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COVID-19 and Practical Guidance for Small Businesses

Day Pitney is pleased to offer this practical guide for small businesses, including family-owned enterprises and family offices, seeking useful information on the impact of the novel coronavirus disease (COVID-19) on their operations and finances. This guide is intended to provide an overview of the issues currently confronting small businesses, including critical employment, financial and tax, and operational considerations, and it includes links to previously released guidance for more in-depth information.

Employment Considerations

Layoff Versus Furlough

- Your business may be facing the decision to lay off (terminate) or furlough (retain employees in an inactive status on your payroll) an employee. Before making that decision, consider available resources, such as assistance with covering payroll and certain tax credits (as discussed below in Financial and Tax Considerations). If you decide on a layoff, you may be required to provide notice of the termination and certain forms, such as unemployment insurance forms, to terminated employees. The law also varies from state to state regarding when employees are entitled to receive their final paycheck. If you decide to furlough employees, you may be able to maintain their group health benefits, depending on the terms of your benefits plans.
- Laying off employees may have long-term consequences for your business. Before terminating any employees, consider what staffing you need to keep your operations running and the staff necessary to provide services following the pandemic.
- Depending on the state in which your company operates and the size of your business, layoffs may implicate federal or state Worker Adjustment and Retraining Notification Act statutes.
- You may also consider reduced employee work schedules or reduced pay. If the company reduces employee schedules or full-time status, an employee may become eligible for partial unemployment benefits, depending on applicable state law. Special considerations apply when reducing the work schedules of employees who are classified as exempt under state and federal laws.

Employees With COVID-19

- While the Occupational Safety and Health Administration mandates that an employer provide a workplace free of recognized hazards that are likely to cause death or serious physical harm to its employees, this is balanced with the employees' protection under the Americans with Disabilities Act. Therefore, if your company becomes aware that an employee has tested positive for COVID-19, in order to ensure employee privacy and to encourage other employees who may have tested positive to disclose such information, have human resources (or some other central contact point) provide an anonymous message to staff about the positive test and the protocols to follow. Any individuals who test positive for COVID-19 should be quarantined for 14 days, regardless of whether they exhibit symptoms.
- For more information, please visit here.

Employee Leaves

- Employers should be aware of federal and state leave laws to ensure they are providing employees all applicable benefits.

- For more information about the new federal leave and benefits available, please visit here.

Prohibition of Penalizing Employees for COVID-19 Leave

- Certain state and federal laws prohibit employers from retaliating against employees for taking protected leave during the COVID-19 pandemic. For an example of such a state law, please visit here.

Information to Employees

- We recommend providing frequent updates to your staff via email. Updates can address office hours, adjusted work hours/wages, and policies related to having contact with customers and vendors and can offer encouraging/unifying messages.

Unemployment

- Unemployment considerations will vary by state, but generally during the pandemic, employees may receive unemployment benefits if they have been laid off or furloughed or had their hours significantly reduced.
    - Sole proprietors and independent contractors in some states also may receive unemployment benefits during the federal emergency.

Financial and Tax Considerations

Coronavirus Aid, Relief, and Economic Security Act Relief

The CARES Act makes loans available to small businesses through its Paycheck Protection Program, which provides the following:

- There is $349 billion available for forgivable loans to any business with 500 or fewer employees or that operates in certain specified industries and meets applicable Small Business Administration employee-based size criteria.
- The maximum loan amount is 2.5 times the average monthly payroll costs (looking back over 12 months), up to $10 million.
- Funds used for payroll costs, paid sick or medical leave, insurance premiums, and certain mortgage interest, rent and utility payments are eligible for forgiveness and do not have to be repaid.
- The forgivable portion of these loans is excluded from the gross income of the borrower for federal income tax purposes.
- Current SBA lenders and other financial institutions authorized by the Department of the Treasury will make the loans.
- The program waives the customary personal guarantees and collateral requirements.
- For more information on the PPP, please visit here.

Economic Injury Disaster Loan Program

- The SBA oversees the EIDL program, which can provide up to $2 million of low-interest financial assistance (actual loan amounts are based on amount of economic injury) to small businesses or private, nonprofit organizations that suffer substantial economic injury as a result of the declared disaster, regardless of whether the applicant sustained physical damage.
- Loans cover fixed and variable expenses, including payroll, but not lost sales or revenue. While both the EIDL program and the PPP include loans for payroll and other expenses, we recommend separating eligible PPP expenses from EIDL program expenses and using them as a basis for forgiveness under the PPP. The SBA charges no upfront fees or early-payment penalties. Recipients' ability to repay the loan will determine their repayment terms.
- For more information on the EIDL program, please visit here.

Small-Business Loans

- The SBA is providing aid to certain business that have been negatively impacted by COVID-19. For more information, please visit here.

- The availability of additional small-business grants and loans to assist businesses impacted by COVID-19 will vary by state.
- For example, Connecticut offered qualifying businesses and nonprofit organizations with 100 or fewer employees access to no-interest loans of up to $75,000 or three months of operating expenses (whichever is less). Unfortunately, based on demand, the state is currently not accepting additional applications.

Additional Relief

- *Employer retention credits*. The CARES Act provides eligible employers with a credit against employment taxes equal to 50 percent of wages paid or incurred after March 12 and before January 1, 2021. An employer is eligible for this credit if (i) its operations are partially or fully suspended by a government order due to COVID-19 or (ii) its gross receipts for the calendar quarter declined by more than 50 percent year over year. The total credit is limited to $10,000 per employee.
- *Payroll tax deferral*. Employers and self-employed individuals are permitted to defer payment of the employer share of the payroll tax from March 28 through December 31, provided the employer does not have indebtedness forgiven under the CARES Act. Any payroll taxes deferred must be paid over the next two years (50 percent due by December 31, 2021, and the remainder due by December 31, 2022).
- *Coronavirus-related distributions*. Employees who participate in an employer's qualified defined contribution plan may take coronavirus-related distributions of up to $100,000 on a tax-favored basis between January 1 and December 31, based on the individual or his/her spouse or dependent(s) receiving a SARS-Cov-2 or COVID-19 diagnosis or experiencing adverse financial consequences related to the pandemic. These distributions can be included in income ratably over a three-year period and can be recontributed to the plan within three years. The plan must be amended to reflect this change.
    - *Plan loans*. Employees who satisfy the requirements for coronavirus-related distributions may take a loan from the plan within 180 days of March 27. The loan cannot exceed the lesser of (i) $100,000 or (ii) the greater of $10,000 or 100 percent of the employee's vested account balance. The plan must be amended to reflect this change.

Other Loan Forgiveness Options

Forgiveness or forbearance for certain loans will vary by state. In New York, for example, state-regulated banks are required to grant 90-day forbearance to certain borrowers. For more information, please visit here.

Tax Considerations

- The federal government extended the due date to file all domestic income tax returns to July 15. Information returns are still due on April 15.
- Several states have also extended reporting deadlines.
- Employers generally are required to withhold taxes from employees' wages; however, employers will be temporarily able to retain an amount of payroll taxes equal to the amount of qualifying COVID-19-related leave the employer has paid.
    - If the amount of qualifying paid leave exceeds the amount of payroll taxes the employer would otherwise deposit with the Internal Revenue Service, the employer is entitled to an accelerated refund from the IRS.
    - Employers can take a tax credit for wages paid after a date selected by the treasury secretary within 15 days following enactment (March 18) and before December 31. For more information, please visit here.
    - *Family Medical Leave Act tax.* The Families First Coronavirus Response Act requires employers with fewer than 500 employees to provide employees with paid family leave and paid sick leave if they (or their families) are affected by COVID-19. Employers providing paid leave pursuant to the FFCRA are entitled to refundable tax credits, which are designed to immediately reimburse them for the cost of providing COVID-19-related leave and maintaining health insurance coverage for affected employees. For more information, please visit here.

Operational Considerations

Even if your company is considered an essential business, you should institute remote work capabilities to the full extent possible and limit the number of employees in the office.

If an employee tests positive for COVID-19, depending on the state, the department of public health (or a similar agency) may require your office to close (and not reopen until authorized by the department or agency) and to go through special sterilization procedures.

Another consideration is whether a company has to notify third parties, such as customers or vendors, if an employee tests positive for COVID-19. Currently, there is no legal obligation for such notification, but in the interest of public health, some companies choose to notify third parties. The decision is dependent on the facts and circumstances – such as whether the third parties can be identified, whether they actually came into contact with the employee and whether the employee's identity can be protected.

Properly managing personnel during the pandemic is essential. We suggest assigning employees to teams to help deal with fatigue. Appoint a team leader for each group so that person can assist in disseminating information to staff.

Quickly assess your contracts (office leases, equipment leases, recurring supply orders, etc.) and consider whether they can be canceled or payments deferred. **Please consult a Day Pitney attorney to assist in reviewing your agreements.** For more information, visit here.

Provide relevant information to your clients or customers to keep them informed about your office, including revised operating hours and the availability of services.

General helpful resources

Day Pitney Alerts

Department of Labor Wage and Hour Division Issues Employment Law Guidance Relating to COVID-19

HIPAA Considerations When an Employee Tests Positive for COVID-19

Preparing Your Business for the New Coronavirus, COVID-19

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

Authors



David M. Waizer
Partner

Parsippany, NJ | (973) 966-8089

New York, NY | (212) 297-2439

dwaizer@daypitney.com



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



R. Scott Beach
Partner

Greenwich, CT | (203) 862-7824

Stamford, CT | (203) 977-7336

rsbeach@daypitney.com