

Legal Impacts of the Coronavirus On Small Businesses and Individuals



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This information is being provided as a service to the community and future guidance and new information may supplant information provided here. Always consult professional services regarding your particular business or personal needs.

Overview

- All lines are muted.
- If you have a question please submit it via the Q&A function via the Zoom software.
- If you have only dialed in, we won't be able to take any questions.
- Questions will be monitored and answered as time permits.
- This session will be recorded.

Today's Topics

1. Employment Matters
2. Leases
3. Dallas Specific Orders, force majeure and other legal concepts
4. Status of Dallas County Courts
5. Financial Assistance Resources
6. Stimulus Package (CARES Act)
7. Stimulus Package (Bank Perspective)
8. WINGs
9. DVAP

Today's Presenters

1. Reilly Moore
2. Anthony Bonan
3. Kate Eberhardt
4. Grayson Linyard
5. Fawaz Bham
6. Dean Elazab
7. Pat Howard (TBank)
8. Donna Henry
9. Michelle Alden

Providing a Safe Workplace

- OSHA General Duty Clause
 - Provide workplace free from recognized hazards
 - Enhanced cleaning, sanitizing procedures
 - Work from home, social distancing or staggered shifts
- Employee Tests Positive
 - Notify public health department
 - Prepare notice to other employees likely in contact
 - ADA: DO NOT RELEASE NAME/IDENTITY OF SICK EMPLOYEE
 - Follow CDC return to work guidelines
- Employee with Symptoms
 - Encourage sick employees to stay home
 - If symptoms consistent with COVID-19, do not return to work until 7 days symptom-free

Americans with Disabilities Act Compliance

- Employee privacy
 - Applies to positive COVID-19 tests, high-risk medical conditions
 - Disclose only on need-to-know basis
- Potential reasonable accommodation issues
- Employee Temperature Testing
 - Not advised unless local health instructs it
 - Qualifies as an ADA medical test
 - Keep results as confidential as possible
 - Use medical professional or trained supervisor to conduct tests

Families First Coronavirus Response Act

- Applies to employers with less than 500 employees
 - For-profit, non-profit, government
- Paid Sick Leave
 - 80 hours (full-time) or two week equivalent (part-time)
 - Full pay if leave involves self-care or diagnosis
 - 2/3 pay if leave involves child out of school/daycare or care for others
- Family Medical Leave Expansion
 - Up to 10 additional weeks
 - Only permissible reason: to care for child out of school or childcare because of virus
 - Paid at 2/3 employee's usual rate, job-protected

Workforce Reductions: Layoff v. Furlough

- Furlough – Temporary, non-duty status
 - Limited hours or zero hour schedules
 - Employee retains benefits
 - Must pay for any time worked
 - Exempt employees – any work = full week of pay
 - Employee still eligible for unemployment (maybe partial)
- Lay off – Full separation from employment
 - Might have to pay out accrued, unused PTO
 - In Texas, depends on terms of policy
 - Formal re-hiring after crisis ends
 - Full unemployment eligibility
 - Federal WARN Act compliance?

Dallas Shelter-in-Place Order

- Allows continued operation of essential businesses
 - Essential healthcare
 - Critical infrastructure (fairly broad)
 - Some retail
 - Food, medicine, household productions, work-from-home products, gas stations, laundromats, personal hygiene manufacturing, hardware stores
 - Subject to social distancing restrictions
 - Providers of basic necessities to economically disadvantaged
 - Food banks, shelters, etc.
 - News media, child care, schools with distance learning
- Explicit List of Non-Essential
 - Print shops, estate sales, commercial amusement, florists, gyms, real estate showings, door-to-door sales, vape shops

Available Resources

- CDC Interim Guidance for Businesses
 - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- OSHA Guidelines for Preparing Workplaces for COVID-19
 - <https://www.osha.gov/Publications/OSHA3990.pdf>
- Texas Workforce Commission Coronavirus Info for Employers
 - <https://www.twc.texas.gov/news/covid-19-resources-employers>

Tenants' Rights

- Residential Tenants:

- Generally do not have rights under their leases to stop paying rent on account of COVID-19.
- However if a Landlord is failing to provide any services required under the lease (e.g. utilities, garbage pickup, repairs and maintenance, building security or other amenities), tenants may have a claim based on constructive eviction for a rent abatement.

- Commercial Tenants:

- Like residential tenants, commercial tenants generally do not have rights under their leases to stop paying rent on account of COVID-19 in the absence of a Landlord failing to provide required services.
- Commercial tenants may be able to make additional claims based on:
 - “Constructive eviction” in the case where a landlord denies access to the building based on its unilateral determination to close the building rather than in response to a governmental order.
 - The doctrine of “frustration or purpose” where a governmental order prevents the tenant from accessing its premises, especially in the case of a short term lease where the order is in effect for substantially the entire term.

Practical Strategies

- Many tenants are sending notices to landlords stating that they are unable to pay their rents due to COVID-19 and requesting a rent abatement or deferral.
- While there is no harm in asking for relief, actually failing to pay rent without an agreement in place puts a tenant at risk of default under their lease, which can trigger penalties including
 - Late payment fees and default interest
 - Loss of renewal/expansion rights
 - Acceleration of rent and eviction
 - Triggering recourse under guarantees
- Tenants seeking relief from their landlords can ask for various accommodations including:
 - Rent abatement
 - Rent deferral
 - Rent restructuring – e.g. switching to a “percentage rent” based on revenue
- In all cases, tenants should be carefully reviewing their leases in light of the pertinent facts to determine a strategy and expeditiously reaching out to landlords to begin discussions.

State and Local Initiatives

- City of Dallas
 - Mayor & City Council
 - Role of City Attorney's Office
- State of Texas
 - Governor's declaration of state of emergency and authority of Texas Supreme Court to issue emergency orders
 - Comptroller Hegar's office offering assistance for sales tax payment plans and in most instances, waiving penalties and interests

Texas Comptroller's Enforcement Hotline - **800-252-8880**

Contractual Provisions Justifying Conduct

Force Majeure

Generally this provision prohibits liability for failure to meet contractual obligations due to acts of God, strikes, work stoppage, government restrictions, wars, labor strikes, civil unrest, or any other cause, whether similar or dissimilar to the foregoing, which could not have been foreseen by the affected party with reasonable care.

Note that every lease defines this differently and sometimes leases specifically state that force majeure does not relieve monetary obligations. In addition, some contracts require the tenant to give notice to the Landlord upon the occurrence of such an event in a specific amount of time.

Common Law Provisions Justifying Conduct

Impracticability

Under the doctrine of impracticability, a party's contractual obligations may be discharged if, after the contract is made, the party's performance becomes impracticable by the occurrence of an event (i) that is outside of a party's control; and (ii) the non-occurrence of which was a basic assumption on which the contract was made. Restatement (2d) Contracts § 261.

Frustration of Purpose

Under the doctrine of Frustration, a party's contractual obligations may be discharged if, after the contract is made, the party's principal purpose is substantially frustrated (i) without the party's fault; and (ii) where the occurrence or non-occurrence of an event was a basic assumption on which the contract was made. Restatement (2d) Contracts § 265.

Prevention by Government Regulation

The parties may be discharged from their obligations if the performance of a duty is made impracticable by having to comply with a governmental regulation or order, the non-occurrence of which was a basic assumption on which the contract was made. Restatement (2d) Contracts § 264.

Dallas Court System Status

- How are courts functioning in Dallas county?
 - Courts are open at judge's discretion, but limited staff
 - Jury trials suspended until May 8
 - Limited Hearings; Telephone; Filings

- If I have a contractual dispute going on now or about to arise, how should I proceed?
 - Deadlines
 - Litigation as a last resort
 - Big Picture, consider optics

Evictions and Other Litigation

- How does the eviction ban work in Dallas county?
 - Residential: No trials, hearings, or other proceedings, and deadlines tolled until after April 19, 2020
 - Unless sworn complaint with imminent threat of physical harm or criminal activity
 - Current cases postponed for 60 days from March 18.
 - Commercial: Order does not apply
 - Workout
 - Legal defenses to breach
- Any other tips for legal disputes during this crisis?
 - Get agreements in writing
 - Be the reasonable one

Financial Assistance

- Dallas Water Utilities has suspended water service disconnects until further notice. Customers who are financially impacted by COVID-19, should contact Water Customer Service at 214-651-1441 to make payment arrangements.
- Atmos Energy has a program, “Sharing the Warmth” to aid customers who are being financially impacted by COVID-19. To apply for the program, customers should visit <https://www.atmosenergy.com/customer-service/get-help-paying-your-bill> or call 888-286-6700 .
- Employees affected by the coronavirus (COVID-19), can apply for benefits either online at any time using Unemployment Benefits Services (UBS) online. UBS is available 24 hours a day, seven days a week or employees can call Texas Workforce Commission’s Tele-Center at 800-939-6631 from 8 a.m. to 6 p.m. Central Time Monday through Friday.
- Additionally, for TXU customers, they are providing additional bill-payment assistance to customers in need through its TXU Energy AidSM program.
- TXU, Ambit, Tri-Eagle will waive late fees, extend payment due dates with no down payment required, reduce down payments and deferring balances over five equal installments.
- Reliant, Green Mountain, Cirro, Stream, XOOM, Discount Power are suspending disconnections for non-payment until April 3.
- All AT&T consumer home internet wireline customers, as well as Fixed Wireless Internet, can use unlimited internet data. Additionally, AT&T will continue to offer internet access for qualifying limited income households at \$10 a month through our Access from AT&T program. They have expanded eligibility to Access from AT&T to households participating in the National School Lunch Program and Head Start. Additionally, they offering new Access from AT&T customers two months of free service.
- AT&T is redirecting more resources to provide communication services and tools for first responders, health care professionals, educators and other essential customers. This additional support will help ensure these customers can continue providing critical support to the country and their communities, particularly to first responders using the FirstNet network.
- <https://dallascityhall.com/Pages/Coronavirus-Resources.aspx>

Stimulus Package – the CARES Act

The small business lending provisions contained in the Bill are summarized below. The CARES Act also provides for tax, healthcare, cash payments and other relief designed to help businesses and their employees.

Small Business Association Provision Highlights

- Creates a new \$350 billion “Paycheck Protection Program” with streamlined procedures for loans to small businesses;
- Reduces the certification requirements for lending institutions to become SBA certified;
- Reduces the requirements to qualify as a borrower for a 7(a) loan;
- Increases funding for traditional 7(a) loans by \$17 billion;
- Increases the maximum loan amount of 7(a) loans to \$10 million and reduces the applicable interest rates;
- Streamlined and reduced diligence requirements for lenders and borrowers;
- Provides subsidies and six months deferment for existing 7(a) loans; and
- Provides 100% loan guarantees through December 31, 2020

Stimulus Package – the CARES Act

CARES Act and the Paycheck Protection Program:

The \$2 trillion stimulus package allocates roughly \$350 billion to guarantee loans for small businesses through the Small Business Association (“SBA”) 7(a) loan program. The SBA currently guarantees approximately \$25 billion in 7(a) program loans.

The CARES Act creates a new Paycheck Protection Program (the “Paycheck Program”) for the covered period of February 15, 2020 until June 30, 2020. Congress has the authority to increase the covered period until the end of 2020 if the need should arise due to the pandemic. The UST and SBA anticipates that the funding cap will be reached, and encourages applicants to apply as soon as possible.

Stimulus Package – the CARES Act

Characteristics of the Paycheck Protection Program:

While the Paycheck Program is still considered a 7(a) loan, loans made during this covered period will have different requirements and features than that of a traditional 7(a) loan. Loans under the Paycheck Program are unsecured, with no collateral or personal guarantees in contrast with a traditional 7(a) loan. The maximum loan amount to each business is equal to the lesser of \$10 million, or the average monthly payroll costs from the last year of the borrower multiplied by 2.5. New businesses may calculate the monthly payroll average as of January 1, 2020 through February 29, 2020 and highly seasonal businesses may calculate the average based using the 12 weeks beginning on February 15, 2019, or from March 1, 2019 to June 30, 2019. The interest rate will be a .50% fixed rate and there are no prepayment penalties or fees.

Small businesses and sole proprietorships can apply for and receive loans under the Paycheck Program starting on April 3, 2020 through existing SBA lenders. Independent contractors and self-employed individuals can apply starting on April 10, 2020 through existing SBA lenders. The UST has not stated when new lenders will be authorized to provide Paycheck Program loans. Each applicant can only file for one loan under the Paycheck Program.

Stimulus Package – the CARES Act

Applicable Uses for Paycheck Program Funds:

The bower will be able to use the proceeds of the funds for the following:

- Payroll costs, including benefits;
- Interest on mortgage obligations, incurred before February 15, 2020;
- Rent, under lease agreements in force before February 15, 2020; and
- Utilities, for which service began before February 15, 2020.

Payroll costs include:

- Salary, wages, commissions, or tips (capped at \$100,000 on an annualized basis for each employee);
- Employee benefits including costs for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payments required for the provisions of group health care benefits including insurance premiums; and payment of any retirement benefit;
- State and local taxes assessed on compensation; and
- For a sole proprietor or independent contractor: wages, commissions, income, or net earnings from self-employment, capped at \$100,000 on an annualized basis for each employee.

Stimulus Package – the CARES Act

Paycheck Program Loan Forgiveness:

The Paycheck Program also includes loan forgiveness for a portion of the loan based on certain expenses of the borrower paid during the eight weeks after the loan origination. The forgiveness is based on the sum of (i) payroll costs plus (ii) payment of interest on a mortgage plus (iii) rent and plus (iv) utility payments. The mortgage must have been in place on February 15, 2020.

- The available forgiveness is reduced if the number of employees and the amount of employee compensation declines during the course of the loan.
- The applicant has until June 30, 2020 to restore its full-time employment and salary levels for any changes made between February 15, 2020 and April 26, 2020 in order to avoid a reduction of the forgiveness amount. Furthermore, the UST has stated that it is anticipated that not more than 25% of the forgiven amount may be used to cover non-payroll costs due to high subscription.
- The goal of this 25% cap is to incentivize each borrower to properly allocate the forgiveness portion of the funds for use in employee retention, as opposed to other overhead costs. The purpose of the loan forgiveness is to incentivize businesses to retain employees and to encourage business to hire back previously fired employees. There is a limit if the borrower is also receiving an economic injury disaster loan (“EIDL”) (discussed below).

Stimulus Package – the CARES Act

Paycheck Program Loan Forgiveness:

- The applicant will request the forgiveness amount from the lender servicing the loan. The forgiveness request must include documents that verify the number of full-time equivalent employees and pay rates, as well as the payments on eligible mortgage, lease, and utility obligations.
- The applicant must certify in good-faith that the documents are true and that the funds were used for the proper purposes. The lender must make a forgiveness decision within sixty (60) days of the request from the applicant.
- If the economic injury addressed by the EIDL is unrelated to Covid-19, the borrower can also apply for a Paycheck Protection Program loan.

Stimulus Package – the CARES Act

Who Qualifies as a Borrower for the Paycheck Program?:

The Paycheck Program applies to businesses, not-for-profits and veterans organizations that were in operation on February 15, 2020 and had employees or independent contractors. The Paycheck Program covers business with 500 or fewer employees, subject to various exceptions. Sole proprietors and the self-employed are also eligible. The applicant, along with each 20% or greater owner, must certify in good faith that the business meets all requirements for the loan and will use the proceeds for their applicable purposes.

An applicant's employee count includes the employees of their affiliates as well. The SBA affiliation rules remain mostly unchanged by the CARES Act. However, the Paycheck Program waives the application of the affiliation rules for three types of applicants:

1. Any business concern with no more than 500 employees and that is assigned a NAICS code beginning with 72;
2. Any business concern operating as a franchise that is assigned a franchise identified code by the SBA; and
3. Any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958.

Stimulus Package – the CARES Act

Who Qualifies as a Borrower for the Paycheck Program?:

The size standards aggregate all entities that share 50% common control under traditional SBA 7(a) affiliation rules. Hospitality and restaurant businesses, franchises, and recipients of Small Business Investment Company (SBIC) investment have statutory exceptions. Franchises and hospitality businesses with multiple locations are tested by a 500 employee per location standard. Any business that receives SBIC financial assistance satisfies the size restriction.

The Paycheck Program does not require the standard “Credit Elsewhere” test that traditional 7(a) loans require. This means the borrower does not have to prove that they are unable to receive credit from another institution in order to qualify for the Paycheck Program. The borrower must certify, in good faith, that their business requires the loans to continue operation during the pandemic, that the funds will be used for the stated purpose of payroll preservation and maintaining operation, and that the borrower does not have any other application pending under the Paycheck Program.

1. One-on-one Support

- Resource Session
- Financial Coach Session
- Employment Coach Session
- Small Business Advising Session
- Easy online scheduling via our COVID-19 page

2. Webinars

Provide up to date information, tips to help you adapt, and plan your path forward.

www.wingsdallas.org/covid19

Dallas Volunteer Attorney Program (DVAP)

- A Joint Program of the Dallas Bar Association and Legal Aid of NorthWest Texas.
- Recruits, trains and supports volunteer attorneys to provide free, civil legal help to low-income people in Dallas County.
- DVAP oversees the placement of civil legal matters, such as:
 - Family Law
 - Housing
 - Landlord-Tenant
 - Real Property
 - Consumer
 - Wills
 - Expunctions/Non-Disclosures
 - Probate
- Applicants who are seeking free legal help from DVAP must apply for assistance and meet eligibility guidelines at the regularly scheduled legal intake clinics.

COVID-19 Response

- Individuals are encouraged to apply online at www.lanwt.org
- Or, call the Legal Aid Line at 888-529-5277
- [Additional resources available to Dallas County Residents](#)
 - Court YouTube Channels
 - Legal Resources (DVAP, DBA Lawyer Referral Service, Texas Law Help)
 - Texas Health and Human Services
 - City of Dallas Resources
 - Dallas County Resources
 - WiNGS

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