues an order prohibiting or impacting access to the business premises. Of course, most civil-authority provisions require some type of physical damage or loss to property (either the insured's property or other property) which then triggers the civil authority to impede access to the insured's premises. A lot of the case authority on this issue involves civil-authority actions taken due to the threat of or damage from a natural disaster, as well as civil authority actions following the 9/11 terrorist attacks. Again, the definition of “physical damage or loss” can be key in gaining coverage under this provision. Some case authority supports that coverage will only apply when a covered loss caused actual physical damage to property, which then prompted the civil authority to restrict access to the insured's property.

Using that interpretation, a pre-emptive civil-authority action meant only to prevent physical damage or loss (i.e., prevent the spread of COVID-19) may not be covered whereas a civil authority-action closing down access to a specific business due to actual contamination may be covered. The arguments in cases involving civil-authority provisions will depend, in part, on the reasons for the civil-authority action, stated or implied. There have already been lawsuits filed in Alabama and surrounding states arguing that state or local government orders restricting gathering in public places due to COVID-19 triggers the civil-authority provisions in all-risk policies. Some of those lawsuits argue that the *impact* of the civil-authority action (loss of use of business premises) constitutes the required physical loss under the policy, and that the *reason* the civil-authority action was issued is irrelevant. More lawsuits are expected and time will tell whether those arguments will prevail.

Main takeaway

Insurers are reluctant to cover business interruption losses in the midst of the COVID-19 pandemic. The amount of loss will be staggering and the correlation to the pandemic is compelling. Nonetheless, legislators are considering actions which would shift the economic burden currently shouldered by smaller businesses to the insurance industry. In March, a bipartisan group of Congress members requested that four industry trade groups consider taking financial losses by retroactively covering COVID-19 related losses, especially for small businesses which are particularly vulnerable.

In response,¹⁷ the trade groups indicated that, while they were willing to work with Congress on solutions, “Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19.” While it is uncertain what will ultimately happen with business interruption claims and COVID-19, the insurance industry is expected to strenuously oppose any attempts to require retroactive coverage for those claims. In addition, there will likely be constitutional challenges to any attempt by the legislature to retroactively alter the rights of insurers under existing insurance policies. Because of the expected opposition to coverage for COVID-19 related claims, it is important to review each insurance policy as a whole to determine the extent of coverage, if any, available. Necessity breeds innovation; and with the potential scope of damages arising from COVID-19, creative arguments from experienced counsel will be key in any successful effort to gain coverage.

Lanier Ford has an experienced team of lawyers ready to assist you in reviewing your insurance policies to determine the potential for coverage and assisting you in gaining coverage.

¹⁷ See letter at https://www.namic.org/pdf/testimony/200323_joint_trades.pdf.

For more assistance with business-interruption insurance coverage, contact the following Lanier Ford attorneys:

- Ed Starnes, DES@LanierFord.com, 256-713-2239.
- Amanda Coolidge, ARC@LanierFord.com, 256-713-2257.

COVID-19 and the ADA

The Americans with Disabilities Act (ADA) is another federal law that employers with more than 15 employees need to be considering during this time. Generally, the ADA prohibits medical examinations and inquiries under typical or standard conditions. Those general guidelines give way during a pandemic when the safety of all employees may be at issue.

Permitted inquiries during pandemic

Under pandemic conditions, an employer is permitted to inquire into an employee's health if he or she is experiencing flu-like symptoms (for example, fever or respiratory difficulties). Other, more pointed questions about disabilities or underlying risk factors or taking employees' temperatures may be permitted if the pandemic reaches the level of becoming a "direct threat" to other employees. Although we have likely reached a "direct threat" level with COVID-19, for most employers, a more conservative approach is to only inquire about an employee's symptoms and require any sick employees to stay home until they can provide a clear medical certification before returning to work.

If employee needs a reasonable accommodation . . .

If employers learn that an employee needs a reasonable accommodation (like telework or time off) due to a disability, the employer is obligated to engage in a dialogue (known as the "interactive process") no differently than a request made during another time. For example, if an employee with a compromised immune system would be at a higher risk of fatality if he or she contracted COVID-19, the employer is under an obligation to determine whether providing that employee with teleworking opportunities, time off, or something else would be a reasonable accommodation.

Time off may be a reasonable accommodation

The most important thing is to communicate with the employee (preferably in writing) to determine what the concerns are and what the employee is requesting. The employer then needs to determine what accommodations will allow the employee to continue performing the essential functions of his or her job. With the passage of the

Families First Act, eligible employers should consider time off as a reasonable accommodation.

Keep medical information confidential

As always, any medical information the employer gets from employees must be kept confidential and maintained separately from each employee's regular personnel file.

See pandemic guidance from the Equal Employment Opportunity Commission (EEOC) at—

https://www.eeoc.gov/facts/pandemic_flu.html

For more assistance with the Americans With Disabilities Act, contact Lauren Smith, LAS@LanierFord.com, 256-713-2235.

COVID-19 and Workers' Compensation

With the rapidly evolving business and community environment as a result of the COVID-19 pandemic, here is some basic guidance on how the pandemic could affect workers' compensation and how employers can respond.

Obviously, an employee with a claimed COVID-19 illness would be a matter of first impression to the Alabama courts; so it is currently unclear how the act would apply to such claims. However, it is our opinion that COVID-19 should be treated as any other illness as it relates to determining whether the illness is compensable. COVID-19 is a "disease," which should be considered no different from the flu. The act generally excludes coverage for "diseases." Alabama Code § 25-5-1 (9) (1975), in defining an injury, states that an "Injury . . . shall **not** include a disease in any form, except for an occupational disease or where it results naturally and unavoidably from the accident" (emphasis added).

Therefore, whether the illness would be compensable would depend greatly on the particular job the employee was performing when exposed and whether the employee has an existing work-related injury. For instance, if an injured worker's health is already compromised due to a work-related injury, or if the injured worker had to go to medical clinics for treatment of a work-related injury, there is a potential argument that the contraction of COVID-19 by the worker "resulted naturally and unavoidably from the [original work-related] accident."

Each day, more is being learned about the illness and that is expected to continue. Therefore, it is extremely important that employers document thoroughly when there

is a report of a work-related COVID- 19 illness. For instance, when reporting a suspected COVID-19 claim, it would be good practice to—

- Mention COVID-19 in the description of the illness so that it is easily recognizable by the carrier and any other entity which would need to implement specific COVID-19 protocols.
- Determine whether the employee had any contact with a person known to be COVID-19 positive, and if so, document when, where, and how that contact occurred.
- Confirm the onset of symptoms and whether the illness has been confirmed with a positive COVID-19 test.
- Document whether the employee or any member of his or her immediate family has traveled to an area of high risk, and if so, whether or not that travel was work related.
- Determine whether any immediate family members are showing symptoms.
- Determine any other employees who have had close contact (within 6 feet per current CDC guidelines) with the employee.

Existing non-COVID-19 claims could potentially be affected by this pandemic as well. One practical effect on existing claims may be that injured workers are unable to complete approved workers' compensation medical treatment. Employers should work with their carriers to determine the options for telehealth to treat minor injuries, participation in virtual physical therapy, etc. Telehealth may also be the best option for employers to determine whether a workers' injury has resolved or whether the injured worker is capable of returning to work. "Return to work" in this scenario would relate only to the worker's injury and not whether the worker is actually able to return to work due to COVID-19 shut downs, etc.

Ultimately, this is an ever-evolving situation, so we recommend that employers consult with their insurance carriers or third-party administrators to determine how best to handle claims related to COVID-19. We will continue to update on pertinent information related to workers' compensation and the effect that this pandemic may have on our clients.

For more assistance with business-interruption insurance coverage, contact the following Lanier Ford attorneys:

- Ed Starnes, DES@LanierFord.com, 256-713-2239.
- Travis Jackson, TSJ@LanierFord.com, 256-713-2214.
- Amanda Coolidge, ARC@LanierFord.com, 256-713-2257.

OSHA Safety Guidance

The Occupational Safety and Health Administration (OSHA) has published a useful booklet to help employers prepare their workplaces for COVID-19. Although guidance published in this booklet does not create any additional legal obligations for employers, it can potentially help to reduce absenteeism.

You can download a copy of “Guidance on Preparing Workplaces for COVID-19” here:

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

Similar guidance can be obtained from the Centers for Disease Control and Prevention:

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

For more assistance with OSHA safety requirements, contact Ed Starnes, DES@LanierFord.com, 256-713-2239.

Loans Available Through the Small Business Administration

The economic uncertainty resulting from the COVID-19 virus pandemic has cast a large shadow over the market, with efforts to contain the virus adversely affecting many small businesses financially. One response to alleviate this strain on small businesses is the Keeping American Workers Paid and Employed Act¹⁸, a law designed to provide liquidity in the short term to small businesses by expanding the current 7(a) loan programs of the SBA and providing 100 percent federally guaranteed loans to employers who maintain their payroll during the pandemic.

Eligibility and Requirements for 7(a) Loans

- Employers with 500 employees or fewer will be eligible to apply for the loans, along with industry’s where the SBA size standard allows more than 500 employees.

¹⁸ This is part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) that became law on March 27, 2020.

- Allows individuals who operate under a sole proprietorship, an independent contractor, or as a qualifying self-employed individual to be eligible for 7(a) loans.
- Allows not-for-profit entities to be eligible for 7(a) loans.
- Loan period begins on February 15, 2020, and ends on December 31, 2020.
- Lenders are required to determine whether a business was operational on February 15, 2020, and had either employees for whom it paid salaries and payroll taxes or a paid independent contractor.
- Size of loan is the average total monthly payroll costs during the one-year period prior to the loan being made multiplied by 2.5, and the maximum loan amount is \$10 million.
- Payroll costs include salaries, wages, tips, payments for sick leave, insurance premiums, and state and local taxes assessed on the compensation of employees, but does not include compensation of employees earning more than \$100,000 (as prorated for the relevant period).

Effect on Lenders

- The bill provides \$349 billion to the 7(a) loan program.
- Loans would be immediately available through existing SBA-certified lenders—such as banks, credit unions, and other financial institutions—and the process will be streamlined to bring additional certified lenders to the program.
- Loans will be fully administered and underwritten by participating lenders.
- Loans are 100% federally guaranteed by the SBA; so creditors bear no risk.
- No lender or borrower fees on these loans.
- Allows complete deferment of 7(a) loan payments for not more than one year.

Payroll and Loan Forgiveness

- Businesses will be eligible to apply for loan forgiveness equal to the amount spent by the business during an 8-week period after the loan closing date on payroll costs, interests on mortgages, payments of rent, and utility payments that were in place before February 15, 2020.
- The portion of the loan used to cover payroll costs for employees earning less than \$100,000 per year will be forgiven without income tax implications.
- The amount of the loan eligible for forgiveness will be reduced proportionally by any reduction in employees retained compared to the previous year, and by the reduction in pay of any employee beyond 25% of the most recent full quarter the employee was employed.
- Employees previously laid off from February 15, 2020, through April 1, 2020, who are rehired will not count against the business in the calculation for loan forgiveness so long as the employees are rehired by June 30, 2020.
- Reductions in pay for employees earning more than \$100,000 per year are not considered in the calculation for loan forgiveness.

You can find information about the SBA’s programs, including the Paycheck Protection Program, here:

<https://www.sba.gov/funding-programs/loans/coronavirus-relief-options>

To apply for a loan, download the form here, but keep in mind additional information is required:

<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>

Next steps

Companies should assess their qualifications for a 7(a) loan. After that, the steps that should be taken include—

1. Checking with your bank or financial institution to see whether it is or expects to participate in the program. If it isn’t participating, identify an appropriate participating lender.
2. Asking your bank or financial institution about the timing of implementation for the proposed legislation, along with any necessary documents or other requirements needed for a 7(a) loan.
3. Preparing an analysis of expected payroll and related costs from February 15 to June 30 for employees earning below \$100,000 annually. For additional funds past the amount expected for payroll, prepare a broader analysis supporting the use for the requested funds.

If you have questions about the legislation or need assistance navigating the SBA requirements or the loan process, our team is standing by ready to assist. Please contact any one of the following Lanier Ford attorneys:

- Corey Jenkins, CWJ@LanierFord.com, 256-713-2234.
- John Baggette, JSB@LanierFord.com, 256-713-2208.
- Fred Coffey, FLC@LanierFord.com, 256-713-2263.
- Graham Burgess, WGB@LanierFord.com, 256-713-2504.
- Paul Seeley, PBS@LanierFord.com, 256-713-2251.

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