KRIEG DEVAULT

Insights

COVID-19 Checklist for Businesses

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[UPDATED APRIL 22, 2020] - The novel Coronavirus (COVID-19) pandemic creates unprecedented and significant challenges for businesses of all sizes. In light of the rapidly evolving circumstances, Krieg DeVault has assembled a checklist to help identify potential legal issues that your business should consider to navigate through this crisis.

1. Determine Whether Your Business is Essential.

Multiple states and other localities have issued "stay-at-home" orders and other lockdown measures. These orders prohibit individuals from leaving their homes except, generally, for working or obtaining services with essential businesses. Indiana Governor Holcomb issued an executive order on March 23, 2020, as part of the State's efforts to contain the COVID-19 virus, which was extended by executive order until 11:59 p.m. on May 1, 2020.This order requires that non-essential businesses cease and people should stay home, but also allows certain essential activities to continue. Therefore, it is important to determine whether your business is considered essential.

While each state or locality may have differing definitions for essential businesses, under Indiana's order, essential businesses include business identified in the **CISA List**, as well as a host of areas similar to other states: Essential Infrastructure, Essential Government Functions, and Essential Businesses and Operations, including (topically) stores that sell groceries and medicine; food, beverage and agriculture businesses; organizations that provide charitable and social services; religious facilities; media; gas stations and businesses needed for transportation; financial and insurance institutions; hardware and supply stores; critical trades; mail, post, shipping, logistics, delivery and pick-up services; educational institutions; laundry services; restaurants for consumption off-premises; supplies to work from home; supplies for Essential Businesses and Operations; transportation; home-based care and services residential facilities and shelters; professional services; manufacture, distribution, and supply chain for critical products and industries; critical labor union functions; hotels and motels; and funeral services. Note that even within a category, some of the business functions will be curtailed.

In review of the fairly long list of businesses that are considered essential, some notable businesses not considered essential are retail operations that do not support an essential business, salons, gyms, and fitness studios.

Consider the following when determining whether your business is essential: Is my business listed in the locality or state order as an industry that is considered essential? Are any of my customers considered an

essential business? Are there any state filings required in order to ensure your business qualifies as essential?

If your business is considered essential you should consider notifying your employees, customers and clients. In addition, employers should consider providing any employees that are still commuting to work or need to travel to perform their work with an authorization letter on company letterhead that identifies the business as an "Essential Business" under the relevant executive order, confirms that the person is an employee and provides a contact at the company for verification.

2. Follow or Prepare a Business Continuity Plan.

A business continuity plan will help a company navigate through temporary disruptions so it continues to function at a high level, even in the worst scenario. A plan should address practical considerations relevant to the business and should be able to be amended on a real-time basis, so management can address situations that arise quickly. In some industries, regulatory agencies require license holders to maintain a business continuity plan as part of a license holder's responsibilities. In other industries, it is deemed best practice. If you have one in place, review the steps the plan lays out.

If you don't have a business continuity plan, put one in place now, and consider the following: Does my business have information backup processes and procedures in place? Does my business have system restoration processes and procedures in place? How will my business continue to provide customer service and customer communications? How will my business address the physical unavailability of key management and/or employees? Does my business have processes, procedures and an IT infrastructure in place for training employees to work remotely? How will my business address the unavailability of business operational systems or components? How will my business continue to maintain recordkeeping? How will my business maintain supervisory obligations? Does my business have emergency contacts and communication trees established for employees? Does my business have a risk and liability mitigation strategy in place for protecting the health of my employees and customers?

3. Insurance Coverage.

Although the COVID-19 outbreak is well underway, the insurance coverage landscape is only starting to develop. Business Interruption and Worker's Compensation are two coverages potentially implicated, but all coverages should be considered, including Commercial General Liability, Property, Cyber, Pollution, Professional Liability, Product Liability, Event Cancellation and Employment Practices. Some exclusions could present challenges to coverage. For example, Business Interruption coverage sometimes contains a "virus" exclusion.

Regardless of your coverages, we recommend a proactive approach. Inventory and make sure you have copies of all of your policies. Have a discussion with your insurance agent and coverage counsel to better understand what coverages you have and how those coverages may respond to COVID-19 losses and claims. Identify with particularity the impact that COVID-19 is having on your business and the implications for your insurance coverage. Work with your agent and attorneys to identify when the impact of COVID-19 is sufficiently acute to "trigger" coverage. Once coverage is triggered, promptly (i.e. immediately) give written notification to your agent and carriers. Determining whether there is coverage and identifying when coverage is triggered are highly fact specific. Generally, we recommend to "over" notify, as it is better to notify sooner rather than later and better to notify under all/more of your policies, than just some. Finally, do not assume coverage is not available and do not accept at face value a statement from an agent or carrier there is no

coverage. Have coverage determinations reviewed by coverage counsel.

It is difficult to predict what developments lie ahead. Already with COVID-19, many lawsuits has been reported in which policyholders seek coverage for COVID-19 business losses. Last week the first reported insurance coverage lawsuit for COVID-19 losses was filed in Indiana for business interruption coverage. Some states are looking at potential legislative solutions to broaden Business Interruption coverages. These outcomes will take months if not years to play out. But while the landscape is developing and outcomes start to take shape, policyholders must be proactive. Delaying notice to your insurance companies could jeopardize coverage.

4. Review Your Contracts Force Majeure Provisions.

As you assess the impact COVID-19 is having on your business, it is important to review all contracts for *force majeure* provisions, and determine if those provisions are for the benefit of you or the other contracting party, or both. So called *force majeure* clauses are frequently included in contracts to excuse performance for acts of god, disaster, circumstances truly beyond the parties control, and the like. You should review your contracts to determine whether they contain *force majeure* provisions and under what circumstances they will excuse a party's performance. Time is of the essence in reviewing these provisions, as they often require notice to the other party within a certain period of time after becoming aware of the *force majeure* event. If excused, thought should be given to replacement suppliers or alternatives, especially if notice of *force majeure* is provided. The ability and requirement to perform contractual obligations may be effected by COVID-19. Click **here** for our alert about *force majeure* clauses.

5. Review the Financial Position of Your Business.

The economic impact of COVID-19 will not be known for many months or more. You will want to position your business to weather what many are predicting is a coming recession of unknown depth and duration. You will want to do full review of your company's financial position – both as debtor and as creditor.

Review all of your loan documents carefully. Your COVID-19 experience could trigger a number of issues, from breaches of covenants to specific events of default. Be proactive with your lender(s) to get in front of these issues. Consider whether alternative sources of capital will need to be explored if your lender(s) will not support your ongoing operations.

Review your customer intake and oversight procedures to determine that such customers are on sound financial footing, including evaluating the impact any "shelter in place" order may have on the customer.

Some questions to consider: Will my business be able to make payments or need a deferral? Will my business be able to continue to satisfy our financial covenants? What other events of default could be triggered? Do any of my contracts contain material adverse change clauses or general insecurity clauses? For economic development programs, will my business be able to meet our employment targets? Does my secured financing structure allow other lending relationships? What collateral is available if my business needs to look elsewhere? What flexibility will my suppliers and other creditors have during this time? What risks does my business face with customer financial stability? Are our collection practices up to date? How will we manage slow-pay customers?

6. SBA Financial Resources.

In the event that your business needs additional financial resources to combat these difficult times, the Small Business Administration has made available two separate loan programs, the Paycheck Protection Program and Emergency Injury Disaster Loans. These loan programs provide nearly immediate relief for small businesses and other entities that have fewer than 500 employees. While the initial dollars approved for these programs was rapidly allocated and did not meet the need, Congress is in the process of approving signficant new funding for each of the programs. For a more in depth overview of these loans click **here**.

7. Understanding Your Obligations to Pay Employees During a COVID-19 Related Leave of Absence or Furlough.

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the "FFCRA"), which went into effect on April 21, 2020. The FFCRA covers most employers with fewer than 500 employees, as well as government employers. In essence, the FFCRA extends up to 12 weeks of FMLA leave to employees who need to be off of work to care for a child whose school or daycare is closed due to COVID-19, providing up to 10 weeks of pay at two-thirds of the employee's pay rate. The FFCRA also provides up to two weeks of paid leave to employees who need to be off of work for other specific COVID-related reasons listed in the FFCRA, with the two weeks being paid at full pay or two-thirds of an employee's pay rate, depending on the reason for the leave. For additional information, please reference our **one-page overview of the FFCRA**, as well as our **Q&A for employers**.

Given the negative impact of COVID-19 on many companies, including a need for fewer workers, and in some cases orders that companies temporarily close their businesses, many employers are faced with very difficult decisions about their employees. Some companies are terminating employees and others are considering furloughing employees, in other words placing employees on leave for a definite or indefinite period of time, yet retaining their employment status. Furloughs present numerous questions, some of which include unemployment eligibility, the ability for the employee to remain on the employer's benefit plans, whether WARN Act notice is required, and also whether a particular employee must be paid during any furlough. As a general rule under the Fair Labor Standards Act, non-exempt (hourly) employees do not have to be paid for any time when they are not working. However, the general rule for exempt (salaried) employees is that if the employer places them off of work, the exempt employee must be paid for an entire workweek if he or she performs any work during that workweek. In this instance, only full weeks off of work could be unpaid. The U.S. Department of Labor published guidance to employers to understand their obligations to pay employees as it relates to COVID-19 situations, which can be located **here**. Despite the FLSA's general rules, employers also need to consider state and local law, collective bargaining agreements, employment agreements, and the new FFCRA, all of which may affect their obligation to pay employees while off of work.

8. FFCRA Tax Credits.

As mentioned above, if you have employees that are sick and required to stay home, the FFCRA requires most employers with fewer than 500 employees to comply with its Emergency Family and Medical Leave Expansion Act ("EFMLEA") and the Emergency Paid Sick Leave Act ("EPSLA"). Employers subject to the FFCRA will receive a refundable tax credit equal to 100% of qualified EPSLA wages or qualified paid EFMLEA wages (plus qualified increases in health care plan expenses) for each calendar quarter. These credits apply to the employer portion of social security taxes (6.2%) and the employer portion of the hospital insurance portion (1.45%). If the total amount of the credit exceeds an employer's liability for social security taxes, all excess credit is refundable to the employer.

9. Instituting a Work From Home Policy.

For some companies, the transition of employees to the "home office" will be a seamless one; for others, it may be the first time employees have worked remotely. Consider your company's "WFH" policy carefully and be proactive about ensuring your policies are effective. If your company has not yet decided whether to activate its WFH policy, consider the following: What is the risk of continuing in-person functions? Do my employees feel safe entering the workplace? Can my IT systems handle a shift to working remotely? Have we effectively communicated to employees what expectations may be when working remotely? How will my choice to require employees to report to work impact the community? How will my choice affect employees that may be at a higher risk for adverse health consequences?

Once the decision is made, review your WFH policy and consider: Is our IT infrastructure capable of providing effective support? Is our helpdesk able to respond effectively to any unique WFH technology issues? Are employees able to connect remotely with clients and each other? Will our servers be able to properly safeguard data and other confidential information? Are existing lines of communication between management, IT, and employees effective? Does my company's cybersecurity policy cover WFH activities?

10. Federal and State Filing Extensions.

A key component to the government's stimulus efforts has been to delay filing and payment of 2019 income taxes. At the federal level, IRS Notice 2020-18 extended the filing deadlines until July 15, 2020, with no limitation on the amount of the payment that may be postponed. For an extension beyond July 15th, an individual taxpayer may file a Form 4868, but will still have to pay estimated taxes by that date. Businesses can also receive the July 15th extension by filing a Form 7004.

Certain states are also allowing for extensions to their income tax filings. On March 19, 2020, the Indiana Department of Revenue announced it was extending the deadlines for filing individual and corporate tax returns until July 15, 2020.

In Michigan, no final decision has been made yet on extending filing deadlines. Governor Gretchen Whitmer signed Executive Order 2020-14, extending the deadline for Michigan residents to pay back taxes and avoid foreclosure on their property during COVID-19). Additionally, revenue officials have stated that monthly sales tax payments due on March 20, 2020, are being pushed back to April 20, 2020, for business owners that file paperwork with the state, subject to certain limitations. More information can be found at the Michigan Department of Treasury website.

In Illinois, the Department of Revenue has enacted short-term relief from penalties for late sales tax payments from certain businesses. State officials issued bulletin FY 2020-23 dated in March 2020 waiving any penalty and interest that would have been imposed on late sales tax payments from those businesses operating eating and drinking establishments that incurred a total Sales Tax liability of less than $75,000 in calendar year 2019.

11. Messaging and Communication Plan.

One of the most important actions to take in our current uncertain situation is communicating early and often with key constituencies, whether that be customers, suppliers, owners, directors, employees, or otherwise. Create a task force or team through which all final plans will be approved, statements will be issued, and

questions will be addressed to ensure a consistent message is provided. Be transparent as much as possible and consider various situations and changes that will need to occur as more information becomes readily available in the market, ensuring the message will include a thoughtful communication strategy to maintain trust and support.

Some questions to consider: What consistent message and tone should we use with all individuals to reassure all interested parties? How should the information and messaging to employees differ from that to the public, owners, and clients? With what regularity should we disseminate updates and information to employees, the public, owners, and clients? What information can we provide to provide relief and comfort to employees, the public, owners, and clients (including, for example, delaying deadlines or certain change fees and being flexible with work-from-home policies)?

12. Emergency Governing Documents.

Significant uncertainties exist regarding the effect of COVID-19 on corporate operations. Consider whether COVID-19 will or may impact any regularly scheduled meetings, votes, or other pertinent actions. Consider whether the organizational documents of your company or, in the alternative, relevant statutory provisions, allow for amendments and/or enactment of emergency bylaws or operating agreements in the case of emergency such as COVID-19. The SEC's Division of Corporation Finance and Division of Investment Management recently issued guidance to assist issuers, shareholders and other market participants to meet their obligations under federal proxy rules amid concerns over COVID-19, allowing flexibility in connection with changing the date, time or location of the annual meeting, along with encouraging all participants to be flexible and cooperate with one another. If not subject to the SEC, companies should still consider the impact of COVID-19 on business operations.

Some questions to consider: Do my company's governing documents permit virtual meetings for annual and/or special meetings to comply with the CDC's restrictions on large gatherings? If not, should my company amend its documents? Will my directors be able to attend meetings when needed to address my business' needs? What abilities to amend and/or enact emergency bylaws/operating agreements or other provisions of the governing documents are available to the shareholders, board, or otherwise during this time?

13. Group Health Plan Consideration.

On March 4, 2020, the DOL clarified that employees who, pursuant to the FFCRA, take expanded family and medical leave or paid sick leave are entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave. This requirement pertains to medical, surgical, hospital, dental, and eye care benefits, as well as mental health counseling, substance abuse treatment, and other benefit coverages offered. While on paid leave, the employee is responsible for paying their portion of the group health plan premium. If the employee does not elect to remain covered while on leave, the employee remains entitled to have coverage reinstated upon returning to work on the same terms in place prior to taking the leave, including family member coverage.

The CARES Act expands the requirement that group health plans provide first-dollar coverage of COVID-19 testing. It also mandates group health plans and health insurers to reimburse providers of COVID-19 testing according to rates negotiated as of January 31, 2020, or the published price on the provider's website. Further, the CARES Act requires group health plans and health insurers to cover any "qualifying coronavirus preventive service" – including immunizations – at no cost-share. Finally, for plan years beginning on or before December 31, 2021, a health plan may provide first-dollar coverage of telehealth and other remote care services without losing high-deductible-health-plan status or disqualifying an individual's ability to contribute to an HSA.

Some questions to consider: Will our group health plan require an amendment to incorporate mandated provisions or can this be addressed by the health insurance carrier or third-party administrator amending the certificate of coverage? If fully-insured, has the health insurance carrier voluntarily expanded first-dollar coverage of COVID-19 treatments and telehealth services under our plan? If self-funded, should we expand first-dollar coverage of COVID-19 treatments and telehealth services under the plan, and if so, can we absorb the cost? With regard to permissible first-dollar coverage, what is included as telehealth or other remote care services? Do we want to expand our FSA or HRA coverage to include the new qualified medical expenses, and will this require amending the plan document? How should we communicate coverage changes to plan participants?

14. Retirement Plan Considerations.

The CARES Act provides tools to address the economic hardships faced by your employees as a result of coronavirus pandemic. Among them are three optional retirement plan provisions. The Act creates temporary "coronavirus-related distributions" and plan loans of up to $100,000, to which the 10% tax imposed on early distributions does not apply. The Act permits the waiver of all RMDs payable in the 2020 calendar year. Additionally, a waiver is permitted for (1) participants with required beginning dates in 2020 and (2) participants who turned age 70 ½ in 2019, but the RMD was not made prior to January 1, 2020 (required by April 1, 2020). For a deeper look at these provisions, please reference our article, The CARES Act: Changes Posed to Employer-Sponsored Retirement Plans.

Krieg DeVault is committed to helping you and your business during these unprecedented times. With your needs in mind, we have established a **COVID-19 Resource Center** to assist you through this process.

If you have any further questions, comments or concerns, please feel free to contact **Robert A. Greising**, **Corben A. Lee,** or a member of our **Business, Acquisitions & Securities** team.