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Covid-19 & Small Businesses: An overview of the Federal, State and Local Response.

Over the last several weeks, we have seen our daily routines turned completely upside down as we have moved into our current reality, first with the practice of social distancing and now with Minnesota joining other states in adopting various shelter-in-place orders as we try to stem the tide of the spread of the Covid-19 virus. Small businesses have been hit especially hard, as the quarantine has limited customer base and restricted cash flow. In response, the Congress has passed with bipartisan support various relief packages that provide a variety of avenues toward helping individuals and business owners. The State of Minnesota, through a series of Executive Orders by Governor Walz, has also retooled some existing programs to provide relief for displaced workers and impacted businesses. Finally, the City of Minneapolis has issued some guidelines on how its existing Sick and Safe Leave Ordinances apply in the current business environment. An overview of some (but not all) of these measures is set out below:

Families First Coronavirus Response Act (HR 6201, the “Families First Act”):

In addition to other measures, the Families First Act expands the Family Medical Leave Act of 1993. While the U. S. Department of Labor just issued guidelines last week for the Families First Leave Act (and is still in the process of refining those guidelines), here is what we know so far: Employers with 500 or fewer employees may be required to provide certain employees with paid sick leave and expanded family and medical leave for specified reasons related to Covid-19. The period of coverage runs from April 1, 2020 through December 31, 2020. Covered full-time employees must receive 80-hours of paid sick leave based on the higher of their regular rate of pay or applicable minimum wage, paid at:

100%, up to \$511 daily and \$5,110 total if the employee:

1. Is subject to a Federal, State, or local quarantine or isolation order related to Covid-19 (note that this has not yet been defined by the Department of Labor);
2. Has been advised by a health-care provider to self-quarantine related to Covid-19; or
3. Is experiencing Covid-19 symptoms and is seeking a medical diagnosis

2/3, up to \$200 daily and \$2,000 total if the employee:

1. Is caring for an individual subject to a Federal, State, or local quarantine or isolation order related to Covid-19; or
2. Is caring for an individual that has been advised by a health-care provider to self-quarantine related to Covid-19; or
3. Is experiencing any other substantially similar condition specified by the U.S. Department of Health & Human Services

Employees may also be entitled to up to 12 weeks of paid sick leave and expanded family medical leave (paid at 2/3 up to \$200 daily and \$12,000 total) if the employee is caring for his or her child whose school or place of care is closed (or childcare unavailable) due to Covid-19 related reasons.

Part time employees are required to receive leave at a proportional amount.

There are a number of exceptions including a lack of eligibility if an employer closes their worksite on or after April 1, 2020, or if they were furloughed on or after that date. Emergency Sick Leave and Expanded FMLA leave cannot be used to cover hours that an employee is no longer scheduled to work due to the employer not having work available for the employee.

Businesses with fewer than 50 employees may be exempt from the expanded leave requirement when doing so would jeopardize the viability of the business. Small businesses seeking to claim this exemption must establish that :

- Providing paid sick leave or expanded family and medical leave would result in the 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 family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of the employee's specialized skills, knowledge of the business, or responsibilities; *or*
- There are not sufficient able, willing, and qualified workers who will be available at the time and place needed to perform the labor or services provided by the employee(s) requesting the leave, and these labor or services are needed for the small business to operate at a minimal capacity.

As mentioned before, the guidelines and rules continue to be developed. Some additional information can be found here: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

Coronavirus Aid, Relief, and Economic Security Act (H.R. 748, the "CARES Act"):

Paycheck Protection Program: The CARES Act includes the Paycheck Protection Program ("PPP") for small businesses. The PPP, based on an existing general business loan program of the Small Business Administration, provides short-term cash-flow assistance to small business in order to help businesses address the economic impact of the Covid-19 pandemic. Loans are made by lenders certified by the Small Business Administration and are guaranteed by the Federal government. Businesses that receive loans must use the money to pay payroll costs (but not salaries over \$100,000), costs related to group health care benefits, employee commissions and tips, interest on mortgage obligations, rent including rent under a lease, utilities, or interest on other debt incurred prior to obtaining the loan.

For the first 8-week period from when the PPP Loan is made, loan proceeds used to cover payroll costs, interest payments on mortgages, rent, and utilities may be forgiven. In order to qualify for loan forgiveness, businesses must keep their employees and pay them at least 75% of their compensation from the prior year. PPP loans must be made prior to June 30, 2020. The maximum PPP loan amount available to a company is \$10,000,000 or 2.5x the average monthly payroll costs of the company over the year prior to making the loan—excluding any compensation above \$100,000 per year—prorated for February 15 through June 30, 2020. As of yet, the SBA has not issued guidelines on this program but has fifteen days to draft implementing regulations.

Payroll Tax Deferral Period: To incentivize employers to retain employees during the pandemic and alleviate cash flow concerns related to remitting payroll taxes to the Internal Revenue Service, the CARES Act creates a "payroll tax deferral period". Running from March 27-December 31, 2020, the payroll tax deferral period allows for employers to defer payment on the employer-share of the Social Security tax. Please note that this allows for *deferral* of the payments, not a *forgiveness* of the payments. Payroll taxes deferred must be paid over the next two years (50% due by December 31, 2021 and 50% due by December 31, 2022), which would allow employers to spread the expense over time. This program will not be available to any organization that has had a PPP loan forgiven so businesses should carefully weigh the pros and cons of these programs before committing to one or the other.

Employee Retention Credit: Employers with fewer than 100 employees (calculated by the average employment in 2019) who fully or partially suspend operations due to a government order *or* experience a decline in revenue of 50% or more for any quarter in 2020 when compared to the same quarter for 2019, is entitled to a refundable credit against employment taxes of up to \$5,000/employee for 50% of qualified wages paid, whether or not the employee is working. Employers with more than 100 employees will also be entitled to the credit, but only for wages paid to employees who are not working.

Economic Stabilization Loans: Employers with between 500 and 10,000 employees may be eligible to receive loans as well. While the CARES Act specifically mentions the airline and other industries, it directs that the Treasury Department to implement a program through the Federal Reserve to provide financing to banks and other lenders to make direct loans to qualifying businesses "to the extent practicable." While there is no loan forgiveness under this program, the interest rates are capped at two percent, and no payments are required or interest accruing for the first six months. Employers who receive such a loan must use the funds to retain at least 90% of the recipient's workforce with full compensation and benefits through September 30, 2020; may not abrogate existing collective bargaining agreements during the term of the loan and for two years thereafter; and must remain neutral in any union-organization effort for the term of the loan.

Changes to Minnesota Unemployment Insurance:

To alleviate the economic burden on employees that have become unemployed as a result of the Coronavirus pandemic, Minnesota has relaxed the requirements of the unemployment insurance program, including waiver of the traditional one-week waiting period. On the employer side, Governor Walz's executive order relieves employers of benefit charges associated with the pandemic. Employers should not see an increase in their UI tax rate as a result of employees collecting unemployment due to Coronavirus, and do not need to notify the Department of Employment and Economic Development ("DEED") to raise an issue to be relieved of Coronavirus-related charges (non-Coronavirus issues must continue to be raised in the normal timeframe). The order also waives the traditional five-week benefit limitation for business owners who had previously elected coverage and have become unemployed as a result of the pandemic.

Qualified Minnesota employers may also be able to reduce costs by participating in the Shared Work Program if they reduce hours by 50% or less. Under this program, available work hours are divided among a group of employees rather than layoffs occurring. The employer pays wages for the hours the employees work, and employees receive partial unemployment benefits to make up a portion of the difference.

The Minneapolis Sick and Safe Time Ordinance:

Employers in Minneapolis are already familiar with the Minneapolis [Sick and Safe Time Ordinance](#) (Minneapolis Code of Ordinances, Title 2, Chapter 40, Article III). Under guidance issued by the Minneapolis Labor Standards Enforcement Division, an employee's accrued sick and safe time hours are

legally protected for their use due to Coronavirus symptoms, testing or infection, including but not limited to:

- Coronavirus screening;
- Care or quarantine due to Coronavirus symptoms or infection;
- Testing or quarantine following close personal contact with a Coronavirus infected or symptomatic person;
- Coverted family members' school or place-of-care closure due to Coronavirus; and
- Workplace closure by order of a public official due to Cornoavirus.

The ordinance does not require employers to allow employees to use accrued Sick and Safe time to make up for reduced hours due to Coronavirus. Preventative closure of business (such as those that are deemed essential and exempt from Governor Walz's shelter-in-place order) or preemptive self-quarantine (that is, quarantine without reason to believe that the employee has contracted an illness) is not covered by the ordinance. Additional information on Minneapolis' Sick and Safe Leave policy can be found here: http://sicktimeinfo.minneapolismn.gov/uploads/9/6/3/1/96313024/covid-19_and_sst_3_18_20.pdf.

The situation is fluid and the above is only a summary of some of the relief efforts being provided to individuals and business owners to ease the economic effects of the Covid-19 pandemic. Additional guidance will be available in the coming weeks as interpreting and implementing regulations are adopted. As always, the team at Madigan, Dahl & Harlan can help you and your business navigate these and any other legal matters that may come up during this time.

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Madigan, Dahl & Harlan, P.A.
Campbell Mithun Tower
Suite 3150
222 South 9th Street
Minneapolis, MN 55402
Main: (612) 604-2000
email@mdh-law.com
www.mdh-law.com

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