PROGRAM MATERIALS
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April 8, 2020

COVID-19 Crisis Management Action Plan: Steps to Take Today

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CELESQ Presents

COVID-19 Crisis Management Action Plan: Steps to Take Today

April 8, 2020 – 2:00 PM-4:00PM

Raymond J. Dowd

William F. Dahill
Robert N. Swetnick
Louis E. Teitel
Samuel A. Blaustein
Nicola Tegoni
Susan Rothwell
Luke McGrath

Join our panel of legal experts for a report on what businesses and individuals should be doing to protect themselves in a rapidly changing domestic and international environment. Employers and employees face a multitude of challenges calling for prompt action. Small businesses are fighting for survival. Landlords, tenants and construction contracts are in flux. Attorneys are also facing unprecedented issues in insurance, immigration, trusts and estates, and litigation. International business is facing daily disruption. Get a practical view of how to prioritize the legal issues COVID-19 has presented we are facing and get a view of what needs to be done. Questions may be submitted and answered live.

TIMED OUTLINE

5 min Introduction – COVID-19 Update – Raymond J. Dowd

25 min Employment Law – William F. Dahill

25 min Small Business – Robert N. Swetnick

15 min Real Estate – Louis E. Teitel

10 min Insurance – Samuel A. Blaustein

10 min Immigration Law – Nicola Tegoni

10 min Trusts and Estates – Susan Rothwell

10 min Litigation/Arbitration/Investigations – Luke McGrath

Q&A

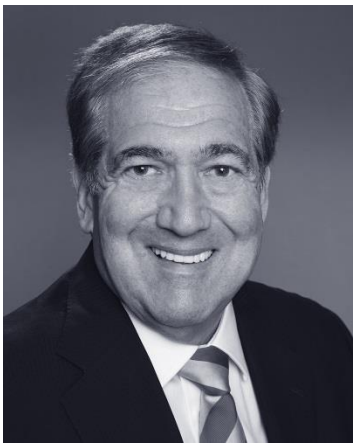
Presenters

Raymond J. Dowd is a partner in the law firm of Dunnington Bartholow & Miller LLP in New York City. He authored *Copyright Litigation Handbook* (now in its 10th edition). His practice consists of federal and state trial and appellate litigation, arbitration and mediation, having served as lead trial counsel in broadcasting, publishing, art law, copyright, trademark, cybersquatting, privacy, trusts and decedents estates, licensing, corporate and real estate cases.

Mr. Dowd works with a lean, experienced team, including trusted experts, to contain, avoid, minimize, and settle disputes. Matters often involve foreign law and conflict-of laws principles, service or discovery in foreign jurisdictions.

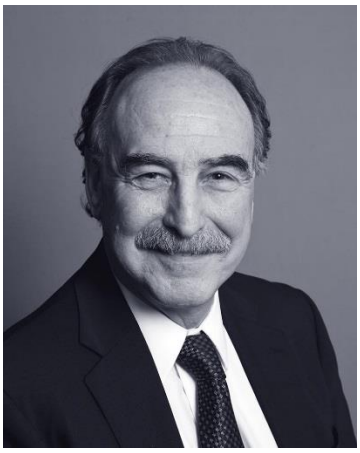
William F. Dahill is a member of Dunnington's employment and litigation, arbitration and mediation practice area. Since 1991, Mr. Dahill has concentrated his practice on complex commercial litigation and employment litigation and counseling. Areas of focus include securities industry litigation, employment litigation, secured lending disputes, partnership disputes, shareholder disputes and construction litigation.

Mr. Dahill counsels and represents business entities at all levels and stages from start-ups to public companies. He also counsels and represents individuals in claims and defenses in litigation and employment matters. He appears regularly in Federal and state Courts in New York and Connecticut.



Robert N. Swetnick is a member of Dunnington's Litigation, Corporate, Real Estate, Employment and Trusts & Estates practice areas. Mr. Swetnick has broad experience serving as outside counsel to high network individuals and businesses, and represents them in all facets of both federal and state litigation, transactional work, real estate matters, and the drafting and review of agreements.

Mr. Swetnick's practice includes the formation and capitalization of businesses, business and real estate purchase and sale transactions, negotiation and drafting of employment, partnership, LLC, license and similar agreements, real estate leases and financing, estate planning, and representation before administrative agencies.



Louis E. Teitel heads Dunnington's transactional real estate practice. Early in his career, he began representing developers involved with the purchase and conversion of New York City loft buildings into cooperative apartments.

Throughout his career, he has guided landlord, commercial tenants, real estate developers, portfolio investors, joint venture partners, office property managers and cooperative boards in sophisticated real estate transactions.

Samuel A. Blaustein is a member of Dunnington Bartholow & Miller LLP's litigation, arbitration and mediation and intellectual property and art law practice areas. Prior to joining Dunnington, Mr. Blaustein served as a law clerk in the United States District Court for the Southern District of New York for the Hon. Laura Taylor Swain.

Mr. Blaustein specializes in commercial disputes in New York state and federal courts from inception through appeal. Mr. Blaustein has argued several cases involving novel issues of insurance law ranging from claims against unauthorized insurers, to intervention by title insurers to arbitrability of claims.

Nicola Tegoni is a member of Dunnington's immigration, international, and employment practice groups.

His practice is exclusive to U.S. Immigration Law. Mr. Tegoni represents and counsels companies and individual clients in business immigration, family immigration, citizenship, removal defense, federal court litigation, and asylum

He is an active member of the American Immigration Lawyers Association (AILA), the preeminent national bar association of attorneys who practice and teach immigration law.

Susan Rothwell is a member of Dunnington's estates, trusts and private clients practice group. She advises clients on estate and tax planning for wealth preservation and prepares wills, trusts and other vehicles to achieve client goals. She assists clients with strategies to protect assets, minimize taxes, and transfer wealth to future generations. For clients who wish to make charitable donations, she advises on strategies that benefit the charity while maximizing tax benefits to the donor.

Ms. Rothwell advises foreign nationals owning property in New York as well as New York residents owning property in other countries. She assists in planning to minimize transfer taxes and ensure that property will be transferred to beneficiaries with a minimum of cost and delay.

Luke McGrath is a member of Dunnington's litigation, arbitration and mediation, international and intellectual property practice areas. Mr. McGrath, a former prosecutor, served as an Assistant District Attorney in the offices of Robert M. Morgenthau, District Attorney of New York County.

Mr. McGrath handles case management of numerous complex matters before state and federal trial courts, state and federal appellate courts, and arbitration panels involving, among other complex matters, securities issues, corporate governance, contract disputes, intellectual property claims, and contested matters unique to the hospitality industry.

Employment Law – William F. Dahill

Dunnington Bartholow & Miller LLP
COVID-19 Announcement:

Dear Clients and Colleagues:

Dunnington, Bartholow & Miller LLP is dedicated to protecting the continued health, safety and well-being of our entire staff while we continue to provide services to you. First and foremost, our thoughts are with all those impacted by the COVID-19 outbreak, and the medical professionals relentlessly working around the clock to fight this new global pandemic.

At Dunnington, we have contingency plans in effect to provide uninterrupted service while working remotely as warranted by conditions. Our attorneys and staff will continue to be responsive to your legal and business needs, whether on existing or new matters, and remain available to answer any of your COVID-19 related questions.

We have thus included below some information that you may find helpful. All updates and insights will be posted in the Dunnington News section of our website (www.dunnington.com/news) under COVID-19 Alerts. Should you have any questions or concerns, please feel free to reach out to us.

We wish everyone good health and safety, and look forward to welcoming you back in our office hopefully in the not too distant future.

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Appendix

I. Background

COVID-19 was initially reported on December 31, 2019 in Wuhan, China. On March 11, 2020, the World Health Organization (WHO) officially declared the outbreak a pandemic and acknowledged the likelihood of it spreading to all countries across the globe. According to a March 12, 2020 "Situation Report" published by the WHO, there are about 125,000 reported cases of individuals contracting COVID-19 and 4,613 related deaths reported globally. As of March 12, 2020 there have been over 1,000 cases of COVID -19 across the United States, with at least 33 deaths.

On Wednesday night, March 11, 2020, President Donald Trump imposed a 30-day travel restriction on foreign nationals who have visited 26 countries in Europe. The travel ban, which went into effect on March 13, 2020, is one of many containment measures to be taken by the administration, as Trump has outlined a series of measures intended to tackle the impact of the virus, which you can read here.

The COVID-19 outbreak has caused significant disruptions to supply chain, employment, contractual and commercial relationships. There currently exists many domestic laws that can help guide appropriate responses to the outbreak, which many Employers should remain aware of as they take steps towards containing the virus and managing employees' concerns.

II. Employment and Labor Law

a. What if employees do not want to come to work?

The U.S. Department of Labor's Occupational Safety and Health Act of 1970 (OSHA) requires employers to be responsible for maintaining safe and healthy work environments for their employees. Though OSHA establishes and enforces standards for responding to outbreaks, there currently exists no OSHA standard that explicitly addresses occupational exposure to COVID-19. Instead, OSHA has highlighted here a few standards that may apply to employers on a case-by-case basis, such as the General Duty Clause in OSHA Section 5(a)(1). See 29 USCA § 654. If employees do not want to come to work due to fears of exposure to COVID-19, then employers, under OSHA, may be required to conduct a hazard assessment and take additional steps toward fulfilling their obligation to provide a safer workplace. OSHA also established a recordkeeping requirement at 29 CFR Part 1904, mandating employers to log certain work-related injuries and/or illnesses. COVID-19 may be considered a recordable illness if the employee is infected while at work.

- Additional information regarding OSHA's Injury and Illness Recordkeeping and Reporting Requirements can be found here.
- OSHA has also provided additional guidance to prevent employees' exposure to COVID-19, which can be found here.

b. What if I suspect an employee has contracted COVID-19?

If an employer believes that an employee has contracted the disease and is at risk of contaminating the workforce, then the employer must have objective evidence before reasonably taking action to reduce widespread exposure in the workplace. Once an employer obtains objective evidence, they may be permitted to ask high risk employees (i.e. an employee exhibiting symptoms

and/or who recently travelled to a foreign country with relatively high rates of exposure to COVID-19) to, without identifying the illness, voluntarily screen themselves or report whether they have a contagious illness.

It may also be permissible to require employees who show symptoms of the virus to take a fitness for duty exam before returning to work. However, it is highly recommended that employers consult with counsel before making any such determination and taking any such action.

c. Can employers issue mandatory quarantines?

Employers that wish to issue mandatory quarantines of employees who exhibit COVID-19 symptoms should be cautious to avoid violating the Americans with Disabilities Act. Though earlier guidance from the Equal Employment Opportunity Commission (EEOC) explicitly permitted employers to encourage employees to work remotely as an effective means of controlling the spread of other pandemics such as influenza, whether or not an employer can require a particular employee to work remotely, depends on the circumstances and should be discussed with counsel.

d. Can employers single out certain employees based on race and ethnic origins?

No. Employers should avoid targeting employees when asking them about their medical history and personal travel plans, and remain mindful that those employees could be in a protected class under anti-discrimination laws (i.e., ethnicity, national origin, race, age).

e. What if I need to close my business?

Under relevant federal and state laws, employers are required to only pay for the actual hours worked by non-exempt employees – i.e. most hourly employees. Please note that New York State is waiving the 7-Day waiting period for filing for unemployment for people who are out of work due to COVID-19 closures or quarantines. If employers temporarily close their businesses due to COVID-19, then employers may be able to require exempt, salaried employees to use their vacation or leave without pay during the temporary closure.

f. What if an employee must take leave to care for themselves or a family member?

Under New York State Law, employees who work at least 20 hours per week for an employer with at least 1 employee are entitled to Paid Family leave for the purpose of, among other things, caring for a family member who is ill. The maximum coverage is 10 weeks, and is capped at 60% of weekly pay, but no more than $840.70. For more info, see https://paidfamilyleave.ny.gov/.

Employees who work in New York City, for at least 80 hours in a calendar year, and for an employer with at least 5 employees, are entitled to up to 5 paid sick days in a calendar year, accrued as 1 hour for every 30 worked, up to a maximum of 40 hours of paid leave. For more info, see https://www1.nyc.gov/site/dca/about/paid-sick-leave-FAQs.page.

The Family and Medical Leave Act (FMLA) requires covered employers to allow employees to take unpaid leave for medical and family related reasons, including severe and complicated cases of the flu, without disrupting group health insurance coverage. The FMLA applies to employers in the private sector

who have more than 50 employees for a period of at least 20 workweeks in the year. Federal law does not require employers to provide leave to employees caring for dependents released from child care or school. In a 12-month period, eligible employees could be entitled to twelve unpaid work weeks for a number of reasons including a "serious health condition" that makes the employee unable to perform the essential functions of his or her job. See 29 USCA § 2611.

If you have any business and employment concerns related to your company policies, seek additional counsel from one of our experienced Employment and Corporate Law attorneys.

III. Corporate Law and Supply Chain

a. The Securities and Exchange Commission (SEC)

On March 4, 2020, the Securities and Exchange Commission (SEC) released an order in response to COVID-19, stating that the commission will provide conditional regulatory relief for certain publicly traded companies with filing obligations under the federal securities law. The SEC also provided an additional 45-days for publicly traded companies to file certain disclosure reports that would have been due from March 1st to April 30th, 2020. The SEC also encourages all companies that have become aware of a COVID-19 related risk, to appropriately inform investors about the risk before engaging in securities transactions with the public. In doing so, companies may be able to avail themselves of the safe harbor provision in Section 21E of the Exchange Act.

- Visit the SEC website here, for additional information pertaining to the SEC's conditional regulatory relief in the wake of the Coronavirus outbreak.

b. Force Majeure

As widely reported, the coronavirus has placed a severe strain on supply-chains around the world. Initially limited to China and its manufacturing centers, COVID-19 is now impacting supply chains not just in Asia, but on all continents. To the extent US-China trade wars have caused brand owners to move manufacturing outside of China, they are now faced with a formidable enemy in new territories. With no end date on the horizon and as international travel restrictions from and to many countries mount, many businesses are examining their contracts to understand the extent of their rights, remedies and obligations.

Parties may wish to proactively audit their critical supply chain and customer agreements to evaluate rights and obligations in the likely event of impact. Each circumstance will be unique. However, general considerations/actions include:

1. Noting contract provisions defining events of default.
2. Determining whether written agreements contain force majeure provisions. If so, key points on which to focus include notice requirements (i.e., time, method of delivery and content of required notices) and possible termination rights. Force Majeure event can occur when an event beyond a company's control occurs and significantly reduces a company's ability to perform under a contract. In which case, the company may be able to temporarily suspend or release their duty to perform without being held liable.

3. If a need to declare a force majeure event is anticipated, assessing facts and circumstances of the event (e.g., specific supply chain components impacted, facilities impacted, availability of alternative facilities or and/or shipping methods).
4. If a force majeure declaration is received from a manufacturer or supplier, assessing not only rights vis-à-vis the declaring party, but also whether receipt of the notice will trigger the necessity for a party to provide its own declaration to customers.
5. In the absence of written agreements or force majeure provisions, parties may wish to conduct risk assessments, explore potentially applicable legal precedents and formulate strategies for productive communications with customers and downstream parties.

c. Frustration and Impossibility of Performance

If a contract lacks a force majeure clause, then parties may wish to consider the defense of frustration of purpose or impossibility of performance. Frustration of purpose occurs when after a contract is made, a party's principal purpose is substantially frustrated without fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. In other words the occurrence of an event makes the performance completely worthless to the other party. The doctrine, however, does not apply where performance under the contract would merely cause some degree of financial hardship.

Impossibility of performance is a defense to nonperformance and refers to situations where the purpose for which the contract was made has become impossible to perform. This occurs where there is destruction of the subject matter of the contract, or the means of performance is objectively impossible to accomplish by a party.

In the context of the delivery of goods, for example, parties may also wish to consider the Uniform Commercial Code. Section 2-615(a) of the N.Y. U.C.C. provides that "[d]elay in delivery or non-delivery . . . is not a breach under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."

Again, one size does not fit all, and specific circumstances will differ. However, proactive review and planning with counsel now may help lessen potential impacts on contractual agreements and minimize disputes and related costs later.

IV. Insurance

a. Business Interruption Insurance

Business interruption insurance protects the insured against losses resulting from an inability to conduct normal operations. For instance, if a store is damaged by fire or a machine breaks down, the period of interruption would be the time it takes to remediate the damage or repair the machine respectively. Generally, the insured would receive the profit that they would have earned absent the interruption.

However, whether an insured is covered and, if so, how much they are insured for, are potential causes for controversy. For instance, if a business is adversely affected by an external issue that does not result in the cessation of business, there may not be any recovery. A primary example of this is the September 11, 2001 terrorists attacks. While many businesses were covered for physical damages; they were not protected against the long-term business reduction in lower Manhattan which were in the nature of uninsurable consequential damages. Similarly, businesses that are affected remain obligated to mitigate damages. We are already starting to see this vis-à-vis COVID-19 with restaurants increasing take-out and delivery options in lieu of dining room operations.

As with all insurance litigation, careful attention to policy details, exclusions, notice periods and other provisions will be required. We expect that numerous declaratory judgment actions and other lawsuits will be filed by insureds if coverage is declined or the amounts offered are deemed insufficient. While health and safety is of the foremost importance at this time, insured business owners should be proactive and take steps to protect themselves. The Dunnington team is available to assist in assessing these important tasks.

V. Immigration

a. Department of State's Office of Academic Exchanges

The Department of State's Office of Academic Exchanges has provided information for exchange visitors whose travel may be affected by the Novel Coronavirus 2019 (COVID-19). In an email to sponsors, the office describes USCIS's discretion to prolong or change status, and in some circumstances give student work authorization, for people who cannot leave the United States due to serious situations. The DOS office reemphasizes that any exchange visitors subject to the home residency requirement will need a 212(e) waiver, but notes that expedited waiver processing may be requested for circumstances with critical humanitarian need. Additionally, the office writes that exchange visitors can request a "No Objection Statement" from their home country government and submit it as an update to their application once they have a waiver case number. F-1 Students experiencing severe economic hardship because of unforeseen circumstances beyond their control may request employment authorization to work off-campus. See 8 CFR 214.2(f)(9). To apply, it is necessary to submit Form I-765, Application for Employment Authorization, and copies of the Form I-20, the Certificate of Eligibility for Nonimmigrant Student Status, and any other supporting documents. The Form I-20 must contain the employment sheet completed by the Designated School Official, showing eligibility for off-campus employment due to severe economic difficulty for unforeseen events beyond the student's control. If the application is approved, the student is authorized to work off-campus for up to one year until the expected date of graduation. See 8 CFR 214.2(f)(9)(ii).

b. Presidential Proclamations

On January 31, 2020, President Trump issued a Proclamation to suspend entry of non-citizens physically present in China, excluding Hong Kong and Macau, 14 days prior to their entry into the United States. The ban became effective on February 2, 2020.Further, U.S. citizens who traveled in the Hubei province (China) in the 14 days prior to arriving in the United States will be subject to up to 14 days of

mandatory quarantine. Returning U.S. citizens who had visited other parts of China, with the exclusion of Hong Kong and Macau, will be subject to monitoring and potentially voluntary quarantine at home.

On February 29, 2020, President Trump issued a second Proclamation extending the same suspensions to Iran. The ban became effective on March 2, 2020.

President Trump issued another proclamation, effective 11:59 pm (ET), March 13, 2020, which suspend the entry of most foreign nationals who have been in certain European countries at any point during the 14 days prior to their scheduled arrival to the United States. These countries, known as Schengen Area, include: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland. This does not apply to legal permanent residents holding a green card, (generally) immediate family members of U.S. Citizens, and other individuals who are specifically identified in the proclamation. The proclamation shall remain in effect until further notice by the President.

On Saturday March 14th President Trump declared that all aliens who were physically present within the United Kingdom, excluding overseas territories outside of Europe, or the Republic of Ireland during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended. This does not apply to legal permanent residents holding a green card, (generally) immediate family members of U.S. Citizens, and other individuals who are specifically identified in the proclamation. The proclamation shall remain in effect until further notice by the President.

c. U.S. Immigration and Customs Enforcement

U.S. Immigration and Customs Enforcement (ICE) announced that it will be "flexible" with visa rules for international students as many universities move courses online as a prophylactic measure against coronavirus. International students on **F visas** for academic studies can only take one course online per semester to maintain legal status. In contrast, students on **M visas** for vocational training are barred from taking any online classes. But ICE stated that it will overlook these requirements temporarily in light of the public health crisis so long as universities provide written notice within ten business days of deciding to change its practices. The U.S. Department of State, which manages the **J-1 exchange visitor program**, has also issued guidance on its own to shield students participating in the program from penalties caused by the virus, including by allowing students who have yet to enter the U.S. to postpone their start dates.

Foreign students on F visas for academic studies can only take one course online per semester to maintain legal status, while students on M visas for vocational training are barred from taking any online classes. But ICE said it will forgive those requirements temporarily in light of the public health crisis so long as universities provide written notice within 10 business days of deciding to change its practices.

ICE also encouraged foreigners working in the U.S. through Optional Practical Training to work with their companies to find "alternative ways to maintain employment," such as through teleworking. However, a work interruption for people on OPT could present problems for workers whose jobs do not permit remote work, such as engineers.

VI. Real Estate – Commercial Leases and Brokers

a. Commercial Leases

Commercial tenants may face daunting rent obligations where retailers are obligated to close due to Coronavirus. At the height of the pandemic, China and other Asian countries faced numerous store closures due to the virus. Tenants should take a close look at their commercial lease provision as they may contain force majeure provisions that typically prevent tenants from withholder rents in such events. Such provisions are typically a negotiated term with respect to the commercial lease. Typical provisions state:

b. Inability to Perform

This Lease and the obligations of Tenant to pay rent hereunder and to perform all of the other covenants and agreements hereunder on the part of Tenant to be performed shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this Lease or to supply, or is delayed in supplying, any service expressed or implied to be supplied or is unable to make, or is delayed in making, any repair, additions, alterations or decorations or is unable to supply, or is delayed in supplying, any equipment or fixtures if Owner is prevented or delayed from so doing by reason of strike or labor troubles or any cause whatsoever beyond Owner's reasonable control including, but not limited to, government preemption or restrictions or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency or by reason of the conditions of supply and demand which have been or are affected, directly or indirectly, by war or other emergency or by reason of any other Force Majeure (as hereinafter defined) occurrence or event.

c. Brokers

Commercial brokers may also consider changing their contracts to add a "state of emergency" clause, so that the agreement is extended if a state or federal authority declares a state of emergency.

VII. Trust and Estates

a. Estate Planning

As shut downs and changes to daily life occur, take a few minutes to review all personal planning documents – Wills, Trust Agreements, Living Wills, Health Care Proxies, Powers of Attorney as well as beneficiary designations for financial accounts, retirement plans and insurance products.

Are your documents up to date – and do they provide adequately for loved ones?

If you have concerns or questions related to any of those documents, or your planning in general, please seek counsel from one of our experienced Trusts and Estates attorneys, who are ready to help you make any needed changes.

VIII. Conclusion

As the world continues to respond to COVID-19 employers and employees must remain diligent and informed in the many ways in which they or their businesses are effected by the ramifications of the outbreak.

While you worry about remaining healthy during this pandemic, let our experienced Corporate, Employment, Immigration, Commercial Litigation, and Real Estate and Trust and Estates attorneys assist with delivering and maintaining your professional objectives. Visit https://www.dunnington.com/ for more information. For any inquiries, please call us at (212) 682-8811.

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DUNNINGTON CLIENT ALERT:

New York State and U.S. Federal Government

COVID-19 Relief Legislation Aims to Help Employees

New York State

On March 18, 2020, New York Governor Andrew Cuomo signed a bill into law that guarantees workers Paid Sick Leave (PSL) for time off of work related to the COVID-19 pandemic. The legislation provides that, effective immediately, "during any mandatory or precautionary order of quarantine or isolation" mandated by public health officials to slow the spread of COVID-19:

- Employees at private companies with 100 or more employees, and public employees, receive a minimum of 14 days of PSL.
- Employees at private companies with 10 or fewer employees that have a net income of greater than $1 million, and at private companies with between 11 and 99 employees, receive at least five days of PSL, followed by eligibility for Paid Family Leave (PFL) and Temporary Disability Insurance (TDI) benefits.
- Employees at private companies with 10 or fewer employees and that have a net income of less than $1 million receive unpaid sick leave and are eligible for PFL and TDI benefits.
- Employees at businesses that close because of COVID-19 can immediately file for unemployment insurance benefits.
- Companies cannot fire employees because they do not go into the office while the government is recommending that people stay at home.

Additionally, the legislation guarantees that employees at small to midsize companies receive up to 40 hours of PSL per year; employees at companies with more than 100 employees receive up to 56 hours of PSL per year; and employees at companies with fewer than five employees, and with a net income of less than $1 million in the previous year, receive up to 40 hours of unpaid sick leave per year. If the net income was more than $1 million in the previous year, the leave must be paid. According to the bill, this policy goes into effect 180 days after the legislature passes it.

U.S. Federal

Similarly, on the federal level, President Trump signed into law the *Families First Coronavirus Response Act* (H.R. 6201) (FFCRA), which provides PSL to workers in the U.S. impacted by the novel coronavirus. Specifically, the legislation would provide all employees with two weeks of PSL, 90 days of family and medical leave for some workers, and enhanced unemployment insurance for impacted workers.

The legislation would ensure that employers with up to 500 employees offer up to 12 weeks of PSL to their workers who, as a result of COVID-19:

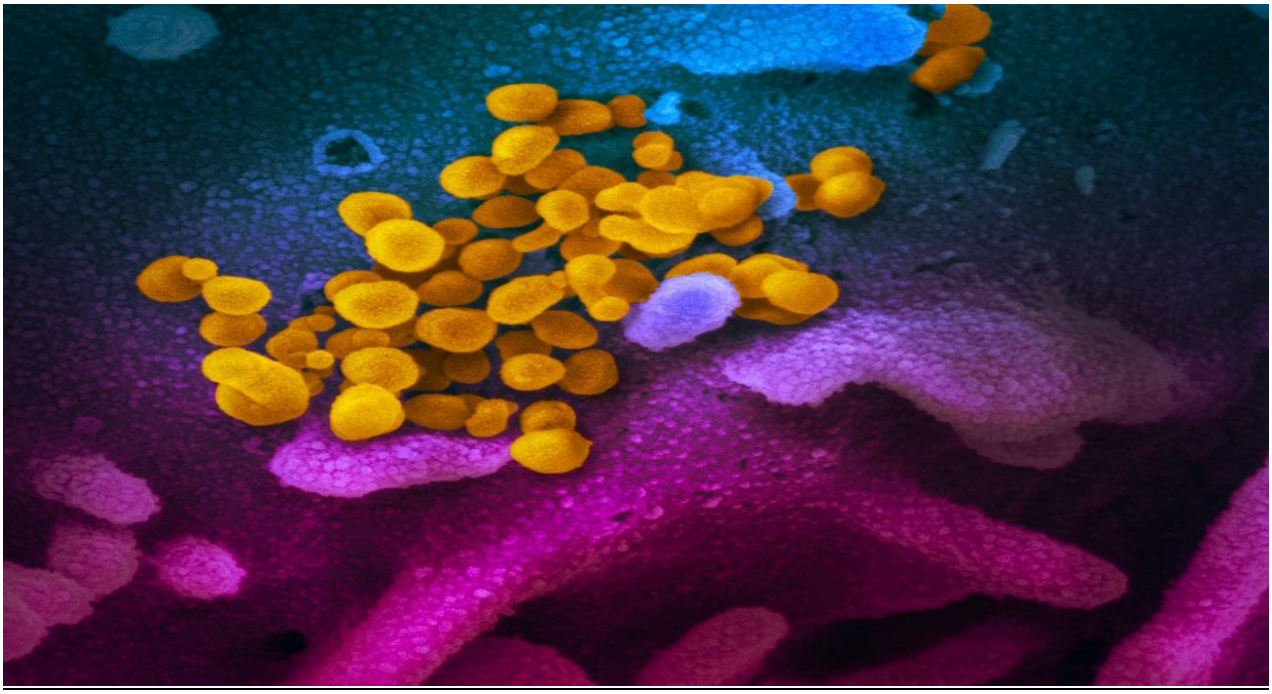
- Are subject to a required quarantine order, or are caring for someone who is subject to such an order;
- Have been advised by a doctor to self-quarantine, or are caring for someone who has been advised to self-quarantine;
- Are experiencing symptoms of COVID-19 and are seeking to be tested for the virus; or
- Are caring for a child due to the closure of a school or place of care.

Under the FFCRA, employees who are on sick leave as a result of the virus receive their full pay per day, and employees who are on leave to care for children due to school or place of care closures are paid at two-thirds the worker's regular rate of pay. Both full-time and part-time employees are entitled to paid sick leave under the FFCRA.

Dunnington Bartholow & Miller LLP

Attorneys at Law

How the CARES Act and Other Recent New York State and New York City Legislation Address Business Interruption and Employment



Courtesy: NIAID-RML

Within the past few days—and as recently as 72 hours ago—the United States government, the State of New York and the City of New York adopted legislation intended to provide economic relief to businesses and individuals impacted by the COVID-19 emergency. The following is a review of various loans, loan forgiveness provisions, and other benefits created by these recent acts.*

U.S. Federal Laws

On March 27, 2020, an approximately $2 trillion coronavirus response bill, the **Coronavirus Aid Relief, and Economic Security ("CARES") Act** (H.R. 748), was signed into law.

The CARES Act:

1. Provides Forgivable Loans to Small Businesses

Under the CARES Act's Paycheck Protection Program, the Small Business Administration (the "SBA") will back loans of up to $10 million from banks to businesses with not more than 500 employees for those businesses to pay employee salaries, paid sick or medical leave, health insurance premiums, and basic immediate operating expenses like mortgage, rent, and utility payments ("Covered Expenses").

Borrower Eligibility

There are very few borrower requirements to obtain a loan under the CARES Act. Those requirements include a good-faith certification that the borrower (a) needs the loan to continue operations during the COVID-19 pandemic, (b) will use the funds to retain workers and maintain payroll, or pay the other immediate operating costs, (c) does not have any other pending application under this program for the same purpose, and (d) has not received duplicative amounts under this program from February 15, 2020 until December 31, 2020.

Eligible businesses include private and public non-profits, sole proprietorships, individuals who are self-employed, and businesses with not more than 500 employees (including full-time and part-time employees) per location. For businesses in the hospitality and dining industries, there is a special eligibility rule: if the business has more than one physical location, it employs not more than 500 employees per physical location, and it is assigned to the "Accommodation and Food services" sector (Sector 72) of the North American Industry Classification System, that business is eligible for a loan.

Notably, the CARES Act includes a "Sense of the Senate" that the SBA should issue guidance to lenders to ensure that the processing and disbursements of loans prioritizes small businesses in underserved and rural markets, small businesses owned by individuals who are socially or economically disadvantaged, women owned businesses, and businesses that have been in operation for less than two years.

The Loan Amount

The maximum loan amount (the "Loan Amount") is the lesser of (a) 2.5 multiplied by the average total monthly payroll costs incurred from the previous one-year period (plus the outstanding amount of any loan that the business received under the SBA's Disaster Loan Program between January 31, 2020 and the date on which that loan may have been refinanced as part of the Paycheck Protection Program ("Prior SBA Loan Amount")), or (b) for businesses that were not in existence from February 15, 2019 to June 30, 2019, 2.5 multiplied by the average total monthly payroll costs incurred from January 1, 2020 to February 29, 2020 (plus

any Prior SBA Loan Amount), or (c) $10 million. Payroll costs include compensation to independent contractors (including compensation based on commission) up to $100,000 in one year.

Loan Forgiveness

A borrower is entitled to loan forgiveness in an amount equal to Covered Expenses paid during the 8-week period following loan origination (the "Loan Forgiveness Covered Period"). Forgiveness is subject to reduction based on a reduction of the business's employees, and wages and salaries as explained below (the "Forgiveness Amount").

To calculate the Forgiveness Amount, the Act instructs to multiply the total of the Covered Expenses incurred during the Loan Forgiveness Covered Period by the result of dividing the average number of full-time equivalent employees ("FTEEs") that the business employed per month during the 8-week Loan Forgiveness Covered Period, by (at the election of the borrower) either (a) the average number of FTEEs that the business employed per month from February 15, 2019 to June 30, 2019, or (b) the average number of FTEEs that the businesses employed per month from January 1, 2020 to February 29, 2020. The Act also provides that employees whom the business laid off between February 15, 2020 and April 26, 2020, but rehired by June 30, 2020 will, in effect, be treated as employed individuals during the 8-week Loan Forgiveness Covered Period so as not to reduce the Forgiveness Amount.

The Forgiveness Amount will be reduced by the amount of employee salary reduction in excess of 25% of that employee's total salary during the most recent full quarter during which the employee was employed before the Loan Forgiveness Covered Period. Thus, if the business did not reduce employee salary or wages during the Loan Forgiveness Covered Period by more than 25%, the Forgiveness Amount will not be reduced in this manner.

It is important for businesses to document the use of its funds received under the program pursuant to the documentation provisions in the CARES Act because businesses that to do not properly document their use may be ineligible for loan forgiveness.

Application Process

Businesses can apply for the loans through private sector lenders authorized by the SBA who can use their own paperwork to process the loans. It is estimated that it will take about two weeks for the SBA to approve each loan, and to guarantee it against default. Lenders will not distribute the loan money to businesses until the SBA has assured it that each loan is fully backed, so it may take at least two weeks from applying for the loan for businesses to start receiving the loan money.

Business owners are not required to provide personal guarantees or use their assets as collateral for the loan. There are no fees associated with obtaining the loan, and interest rates are capped at 4%.

2. Provides Emergency EIDL Grants

The CARES Act provides, in certain circumstances, emergency Economic Injury Disaster Loan (EIDL) grants of up to $10,000 from the SBA to small businesses for those businesses to use the funds for, among other things, providing paid sick leave for employees, maintaining payroll, meeting increased costs due to an interrupted supply chain, and making rent or mortgage payments. It is currently uncertain as to what impact, if any, obtaining an emergency grant under this provision may have on applications made under the Paycheck Protection Program.

3. Expands Unemployment Benefits

Under the CARES Act's temporary Pandemic Unemployment Assistance Program, workers not usually eligible for state and federal unemployment benefits—such as independent contractors, and people who are self-employed or who have a limited work history—may receive unemployment benefits if they are unable to work because of the COVID-19 pandemic. Anyone who self-certifies that they are able and available to work but is unemployed or partially unemployed because of the COVID-19 pandemic is considered a "covered individual." If workers have the ability to work remotely with pay, they are not eligible for these benefits.

Under the CARES Act, unemployment benefits are available for the weeks of unemployment, partial unemployment, or inability to work caused by COVID-19 beginning on or after January 27, 2020 (the date on which the Secretary of Health declared COVID-19 a public health emergency) and ending on or before December 31, 2020, and shall continue to be available as long as the individual's unemployment, partial unemployment, or inability to work continues, for up to 39 weeks. Individuals will receive the amount that would be calculated under state law plus $600 each week for up to four months, as opposed to the usual three months. Additionally, the standard one-week waiting period is waived, so laid off employees immediately qualify for benefits.

4. Provides Refundable Payroll Tax Credit to Employers

For businesses whose operations were fully or partially suspended by a government entity due to the COVID-19 pandemic or had a decrease in gross receipts of 50% or more compared to the same quarter last year, the CARES Act provides for a refundable payroll tax credit equal to 50% of the first $10,000 in wages per employee. This payroll tax credit can be claimed for employees who are retained but who do not work during the COVID-19 pandemic. Businesses

with 100 or fewer full-time employees can claim the payroll tax credit for all employees' wages—whether the employer is open for business or has been ordered to close. Businesses with more than 100 full-time employees can claim the credit for employees who are retained but who do not work due to the COVID-19 pandemic.

New York City and New York State Laws

Employers that employ at least two employees in New York State seeking to avoid layoffs should also know about the **Shared Work Program**, which provides partial unemployment benefits to employees who are working reduced hours. To participate, employers must design a "Shared Work Plan" and apply to participate here at least one week before the proposed effective date. After an employer's plan is approved, participating employees must file unemployment insurance Shared Work claims. Eligible employees include those who qualify to receive unemployment insurance benefits in New York state and who normally work no more than 40 hours per week. Covered employees may receive up to 26 weeks of regular Shared Work benefits in one year. Currently, it is unclear how employers would take advantage of the New York State Shared Work Program and the Federal Paycheck Protection Program simultaneously. One potential scenario is that the reduction in salary and wages under the Shared Work Program may reduce the amount of the loan forgiveness under the Paycheck Protection Program.

Under New York City's **Employee Retention Grant Program**, small business in New York City (including nonprofits) that have been in operation for at least six months, with one to four employees that can demonstrate at least a 25% decrease in revenue as a result of the COVID-19 pandemic may be eligible to receive a grant covering up to 40% of their payroll for two months, for a maximum of up to $27,000. This program was implemented to help New York City businesses retain employees. More information can be found here.

Under New York City's **Small Business Continuity Loan Program**, businesses in New York City with fewer than 100 employees that can demonstrate at least a 25% decrease in revenue as a result of the COVID-19 pandemic, and that it has the ability to repay the loan, may be eligible for an interest-free loan up of up to $75,000 to help retain employees and continue business operations. More information can be found here.

*Evolving Regulation and Implementation Procedures

The foregoing is intended as a summary of the various measures enacted within the past few days. The legislation examined above was understandably passed under exigent circumstances. Most, if not all, of the above will be subject to rule-making and interpretation. Therefore, implementation structures, procedures and subsequent regulations may vary from the analysis presented above.

For questions about the foregoing and further developments, please contact us. We also have assembled resources and alerts for COVID-19-related legal issues and considerations on our

website under "News - COVID-19 Guidance." Please check there for useful information and updates as events evolve.

Dunnington, Bartholow & Miller LLP is a full-service law firm providing corporate, employment, litigation, arbitration, mediation, intellectual property, real estate, immigration, and trusts and estates services for national and international clientele.

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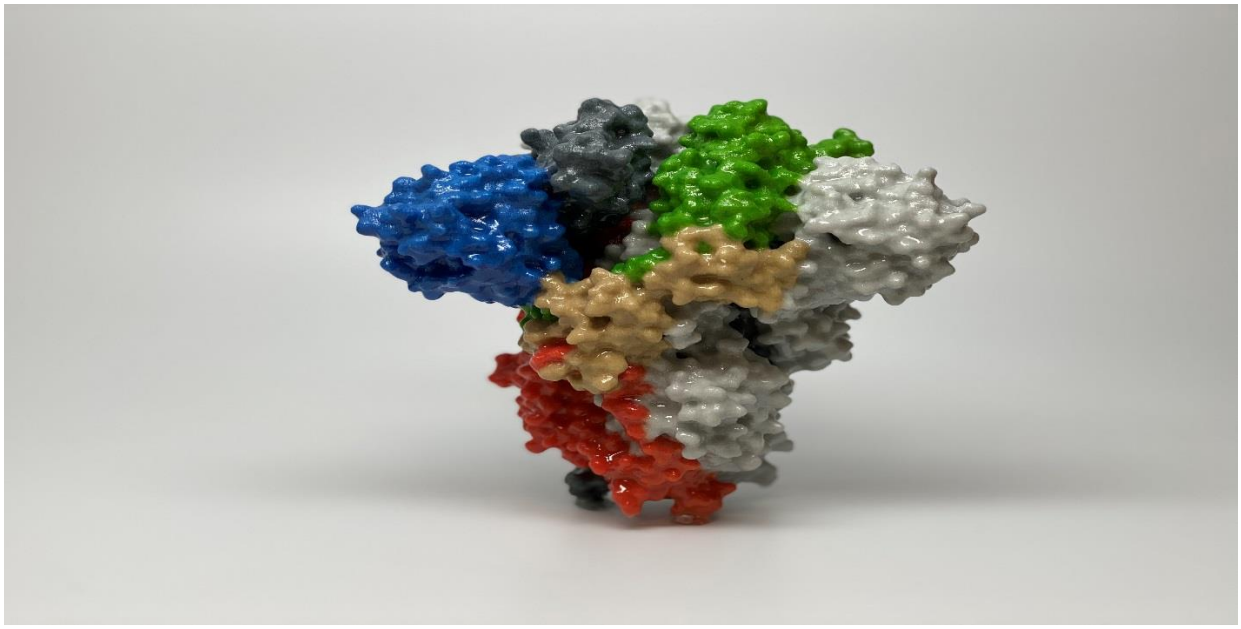
Dunnington Bartholow & Miller LLP

Attorneys at Law

Federal COVID-19 Relief Funding:

What Applicants Need to Know *Now* to Qualify and Apply



"Novel Coronavirus SARS-CoV-2 Spike Protein" *Courtesy: NIAID*

On March 30, 2020, Dunnington provided an alert summarizing various U.S. federal, New York state and municipal economic assistance programs available to individuals and businesses impacted by the COVID-19 pandemic. Two of the federal programs that have been made available via the newly enacted **Coronavirus Aid Relief and Economic Security** ("**CARES**") **Act** are the **Economic Injury Disaster Loan** ("**EIDL**") including **Emergency Economic Injury Grants** and the **Paycheck Protection Program** (the "**PPP**"). These programs are being implemented quickly, so it is important to understand relevant criteria and application procedures. Below, we provide information concerning these economic relief vehicles. While each applicant's circumstances may differ, the following serves as a brief guide and checklist to provide information that may be of assistance in preparing to qualify and apply for these federal programs.*

EIDL With Emergency Economic Injury Grants

An **EIDL** from the Small Business Administration (the "SBA") has been the traditional source of federal funding for small businesses suffering from economic injury or disaster. The **CARES Act** now explicitly makes **EIDL**s available to small businesses and nonprofits impacted by the COVID-19 pandemic. The **EIDL** carries a maximum maturity of 30 years (depending on the

applicant's ability to repay) and an interest rate of 3.75% for small businesses, and 2.75% for nonprofits.

For businesses that are in immediate need of funding for COVID-19 relief, the **CARES Act** also implemented the **Emergency Economic Injury Grant**, which is an emergency cash advance on the **EIDL** of up to $10,000 for COVID-19 relief. The grant is eligible for loan forgiveness under certain conditions described below.

The following is a general explanation of the criteria and requirements, application procedure, and information and documents needed to qualify for the **EIDL**, including the **Emergency Economic Injury Grant**:

Criteria and Requirements

- Loan Amount – Applicant can receive up to $2 million dollars.

- Eligibility – Applicant is eligible if applicant is a small business that meets SBA size standards: sole proprietorship, independent contractor, cooperative or employee-owned business, or tribal small business, that (1) was in business on January 31, 2020, and (2) has 500 or fewer employees. Small business concerns and small agricultural cooperatives that meet applicable SBA size standards are also eligible, in addition to most private nonprofits of any size. (Guidance regarding whether applicant is a "small business" under the SBA's size standards is available on the SBA's website here).

- Emergency Grant – The emergency cash advance of up to $10,000 is forgiven if it is spent on paid leave, maintaining payroll, increased costs due to supply chain disruption, mortgage or lease payments or repaying obligations that cannot be met due to revenue loss.

- Overlap with the PPP – Applicants can apply for and receive an **EIDL** with an emergency cash advance grant and later refinance it into a **PPP** loan (discussed below), but any emergency cash advance grant received through the **EIDL** will be subtracted from any amount forgiven under the **PPP**. Applicants cannot use the **EIDL** or emergency grant for the same purpose as the **PPP** loan.

Application

The COVID-19 **EIDL** application was posted on March 30th on the SBA's website here. Qualifying applicants will receive a cash advance grant as needed but the full **EIDL** is issued once the SBA validates an applicant's information. The form does not require attachments, but applicants will be required to validate their information with the SBA later.

Information and Documentation That Will Be Needed

- Applicant's six digit North American Industry Classification System (NAICS) code and three year average annual revenue to complete the SBA's size standard test;

- Records showing the business's revenue before and after January 31, 2020, dates of formation, and number of employees; and
- Records reflecting the use of the $10,000 emergency cash advance grant (to qualify for loan forgiveness on the advance).

The PPP

The **CARES Act** has authorized qualified lenders to issue **PPP** loans to businesses with 500 or fewer employees to pay employee salaries, paid sick or medical leave, health insurance premiums, basic immediate operating expenses like mortgage, and rent and utility payments. **PPP** loans are eligible for loan forgiveness, and any loan amount not forgiven carries a low interest rate. There are no loan or prepayment fees.

Dunnington previously issued guidance on the criteria for **PPP** loans. That alert is accessible here.

The following is further information, which has since become available, addressing the requirements, application process, and information and documents needed to qualify and apply for a **PPP** loan:

Criteria and Requirements

- Good Faith Certification – Applicants must make a good faith certification that the applicant needs the loan to continue operations during the COVID-19 pandemic, will use the funds for applicable covered expenses, does not have any other pending application under the **PPP** for the same purpose, and has not received duplicative amounts under the **PPP** from February 15, 2020 until December 31, 2020.

- Qualified Lenders – Banks, savings and loans, credit unions, and other specialized lenders may be qualified as lenders. The Treasury Department is determining additional lenders that will be qualified to issue **PPP** loans. Ask local lenders whether they will be qualified to issue **PPP** loans.

- Overlap with EIDL – If an applicant applied for or received an **EIDL** before applying for a **PPP** loan, the applicant can also apply for a **PPP** loan, *however*, any emergency cash advance received under the **EIDL** will be deducted from any amount that may be forgiven in the **PPP** loan. The amount due under the **EIDL** can be refinanced into a **PPP** loan. An applicant cannot receive a **PPP** loan to cover an expense that the **EIDL** or the cash advance from the **EIDL** financed. An applicant must make a good faith certification that the application for a **PPP** loan does not duplicate other loan applications or funding received, including from an **EIDL** or cash advance under the **EIDL**.

Application

Sample application forms for the **PPP** loans were distributed by the Treasury Department on March 31st. Applicants can access the sample application form here. The Treasury Department also released an information sheet accessible here. Please note, however, that qualified lenders are

not yet accepting applications for **PPP** loans. Applicants can review the application form to begin gathering information and documents necessary to submit an application once the **PPP** loans become available. The anticipated date for applicants to be able to apply for **PPP** loans is Friday, April 3rd, so consider an **EIDL** grant if you have an immediate need for funding. Potentially eligible businesses should contact their local lenders as soon as possible to determine whether those lenders are issuing **PPP** loans, check the SBA and Treasury Department websites daily for instructions and availability, and review any Dunnington updates for information on the application process for **PPP** loans. Also, begin compiling the documents below and any others an applicant will need to process a **PPP** loan application.

Information and Documentation That Will Be Needed

- Payroll documentation;
- Any documents needed to fill out the application form for **PPP** loans; and
- Records reflecting applicant's use of any **PPP** loan funding (to qualify for loan forgiveness on qualified uses).

***Fact Based Determination**

The foregoing is intended to be helpful information concerning fast-moving and developing guidelines for implementation of newly-enacted legislation. Each application will be unique and decisions will be fact-based, therefore circumstances will vary. Much of the above may be subject to further rule-making and interpretation and therefore, the final loan procedures may vary from the analysis presented above.

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Small Business – Robert N. Swetnick

The Future for Small Business

(1) It will be a new landscape for small businesses, especially in cities.

A) Economic reality of getting back in operation
- Landlord
- Vendors
- Staff hires

B) New customer preferences
- Limited business or personal travel
- Fewer large meetings
- More home delivery
- Avoid crowds
- Less disposable income
- Learned new customs
  - Make own coffee
  - Work from home
  - Wear clothes that don't need to go to cleaners
  - Early to bed

(2) Prepare now.

A) Contact your clients – solidify your relationship
B) Learn what governmental lending or grant programs are available
C) Have your client get his lease/guarantee ready, bank loans/guarantees, vendor guarantees
D) Assist for employees re unemployment, letters of reference, letters of future employment
E) Assist client with alternative plans and how best to implement them

(3) The future is bleak for most small businesses, but it is an opportune time for you to solidify and build your client base.

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"Novel Coronavirus SARS-CoV-2 Spike Protein" Courtesy: NIAID

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The following is a general explanation of the criteria and requirements, application procedure, and information and documents needed to qualify for the **EIDL**, including the **Emergency Economic Injury Grant**:

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Application

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Required Disclaimer: This alert is provided for informational purposes and does not constitute, and should not be considered legal advice. Specific facts and circumstances will differ. Neither the transmission nor the receipt of this information shall create an attorney-client relationship between the transmitter and the recipient. You should not take, or refrain from taking, any action based upon information contained in this alert without consulting legal counsel of your own choosing. Under applicable professional rules of

conduct, this informational publication may be considered attorney advertising.

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Real Estate – Louis E. Teitel

DISCLAIMER: This document is meant as an example only and is not specific to any particular circumstance. When using this form, Landlords, Tenants, and Agents (as applicable) must consult with a licensed attorney who is competent in transactional real estate matters to obtain legal advice.

Revise the Amendment to make the terminology match the terminology in the Lease.

THIS LEASE AMENDMENT AND FORBEARANCE AGREEMENT (this "**Amendment**") dated as of _____, 2020 is made and entered into by and between _____, a _____ ("**Landlord**") and _____ _____, a _____ ("**Tenant**"), with respect to the payment of rent(s) by Tenant under the terms of a Lease dated _____ (as amended, the "**Lease**") between Landlord and Tenant concerning Tenant's occupancy of the property known as _____ (the "**Premises**").

RECITALS

WHEREAS, the parties hereto acknowledge that the current economic conditions and projections may make it likely that Tenant will be unable to pay the monthly amounts which Tenant owes for "**Rent**" (Minimum Rent and Additional Rent) under the Lease beginning with the installment due on _____, 2020 (the "**Forbearance Start Date**"); and,

WHEREAS, subject to the terms and conditions set forth herein, Landlord is willing to forbear for a period commencing on the Forbearance Start Date ending on the Forbearance Termination Date (as defined below), in the exercise of remedies with respect to any Event of Default under the Lease arising solely out of Tenant's failure to pay the monthly installments of Rent as owed under the Lease, providing that Tenant pay to Landlord the Minimum Rent (as defined below), while reserving to Landlord all rights and remedies with respect to any other default or Event of Default under the Lease.

NOW, THEREFORE, in consideration of the premises and the agreements, provisions and covenants herein contained, the parties hereto agree as follows:

AGREEMENT

1. **Incorporation of Recitals**. The Recitals to this Amendment are incorporated into and shall constitute a part of this Amendment.

2. **Force Majeure**. Notwithstanding the terms of **Section __** of the Lease defining Events of Force Majeure or any other provision of the Lease dealing with or defining Events of Force Majeure (each a "**Force Majeure Clause**"), the terms within this Amendment shall supersede, control and have precedence over any such Force Majeure Clause with such precedential and controlling effect to endure for the period of the Forbearance Period (as defined below).

3. **Rent**. As of the Forbearance Start Date, Tenant is obligated to pay Landlord monthly installments of (i) $_____ for Minimum Rent ("**Minimum Rent**") and (i) $_____ for Additional Rent ("**Additional Rent**") pursuant to the terms of the Lease. Minimum Rent and Additional Rent are collectively referred to herein as "**Rent**".

4. **Forbearance**. Subject to the terms of this Amendment, at the request of Tenant, Landlord agrees to forbear from exercising its rights and remedies under the Lease with respect to any Event of Default under the Lease arising solely out of Tenant's failure to pay the monthly Rent under the Lease during the Forbearance Period, provided that beginning on _____, 202__ and continuing on the first day of each month thereafter during the Forbearance Period, Tenant pays to Landlord the amount of $_____ as "**Alternate Rent**" (as defined below).

The amount of the Rent under the Lease owed for each period during the Forbearance Period less the amount of Alternate Rent which Tenant is obligated to pay during the Forbearance Period under this **Section 4** shall be deemed a "**Permitted Default**".

5. **Deferred Accrual**. The difference between the total Alternate Rent paid by Tenant to Landlord and the Rent owed by Tenant under the Lease during the Forbearance Period shall be referred to as the "**Deferred Amount**".

6. **Forbearance Period**. Such forbearance shall begin on the Forbearance Start Date and terminate on the "**Forbearance Termination Date**", which shall be the earliest to occur of; (i) _____, 202__, (ii) the date of the Receipt of Financial Aid (as defined below), (iii) the occurrence of an Event of Default under the Lease, which shall include the failure of Tenant to pay an installment of Alternate Rent, but exclude a Permitted Default (the "**Forbearance Period**"). During the Forbearance Period, all Rent that is not paid by Tenant to Landlord will continue to accrue and be owed by Tenant to Landlord as the Deferred Amount.

7. **Receipt of Financial Aid**. "**Stimulus**" shall mean the receipt by Tenant of any governmental aid whether such is obtained from a source that with a jurisdiction that is local, county, state, or federal (collectively and independently "**Governmental**") and/or, the receipt by Tenant of any non-governmental aid whether such is obtained by and through grant, insurance, charity, investment, cash infusion, or loan (collectively and independently "**Private**"), and which amounts or results in any financial aid or investment that is related to, [or arising from, Tenant's past or future operation of its business operated at the Premises or payment of Tenant's debts related to its business operated at the Premises. [ALTERNATIVE LANGUAGE: [assistance with respect to payment of rent]

Such Stimulus shall further include, but not be limited to, the following which occur in relation to, or arising from Tenant's past or future operation of its Property business or payments of its Property business related debts; any Governmental or Private direct payment to Tenant, any loan obtained by Tenant, any forgiveness of Tenant debt, any reduction of Tenant debt, any forbearance of Tenant debt. [Tenant may want to omit this paragraph to restrict requirement to pay Landlord from reimbursements/loans intended for other expenses.]

Tenant shall, within three (3) business days after obtaining the pledge or the receipt of any Stimulus which exceeds in the aggregate $_____, notify Landlord, in the same manner as is set forth in the Lease ("**Notice of Stimulus**"), of the amount of the Stimulus and the timing and manner of the payment of the Stimulus to Tenant, including any forbearance of payment granted to Tenant. The date that Landlord receives a Notice of Stimulus from Tenant will be the date of the "**Receipt of Financial Aid**".

~~7~~8. **COVID 19 Relief Proceeds**.

(a) Notwithstanding the deferment of Rent provided for in **Section 4** and **Section 5** above, Tenant acknowledges and agrees that such deferment shall not apply to the extent Tenant receives COVID 19 Relief Proceeds (hereinafter defined), and Tenant shall pay to Landlord all Rent otherwise due and payable under the Lease (without taking into account the foregoing Rent deferment or this Amendment) up

to the amount of COVID 19 Relief Proceeds received by Tenant. Any payment of COVID 19 Relief Proceeds shall be paid to Landlord within fifteen (15) days of its receipt. As used herein "**COVID 19 Relief Proceeds**" shall mean and include (i) all income and proceeds from business interruption, rental interruption and use and occupancy insurance with respect to the operation of the Premises (after deducting therefrom all necessary costs and expenses incurred in the adjustment or collection thereof); and (ii) all funds and relief received by the Tenant from any federal, state, county, municipal, city, or local government relief programs instituted to address the COVID 19 pandemic.

(b) Tenant shall provide to Landlord (i) notice of any claims [for rent] which Tenant has made, or will make, in respect of the Premises for COVID 19 Relief Proceeds, and (ii) at least monthly, a certification setting forth the status of any such claims and an accounting of any COVID 19 Relief Proceeds received during the immediately preceding month, if any. Failure to so notify Landlord as required herein shall be a material breach of this Amendment and an Event of Default under the Lease and Landlord shall be entitled to exercise all rights and remedies with respect to the Permitted Default as if such forbearance had never been granted.

9. **Failure to Notify Landlord of Stimulus**. The failure of Tenant to notify Landlord of any Stimulus received by Tenant as required herein shall be a material breach of this Amendment and an Event of Default under the Lease and Landlord shall be entitled to exercise all rights and remedies with respect to the Permitted Default as if such forbearance had never been granted.

10. **Failure to Pay Minimum Rent**. Should Tenant fail to pay to Landlord the Alternate Rent at any and all times when such amount is due, then such failure shall constitute an Event of Default under the Lease and Landlord shall be entitled to exercise all rights and remedies granted to Landlord under the Lease with respect to the Permitted Default as if such forbearance had never been granted.

11. **Disposition**. At the end of the Forbearance Period, and conditioned upon (a) there being no uncured Event of Default by Tenant under the Lease (excluding the Permitted Default) and (b) no event having occurred or is continuing or will result from the consummation of the transactions contemplated by this Amendment that would constitute an Event of Default under the Lease other than the Permitted Default, then the Deferred Amount accrued shall be treated as follows:

[USE OR CRAFT THE OPTION(s) OR ALTERNATE DESIRED]

Forgiven in full.

OR

Forgiven in part to allow for the Deferred Amount of $_____ (the "**Remainder**") and with such Remainder to be paid as follows:

Paid in full within _____ days of the Forbearance Termination Date.

OR

Paid in equal _____monthly installments ("**Number of Months**") of $_____ beginning on the first day of the first calendar month following the end of the Forbearance Period (the "**Repayment Period**"), which amount shall be the total Deferred Amount then divided by the Number of Months. Such amount shall be in addition to the full monthly Rent required under the Lease and shall be paid at the same time and place as the monthly Rent under the Lease.

12. **Acceleration of the Payment of the Remainder**. If, prior to Tenant paying the Remainder in full, (a) Tenant vacates or abandons the Premises, (b) Tenant fails to pay any portion of the Remainder when due, (c) Tenant commits an Event of Default under the Lease or (d) the Lease is terminated, then the entire Deferred Amount not yet paid by Tenant shall become immediately due and payable.

13. **Material to Agreement**. The parties recognize and agree that the provisions, warranties, covenants, prohibitions, terms and conditions of set forth in this Amendment are made partly as consideration to Landlord to enter into this Amendment and, are so essential and material to this Amendment that any breach thereof will cause an adverse effect and/or irreparable damage to Landlord.

14. **Tenant Confidentiality**. [Can modify and can also include Landlord's obligation not to disclose Confidential Information.] This Amendment, all its terms and even its existence ("**Confidential Information**") are to be kept in confidence by Tenant. As a condition to the Confidential Information being furnished to Tenant, Tenant agrees to treat the Confidential Information in accordance with the provisions of this Amendment and to take or abstain from taking certain other actions hereinafter set forth. Without the prior written consent of Landlord, or except as may be required by applicable law or regulation, Tenant nor any person acting on behalf of Tenant, shall disclose to any third party that discussions or negotiations are taking place between the parties concerning the terms of this Amendment, including the status of such discussions or negotiations, and/or any prior communications, prior drafts or documentation of, or regarding, this Amendment. This is a material provision to this Amendment and Landlord would not have disclosed any Confidential Information to Tenant but for this provision.

Tenant agrees to hold the Confidential Information in trust and confidence through the later of (a) the last day of the Forbearance Period and or (b) a period of three (3) years after the date of this Amendment.

Tenant shall use its best efforts to keep the Confidential Information in confidence and shall not disclose any of the Confidential Information to any other person except as set forth below. Notwithstanding the foregoing, Tenant may disclosure Confidential Information to Tenant's representatives, advisors, attorneys, accountants, auditors, tax or financial advisors, investors, lenders, shareholders, directors, officers, partners, members (collectively, the "**Representatives**") who need to know such information for the purpose of evaluating this Amendment and performing other services to Tenant. These Representative shall agree to keep such information in confidence. Tenant will not disclose or permit inevitable disclosure of such Confidential Information, and Tenant shall be solely and directly responsible for all persons who obtain Confidential Information by or through Tenant or the Representatives. Tenant shall not otherwise permit such Confidential Information to be available or accessible, stored electronically or otherwise, published, distributed, transmitted, or delivered in any form whatsoever to anyone else. Without limitation to these obligations, all Confidential Information will be safeguarded with the highest degree of care to avoid disclosure, and shall, to the extent reasonably possible. Tenant shall not allow or permit any such Confidential Information to be knowingly or negligently misappropriated or used by Tenant or the Representatives for their own benefit or for the benefit of others.

In additions, Tenant may disclose Confidential Information (i) in connection with a bona fide financing or sale transaction in which all or substantially all of a Tenant's business, assets or equity capital is proposed to be sold, (ii) as required by applicable law, regulation, or stock exchange requirement, (iii) in connection with any action or claim to enforce a Tenant's rights hereunder or under the Lease or (iv) to comply with a subpoena or court order in the manner specified in below.

In the event that Tenant or anyone to whom it discloses the Confidential Information receives a request to disclose all or any part of the Confidential Information under the terms of a subpoena or other

order issued by a court of competent jurisdiction or by another governmental agency, Tenant shall (x) if practicable, promptly notify Landlord of the existence, terms, and circumstances surrounding such a request and consult with Landlord on the advisability of taking steps to resist or narrow such a request, (y) if disclosure of such Confidential Information is required, furnish only such portion of the Confidential Information as Tenant is required to disclose, and (z) cooperate with Landlord, at Landlord's expense, in its efforts to obtain an order or other reliable assurance that confidential treatment will be accorded to such portion of the Confidential Information that is required to be disclosed.

Tenant shall not issue or permit any media release or public comment regarding the discussions, the Amendment, this Amendment or the Confidential Information without the prior written consent of Landlord. Tenant shall ensure that Confidential Information is not stored or made available for third party access on any Electronic Medium or system (e.g. World Wide Web, local or wide area network, shared folder or file). Efforts required by Tenant to ensure such include, but are not limited to, taking reasonable steps to prevent or to safeguard any the transmission, storage, deposit of the Confidential Information in any format (e.g. copy, file, image, data, description, identifiable information) which may be accessed by a third party through an Electronic Medium or system.

Tenant, even while using commercially reasonable efforts to preserve the confidentiality of this Amendment, upon providing or discovering the provision of the Confidential Information to a third party, shall give the other Landlord prompt Notice of any such disclosure and shall describe within the writing the nature and extent of the disclosure. Landlord, once so notified may, at its sole discretion, seek to obtain an injunction or a protective order or take other measures to prevent its initial disclosure and/or its continued access and use.

15. **Liquidated Damages for Breach of Confidentiality**. Tenant acknowledges that its breach of any confidentiality obligation as set forth in this Amendment will cause Landlord damages that are difficult to quantify and Landlord shall be entitled to recover from Tenant as liquidated damages the amount of TEN THOUSAND DOLLARS ($10,000.00) per breach thereof, in addition to any other rights or remedies Landlord may possess, and that Tenant agrees that such amount(s) are reasonable under the totality of circumstance.

16. **Conditioned Upon Lender Approval**. Because Landlord may have one or more loans encumbering the Premises (collectively the "**Loan**") which contain provisions whereby the amendment of any the Lease to grant Tenant the right to pay less than the full amount of Rent when due, requires the written approval of the lenders under the Loan (collectively, the "**Lender**"), this Amendment is subject to and conditioned upon the Lender consenting to this Amendment in writing within _____ days after the date that both Landlord and Tenant have executed this Amendment and a fully executed copy has been delivered to both Landlord and Tenant or their counsel (the "**Effective Date**"). Landlord will provide Tenant with a copy of the signed Consent by Lender upon receipt by Landlord. The failure of any Lender to consent to this Amendment within such time will render this Amendment void (excepting those provisions set forth in **Section 17** "**Survival**".

~~16~~17. **ALTERNATIVE SECTION 16**

Conditioned Execution of Related Documents. This Amendment is conditioned upon Landlord and Tenant successfully negotiating and executing (i) _____ and (ii) _____ (the "**Further Agreements**"). This Amendment shall be integrated and part of the Further Agreements upon successful execution of the Further Agreements. Failure by the parties to successfully negotiate and execute the Further Agreements within **five (5) days** after the Effective Date will render this Amendment void (excepting those provisions set forth in **Section 18** "**Survival**").

~~17~~18. **Survival.** **Section 11** "**Disposition**", **Section 14** "**Tenant Confidentiality**", and **Section 15** "**Liquidated Damages for Breach of Confidentiality**" shall survive the termination of this Amendment and remain enforceable regardless of

the failure of a Lender to consent to this Amendment in a timely manner.

OR

the failure of the Further Agreements to be fully executed in a timely manner.

~~18~~19. **Tenant Certification**. Tenant certifies the following as of the Effective Date:

(a) Tenant is in possession of and occupies the Premises.

(b) Tenant has not assigned the Lease or subleased all or any portion of the Premises.

(c) Tenant has no outstanding claim, charge, defense, right to setoff, lien, abatement or counterclaim against Landlord in respect of payment of Rent or otherwise under the Lease.

(d) To the best of Tenant's knowledge, there are no defaults under the Lease which remain ongoing after the applicable notice and cure provisions have expired under the Lease on the part of Landlord or Tenant and no event has occurred which, with the passage of time or the giving of notice, or both, would constitute such a default.

(e) All work, if any, required to be performed by Landlord under the Lease has been performed in full, and the Premises are entirely satisfactory and suitable for Tenant's purposes.

~~19~~20. **Assignment, Successors and Assigns**. No interest or right of Tenant under this Amendment shall be assigned voluntarily or involuntarily, whether by Merger, consolidation, dissolution, operation of law, or any other manner without the prior written consent of Integrity.

For purposes of this Section, "**Merger**" refers to any merger in which Tenant participates, regardless of whether it is the surviving or disappearing corporation or entity, and a change in control is deemed an assignment.

Any purported assignment or delegation by Tenant in violation of this Section is void. Landlord may assign any interest or right under this Amendment at any time without the consent of Tenant and without prior written notice to Tenant and Landlord may, if it so desires, utilize any subcontractor, designated representative or agent to perform any of its obligations under this Amendment.

Subject to the foregoing, this Amendment shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, legal representatives, successors, and assigns.

~~20~~21. **Rights and Remedies Cumulative**. The enumeration of Landlord's rights and remedies set forth in this Amendment is not intended to be exhaustive. The exercise by Landlord of any right or remedy under this Amendment, the Lease, or under any other agreement entered into in connection with the Lease, does not preclude the exercise of any other rights or remedies available to Landlord, all of which are cumulative and are in addition to any other right or remedy given under this Amendment, the Lease or any other agreement between Lender and any Tenant, which may now or subsequently exist in law or in equity or by statute or otherwise.

~~21~~22. **Definitions and Headings**. Capitalized terms used, but not defined in this Amendment, shall have the same meaning ascribed to such terms in the Lease. Words within this Amendment and/or within any attachment, appendix, schedule, exhibit, addendum thereto; and/or as may be set forth within any Section or Paragraph within such document(s), are to be interpreted in a normal and reasonable manner whether capitalized or not. Words indicating the singular also include the plural and words indicating the plural also include the singular. Some words, terms, or phrases intended to have a particular meaning may be specifically defined and/or may be established by the use of a term preceded or followed by quotation within or without a surrounding parenthetical e.g., "**Term**", or ("**Term**"). The headings in this Amendment are included principally for convenience and do not by themselves affect the construction or interpretation of any provision in this Amendment nor affect any of the rights or obligations of the parties to this Amendment.

~~22~~23. **Binding Obligation**. This Amendment has been duly executed and delivered by Tenant and constitutes a legal, valid and binding obligation of Tenant, enforceable against such Tenant in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium, reorganization or other similar laws affecting creditors' rights generally and except as enforceability may be limited by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

~~23~~24. **Ratification of Lease**. Landlord and Tenant hereby ratify and affirm the Lease and agree the Lease, as amended, remains in full force and effect in accordance with its terms, provided, however, to the extent of any conflict between the Lease and this Amendment, the terms of this Amendment shall control.

~~24~~25. **Integration of this Amendment and the Lease**. This Amendment and the Lease shall be deemed to be, for all purposes, one instrument.

~~25~~26. **Lease in Full Force and Effect**. Except as modified by this Amendment, all of the terms, conditions, agreements, covenants, representations, warranties, and indemnities contained in the Lease remain in full force and effect.

~~26~~27. **Severability**. If any provision of this Amendment or the application thereof to any person or circumstance is or shall be deemed illegal, invalid, or unenforceable, the remaining provisions hereof shall remain in full force and effect and this Amendment shall be interpreted as if such legal, invalid, or unenforceable provision did not exist herein.

~~27~~28. **Counterpart Execution**. This Amendment may be executed in any number of counterparts and by each of the parties hereto in separate counterparts, all such counterparts together constituting but one and the same instrument. This Amendment shall not be effective unless and until the same has been executed and delivered by all parties hereto whether in one or more counterparts. To facilitate execution of this Amendment, the parties may execute and exchange counterparts of signature pages by telephone facsimile or Adobe portable document format (.pdf).

~~28~~29. **Limitation of Landlord's Liability**. Redress for any claim against Landlord under the Lease and this Amendment shall be limited to and enforceable only against and to the extent of Landlord's interest in the Premises **(or Shopping Center or Building)**. The obligations of Landlord under the Lease as amended by this Amendment are not intended to and shall not be personally binding on, nor shall any resort be had to the private properties of, Landlord or any members, managers, partners, beneficiaries, shareholders, employees, or agents of Landlord.

IN WITNESS WHEREOF, the parties have caused this Amendment to be executed as of the day and year first above written.

LANDLORD:

_____

By: _____
Name: _____
Title: _____

TENANT:

_____

By: _____
Name: _____
Title: _____

CONSENT OF LENDER

_____ ("**Lender**") acknowledges that it holds a security interest in the Premises. Lender hereby consents to the Lease Amendment and Forbearance Agreement to which this Consent is attached, and any foreclosure by Lender of its security interest in the Premises will not terminate or modify this the Lease Amendment and Forbearance Agreement.

Dated: _____, 2020.

LENDER:

_____

By: _____
Name: _____
Title: _____

STATE OF _____)
)ss
COUNTY OF _____)

On this ____ day of _____, 202__, before me personally appeared _____ to me personally known to be the _____ of _____, a _____, and that the foregoing instrument was signed on behalf of said _____ by authority given to him/her in the _____, and that he/she acknowledged said instrument to be the free act and deed of said entity.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

_____
Notary Public

My commission expires: _____

COMMERCIAL LEASE ISSUES DURING COVID 19 PANDEMIC

APPLICABILITY OF FORCE MAJEURE PROVISIONS AND OTHER COMMON LAW DOCTRINES (IMPOSSIBILITY OF PERFORAMCNE AND FRUSTRATION OF PURPOSE)

I. Force Majeure

Generally,

> "Contractual force majeure clauses—clauses excusing non-performance due to circumstances beyond the parties' control—provide a narrow defense excusing a party's obligation to perform. The clause will be narrowly construed. Ordinarily, the clause must contemplate the specific event that is claimed to have prevented performance. Only in such circumstance will a party's performance be excused. Mere impracticability of, or unanticipated difficulty in, performance is not sufficient to excuse performance under a force majeure clause." NYPRAC-CONT § 20:14. *Force Majeure – Scope of a force majeure clause*.

> "[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure. . . ." *Constellation Energy Services of New York, Inc. v. New Water Street Corp.,* 146 A.D.3d 557, 46 N.Y.S.3d 25 (1st Dept. 2017)(applicability of force majeure clause as absolute defense after unforeseen event Hurricane Sandy) .

A. Whether a force majeure clause will apply to COVID-19 depends on the specific terms of the clause.

(1) Examples of force majeure events typically listed in commercial contracts are:

- Pandemics
- Quarantines
- National emergencies
- Acts of God
- Governmental orders
- Floods
- Earthquakes and
- Hurricanes

Thus, the issue whether COVID-19 outbreak falls into any of these events. Probably.

First, WHO declared COVID-19 a "pandemic"; second, it appears that we are in the midst of at the very least "national emergency"; third, the Governor of New York has issued executive

orders to, among others, "quarantine" the population of the New York State in order to stop the spreading of the coronavirus.

Most commercial leases force majeure clauses do not have any mention of pandemics or epidemics," This to be sure will change.

However, if there is a "catchall" clause (i.e. "or other similar causes beyond the control of such party," an argument can be made that COVID-19 falls within the "catchall" phrase. Under, the New York law, force majeure clauses are narrowly construed. As the Court of Appeals explained in *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 903, 524 N.Y.S.2d 384, 386 (1987), "The principal of interpretation applicable to such clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned. . . ."

(2) As to acts of God, generally they refer to natural disasters, such as floods, earthquakes, blizzards and hurricanes. *See* Jill M. Fraley, Re-examining acts of God, Pace Environmental Law Review, 27 PACENVLR 669 (Summer 2010).

> "The act of God defense is an affirmative defense that requires defendant to show that plaintiff's losses and injuries were 'occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight.' " *Pokras v. Herman*, 44 Misc.3d 314, 316 (Dist. Ct. Suffolk County 2014) (quoting *Tel Oil Co. v. City of Schenectady*, 303 A.D.2d 868, 871 (3d Dep't 2003). "For a loss to be considered the result of an act of God, human activities cannot have contributed to the loss in any degree." *Cangialosi v. Hallen Const. Corp.*, 282 A.D.2d 565, 566 (2d Dep't 2001).

Sullivan v. Christie's fine Art Storage Services, Inc., 2016 WL 427615 (Sup. Ct. NY County, Feb. 3, 2016).

It will be up to the courts to expand the "act of God" definition to cover COVID-19.

B. Abatement of rent.

Complicated question. In most cases the commercial leases do not have rent abatement provisions (other than for a casualty) or force majeure provisions. The buildings remain open and are operating and Landlords are not being given any concessions from their mortgage lenders or relief from the state as to taxes, or utilities, etc

In cases where the rent will not abate even in the event of a force majeure event, the arguments made by the tenant might rely on "frustration of purpose" doctrine based on the government's social distancing rules making commercial spaces unavailable and therefore negating their rental obligations.

II. OTHER DOCTRINES THAT EXCUSE PERFORMANCE

A. Impossibility of Performance

"Typically, impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance renders performance objectively

impossible.

Such impossibility of performance must be the result of an unanticipated event that could not have been foreseen or protected against in the contract." 22A N.Y. Jur. 2d Contracts § 385. *Limited defense of impossibility of performance; see also Kel Kim Corp., supra.*

While COVID-19 pandemic could be viewed as unanticipated, the issue to be considered is whether the coronavirus makes the performance of the contract "objectively impossible."

B. Frustration of Purpose

Generally,

> "To constitute the defense of frustration of the purpose of the contract, the inducing circumstance which no longer exists must be the foundation of the contract.
>
> To invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." 22A N.Y. Jur. 2d Contracts § 367. *Frustration of contract purpose as excuse for nonperformance.*

However, "if the event which is claimed to have frustrated a contract's purpose was foreseeable, the defense of frustration of purpose is not available." Id.

For example, in *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 33 N.Y.S.2d 7 (1st Dept. 2016), the Appellate Division reversed the granting of summary judgment to the Landlord where a tenant who leased space in a building for commercial purpose sought to rescind the lease upon discovering that the certificate of occupancy for the building required that the leased premises be used only for residential purposes. The Appellate Division held that there was an issue of fact as to the frustration of purposes. "Without the ability to use the premises as an office, the transaction would have made no sense. . . ." *Citing Two Catherine St. Mgt. Co. v. Yam Keung Yeung*, 153 A.D.2d 678, 544 N.Y.S.2d 676 2nd Dept. 1989)(Since the intended purpose of the lease may have become impossible to effectuate through no fault of the defendant tenant, he may have been entitled to terminate the lease.)

research on frustration of purpose and impossibility in the NY commercial L&T context, including in cases involving WW II restrictions & the 9/11 WTC attacks, thus far show exceptions are interpreted narrowly and mostly in landlords' favor -- especially in the area of real estate leases -- and, at best, the relief would be suspension rather than termination. One could note that widespread influenza and epidemics have solid historical precedent and have long been predicted (see, e.g., Laurie Garrett, The Coming Plague (Penguin Books 1995) (1996 Pulitzer Prize winner & New York Times Bestseller)).

III. FORBEARANCE AGREEMENTS

In face of COVID-19, landlords and tenant may enter into Forbearance Agreements, which would provide for rent deferrals, alternative rent structures, etc. A form of such a forbearance agreement is attached.

IV. STAY OF EVICTIONS

1. Courts are generally closed and orders from government currently stay all eviction proceedings.

2. On March 15, 2020, the New York State Court System issued an indefinite moratorium on eviction proceedings, effectively allowing many people and families throughout the state to stay in their homes and off the streets or in shelters.

3. Once the courts open up again, I think that judges will be forgiving, and in most cases landlords will take the high road or forced to take the high road, and they will want to retain their tenants, with further concessions.

4. Governor Andrew Cuomo signed an Executive Order No. 202.8, on March 20, 2020, which provides that "There shall be no enforcement of either an eviction or any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days."

5. A bill, S8125-A, has been introduced in the NYS Senate, but has not been enacted yet, that would "suspend rent payments for certain residential tenants and small business commercial tenants and to suspend certain mortgage payments for ninety days. . ."

Insurance – Samuel A. Blaustein

BUSINESS INTERRUPTION AND RELATED INSURANCE CLAIMS ARISING FROM THE COVID-19 PANDEMIC

A Precedential Approach To An Unprecedented Event

Samuel Blaustein, Partner, Dunnington Bartholow & Miller

TEN KEY PRACTICE POINTERS

1. **Contact your insurance broker immediately to review your policies regarding business interruption coverage, whether other provisions (i.e. civil authority) or specialized coverages (i.e. an all risks policy) apply, deductibles and the claims process including the time to file a claim (tip: an agent and the broker are *not* the same; a broker represents the insured and an agent represents the insurer)[i]**
2. **Timely put your insurance carrier on notice (tip: notice to a broker is *not* notice to the carrier and your policy will address the time to provide notice)**
3. **Mitigate damages (tip: mitigation does not generally harm an insured's position and failure to mitigate may entitle the insurer to a "set off" or other defense; an example of mitigation is a sit-down restaurant converting to pick-up and delivery)**
4. **Aggregate "books and records" concerning the businesses anticipated losses, historical projections (tip: policies may require access to but not adequately define "books and records"; put your employees to work during the COVID-19 crisis)**
5. **Institute a litigation hold (tip: any hold should encompass electronically stored information or "ESI")**
6. **Prepare a claim with professional input including your attorneys and accountant (tip: the insurer will likely have counsel and, where appropriate, accountants specializing in business losses and the insured should participate in this process and retain their own specialists to ensure proper treatment of their claim)**
7. **Participate actively in settlement negotiations (tip: policies are often unclear and even omit what documents and information the insurer will consider; by inquiring what documents and information are sought the insured can avoid later claims that adequate documentation as not forthcoming)**
8. **File any lawsuit timely (tip: breach of contract cases normally have a six year statute of limitations in New York but the policy documents will control)**
9. **Continue to update claim documents throughout the process (tip: even if the insured prevails on liability, damages will need to be established separately)**
10. **Assess whether consequential losses, special or other damages are available (tip: most policies exclude damages other than actual damages but the law recognizes limited exceptions including for "losses" resulting from insurer misconduct)**

A. A Primer On Business Interruption Insurance

a. Section 5401(d)(4) of the New York Insurance Law provides: "'Business interruption insurance', means coverage against actual loss resulting from necessary interruption of business due to damage or destruction of property by a peril insured against." Insurers tend to argue that absent (i) physical damage resulting in (ii) a cessation of business operations that no coverage applies or rely on (iii) special exclusions for pandemics, biohazards and infectious diseases.
b. "The purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained a result of the hazard insured against."[ii]
c. Another purpose of business interruption insurance is to "return to the insured that amount of profit that would have been earned during the period of interruption had a casualty not occurred."[iii]
d. However, generally, business interruption insurance does not cover lost business opportunities or other "consequential damages."[iv]
e. Instead, courts will focus on the "period of restoration" and not when "functionally equivalent operations" are restored.[v]
f. That said, New York recognizes an exception to this rule and authorizes consequential "losses" (as distinct from damages) where an insurer's violation of the policy results in additional harm up to and including business failure.[vi]

B. Insurance Industry And Regulation In The Time Of COVID-19

a. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, provides that regulation of the "business of insurance" is reserved for the states.[vii] In New York, the relevant regulatory agency is the New York Department of Financial Services ("DFS") which has published non-policy specific FAQS concerning business interruption insurance and COVID-19.[viii]
b. To date, no federal legislation has been passed concerning business interruption insurance but there is precedent for Congress taking action in connection with pandemics, including the Swine Flu Act passed in response to the 2009 pandemic pursuant to which New York state passed legislation.[ix]
c. Timelines are important. On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic. Governor Cuomo declared a State of Emergency on March 7, 2020. Mayor DiBlasio declared a State of Emergency in New York City on March 12. 2020 and banned gatherings of over 500 people. Other directives have followed.
d. Governor Cuomo has utilized his executive authority to suspend, modify and otherwise amend the New York Insurance Law during the declared COVID-19 emergency to provide extensions of time to pay life insurance and other premiums and to preclude cancellation of certain insurance policies issued to small

businesses (defined as businesses with under 100 employees). A copy of the Executive Order is attached as **Annex 1**).

e. By letter dated March 10, 2020 the DFS directed property and casualty insurers in New York to provide information to DFS and policy holders about their business interruption coverage pursuant to N.Y. Ins. Law § 308. A copy of the letter is attached as **Annex 2.**
f. In response, insurers are attempting to creative a narrative that business interruption insurance does not cover COVID-19 related claims. For instance, Travelers is advising policyholders that only physical damage will be covered and that even viral contamination such as COVID-19 would be excluded under a separate clause of their policies.[x] Similarly, the National Association of Insurance Commissioners ("NAIC") has published guidance stating that "Business interruption policies were **generally not designed** or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk."[xi]
g. Proposed legislation has been introduced in the New York Assembly to require COVID-19 claims to be included in business interruption coverage based on certain factors. *See* Bill A. 10226 (March 27, 2020) (copy attached as **Annex 3**). Other states have passed comparable legislation. If passed, the Bill would require insurers to retroactively cover claims during the declared period of emergency for small (i.e. under 100 employees) business. The Bill includes potential reimbursement to insurers and other benefits. It is likely that that Bill will be met with resistance and perhaps legal challenges.

C. Practice Pointers

a. Insurance contracts are subject to the same legal analysis as any other contract and a successful claimant must establish (i) the existence of a contract; (ii) a material breach of the contract; and (iii) damages flowing from the breach.[xii] A claimant may also seek declaratory relief i.e. a judicial determination that a certain claim is covered.
b. Read your policy carefully! For instance, even a valid claim may be time barred.[xiii] On the other hand, special coverages included in multi-peril, business owner and other policies (i.e. all-risk,[xiv] contingent risk, supply chain failure, act of civil authorities) may provide alternate or supplemental coverage.[xv]
c. If an insurer relies on an exclusion, it bears the burden of demonstrating that (i) the exclusion is stated in clear and unmistakable language, (ii) the exclusion is subject to no other reasonable interpretation, and (iii) the exclusion applies in the particular case.[xvi]
d. Generally, any ambiguities are to be reconciled in the favor of the insured.[xvii] However, many policies include a provision against this maxim.

e. Document retention and collection efforts should be on a case-by-case basis and undertaken with the assistance of legal counsel, accountants and other experts where advisable.[xviii] A set of suggested guidelines in attached as **Annex 4.**

D. Final Matters

a. Business owners should be wary of other insurance coverage issues including:
   - **i.** Workers Compensation (medical, law enforcement, transportation and essential employees are likely to be affected) and pre-Quarantine transmission may also be the source of claims.
     - **1.** It will be interesting to see if Congress passes legislation preempting relevant claims.
   - **ii.** Unemployment
     - **1.** Layoffs may cause rates to go up and result in other types of claims.
   - **iii.** Cybersecurity
     - **1.** More workers at home logging in remotely presents numerous potential security threats.
   - **iv.** General Property & Casualty

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[i] *See* N.Y. Ins. Law §§ 2103, 2104, CPLR § 3420(3); *Sec. Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 442, 293 N.E.2d 76, 79 (1972)

[ii] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. TransCanada Energy USA, Inc.*, 52 Misc. 3d 455, 466, 28 N.Y.S.3d 800, 809–10 (Sup. Ct. N.Y. Co. 2016), *aff'd sub nom.* 153 A.D.3d 1153, 61 N.Y.S.3d 4 (1st Dept. 2017) *quoting Cytopath Biopsy Lab. v. United States Fid. & Guar. Co.*, 6 A.D.3d 300, 301, 774 N.Y.S.2d 710 (1st Dept. 2004).

[iii] *Id. quoting Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145 (3d Cir.1992)

[iv] *Lava Trading Inc. v. Hartford Fire Ins. Co.*, 365 F. Supp. 2d 434, 440 (S.D.N.Y. 2005); *J & R Elecs. Inc. v. One Beacon Ins. Co.*, 35 A.D.3d 169, 825 N.Y.S.2d 462, 463 (1st Dept. 2006)

[v] *Id. see Admiral Indem. Co. v. Bouley Int'l Holding, LLC*, No. 02 CIV. 9696 (HB), 2003 WL 22682273, at *4 (S.D.N.Y. Nov. 13, 2003)

[vi] *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 196, 886 N.E.2d 127 (2008) (insurer liable for failure to timely investigate, adjust and pay claim); *Certain Underwriters at Lloyd's v. BioEnergy Dev. Grp. LLC*, 178 A.D.3d 463, 464, 115 N.Y.S.3d 240, 241 (1st Dept. 2019) *citing id.*

[vii] However, the federal government can preempt state law, e.g. HIPAA and ERISA.

[viii] https://www.dfs.ny.gov/consumers/coronavirus/business_interruption_insurance_faqs (last accessed April 1, 2020)

[ix] *See* Public Readiness and Emergency Preparedness Act (hereinafter PREP Act) (*see* Pub. L. No. 109–148, 119 Stat. 2680 [109th Cong., 1st Sess., Jan. 7, 2005]) as cited in *Parker v. St. Lawrence Cty. Pub. Health Dep't*, 102 A.D.3d 140, 143, 954 N.Y.S.2d 259, 262 (3d Dept. 2012) (negligence and battery claims dismissed where Peramivir was injected without guardian's consent). By contrast, PREP did not apply where the injection was withheld and instead New York law applied. However, a claim that could be made and in fact has been made here is that

Dr. Casabianca's treating physicians, by deciding not to provide him with the vaccine, committed malpractice, which was a cause of his death. Such a cause of action is in no way covered by PREP, and the immunity from suit claimed by the defendants here simply does not exist. *Casabianca v Mount Sinai Medical Center*, No. 112790/10, 2014 WL 10413521, at *5 (N.Y. Sup. Ct. Dec. 02, 2014)

[x] https://www.travelers.com/about-travelers/covid-19-business-interruption (last accessed April 1, 2020)

[xi]https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm (last accessed April 1, 2020)

[xii] *See Nat'l Union Fire Ins. Co., supra*.

[xiii] *Albert Frassetto Enterprises v. Hartford Fire Ins. Co.*, 144 A.D.3d 1556, 1557, 40 N.Y.S.3d 829, 830 (4th Dept. 2016) (two year statute of limitations included in contract was unambiguous)

[xiv] *A & B Enterprises, Inc. v. Hartford Ins. Co.*, 198 A.D.2d 389, 389, 604 N.Y.S.2d 166, 168 (2d Dept. 1993) (all risk policy covers "fortuitous" events i.e. those outside the control of the parties including theft of equipment)

[xv] *New York Career Inst. v. Hanover Ins. Co.*, 6 Misc. 3d 734, 740, 791 N.Y.S.2d 338, 343 (Sup. Ct. N.Y. Co. 2005) (civil authority provision not barred by co-insurance provision); https://www.marsh.com/us/insights/research/business-insurance.html (last accessed April 1, 2020) acknowledging business-specific solutions)

[xvi] *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 652, 609 N.E.2d 506, 512 (1993) (pollution exclusion inapplicable to asbestos claim); *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 13 A.D.3d 599, 599, 788 N.Y.S.2d 142, 144 (2d Dept. 2004) (pollution exclusion not applicable to faulty raw ingredients)

[xvii] *Broad St., LLC v. Gulf Ins. Co.*, 37 A.D.3d 126, 131, 832 N.Y.S.2d 1, 4 (1st Dept. 2006)

[xviii] https://www.irmi.com/articles/expert-commentary/beyond-the-policy-documenting-a-business-interruption-claim (last accessed April 1, 2020)

State of New York

Executive Chamber

No. 202.13

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to be continue;

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 28, 2020 the following:

- Sections 16.03 and 16.05 of the Mental Hygiene Law and Part 619 of Title 14 of the NYCRR to the extent that they limit the provision of certain services to certified settings provided, however, that use of such settings shall require the approval of the commissioner of OPWDD;

- Sections 16.33, 16.34, 31.35 and 19.20 of the Mental Hygiene law; sections 378-a, 424-a and 495 of the Social Services law; sections 550, 633.5, 633.24 and 805 of Title 14 of the NYCRR; Article 3, sections 442.18, 447.2, 448.3, 449.4, 450.9, 451.6 of Title 18 of the NYCRR ; and sections 166-1.2, 180-1.5, 180-3.4, 182-1.5, 182-1.9, 182-1.11, 182-2.5, -182-2.9 and 6051.1 of Title 9 of the NYCRR, to the extent necessary to allow current employees of OPWDD or OPWDD approved providers, OCFS licensed or certified programs, OASAS certified, funded or authorized programs, OMH or OMH licensed, funded or approved programs who have previously undergone such background checks to be employed by a different OPWDD approved provider and/or OCFS licensed or certified program and/or OASAS certified, funded or authorized program and/or OMH licensed, funded or approved program without undergoing new background checks. These provisions are also waived to the extent necessary to allow providers the discretion to permit already qualified individuals and who are not listed on the Staff Exclusion List to work unsupervised while an updated background check is completed;

- Sections 3203 and 4510 of the Insurance Law are modified to extend the grace period for the payment of premiums and fees to 90 days for any life insurance policyholder or fraternal benefit society certificate holder, as those terms are used in such sections, facing a financial hardship as a result of the COVID-19 pandemic;

- Sections 3203, 3219, and 3220 of the Insurance Law are modified to provide a life insurance policyholder or annuity contract holder or a certificate holder, as those terms are used in such sections, under a group policy or contract with 90 days to exercise rights or benefits under the applicable life insurance policy or annuity contract for any policyholder or contract holder or certificate holder under the group policy or contract who is unable timely to exercise rights or benefits as a result of the COVID-19 pandemic;

- Section 1116 and Articles 34, 53, 54, and 55 of the Insurance Law and Sections 54 and 226 of the Workers' Compensation Law are modified to impose a moratorium on an insurer cancelling, non-renewing, or conditionally renewing any insurance policy issued to an individual or small business, or, in the case of a group insurance policy, insuring certificate holders that are individuals or small businesses, for a period of 60 days, for any policyholder, or in the case of a group insurance policy, group policyholder or certificate holder, facing financial hardship as a result of the COVID-19 pandemic. The foregoing relief shall also apply to the kinds of insurance set forth in paragraphs (16), (17), (20), (21), (24), (26), and (30) of Section 1113(a) of the Insurance Law. For purposes of this Executive Order, a small business shall mean any business that is resident in this State, is independently owned and operated, and employs one hundred or fewer individuals;

- Section 576 of the Banking Law is modified to grant the Superintendent of Financial Services the authority to promulgate an emergency regulation to apply the provisions of the Executive Order relevant to policy cancellations, to premium finance agencies (as defined in Article XII-B of the Banking Law), subject to the safety and soundness considerations of the premium finance agencies;

- Subdivisions three and four of section 42 of the Public Officer's Law to the extent that it requires that a proclamation be separately issued by the Governor for an election to fill a vacancy; and

- Subdivision (i) of section 414 of the Education Law to the extent necessary to allow the school districts to pay for the cost of such child care services.

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of this Executive Order through April 28, 2020:

- All instruments that are signed and delivered to the superintendent under the New York Banking Law (the "Banking Law"), and are required to be verified or acknowledged under the Banking Law, may be verified or acknowledged by including standard verification or acknowledgement language in the instrument and transmitting a legible copy of the signed instrument by fax or electronic means.

- The special election in the City of New York to fill the vacancy in the Office of Borough President of Queens is rescheduled for June 23, 2020. Only candidates who were eligible to appear on the ballot for the March 24, 2020 special election shall appear on the ballot for the June 23, 2020 special election.

- Any special election which was previously scheduled to occur on April 28, 2020 and rescheduled for June 23, 2020 by virtue of Executive Order 202.12 shall only contain the names of those individuals who had previously been qualified to appear on the ballot on April 28, 2020.

- Circulation, filing, and collection of any designating petitions, or independent nominating petitions for any office that would otherwise be circulated or filed pursuant to the Election Law, Education Law or any other consolidated law for any office commencing March 31, 2020 are hereby postponed.

- Any school board, library board, or village election scheduled to take place in April or May of 2020 is hereby postponed until at least June 1, 2020, and subject to further directive as to the timing, location or manner of voting for such elections.

- Any worker who is employed by the state of New York, shall, if deemed non-essential by their agency shall work from home or shall be able to stay home without charging their accruals until April 16, 2020.

- Executive Order 202.6 is hereby modified to clarify that construction which was an essential service not subject to the in-person work restrictions is modified to provide only **certain** construction is considered exempt from the in-person restrictions as of March 28, 2020. Further, on and after March 27, 2020, Empire State Development Corporation is hereby authorized to determine which construction projects shall be essential and thereby exempt from the in-person workforce prohibition, contained in EO 202.6 and subsequent Executive Orders which further reduced the workforce requirements. All continuing construction projects shall utilize best practices to avoid transmission of COVID-19.

- By virtue of Executive Orders 202.3, 202.4, 202.5, 202.6, 202.7, 202.8, 202.10, 202.11 which closed or otherwise restricted public or private businesses or places of public accommodation, all such Executive Orders shall be continued, provided that the expiration dates of such Executive Orders shall be aligned, such that all in-person business restrictions will be effective until 11:59 p.m. on April 15, 2020, unless later extended by future Executive Orders.

- The directive of Executive Order 202.12 requiring a support person for a patient giving birth is modified insofar as to cover labor, delivery as well as the immediate postpartum period.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this twenty-ninth day of March in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

NEW YORK
STATE OF
OPPORTUNITY.

Department of
Financial Services

ANDREW M. CUOMO
Governor

LINDA A. LACEWELL
Superintendent

March 10, 2020

TO: All authorized Property/Casualty Insurers

RE: CALL FOR SPECIAL REPORT PURSUANT TO SECTION 308, NEW YORK INSURANCE LAW: BUSINESS INTERRUPTION AND RELATED COVERAGE WRITTEN IN NEW YORK

Pursuant to Section 308 of the New York Insurance Law, the Department of Financial Services ("DFS") hereby instructs each authorized property/casualty Insurer (collectively, "Insurers") to provide certain information regarding the commercial property insurance it has written in New York and details on the business interruption coverage provided in the types of policies for which it has ongoing exposure. For the purpose of this letter, DFS considers commercial property insurance to include the following, along with substantially similar insurance: business owner policies, commercial multiple peril policies, and specialized multiple peril policies.

By way of background, in connection with the outbreak of the novel Coronavirus ("COVID-19"), policyholders have urgent questions about the "business interruption" coverages provided by their commercial property insurance policy. Policy terms may vary in treatment of "covered perils" and "physical loss or damage." Coverage implicated by COVID-19 may change depending on how the situation evolves. Given the potential impact of COVID-19 on business losses, particularly concentrated effects in local communities, DFS considers Insurers' obligations to policyholders a heightened priority. In the interest of the timely and equitable fulfillment of insurance contracts, Insurers must explain to policyholders the benefits under their polices and the protections provided in connection with COVID-19. Any Insurer that writes none of the business described herein should notify DFS in a statement signed by an officer or other authorized representative of the Insurer in lieu of complying with the provisions below.

First, each Insurer should provide to DFS the volume of business interruption coverage, civil authority coverage, contingent business interruption coverage and supply chain coverage the Insurer wrote that has not lapsed as of the date of this letter, which should be expressed in amounts of direct premium, policy types and numbers of policies written of each type.

Second, each Insurer should examine the policies it has issued and explain the coverage each policy offers in regard to COVID-19 — both presently and as the situation could develop to change the policyholder's status (i.e., is there any potential for coverage as a result of COVID-19).

For each policy type, Insurers should prepare such information in a clear and concise explanation of benefits that is suitable for policyholder review. Insurers should then send such explanation to each of their policyholders of the applicable policy types. Insurers should also send copies of all such explanations to DFS, along with a representation that the explanations have been provided to the Insurer's policyholder.

The explanation to policyholders should include all relevant information, including, without limitation:

- What type of commercial property insurance or otherwise related insurance policy does the insured hold?
- Does the insured's policy provide "business interruption" coverage? If so, provide the "covered perils" under such policy. Please also indicate whether the policy contains a requirement for "physical damage or loss" and explain whether contamination related to a pandemic may constitute "physical damage or loss." Please describe what type of damage or loss is sufficient for coverage under the policy.

- Does the insured's policy provide "civil authority" coverage? If so, please describe what type of damage or loss is sufficient for coverage under the policy. Please also describe any relevant limitations under the policy. Please explain whether a civil authority prohibiting or impairing the policyholder's access to its covered property in connection with COVID-19 is sufficient for coverage under the policy.
- Does the insured's policy provide "contingent business interruption" coverage? If so, please describe what type of damage or loss is sufficient for coverage under the policy. Please provide the "covered perils" under such policy. Please also indicate whether the policy contains a requirement for "physical damage or loss" and explain whether contamination related to a pandemic may constitute "physical damage or loss."
- Does the insured's policy provide "supply chain" coverage? If so, is such coverage limited to named products or services from a named supplier or company? Please also indicate whether the policy contains a requirement for "physical damage or loss" and explain whether contamination related to a pandemic may constitute "physical damage or loss."
- For each instance of coverage described above, please provide the applicable waiting period under the insured's policy. Please also indicate whether the amount of time coverage remains in effect once becomes active for a given incident.

It is important for Insurers to continue to assist policyholders with the above information as developments concerning COVID-19 unfold.

All responses should be sent to Hoda.Nairooz@dfs.ny.gov on or before March 18, 2020.

Very truly yours,

Deputy Superintendent Stephen Doody

A10226 Summary:

BILL NO A10226

SAME AS No Same As

SPONSOR Carroll

COSPNSR Fahy, Griffin, Simotas, Epstein, Lentol, Miller MG, Pheffer Amato, Wright, Dinowitz, Ortiz, Thiele

MLTSPNSR

Requires certain perils be covered under business interruption insurance during the coronavirus disease 2019 (COVID-19) pandemic.

A10226 Text:

STATE OF NEW YORK

10226

IN ASSEMBLY

March 27, 2020

Introduced by M. of A. CARROLL -- read once and referred to the Committee on Insurance

AN ACT in relation to requiring certain perils be covered under business interruption insurance during the coronavirus disease 2019 (COVID-19) pandemic

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. (a) Notwithstanding any provisions of law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic.

(b) The coverage required by this section shall indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption for the duration of a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic.

(c) This section shall apply to policies issued to insureds with less than 100 eligible employees in force on the effective date of this act. "Eligible employee" means a full-time employee who works a normal work week of 25 or more hours.

§ 2. (a) An insurer which indemnifies an insured who has filed a claim pursuant to section one of this act may apply to the superintendent of financial services for relief and reimbursement by the department from funds collected and made available for this purpose as provided in section three of this act.

(b) The superintendent of financial services shall establish procedures for the submission and qualification of claims by insurers which are eligible for reimbursement pursuant to this act. The superintendent of financial services shall incorporate in these procedures such standards as are necessary to protect against the submission of fraudulent claims by insureds, and appropriate safeguards for insurers to employ in the review and payment of such claims.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD16053-01-0

§ 3. (a) The superintendent of financial services is authorized to impose upon, distribute among, and collect from the companies engaged in business pursuant to the insurance law, such additional amounts as may be necessary to recover the amounts paid to insurers pursuant to section two of this act.

(b) The additional special purpose apportionment authorized pursuant to subdivision (a) of this section shall be distributed in the proportion that the net written premiums received by each company subject to the apportionment authorized by this section for insurance written or renewed on risks in this state during the calendar year immediately preceding, bears to the sum total of all such net written premiums received by all companies writing that insurance or coverage within the state during that calendar year, as reported.

(c) For the purposes of this section, "net written premiums received" means gross direct premiums written, less return premiums thereon and dividends credited or paid to policyholders, as reported on the company's annual financial statement.

§ 4. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after March 7, 2020 and shall apply to insurance policies in force on that date.

Documenting A Business Income Claim

1. Prepare a timeline
• Document changes to business operations
• Government/Executive/Other Authoritative Orders

2. Track and document key business metrics (varies by industry)
• Occupancy and rate statistics (e.g. room nights/room rates)
• Rent rolls and vacancy statistics
• Number of customers
• Number of procedures
• Number of events
• Production levels

3. Track and document expenses that are related to the event (these may be new expenses or increased expenses as a result of the event)
• Examples may include cleaning costs, protective equipment, addition of new/temporary employees, overtime, etc.
• Maintain purchase orders, invoices, receipts, credit card bills, expense reports, payroll support and other underlying supporting documentation

4. Track specific event related business activity, i.e. cancellations, customer complaints, returns
• Supporting documentation related to customer complaints, cancellation and/or rescheduling of events
• Correspondence/email
• Copies of contracts related to cancellations and/or rescheduling
• Maintain a log that tracks verbal discussions in real time
• Identify and document lost opportunities (e.g. for event locations may be the inability to market business or book future events)
• Discounts/special promotions
• Refunds
• Rent abatement
• Penalties/liquidated damages
• Destruction/donation of products (inventory)
• Loss of key employees, vendors and/or customers

5. Compile a three year look back of financial data including but not limited to:
• Monthly and annual profit and loss statements
• Budgets, forecasts, projections
• General and subsidiary ledgers and trial balances
• Key financial reports, e.g. revenues, production, payroll, statistic reports related to the business

Immigration Law – Nicola Tegoni

Immigration Outline

a. Department of State's Office of Academic Exchanges

The Department of State's Office of Academic Exchanges has provided information for exchange visitors whose travel may be affected by the novel coronavirus 2019 (COVID-19). In an email to sponsors, the office describes USCIS's discretion to prolong or change status, and in some circumstances, give students work authorization, for people who cannot leave the United States due to serious situations. The DOS office reemphasizes that any exchange visitors subject to the home residency requirement will need a 212(e) waiver, but notes that expedited waiver processing may be requested for circumstances with critical humanitarian need. Additionally, the office writes that exchange visitors can request a "No Objection Statement" from their home country government and submit it as an update to their application once they have a waiver case number. F-1 Students experiencing severe economic hardship because of unforeseen circumstances beyond their control may request employment authorization to work off-campus. See 8 CFR 214.2(f)(9). To apply, it is necessary to submit Form I-765, Application for Employment Authorization, copies of the Form I-20, the Certificate of Eligibility for Nonimmigrant Student Status, and any other supporting documents. The Form I-20 must contain the employment sheet completed by the Designated School Official, showing eligibility for off-campus employment due to severe economic difficulty for unforeseen events beyond the student's control. Once the application is approved, the student can work off-campus for up to one year until the expected date of graduation. See 8 CFR 214.2(f)(9)(ii).

b. Presidential Proclamations

On January 31, 2020, President Trump issued a Proclamation to suspend entry of non-citizens physically present in China, excluding Hong Kong and Macau, 14 days before their entry into the United States. The ban became effective on February 2, 2020. Further, U.S. citizens who traveled in the Hubei province (China) in the 14 days before arriving in the United States will be subject to up to 14 days of mandatory quarantine. Returning U.S. citizens who had visited other parts of China, with the exclusion of Hong Kong and Macau, will be subject to monitoring and potentially voluntary quarantine at home.

On February 29, 2020, President Trump issued a second Proclamation extending the same suspensions to Iran. The ban became effective on March 2, 2020.

President Trump issued another Proclamation, effective 11:59 pm (ET), March 13, 2020, which suspends the entry of most foreign nationals who have been in the Schengen Area during the two weeks before their arrival in the United States. Initially, the restriction did not apply to the United Kingdom and the Republic of Ireland, but on March 14, President Trump extended the ban on all aliens physically present within the United Kingdom or the Republic of Ireland during the 14 days preceding their entry or attempted entry into the United States. This does not apply to legal permanent residents holding a

green card, (generally) immediate family members of U.S. Citizens, and other individuals who are specifically identified in the Proclamation. The Proclamations shall remain in effect until further notice by the President.

c. U.S. Immigration and Customs Enforcement

U.S. Immigration and Customs Enforcement (ICE) announced that it will be "flexible" with visa rules for international students as many universities move courses online as a prophylactic measure against coronavirus. International students on **F visas** for academic studies can only take one course online per semester to maintain legal status. In contrast, students on **M visas** for vocational training are barred from taking any online classes. But ICE stated that it will overlook these requirements temporarily in light of the public health crisis so long as universities provide written notice within ten (10) business days of deciding to change its practices. The U.S. Department of State, which manages the **J-1 exchange visitor program**, has also issued guidance on its own to shield students participating in the program from penalties caused by the virus, including by allowing students who have yet to enter the U.S. to postpone their start dates.

International students on F visas for academic studies can only take one course online per semester to maintain legal status. In contrast, students on M visas for vocational training are barred from taking any online classes. But ICE said it will forgive those requirements temporarily in light of the public health crisis so long as universities provide written notice within ten (10) business days of deciding to change its practices.

ICE also encouraged foreigners working in the U.S. through Optional Practical Training (OPT) to work with their companies to find "alternative ways to maintain employment," such as through teleworking. However, a work interruption for people on OPT could present problems for workers whose jobs do not permit remote work, such as engineers.

d. Suspension of All Premium Processing for I-129 and I-140 Petitions Due to COVID-19 Effective March 20, 2020

The USCIS just Announced a Temporary Suspension of All Premium Processing for I-129 and I-140 Petitions Due to the COVID-19 Effective March 20, 2020.

e. Extension of ESTA and Visa Waiver Participants' Periods of Admission

Individuals in the VWP and ESTA program unable depart the U.S. by the end of their period of admission because of COVID-19 who were admitted through John F. Kennedy International Airport (JFK), and Newark Liberty International Airport (EWR) can contact the Deferred Inspections office at JFK to demand Satisfactory Departure for up to a month.

Individuals and their attorneys can request Satisfactory Departure if the individual's stay will expire in two weeks or less from the day he or she contacts JFK

Deferred Inspections. If their period of VWP/ESTA admission has expired, the decision to grant satisfactory will be considered on a case by case basis.

f. Closing of Northern and Southern Borders

On March 20, the U.S. and Canada announced that the Northern Borders would be closed to "Non-Essential" traffic, i.e., tourism or recreational.

Similarly, a joint U.S. and Mexico announcement was made on the same date, closing the Southern border to non-essential travel. This policy is effective from March 21, 2020, for 30 days and may be extended upon further review.

g. Changes in Work Conditions Impacting H-1B Workers due to COVID-19

AILA's Department of Labor (DOL) Liaison Committee offered the following quick reference with typical scenarios and tips to evaluate and consult.

DOL regulations require employers to abide by the labor conditions to which they agreed when filing the H-1B petition. These are the terms outlined in the underlying ETA Form 9035 and Labor Condition Application (LCA). These requirements apply to H-1B1 and E-3 as well.

1. Does the Employer have to keep paying the required wage outlined in the LCA?

Under the DOL regulations employers must pay the wage outlined in the LCA.

Questions arise for counsel as to how employers would be able to place H-1B employees in a non-productive status while simultaneously maintaining compliance with the applicable DOL regulations that requires the employer to provide the required wage regardless of the work status being non-productive.

Non-productive status is a status where the employee is not able to work. When an employee is such a status because of an employer's decision, according to 20 CFR 655.731(c)(7)(i), the employer is still required to pay the wage. However, an employer is not legally required to pay when the employee is non-productive at the employee's voluntary request and convenience or because they are unable to work due to a reason which is not directly work-related and required by the employer.

2. Does an employer have to provide the required wage if the employee has tested positive for COVID-19, is unable to work, and placed into quarantine?

An employer does not have to pay the required wage if the employee is not able to work due to a not work-related reason. However, Employers should keep an eye on any additional federal legislation passed regarding employers' obligations during this national emergency.

3. How can the employer stop to pay the required wage?

Under 20 CFR 655.731(c)(7)(ii) payment of the necessary wage can be terminated if there has been a bona fide termination of the employment relationship.

Employees could avail themselves of the shorter of a 60-day grace period or the remainder of the petition duration as provided for under 8 CFR 214.1(l)(2) to seek to change employer, change status, and extend her stay in the United States.

h. Immigration Lawyers sue federal government to stop in-person immigration hearings

On March 30, 2020, a group of immigration lawyers sued the federal government to prevent in-person immigration hearings and to obtain better protection for the duration of COVID-19 emergency.

The attorneys said that their goal is to provide remote access alternatives for detained individuals willing to proceed with their hearings for the entire duration of the crisis.

Trusts and Estates – Susan Rothwell

ESTATE PLANNING IN A PANDEMIC

The Surrogate's Courts, which deal with estate and trust issues, are currently shut down and only available to handle emergencies. This is the situation right now in all of the courts in NY. Defining what constitutes an emergency is the difficult question in this chaotic environment.

This is a very good time to review your existing estate planning documents or get estate planning documents if you don't yet have a will or a trust. Remember the essential purpose of estate planning is to provide for our own needs - for those we care for - and for those upon whom we are depending.

Today I'm going to discuss two topics:

1. What to think about as you review your estate planning documents (or are beginning to think about your estate planning for the first time) and
2. The advantage of having a revocable trust in a situation like the one we find ourselves in today.

<u>Reviewing your estate planning documents.</u>

Here are some questions to keep in mind:

If you're suddenly rushed to the hospital, do your family or friends know where you store your estate planning documents? They should be in a drawer or safe place but not in a safe deposit box. If you were to die, a bank would require a court order to allow anyone to open the box. Do you have a list of your on-line accounts and passwords? This should be stored in the same place as your other estate planning documents.

Do you have copies of your beneficiary designation forms? Do you remember filling out these forms many years ago for your retirement assets or when you opened a bank or investment account or purchased an insurance policy? Today these forms may exist online (on the website for Vanguard, Fidelity, etc.) Maybe you named a son and his spouse as beneficiaries and now that son is divorced. Remember that any account that has a completed beneficiary designation form results in those assets passing outside of your will at the time of your death (unless you've named your estate as the beneficiary). So, for example, if all of your wealth is held in investment accounts and you have completed a beneficiary designation form on each account that names your daughter, all of your assets will go to your daughter regardless of what your will says. Perhaps you have a will that instructs your Executor to leave your residuary estate to your spouse. That doesn't matter. Your beneficiary designation forms in effect trump your will. Your will is effective only for the assets in your estate that don't pass by beneficiary designation. So, check those beneficiary designations to make sure they don't defeat the instructions for distributing assets under your will.

Do your documents reflect your current situation and thinking? Are those named as beneficiaries still the people you wish to benefit? Have their circumstances changed?

Your will and other estate planning documents enable you to name a person to be responsible for carrying out the terms of your will or be responsible for making financial or medical decisions for you. Are those you have designated for example as Executors of your Will, Trustees of your trust, Health Care Proxies and Attorneys-in-Fact (and as alternates) still appropriate? Are they still able and willing to act? Do they remember you gave them these

powers? The person that you appoint as Executor under your will is the person who will have the legal authority to manage your estate, pay your debts, final bills and taxes and distribute your property to your beneficiaries. Here is a quick review of the roles of each of the persons mentioned above:

1. The **Executor** is the person that ensures that your wishes as expressed in your will get carried out.
2. If you've set up a trust, you've appointed a **Trustee** to be responsible for administering the trust and making sure that your wishes as stated in the trust agreement are carried out.
3. Your **Health Care Proxy** is the person you've appointed to make medical treatment decisions for you if you are not able to speak for yourself.
4. Your **Attorney-in-Fact** is the person you appoint under a Power of Attorney document to step in and access your financial assets if you are unable to manage your own financial affairs.

Given the legal powers that you are giving to the individuals who fill these roles, are you comfortable with your choices?

Here are some practical questions: Do those you name in Health Care Proxies, Living Wills and Powers of Attorney know your wishes? Do you and the persons you've named have copies of the relevant documents? Does your doctor have a copy of your Health Care Proxy? Does your Health Care Agent have a copy of your Living Will (the document that states that if you're in an irreversible vegetative state, you do not wish to be kept alive)?

Have your circumstances changed since you executed your estate plan? For example, marriages (your own or a child's), divorces, births, purchases or sales of property are all events that should cause you to review your estate planning documents to make sure they still express your wishes.

If you are not a United States Citizen, but spend significant time in this country, or own assets located here – such as real property, art work, jewelry, vehicles or other items or collections of value, does your planning take account of potential US estate taxes on that property? Remember foreign nationals can only exclude $60,000 of their US estate from US estate taxes absent an estate tax treaty between the US and their country of residence. Similarly, if you are a United States citizen, or a foreign national residing in the United States, with assets in another country, does your estate plan provide liquidity for the payment of US estate taxes on your worldwide assets?

Troubled economic times sometimes provide planning opportunities. Have you considered possibilities such as gifting assets or making low interest loans to the people you care about in order to move the appreciation on those assets out of your taxable estate? The federal estate tax exemption amount (the amount that an individual can shelter from federal estate tax) currently $11.58 million, is slated to fall back to $5 million (adjusted for inflation) at the end of 2025. Or that amount could change sooner if there is change in political parties next fall.

<u>Revocable Trusts</u>

Now I'm going to turn to my second topic, revocable trusts and the current shutdown of the Surrogate's Courts which are only available to handle emergencies. One would think that

the death of a loved one and the ability to get control over his or her assets in a moment of economic chaos would qualify as an emergency, but unfortunately the court may not see it that way. And you'd have to petition an Administrative Judge to first determine whether your case is an emergency.

Under normal circumstances, when someone dies, the family or loved ones must petition the court, submit the original will (if there is one) and wait for the court to review and approve the petition and will and award Letters Testamentary (Letters of Administration, if no will) to the person named as executor under the will. Without those "Letters" all the assets of a decedent are frozen at death and can't be accessed by anyone. It doesn't matter that the stock market may be taking the biggest nose dive since the 1930's. Nobody can touch the assets. So, you're caught in a very difficult emotional situation trying to cope with a loss as well as a financial crisis.

Is there anything you can do now to make sure you or your loved ones don't find themselves in this nightmarish situation? The answer is yes, you can set up a revocable trust to hold your assets. The revocable trust includes instructions about what happens to the assets on your death and in that respect functions like a will. The difference is that nobody has to go to court to be able to access the assets; the trustee that you've appointed under the trust agreement takes over and can access all other assets in the trust immediately. Here is a brief review about how a revocable trust works.

You are the trustee in charge of managing the assets while you are alive and healthy and you appoint someone you trust to step in as trustee if you become too ill to manage your financial affairs or die. Your successor trustee maintains control over the trust assets and does not have to go to the court to get Letters Testamentary in order to legally access your assets. Therefore, there is no disruption in managing the assets; the trustee has immediate access.

In order for the revocable trust to work, you have to re-title your assets from your own name into the name of the trust. For example, an investment account's owner has to change from "John Smith" to "The John Smith Revocable Trust." There are no tax consequences of having a revocable trust because the trust uses your social security number. You still have the same access to your assets to pay bills, manage your assets and so on that you had before you transferred your assets into the trust.

If these questions lead you to consider changes to your estate plan, please reach out to us or another estate planning attorney for assistance.

Most of all, please stay well and do whatever you can to see that those you care for also stay well.

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