Coping with COVID-19

Standard Disclaimer – We have to do this…

- This webinar is being broadcast on April 15, 2020 at 12 PM PST. Additional legislation or agency guidance/regulations may modify some of the information provided.
- The presentation provides general information and guidance regarding recent updates.
- The discussion provided in this webinar is general in nature and does not constitute legal advice for a particular situation. Please consult an attorney if you need help with an issue or question.
Site Operating Procedures –
Protecting Your Workforce

Self-Isolation

• Anyone who meets one of the following criteria should not come to site:
  • Has a high temperature or a new persistent cough
  • Is a vulnerable person (by virtue of their age, underlying health condition, clinical condition or are pregnant)
  • Is living with someone in self-isolation or a vulnerable person.
Procedure if Someone Falls Ill

If a worker develops a high temperature or a persistent cough while at work, they should:
• Return home immediately
• Avoid touching anything
• Cough or sneeze into a tissue and put it in a bin, or if they do not have tissues, cough and sneeze into the crook of their elbow.
They must then follow the guidance on self-isolation and not return to work until their period of self-isolation has been completed.

Protecting your Workforce/Limiting Liability

Reasons why you need to be alert for COVID-19
• Protect your workforce: keep your workers safe and healthy
• Avoid claims that your company exposed workers to unsafe conditions
Travel to Site

Wherever possible workers should travel to site alone using their own transport and sites need to consider:

• Parking arrangements for additional cars and bicycles
• Other means of transport to avoid public transport e.g. cycling
• Providing hand cleaning facilities at entrances and exits. This should be soap and water wherever possible or hand sanitizer if water is not available
• How someone taken ill would get home.

Site Access Points

• Stop all non-essential visitors.
• Introduce staggered start and finish times
• Monitor site access points to enable social distancing –
• Remove or disable entry systems that require skin contact e.g. fingerprint scanners.
• Require all workers to wash or clean their hands before entering or leaving the site.
• Allow plenty of space (six feet) between people waiting to enter site.
• Drivers should remain in their vehicles if the load will allow it and must wash or clean their hands before unloading goods and materials.
Hand Washing

• Ensure soap and fresh water is readily available and soap is always stocked.
• Provide hand sanitizer where hand washing facilities are unavailable.
• Regularly clean the hand washing facilities and check soap and sanitizer levels.
• Provide sufficient trashcans for hand towels with regular removal and disposal.

Toilet Facilities

• Wash hands before and after using the facilities.
• Enhance the cleaning regimes for toilet facilities particularly door handles, locks and the toilet flush.
• Portable toilets should be avoided wherever possible, but where in use these should be cleaned and emptied more frequently.
Avoiding Close Working

There will be situations where it is not possible or safe for workers to distance themselves from each other by six feet.

Avoiding Close Working

General Principles

• Non-essential physical work that requires close contact between workers should not be carried out.
• Plan all other work to minimize contact between workers.
• Re-usable PPE should be thoroughly cleaned after use and not shared between workers.
• Single use PPE should be disposed of so that it cannot be reused.
• Regularly clean the inside of vehicle cabs and between use by different operators.
Avoiding Close Working

*Site Meetings*
- Only absolutely necessary meeting participants should attend.
- Attendees should be six feet apart from each other.
- Rooms should be well ventilated / windows opened to allow fresh air circulation.
- Consider holding meetings in open areas where possible.

Force Majeure
Force Majeure – Read Your Contract!

- Always read your contract to determine:
  - What is a force majeure event?
  - What type of notice do I need to provide?
  - What am I entitled to receive?

Force Majeure – What is it?

- A force majeure event is an unforeseen circumstance which prevents a contracting party from fulfilling its obligations under the contract.
  - The unforeseen circumstance typically must:
    - Not be reasonably foreseeable
    - Be beyond the reasonable control of the parties
    - Materially affect performance
Force Majeure – What is it?

- A Force Majeure clause can be general or specific
  - General – includes causes beyond the control of the parties
  - Specific – includes causes set forth in a specific list
- Review your specific contract to determine what causes are included

Force Majeure – What Notice is Required?

- Your contract should specify the way notice must be provided to the other contracting party(ies) and the time frame for providing such notice
- The information may be found in different sections of the Contract, including:
  - Delay clause
  - Change Order clause
  - Claims process or alternative dispute resolution clause
Force Majeure – What Notice is Required?

- Once you know what will trigger the Force Majeure clause, you must provide notice within the time frame required by the Contract.
  - Your contract may provide that a claim under a force majeure clause is waived if timely notice is not provided.

Force Majeure – What Am I Entitled to Receive?

- Read your Contract!
- Typically, a Force Majeure clause will allow for an extension of time but NOT an adjustment to the Contract Sum
  - This will provide relief from liquated damages but may not allow for extended general conditions, increase in cost of materials, etc.
Force Majeure – Example Clauses

• AIA A201-2017, Section 8.3.1
  • If the Contractor is delayed at any time in the commencement or progress of the Work by…
    • labor disputes,
    • fire,
    • unusual delay in deliveries,
    • unavoidable casualties,
    • adverse weather conditions documented in accordance with Section 15.1.6.2, or
    • other causes beyond the Contractor’s control…
  • …then the Contract Time shall be extended for such reasonable time as the Architect may determine.

• AIA A201-2017, Section 8.3.2
  • Claims relating to time shall be made in accordance with applicable provisions of Article 15.
  • Article 15 is the article addressing Claims.
    • Sections 15.1.3 and 15.1.6 provides for notice time frame and requirements.
Force Majeure – Example Clauses

- ConsensusDocs 200, Section 6.3.1
  - If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contractor Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following:
    - transportation delays not reasonably foreseeable;
    - labor disputes not involving Constructor;
    - general labor disputes impacting the Project but not specifically related to the Worksite;
    - fire;
    - Terrorism;
    - epidemics;
    - adverse governmental actions;
    - unavoidable accidents or circumstances;
    - adverse weather conditions not reasonably anticipated.

- ConsensusDocs 200, Section 6.3.1
  - Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.
  - Article 8 is the article addressing Changes.
    - Section 8.4 provides for notice time frame and requirements.
Force Majeure – Summary

- Review your Contract
  - Preferably prior to when you think you have a Force Majeure event
- Determine what events will trigger the Force Majeure clause
- Determine the time frame you must provide notice upon occurrence of a Force Majeure event
- Determine what you are entitled to receive if a Force Majeure event occurs

Force Majeure – Looking Forward

- How is Force Majeure addressed in NEW contracts?

- Are you including pandemic as a defined Force Majeure event?

- Are you including COVID-19 delays arising from other parts of the country/world as possible Force Majeure events?

- Are you specifying that your bid and/or contract sum do NOT account for possible delays/costs resulting from COVID-19?
Emergency Paid Sick Leave & Expanded FMLA

Quick Reminders

- Emergency Paid Sick Leave (EPSL)
  - Applies to employers with 1-499 employees.
  - No minimum length of employment for eligibility.
  - Requires employers to provide 80 hours of paid sick leave to employees for six specific reasons:
    - Subject to government quarantine due to COVID-19.
    - Advised by a health-care provider to self quarantine due to COVID-19.
    - Experiencing symptoms of COVID-19 and seeking medical diagnosis.
    - Caring for an individual who is quarantined as required by the government or on the advice of a medical practitioner due to COVID-19.
    - Caring for a child due to a school or childcare facility being closed/unavailable due to COVID-19.
    - Experiencing any other substantially similar condition determined by the Sec. of HHS, Treasury, or Labor.
  - Pay cap included.
Quick Reminders

- Expanded Family and Medical Leave Act (EFMLA)
  - Applies to employers with 1-499 employees.
  - Any employee that has worked for you for 30 or more days.
  - Provides up to 12 weeks of leave for employees who need time away from work to care for a child under 18 when school or childcare is closed or unavailable due to the COVID-19 outbreak.
  - Unpaid for the first 2 weeks. Paid for weeks 3-12.
  - Pay cap included.

- Employers may receive tax credits for amounts paid to employees for EPSL and EFMLA.

- English and Spanish Required Posters are available on F&M website.

EFMLA & EPSL – Run Concurrently.

1. EFMLA – 12 weeks total.
   - Unpaid for first 10 days
   - Paid for weeks 3-12
   - Paid at two-thirds the employee’s regular rate of pay for their normally scheduled hours. Limit of $200/day or $10,000 total – per employee.

2. EPSL – 80 hours of paid leave
   - May be used at the beginning of EFMLA to cover unpaid period
Don’t forget...

Other leaves of absence and paid time off programs still apply.
- FMLA
- Non-FMLA Leaves Provided by an Employer
  - Small employers, post-FMLA
  - Leaves of Absence as an ADA Accommodation
- State Mandated Paid Sick Time
- Paid Time Off
- Short Term Disability
- Long Term Disability

Furloughs, Layoffs and Time Off

- Employees who are subject to reduced hours, furlough, or layoffs may not use EPSL or EFMLA as of the date of the action.

- People already on EPSL and EFMLA should be considered for furlough/layoff as if they were still at work. However, the use of EPSL or EFMLA may not be a criteria for whether or not someone is chosen.
  
  (Discrimination, discipline are prohibited.)
Workers’ Compensation & Disability

• If an employee is not working due to a workers’ compensation injury, they may not take EPSL or EFMLA. (Or if they are out and receiving disability benefits.)

• Unless they were working in a light-duty position and experience one of the qualifying reasons for EPSL and EFMLA we discussed.

• Remember, EPSL and EFMLA are paid for hours the employee would have been working.

EFMLA and EPSL

• Eligible employers who pay qualifying sick or child care leave will be able to retain an amount of payroll taxes equal to the amount of sick and child care leave paid out. (Instead of depositing with IRS.)

• Take these credits from federal income taxes, employee share of Social Security and Medicare, and the employer share of Social Security and Medicare for all employees.

• If insufficient, file a request for accelerated payment from the IRS.
Common Questions

• My employee’s spouse has said that she shouldn’t come to work anymore because there’s too much risk now. Is this covered by EPSL/EFMLA?

• My employee has said he needs to stay home to help with his kids who are out of school. But I know his wife is a teacher. Why can’t she do it?

• My employee showed up to work sick. Can I send him home and require that he stay home for 14 days? Is this covered by EPSL?
Paycheck Protection Program

- Zero-fee, non-recourse, federally guaranteed SBA loans
- Amount is the lesser of $10MM or 2.5 times average monthly payroll for all employees with annual salary 100k or less
- Eligible to apply if harmed by COVID-19 between February 15, 2020 and June 30, 2020
- Retroactive to February 15, 2020 in order to help bring workers who may have already been laid off back onto payrolls

FAQs

- What types of businesses and entities may be eligible for a PPP loan?
  - Small businesses (generally, less than 500 employees)
  - Non-profits
  - Sole proprietorships
  - Independent contractors and eligible self-employed
  - In operation on February 15, 2020
  - Other SBA rules that may exempt larger employers
How is the Loan Size Determined?

- **If you were in business between 2/15/19 – 6/30/19:** Max loan is lesser of $10M or 250% of your average monthly payroll costs for the year prior to the loan application. Exception for businesses with seasonal workers (if that is you, call us).

- **If you were not in business between 2/15/19 – 6/30/19:** Max loan is lesser of $10M or 250% of your average monthly payroll costs between January 1, 2020 and February 29, 2020.

- **If you took out an Economic Injury Disaster Loan (EIDL) between 2/15/20 – 6/30/2020,** you can refinance that loan into a PPP loan by adding the outstanding loan amount to the payroll sum, but the EIDL loan is not forgiven (and may not be used for the same purpose as a PPP loan).

What Costs are Eligible for “Payroll”?

- Compensation that includes salaries, wages, commissions, or similar compensation, payment of cash tips or equivalent
- Payments for vacation, parental, family, medical, or sick leave
- Allowance for dismissal or separation
- Payments required for the provision of group health care benefits, including insurance premiums
- Payment of any retirement benefit
- Payment of State or local tax assessed on the compensation of employees
What Costs are Not Eligible for “Payroll”?

- Employee / Owner compensation over $100,000
- Taxes imposed or withheld under Chapters 21, 22, and 24 of the IRS Code
- Compensation for employees whose principal place of residence is outside of the U.S.
- Qualified sick and family leave for which a credit is allowed under Sections 7001 and 7003 of the Families First Coronavirus Response Act (FFCRA).

What are Allowable Uses of Loan Proceeds?

- Payroll costs (as noted previously)
- Costs related to continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums
- Employee salaries, commissions, or similar compensation (subject to exclusions noted previously)
- Payments of interest on any mortgage obligation (shall not include any prepayment of or payment of principal on a mortgage obligation)
- Rent (including rent under a lease agreement)
- Utilities
- Interest on any other debt obligations that were incurred before the covered period
How do I get forgiveness on a PPP loan?

- Apply through your lender for forgiveness. In the application, you must include:
  - Documentation verifying the number of employees on payroll and pay rates, including IRS payroll tax filings and State income, payroll and unemployment insurance filings
  - Documentation verifying payments on covered mortgage obligations, lease obligations, and utilities
  - Certification from a representative of your business or organization that is authorized to certify that the documentation provided is true and that the amount that is being forgiven was used in accordance with the program’s guidelines for use.

What happens after the forgiveness period?

- Principal and interest will continue to be deferred, for a total of 6 months to a year after disbursement of the loan.
- Any loan amount not forgiven at the end of one year is carried forward as an ongoing loan with max terms of 10 years, at 4% max interest.