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COVID-19:

OVERVIEW & BEST PRACTICES FOR LOUISIANA and TEXAS BUSINESSES

May 1, 2020 - 5:00 p.m. CDT

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BCFIRM.LAW

I. INTRODUCTION

Having already worked with several clients impacted by the global coronavirus outbreak, we prepared the below overview to be shared with our clients and close contacts to provide a general understanding of the current state of the COVID-19 outbreak and a high-level overview of the anticipated impacts and legal responsibilities of Louisiana and Texas businesses.

II. WHAT IS COVID-19?

In December 2019, health care professionals discovered cases of a coronavirus strain in Wuhan, China believed to spread through person-to-person contact (within about 6 feet) or respiratory droplets from sneezing or coughing by an infected person. The disease caused by this virus (SARS-CoV-2) has been labeled coronavirus disease 2019 (COVID-19 is used interchangeably herein for the virus and the disease). It is also likely that COVID-19 can spread from contact with infected surfaces or objects, but this is not thought to be the main disease vector for COVID-19. The virus symptoms are a mild to severe respiratory illness with fever, cough, and difficulty breathing. These symptoms may take 2-14 days to appear after exposure.

As of May 1, 2020, COVID-19 has spread to every continent (except Antarctica) and is present in at least 170 countries, with 3,157,207 confirmed cases globally. The virus is responsible for over 224,172 deaths, the majority of which have occurred in Europe.[1] According to the World Health Organization, the risk assessment for further spread of COVID-19 across the globe remains very high. The United States has confirmed 1,062,446 CDC laboratory-confirmed and/or reported presumptive cases as of this writing,[2] including 62,406 deaths, across 55 jurisdictions (50 states, D.C., Puerto Rico, Guam, Northern Marianas, and US Virgin Islands). However, as non-CDC testing has increased significantly in the last months, these numbers understate the number of COVID-19 cases at the time of this writing. According to Johns Hopkins, the United States has 1,094,640 confirmed COVID-19 cases and 64,324 deaths.[3]

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1 *See* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200501-covid-19-sitrep.pdf?sfvrsn=742f4a18_2 (updated as of May 1, 2020). Johns Hopkins, as of May 1, 2020 at 4:30 p.m. CDT, provided 3,329,740 global confirmed cases and 237,647 deaths.

2 *See* https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html (updated as of May 1, 2020 at 4:30 p.m. CDT).

3 *See* https://coronavirus.jhu.edu/map.html (updated as of May 1, 2020 at 4:30 p.m. CDT).

As of this writing, Texas has at least 29,229 confirmed cases and 816 deaths (with 210 of 254 counties reporting cases).[4] Louisiana has at least 28,711 confirmed cases and 1,927 deaths with every parish impacted.[5] While testing has become much more available,[6] the number of confirmed cases is expected to continue increasing for some time.

While the U.S. has not issued federal travel restrictions domestically, the CDC issued a domestic travel advisory on March 30, 2020 for New York, New Jersey, and Connecticut residents to refrain from non-essential domestic travel for 14 days effective immediately. Multiple state and local authorities have imposed various restrictions. Stay-at-home orders have been issued in California, Florida, Ohio, New York, Louisiana, Dallas, Houston, and other states and cities. On March 26, 2020, Governor Abbott of Texas imposed a 14-day quarantine (or the length of their stay, if shorter) for airline passengers flying into Texas from New Orleans, New York, Connecticut, or New Jersey (whether as point of origin or point of last departure), though this was expanded to all road travelers from any location in Louisiana on March 29, 2020.[7] As of May 1, 2020, the restrictions on travel from New Orleans and Louisiana were rescinded, but the restrictions do apply to air passengers from States of California, Connecticut, New York, New Jersey, or Washington as well as from Atlanta, Georgia; Chicago, Illinois; Detroit, Michigan; or Miami, Florida. On March 28, 2020, Rhode Island announced that any persons entering its borders (for a non-work-related purpose) would be subject to a mandatory 14-day quarantine period. On March 31, 2020, Governor Andy Beshear of Kentucky instructed residents not to leave the state or potentially face a 14-day quarantine period upon return. On April 1, 2020, Governor DeSantis of Florida established travel checkpoints along Interstate 10 to screen travelers from New Orleans or New York. This overview does not discuss the constitutionality of these restrictions, but if they impact your workforce, we are here to discuss them with you.

Internationally, the federal government has banned from entering the country non-citizens who, in the 14 days before entry into the US, have visited China, Iran, the United Kingdom, the Republic of Ireland, and the European Schengen Area.[8] The U.S.

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4 https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83 (updated as of May 1, 2020 at 4:30 p.m. CDT).

5 *See* http://ldh.la.gov/Coronavirus/ (updated as of May 1, 2020 at 4:30 p.m. CDT).

6 *Id.* As of this writing, Louisiana has completed 8,061 state lab coronavirus tests and 160,190 tests reported by commercial labs to the State.

7 https://gov.texas.gov/uploads/files/press/EO-GA-11_airport_travel_reporting_COVID-19_IMAGE_03-26-2020.pdf. This restriction does not apply to travel related to commercial activity, military service, emergency response, health response, or critical infrastructure functions.

8 *See* https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html (updated as of May 1, 2020 at 4:30 p.m. CDT).

government has also issued Level 3 travel advisories warning against non-essential travel to all international locations.[9] The U.S. State Department has also issued a Level 4 advisory for U.S. citizens to avoid international travel due to the global impact of COVID-19 and has notified the public of a suspension of normal passport operations.[10]

The CDC's current risk assessment for the U.S. provides that nearly every U.S. state is experiencing sustained community transmission for now, including 34 states that are experiencing widespread sustained community transmission (Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin). In communities where there is ongoing community spread with COVID-19, people are at elevated risk of exposure with the level of risk dependent on the location, and close contacts of persons with COVID-19 are also at elevated risk of exposure. [11]

III. ECONOMIC IMPACT OF COVID-19

As our clients are all aware, COVID-19 is affecting businesses across the world. Supply chains originating in Asia, and China especially, have showed strain due to COVID-19, and the Chinese government has issued force majeure notices to qualifying businesses operating in China to help mitigate the effect of the virus. COVID-19 has similarly affected U.S. domestic manufacturing, transportation, hospitality, and other commercial industries, as companies have begun to rely on *force majeure* contractual provisions as a legal defense for failures or anticipated failures to perform under various agreements.

IV. *FORCE MAJEURE*

a. *FORCE MAJEURE* IN LOUISIANA

In Louisiana and many common law jurisdictions, *force majeure* is a doctrine that recognizes that a party should not be responsible for a breach of contract caused by an unforeseeable event. Louisiana jurisprudence "uses the terms 'fortuitous event' and force

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9 *See* https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html (updated as of May 1, 2020 at 4:30 p.m. CDT) (Global pandemic notice).

10 https://travel.state.gov/content/travel/en/traveladvisories/ea/travel-advisory-alert-global-level-4-health-advisory-issue.html (updated as of May 1, 2020 at 4:30 p.m.).

11 *See* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (updated as of May 1, 2020 at 4:30 p.m. CDT); https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html (updated as of April 19, 2020 at 4:00 p.m. CDT).

majeure (irresistible force) interchangeably."[12] "Force majeure is defined as 'an event or effect that can be neither anticipated nor controlled.'"[13] Fortuitous events and force majeure include "such acts of nature as floods and hurricanes" and "[i]t is essentially synonymous with the common law concept of 'act of God.'"[14]

Under Louisiana law, "[t]o relieve an obligor of liability, a fortuitous event must make the performance ***truly impossible***."[15] "The nonperformance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner contemplated by the obligor at the time the contract was entered into."[16] In other words, if the fortuitous event prevents the obligor from performing his obligation in the manner contemplated at the time of contracting, ***he must pursue reasonable alternatives to render performance in a different manner before he can take advantage of the defense of impossibility***.[17] This is a very strict standard and carries a heavy burden for the party invoking *force majeure* as an excuse for non-performance. Indeed, a party is not released from his duty to perform under a contract ***by the mere fact that such performance has been made more difficult or more burdensome by a fortuitous event***.[18] "[A] party is obliged to perform a contract entered into by him if performance ***be possible at all***, and regardless of any difficulty he might experience in performing it."[19]

Generally, parties will also include *force majeure* provisions in contracts to provide more certainty on what constitutes a *force majeure* in their specific agreement and the procedures for invoking it. Otherwise, the decision whether an event was foreseeable would be left entirely to the courts. As these provisions are often non-exclusive, however, parties still dispute whether certain events are or are not *force majeure*, so ultimately, whether COVID-19 constitutes a *force majeure* triggering event will be determined based

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12 *Payne v. Hurwitz*, 2007-0081 (La. App. 1st Cir. 1/16/08), 978 So.2d 1000, 1005.

13 *Id.* at 1005 (citing Black's Law Dictionary 673-674 (8th ed. 2004)).

14 *Id.* at 1005 (citing *Saden v. Kirby*, 94-0854 (La. 9/5/95), 660 So.2d 423, 428; *Bass v. Aetna Ins. Co.*, 370 So.2d 511, 513 n. 1 (La. 1979); and *A. Brousseau & Co. v. Ship Hudson*, 11 La. Ann. 427 (La. 1856)).

15 *Payne*, 978 So. 2d at 1005 (citing La. C.C. art. 1873, Revision Comments—1984, (d)) (emphasis added).

16 *Id.* (citing *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.*, 161 La. 1077, 1078–79, 109 So. 844 (La. 1926)).

17 *West v. Cent La. Limousine Serv., Inc.*, 03–373, p. 2 (La. App. 3rd Cir. 10/1/03), 856 So.2d 203, 205.

18 *Schenck v. Capri Constr. Co.*, 194 So.2d 378, 380 (La. App. 4th Cir. 1967).

19 *Associated Acquisitions, L.L.C. v. Carbone Properties of Audubon, L.L.C.*, 07–0120 (La. App. 4th Cir. 7/11/07), 962 So.2d 1102, 1107-08 (emphasis added).

on the contract language in the context of COVID-19's effects on the non-performing party, *e.g.*, whether there are any government act or travel restrictions preventing performance either in Louisiana or the attendees' places of origin, among other potentially applicable language.

b. *Force Majeure* in Texas

As explained above, the doctrine of *force majeure* is recognized in jurisdictions other than Louisiana, including Texas. After all, events beyond the control of the parties are not unique to Louisiana, so parties often include *force majeure* clauses in their contracts. In the absence of such a clause, a court's decision on whether a party can be excused for a default in performance will depend largely on the foreseeability of the event, but some courts have determined that the absence of a *force majeure* clause makes a party's obligation to perform absolute and not excusable even for an act of God.[20]

Additionally, your *force majeure* rights may depend on the type of contract. For contracts for delivering goods, for example, the Uniform Commercial Code includes a default provision, unless the parties agree otherwise, that excuses sellers from timely delivery or non-delivery of goods where performance has become commercially impracticable because of either (1) unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting or (2) compliance in good faith with an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.[21]

To avoid the uncertainty in whether *force majeure* applies or how it would apply, parties include a clause to allocate risk of certain events regardless of their foreseeability and to excuse performance during a *force majeure* event. If the parties unambiguously allocate risk for a specific event, for example a flood or a pandemic, then courts cannot inquire into the foreseeability of that event.[22] This means that a party should not rely on broad language about acts beyond its control to cover *foreseeable* events. Catch-all provisions are still interpreted based on the foreseeability of the event, while specifically enumerated events are not.[23] Therefore, it is important, before agreeing to a *force majeure* clause under Texas law, that you consult with your attorney and ensure that it reflects the proper allocation of risk.

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20 *GT & MC, Inc. v. Texas City Reg., Inc.*, 822 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

21 Tex. Bus. & Com. Code Ann. 2.615(1); *see also id.* at Cmt. 1.

22 *PPG Indus, Inc. v. Shell Oil. Co.*, 919 F.2d 17, 19 (5th Cir. 1990); *see also TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 183 (Tex. App.—Houston [1st Dist.] 2018).

23 *Id.*; *see also Valero Transmission Co. v. Mitchell Energy Co.*, 743 S.W.2d 658, 660-63 (Tex. App.—Houston [1st Dist.] 1987, no writ).

V. EMPLOYER BEST PRACTICES

Certain federal and state regulations affect how employers should react to outbreaks like COVID-19, the most important of which are the Family Medical Leave Act ("FMLA"), the Americans with Disabilities Act ("ADA"), and the Occupational Safety and Health Act ("OSHA").

A. *The Family Medical Leave Act*

Under the FMLA, eligible employees may take leave from a covered employer for up to 12-weeks for specified family and medical reasons, including diseases like the flu or COVID-19. Leave related to the coronavirus would likely be unforeseeable, so employees must notify the employer of leave "as soon as possible and practical." Whether notice complies with this standard is a fact-specific inquiry. Once an employer has enough information indicating a need for COVID-19-related leave, it ***must*** begin the FMLA leave process.

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act, a major piece of legislation amending the FMLA on a temporary basis (the "Act"). To avoid disrupting the rest of the FMLA, the Act provides an additional leave provision to Section 102(a)(1) of the FMLA specifically for the public health emergency created by COVID-19. Under this amended FMLA, an employee[24] who is unable to work (or telework) can take leave if their minor child's school or place of care has been closed or if their childcare provider is unavailable due to a public health emergency. This is the only avenue for leave under the added FMLA provision and provides for 12 weeks of protected, partially paid, leave. Employers must also post the most up-to-date notice applicable to the Act in a conspicuous place on its premises.[25]

Separately, the Act provides a paid sick leave obligation to applicable employers, who must now make available 80 hours of paid sick leave for full-time employees.[26] Part-time employees are entitled to the number of hours equal to the number of hours that employee worked on average over a 2-week period.[27] Employees are entitled to this sick leave if an employee is unable to work (or telework) because:

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[24] An employee is eligible if they have worked for the employer for at least 30 calendar days, far shorter than the original FMLA.

[25] The current model notice can be found here: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.

[26] Unlike the new FMLA leave which applies to those employed for at least 30 calendar days, this paid sick leave obligation applies to all current employees.

[27] The Department of Labor provided a FAQ on Mar. 24, 2020 which further explains how to calculate part-time hours. That FAQ can be found here: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions (as of Mar. 25, 2020 at 5:00 p.m. CDT).

(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 health care provider to self-quarantine due to concerns related to COVID–19.

(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 subparagraph (1) or has been advised as described in paragraph (2) [*sic*].

(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 child care 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 Act provides varying payment caps depending on whether the employee is seeking leave under the FMLA or the paid sick leave provisions. If under the FMLA, the employer can provide the first 10 days of leave unpaid and then additional leave must be paid at not less than 2/3rds the employee's regular rate of pay, subject to a cap of $200 per day and $10,000 in the aggregate. Employees can substitute their accrued leave (vacation, personal, or medical/sick) for this unpaid period. After the end of the leave, employers must reinstate the employees, subject to an exception for employers with 25 or fewer employees described below.

Paid sick leave is also capped but at a higher rate. Employees taking advantage of the paid sick leave obligation are entitled to their regular rate of pay but no higher than $511 per day and $5,110 in the aggregate for uses 1-3 listed above or $200 per day and $2,000 in the aggregate for uses 4-6 listed above (and only 2/3rds of their regular rate of pay). This leave must be provided in addition to any existing paid leave policies already provided by the employer, and employers cannot require employees use other forms of paid time off before using paid sick leave).

Critically, the Act applies to private employers with 500 or fewer employees and certain public employers.[28] The Act does *not* provide a statutory exemption for employers of fewer than 50 employees as the original FMLA did.[29] Instead, the Act creates two potential reprieves for the struggling small business. First, employers with fewer than 25

[28] For both FMLA and paid sick leave, employers of healthcare providers or first responders can elect to exclude such employees from the application of the FMLA and paid sick leave provisions.

[29] Like the original FMLA, the Act does not provide an exemption for non-profit organizations.

employees do not have to restore the employee to the same or equivalent position if the employees position no longer exists due to economic conditions or other changes in the employer's operations which affect employment and are caused by the public health crisis during the period of leave. Employers who seek to take advantage of this exception must reasonably try to restore the employee and follow the notice requirements under the Act.

Second, the Act authorizes the Department of Labor to issue regulations allowing for exemptions for employers of fewer than 50 employees when the Act's provisions would jeopardize the viability of the business as a going concern, but there is no requirement that the Department actually promulgate these regulations or even a period of time for doing so. Lastly, to help employers comply with the Act, those employers who pay benefits under the Act are entitled to a tax credit against payroll tax up to 100% of the benefits paid with respect to each calendar quarter subject to the caps provided by the Act.

On March 20, 2020, Treasury, the Internal Revenue Service, and Labor announced their plan to implement the new law. First, as stated above, employers receive 100% reimbursement for paid leave pursuant to the Act, including health insurance costs. Employers then face no payroll tax liability and self-employed individuals receive an equivalent credit. Second, an immediate dollar-for-dollar tax offset against payroll taxes will be provided, and if a refund is owed, an application for accelerated relief may be submitted. This means that businesses can retain withholdings they would normally pay in payroll taxes to satisfy their credit and any excess can be sought through a claim form to be released next week. Third, employers with fewer than 50 employees are eligible for an exemption from the requirements to provide leave to care for a child whose school is closed, or child care is unavailable in cases where the viability of the business is threatened.[30] It is unclear if this means that the Act's exemption will not apply to the other paid sick leave obligations, but guidance is expected to be issued soon. However, as of March 23, the Department of Labor website simply states that regulations are expected April 2020.

The law takes effect no more than 15 days after enactment, *i.e.*, April 2, 2020, but the Department of Labor news release on March 24, 2020 clarified that the enforcement date for the Act is April 1, 2020.[31] The Mar. 20, 2020 announcement also provided a 30-day non-enforcement period for good faith compliance efforts. The recent announcement does add additional confusion because it suggests that the Act is already in force or that the Act's benefits are immediately available while its obligations will come into effect on April 2. Hopefully, the joint guidance next week will make this clear. Finally, the new law includes a sunset provision establishing that this change to the FMLA will automatically

30 The plan did not explain if this meant that the exemption would not apply to other bases for leave under the Act, but further guidance will hopefully be made available.

31 The Department of Labor FAQ can be found here: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions (as of Mar. 25, 2020 at 5:00 p.m. CDT).

expire on December 31, 2020, but Congress could always pass additional legislation extending the benefits of the new FMLA.

B. The Americans with Disabilities Act

Under the ADA, an employer cannot inquire as to disabilities and cannot require medical examinations unless (1) the inquiry or exam is job-related and consistent with business necessity or (2) the employer has a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation. The EEOC relies on the CDC and other public health authorities to determine whether an outbreak is a direct threat. At this time, WHO and CDC have classified COVID-19 as a pandemic but have not determined that there is an immediate risk of exposure to all Americans. The EEOC has stated that diseases like seasonal influenza or swine flu (which affected 61 million Americans in 2009) would not pose a direct threat or justify disability-related inquiries or medical examinations.

However, EEOC, on March 21, 2020, updated their guidance on Pandemic Preparedness in the Workplace and the Americans with Disabilities Act. Under this guidance, "[e]mployers and employees should follow guidance from the CDC as well as state/local public health authorities on how best to slow the spread of [COVID-19] and "protect workers, customers, clients, and the general public."[32]

Critically, the EEOC has decided that, based on the guidance of the CDC and public health authorities, "the COVID-19 pandemic meets the direct threat standard."[33] EEOC recognizes the precautions taken by public authorities and private parties to slow the spread of COVID-19, including but not limited to school, business, entertainment venue, and other closures. EEOC believes that the facts now at hand "manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time." This finding, of course, is subject to change should public health authorities such as the CDC revise their assessment of the spread and severity of COVID-19.[34]

We encourage employers to familiarize themselves with the EEOC guidance, but we have highlighted a few matters for your attention.

First, the EEOC answers whether an employer must continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship. The EEOC recognizes that COVID-19 has clearly disrupted workplaces and may result in "unexpected or increased requests for reasonable

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32 https://www.eeoc.gov/facts/pandemic_flu.html (updated as of March 21, 2020).

33 *Id.*

34 *Id.*

accommodation."[35] However, employers should still address the requests as soon as possible, but the "extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted."[36] Employers should still seek interim solutions to enable employees to keep working as much as possible.

Second, how can employers hire during COVID-19? Importantly, employers *can* screen job applicants for symptoms of COVID-19 after making a conditional job offer, "as long as it does so for all entering employees in the same type of job."[37] Employers should note that this guidance applies *post*-offer and not *pre*-offer. This medical exam can include taking an applicant's temperature, and if an applicant has COVID-19 or symptoms of COVID-19, employers can delay that applicant's start date, as individuals with COVID-19 or symptoms associated with it "should not be in the workplace."[38] For the same reason, an employer who needs an applicant to start immediately can withdraw an offer to that applicant if they have COVID-19 or symptoms of it.[39]

While a vaccine for COVID-19 does not exist at this time, the EEOC does have guidance on whether ADA-covered employers can compel employees to take a vaccine under the ADA and Title VII of the Civil Rights Act of 1964. As of this writing, the EEOC notes that there is no vaccine available for COVID-19 but in the context of the influenza vaccine, employers cannot compel vaccinations and that they should simply encourage employees to take the vaccine rather than requiring them to take it. Should a vaccine be made available, it would be important to see if EEOC has updated this guidance.

As a baseline rule, EEOC informs employers that the "ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so."[40]

Based on the developments of COVID-19, employers can and should send employees home with COVID-19 or symptoms of it. Moreover, if an employee appears sick with a fever, cough, chills, sore throat, or difficulty breathing, an employer can ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine whether they may have COVID-19.[41] Employers may now also

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35 https://www.eeoc.gov/facts/pandemic_flu.html (updated as of March 21, 2020).

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 https://www.eeoc.gov/facts/pandemic_flu.html (updated as of March 21, 2020).

measure employees' body temperature but with the understanding that an employee's medical information is still subject to ADA confidentiality requirements.[42]

C. The Occupational Safety and Health Act

If employees refuse to come to work because they fear getting infected, that situation is governed, in part, by the Occupational Safety and Health Act ("OSHA"). OSHA allows employees to refuse to work in that situation only if they believe they are in imminent danger. Whether this condition has been met at this time is part of an objective analysis of a multi-factor test involving a rapidly developing environment. Further, this inquiry would likely involve whether someone with COVID-19 or symptoms of COVID-19 has been in the workplace in the last 14 days. Before taking action, you should consult with your attorney.

Likewise, if an employee demands to use a mask during work, OSHA has provided the following conditions must be met in order for that employee to have a right to the use of personal protective equipment ("PPE"), including imminent danger:

1. The employee unsuccessfully asked the employer to eliminate the danger;

2. The employee refused to work in good faith, *i.e.*, that they genuinely believed they were in imminent danger;

3. A reasonable person would believe there is a real danger of death or serious injury; and

4. The urgency of the hazard does not allow sufficient time to correct the hazard through regular enforcement channels such as requesting an OSHA inspection.

If imminent danger is not found, then the above factors likely will not be met for anyone who is not exhibiting symptoms. However, if any employees are in "medium" risk of exposure positions, meaning that their job requires frequent and/or close contact, i.e., within six feet) of people who may be infected but are not known or suspected COVID-19-infected persons, then employers should consider whether appropriate controls are in place to protect their employees. For example, if these medium-risk positions can be shifted to telephonic operations rather than in-person interaction, then this should be considered. Workers with medium exposure risk may need to wear personal protective equipment ("PPE") such as a face mask or gloves and be *trained* in the use of that PPE. Lastly, your state or local jurisdiction may require a face mask such as a cloth mask at this time. For example, in Louisiana, public-facing employees must wear masks at work.

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42 *Id.*

If an employer determines that OSHA's guidelines do *not* require a facemask or other PPE but the employer wishes to provide them anyway, the employer should clearly express that PPE is being provided voluntarily and that employees are not obligated to wear them (but anyone with COVID-19 symptoms should report those symptoms). When employers do provide PPE, they should also consider the appropriate guidelines. For example, the CDC has recommended cloth masks, as N-95 respirators should be reserved for healthcare workers and other medical first responders; however, employers providing respirators to employees who *must* wear N-95 respirators must also comply with OSHA's respiratory protection standard at 29 C.F.R. 1910.134(c)(1). Regardless of risk level, employers who require any form of protective equipment (whether it constitutes PPE or not) to employees must ensure adequate training on how to use that equipment.[43]

Lastly, if any employees object to any of their employer's practices on behalf of others or discuss with other employees any frustrations with such practices, these conversations will likely constitute concerted protected activity under Section 7 of the NLRA. **BC Firm strongly recommends you consult with counsel before taking any action relating to such objections in order to ensure your business does not violate any employee protections.** If you have any questions on how the above employment laws may apply to your business, we are available to assist you.

VI. EMPLOYEE HEALTH BEST PRACTICES

As COVID-19 continues to spread in the United States, employees are asking employers for guidance on how to handle themselves in the workplace to avoid infection. The CDC has provided interim guidance to help prevent workplace exposures to acute respiratory illnesses in non-healthcare settings. **Critically, the CDC has advised employers *not* to make risk determinations based on race or country of origin and to maintain confidentiality of people with confirmed COVID-19 (a requirement of the ADA).**

The below summarizes the CDC's guidance on employer administrative controls, and any updates, more specifics, and additional information may be found at https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html.[44] **Please note, however, that any actions must follow the ADA and FMLA requirements summarized above and other applicable law.** The CDC's interim guidance instructs employers to consider activities in one or more of the following areas:

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[43] This discussion does not include OSHA guidelines on employees more likely to be exposed to COVID-19 in the workplace. If an employer is in the healthcare industry, biohazard remediation industry, or viral laboratory industry, among other higher-risk professions, higher safety protocols would have to be in place. Moreover, all employees owe a general duty to keep employees safe from workplace hazards, so this baseline standard should be kept in mind when discussing how to protect your employees.

[44] OSHA has also published pandemic-related best practices which can be found here—https://www.osha.gov/Publications/influenza_pandemic.html#lower_exposure_risk.

1. **Reduce Transmission Among Employees;**

   A. Actively encourage sick employees to stay home:
   B. Identify where and how workers might be exposed to COVID-19 at work:

   C. Separate sick employees:

   D. Educate employees about how they can reduce the spread of COVID-19, including training on coughing etiquette, hand washing, use of towels or utensils in common areas, etc.

2. **Maintain Healthy Business Operations;**

   A. Identify a workplace coordinator for COVID-19 issues;

   B. Implement flexible sick leave and supportive policies and practices.

   C. Assess your essential functions;

   D. Determine how you will operate if absenteeism spikes;

   E. Consider establishing policies and practices for social distancing;

   F. Provide local managers with authority to take appropriate action based on local conditions, if you have more than one business location.

3. **Maintain a Healthy Work Environment**

   A. Consider improving the engineering controls using the building ventilation system;

   B. Support respiratory etiquette and hand hygiene for employees, customers, and worksite visitors;

   C. Perform routine environmental cleaning and disinfection;

   D. Perform enhanced cleaning and disinfection after persons suspected/confirmed to have COVID-19 have been in the facility;

   E. Advise employees before traveling to take additional precautions;

   F. Take care when attending meetings and gatherings.

For more information, please review CDC as well as applicable federal, state, and local resources.

VII. MARITIME EMPLOYEE CONSIDERATIONS: MAINTENANCE AND CURE

In our region, it is worth noting that COVID-19 also presents a unique situation for maritime employers. Seamen injured at sea are entitled to what is called "maintenance and cure." These terms each refer to separate obligations. For maintenance, an employer is responsible for a seaman's day-to-day living expenses, while cure refers to the medical costs incurred by the seaman. Maintenance and cure obligations continue from the time that the seaman becomes injured (or becomes ill) while performing services in furtherance of the vessel until the seaman is fit for duty or has become as well as medical treatment will allow (known as maximum medical improvement ("MMI")). *See Calmar S.S. Corp. v. Taylor*¸ 303 U.S. 525 (1938).

If an employee becomes ill with COVID-19 while working as a seaman on a vessel, then their employer will be liable for the maritime version of workers' compensation. Maintenance obligations however do not have statutorily set dollar obligations, so daily obligations may vary considerably. Moreover, cure obligations include all necessary medical care such as hospitalization, emergency medical care, medications, and in some circumstances, transportation to and from the health care provider. Therefore, when your seamen are determined to have COVID-19, your obligations don't just end when you send them to the hospital. Your maintenance and cure obligations continue, and it can be difficult to determine when exactly the seaman has become fit or duty or has hit MMI. For this reason, some employers use independent physicians to do this analysis to avoid any bias associated with the treating physician. However, as COVID-19 is an infectious disease, this could be problematic, so consult with your attorney before taking action. **If you have questions regarding maritime employee obligations, our firm is available to assist you.**

VIII. INSURANCE

A. Business-related Insurance Considerations:

A variety of insurance policies may provide coverage for COVID-19-related claims, losses and/or extra expenses including: (i) business interruption and contingent business interruption, and (ii) commercial general liability (CGL).[45]

While determining coverage for such losses will depend on the circumstances, policy wording, and applicable state law, businesses should proactively manage their

[45] Other available coverage may be found in certain industry-specific policies including, but not limited, to directors & officers ("D&O) coverage (in particular, crisis management coverage, derivative suit liabilities, among others), workers' compensation insurance, political risk insurance, and event cancellation insurance, among others. Additionally, certain specialized insurance endorsements may also provide coverage including those afforded to healthcare and hospitality industries.

COVID-19-related losses by evaluating the existence of, and likelihood of success in asserting claims for, coverage under various policies. This is not only necessary to evaluate and manage the financial impact of COVID-19 on your business but goes hand-in-hand with your business's ability to comply with any prompt or timely notice of claim provisions under your policy.

B. Business Interruption Coverage & Contingent Business Interruption Coverage:

Generally, Business Interruption ("BI") coverage is triggered by the policyholder experiencing a "direct physical loss of or damage to" insured property by a covered cause of loss. In the case of BI coverage under an "All Risk" policy business owners' policy, coverage is triggered when an ins sustains a "direct physical loss of or damage to" insured property by a cause not expressly excluded by the wording of the policy.[46]

Under Contingent Business Interruption ("Contingent BI") coverage, policies will typically afford coverage for economic damages sustained due to disruptions to your business's customers or suppliers provided the underlying cause of loss would otherwise be covered under the policy (*i.e.*, a loss covered if sustained by the business's insured premises).

When faced with a COVID-19 claim, many insurers may take the position that the "physical loss" prerequisite is not met. This does not end the inquiry, however, as different jurisdictions interpret the meaning of "physical loss" in different ways with several courts having determined contamination and other factors that render an insured property "uninhabitable" or otherwise unfit for its intended use may satisfy the "physical loss" requirement.

And certain BI policies also provide coverage when "civil authority" impacts access to the insured's premises. In such cases, and depending on the specific wording of the policy, a claim may be that a policy's "civil authority" coverage is triggered even absent a "physical loss" to the extent "civil authority" coverage is not tied to the same "physical" damage requirement.

On March, 16, 2019, Oceana Restaurant, a Louisiana establishment in the French Quarter, sued its London insurers seeking a declaratory judgment that its business interruption insurance policy provides coverage making precisely these arguments.[47] Oceana claims it sustained, and continues to sustain, business income losses, among other damages, as a result of (i) Governor John Bel Edwards' March 13, 2020 order banning gatherings of 250 or more people, and (ii) Mayor Latoya Cantrell's March 15, 2020 order

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[46] Both types of BI policies may also include coverage for extra expenses incurred because of an otherwise covered loss.

[47] *See generally Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's of London, et al.*, Civ. No. 20-02558, Civil District Court, Orleans Parish, State of Louisiana.

requiring full-service restaurants to limit their seating capacity by 50% and close by 9 p.m. CDT – both of which it maintains have affected its ability to operate at capacity (500 guests).[48] Oceana maintains coverage is due under the "civil authority" coverage grant of its "all risk" BI policy as COVID-19, and global pandemics generally, are not specifically excluded from coverage.

While the case is in its initial stages, its filing is a sign of coronavirus insurance coverage litigation to come. Louisiana courts have found intrusion of "abstract" impacts to premises may satisfy the "direct physical" loss requirement of BI policies.[49] However, whether and under what circumstances Louisiana courts will extend coverage based to COVID-19 impacts under "civil authority" and whether COVID-19's ability to "infect" physical spaces through "fomites" will satisfy the "physical damage" threshold where such damage is required, will be determined on a case-by-case analysis of the specific policy wording and applicable state law under which the contract is interpreted.

C. Commercial General Liability Coverage:

COVID-19 presents both bodily injury and property damage claims for businesses. Commercial General Liability ("CGL") policies typical provide coverage for an insured's liability as a result of such damages provided the cause of loss takes place during the policy period (otherwise referred to as "occurrence" based policies), meets the definition of a covered loss, and is not otherwise excluded. CGL policy definitions for property damage are typically broader than traditional property insurance policies and may include coverage for economic losses resulting from covered bodily injury or property damage claims. The key to coverage will turn on the specific policy wording and circumstances of each case. And, importantly, coverage may be found in a myriad of different policies. It is, therefore, important to review all of your policies when determining available coverages.

Practically for business owners, the CGL will be the first policy to review if a customer sues you for failing to prevent COVID-19 transmission. However, many CGLs contain virus, bacteria, or pathogen exclusions, so it is critical to review your policy. CGLs for certain industries, like hotels or restaurants, are sometimes sold with bacteria/viral coverages, so do not assume that COVID-19 liability is excluded. If your business requires assistance evaluating insurance coverage for COVID-19-related claims or losses, our firm is available to assist you.

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48 Additional orders affecting Louisiana businesses have been issued, including: (i) Governor John Bel Edwards' March 16, 2020 order banning gatherings of 50 or more people, (ii) Mayor Latoya Cantrell's March 16, 2020 order banning all non-emergency gatherings, subject to exclusions, closing all bars, health clubs, shopping centers, and other establishments risking the spread of COVID-19, and limiting restaurants to take out and delivery only; and (iii) Governor John Bel Edwards' March 22, 2020 order banning gatherings of 10 or more people and issuing a general stay-at-home order.

49 *See Widder v. La. Citizens Prop. Ins. Corp.*, 2011-0196 (La. App. 4 8/10/11); 82 So. 3d 294, 296, *writ denied*, 2011-2336 (La. 12/2/11) (holding the intrusion of lead or gaseous fumes constitute direct physical loss).

D. Worker's Compensation Insurance:

In Louisiana and Texas, businesses must carry workers' compensation insurance. These policies cover occupational diseases contracted peculiar to a trade, occupation, or employment. They do *not* cover what are called ordinary diseases, *i.e.*, diseases to which the general public is exposed. For example, asbestos claims against employers often fall within the scope of workers' compensation insurance if employees had to work with asbestos-containing materials as part of their job but getting the flu at work would not be covered.

To the extent your business has an added risk of exposure to COVID-19, you may have an argument that COVID-19 is an occupational, not ordinary, disease. This is an easier argument to make for hospital workers, nursing home workers, emergency responders, etc., but the more factors your business has that puts employees at particular or peculiar risk of COVID-19 exposure, the more change you have of a successful claim on your workers' compensation insurance may cover those employees. An additional hurdle though would be having to prove that a COVID-19-positive employee contracted COVID-19 at the workplace.

E. Departments of Insurance consider the impact of COVID-19:

Insurance commissioners and departments across the country understand that many insurance policies written pre-COVID-19 are not well-suited to handle the exposures of business policyholders right now. Their responses have varied by state. For example, California's Department of Insurance requested a 60-day grace period on March 18, 2020 for policyholders to pay their premium.[50] Many state Departments of Insurance have also warned of scams aimed at older citizens attempting to sell COVID-19 cures, as no cures have been made publicly available at this time.[51]

More substantively, 18 members of the U.S. House of Representatives addressed a letter to the leaders of the American Property Casualty Insurance Association ("APCIA", the National Association of Mutual Insurance Companies, the Independent Insurance Agents & Brokers of America, and the Council of Insurance Agents and Brokers. The House representatives asked the insurer leaders to work with their member companies and brokers to recognize financial loss as part of business interruption coverage. In response, the president of the APCIA and others sent a joint letter to Representative Velazquez stating that business interruption policies "do not, and were not designed to, provide coverage against communicable diseases such as COVID-19."

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50 http://www.insurance.ca.gov/0400-news/0100-press-releases/2020/upload/nr030-BillingGracePeriodNotice03182020.pdf.

51 Various trials into treatments and/or vaccines are ongoing but are not publicly available.

In New Jersey, legislation was proposed that sought to retroactively cover small businesses for COVID-19-related business interruptions regardless of any virus exclusion.[52] The bill would apply to New Jersey businesses with less than 100 eligible employees, *i.e.*, full-time employees working a normal week of 25 hours or more, who had a business interruption policy as of March 9, 2020. While many policyholders would be thrilled to see this type of legislation in their jurisdiction, any law retroactively amending virus exclusions will surely be tied up in litigation for a significant period.

Article 1 of the U.S. Constitution prohibits state laws from substantial impairing private contracts. This "Contracts Clause" once was a primary tool to invalidate unconstitutional state laws, but over time, it increasingly lost its teeth. As recently as 2018, the U.S. Supreme Court considered a Minnesota statute that retroactively revoked life insurance beneficiary designations upon divorce.[53] On an 8-1 vote with Justice Gorsuch dissenting, the Court held that the statute did *not* substantially impair pre-existing contractual arrangements. While states like New Jersey may see this case as a green light to move forward with retroactive changes to virus exclusions, the number of potential COVID-19 cases may pressure the courts to distinguish the *Sveen* decision.

Of course, we are monitoring these developments to provide our clients with the best possible arguments for coverage.

F. ***Trade Credit Insurance***:

COVID-19 has forced policyholders to look at their business insurance policies more closely to find some form of coverage, but the presence of epidemic or pathogen exclusions has led to a concern in a little-known area of insurance—trade credit insurance. As policyholders find themselves excluded or forced to argue novel insurance theories for coverage, the recession continues. Customers are often legally barred from staying at your hotel, restaurant, or other business. Those businesses now cannot pay their rent, service providers, and other vendors. Trade credit insurance covers the risk that a company's customers cannot pay for goods or services bought on credit.

As airlines and hotels across the world feel the bite of the COVID-19 pandemic, trade credit insurers are finding multiple pressure points. Their investments have been hit by what will likely be a significant recession, and their payable losses are rising with each passing week. Therefore, policyholders should expect, and plan for, stricter underwriting for their trade credit insurance renewals.

IX. DATA PRIVACY AND CYBERSECURITY CONCERNS

COVID-19 has impacted multiple areas of the law, and the data privacy/cybersecurity arena is no different. Back in February 2020, which seems eons ago now, the U.S. Department of Health and Human Services ("HHS") issued a bulletin to

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52 *See* N.J. Assembly Bill A-3844.

53 *Sveen v. Melin*, 138 S. Ct. 1815 (2018).

HIPAA-covered entities and business associates regarding the sharing of patient information during an outbreak of infectious disease or other emergencies that may differ from the general rules. For example, HIPAA allows covered entities to disclose needed protected health information ("PHI") to public health authorities for the purpose of preventing or controlling disease, so a hospital can report to CDC or state health departments all prior or prospective cases of patients exposed to or suspected or confirmed to have COVID-19 without obtaining the individual patients' authorizations.[54] Additionally, employers who are conducting or requiring medical examinations for employees could trigger data privacy/confidentiality concerns under the ADA, GDPR, or potentially state law.

On the cybersecurity front, the number of people working remotely has boomed due to non-essential business employers being ordered to allow their employees to work from home. This presents significant concerns to businesses without a large online distributed presence before COVID-19.

First, businesses' servers are getting the ultimate stress test to see if they can withstand the higher volume of traffic. Slowdowns in workflow can result in employees getting frustrated with cybersecurity protections that may be slowing their connections. Businesses should take care that their servers are able to handle their workflow and do so securely.

Second, employees are likely using their personal devices more than ever to conduct business work. This opens that work to potential threats, especially if they have not been provided with and/or warned to use Virtual Private Networks ("VPNs"). VPNs allow users to share data on public networks as if the devices were directly connected to a private network.

Third, some businesses built their data integrity infrastructure on the assumption that most business would flow through the local private network at their place of business. That is no longer be true for many businesses, so these companies may be flying blind regarding potential compromises to their data while employees are working from home. For example, companies that do allow employees to remotely access work computers must take precautions. Employers should disable the ability to send data between their employees' virtual desktop and the machine connected still connected at the office. Otherwise, threats from employee personal devices could use the same connection to access work computers and servers.

Due to the number of cybersecurity concerns, employers should take this time to refresh employees on their company's employment information security policies, cybersecurity best practices, bring-your-own-device policies governing employees'

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54 www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf (as of March 27, 2020).

personal devices, and/or cyber incident response plans. If you don't have any of those, it may be time to consult with a cybersecurity attorney in your area.