Navigating Critical Legal Issues in the COVID-19 Crisis

Enhancing Trust

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Managing Potential Religious Restrictions in CARES Act Programs

Overview

► How we got here
► Where we are now
► What can we do
How We Got Here
General Nondiscrimination Laws

- Type of Activities
  - Employment
  - Activities: Goods, Services, Public Accommodations

- Protected Classes
  - Race
  - Religion
  - Sex
  - Other

- Religious Exemptions
  - From "religious activities" to all activities
  - Only on the basis of religion
  - May be limited if receiving government funds, such as in Colorado

How We Got Here
Government Funding

- Church/State Separation Cases

- Statutes, Regulations, and Executive Orders ("Oh My")
  - Broad religious restrictions on activities
  - Nondiscrimination in employment and provision of goods/services

- The Pendulum Swings
  - Church/State separation cases reversed
  - Charitable Choice protects hiring rights and permits religious activity
  - Government cannot exclude religious organizations or impose certain restrictions burdening religious exercise
How We Got Here

The CARES Act

- Provides PPP/EIDL loans through the SBA
  - Disaster Response/Relief
  - No religious restrictions
- Other Features (CARES Act plus)
  - Loans to larger employers
  - Unemployment benefits and paid leave
  - Employer tax payment deferrals/credits
  - Charitable contribution incentives
  - Access to retirement plans

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No religious activities:

An applicant is ineligible if it is "principally engaged in teaching, instructing, indoctrinating or counseling religion or religious beliefs, whether in a religious or secular setting." 13 CFR 120.110(k)
How We Got Here
SBA Loan Regulations

► No employment discrimination:

No recipient shall “[w]ith regard to employment practices within the aided business or other enterprise, whether or not operated for profit; fail or refuse, because of race, color, religion, sex or national origin of a person, to seek or retain the person’s services, or to provide the person with opportunities for advancement or promotion, or accord an employee the rank and rate of compensation, including fringe benefits, merited by the employee’s services and abilities”

► Limited religious exemption

“Nothing in [SBA nondiscrimination regulations] shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities.”

SHERMAN&HOWARD

How We Got Here
SBA Loan Regulations

► No discrimination in activities:

“Discriminate with regard to goods, services, or accommodations offered or provided by the aided business or other enterprise, whether or not operated for profit, because of race, color, religion, sex, handicap, or national origin of a person, or fail or refuse to accept a person on a nonsegregated basis as a patient, student, visitor, guest, customer, passenger, or patron”

► Affiliation rules for employee count

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Where We Are Now
SBA Guidance

- IFR’s and FAQs ("Oh My")
- No enforcement of restriction on religious activities (or secular service requirement)
- A religious borrower retains its “autonomy with respect to membership or employment decisions connected to its religious exercise.”
- The nondiscrimination restrictions on goods, services or accommodations do not apply to an organization’s “ministry activities within its own faith community.”
- They do apply to activities “offered generally to the public”

Once the loan is paid or forgiven, the nondiscrimination obligations will no longer apply.
- Organizational affiliations do not count if they are “based on a religious teaching or belief or otherwise constitute a part of the exercise of religion.”
- Adopted as a new regulatory section!
Where We Are Now

SBA Loan Application Form

- Certification:

  "I will comply, whenever applicable, with the civil rights and other limitations in this form"

- Civil Rights Definition:

  **Civil Rights (13 C.F.R. 112, 113, 117)** – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

Where We Are Now

Other Legal Considerations

- General statutes: race, national origin, disability, age
- State law limitations, such as Colorado
- Religious exercise/expression protections
- Legal implications of certification on claiming exemptions
What Can We Do Now
Strategic and Management Considerations

- Determine your organization’s disposition (theological or otherwise) toward government support:
  - would you accept government funds even if there were no strings attached, or regardless of any such strings?
  - Determine your organization’s risk tolerance regarding potential legal implications for your religious exercise.

Articulate your standards for your members and your employees (i.e., your faith community), and for your activities, describing these standards as means by which you exercise and express your beliefs.

Affirmatively clarify in your application or other communication that your certification is based on your interpretation that, e.g., the SBA civil rights regulations add nothing to general civil rights laws that otherwise apply lawfully.
What Can We Do Now

I Peter 3:14-15

But even if you should suffer for what is right, you are blessed. “Do not fear their threats; do not be frightened.” But in your hearts revere Christ as Lord. Always be prepared to give an answer to everyone who asks you to give the reason for the hope that you have. But do this with gentleness and respect.

OSHA

- General Duty Clause
- Personal Protective Equipment
- Blood Borne Pathogens
- Infection Disease Preparedness & Response Plan
Human Resources Issues

- Executive Orders and Public Health Orders
  - Essential Services
- Furlough vs Layoff
- Paying (Non-Ministerial) Exempt vs Non-Exempt Employees
- Beware of Employment Agreements
- Mandated Benefits
  - FMLA: Coverage and benefits
  - Expanded FML for employers of fewer than 500 U.S. employees
  - Paid Sick Leave for employers of fewer than 500 U.S. employees

Retirement Plans: Coronavirus-Related Distributions

- Coronavirus-Related Distributions: Withdrawals by eligible individuals are available from:
  - all defined contribution plans (i.e., 401(k) plans, profit sharing plan, 403(b) plans);
  - 457(b) plans; and
  - IRAs.
- Eligible Individuals:
  - Any individual who is diagnosed with COVID-19;
  - Any individual whose spouse or dependent is diagnosed with COVID-19;
  - Any individual who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19; or other factors as determined by the Treasury Secretary.
Retirement Plans: Coronavirus-Related Distributions

- Coronavirus-related distributions are available from an individual's own contributions, any vested employer contributions, any rollover contributions, plus earnings, up to a maximum distribution amount of $100,000.
- The distribution must be made by December 31, 2020.
- The 10% penalty on early distributions will not apply, regardless of individual's age.
- Mandatory federal income tax will not be withheld, but individual can elect to have federal income tax withholding apply.
- Instead, the individual will pay federal income tax on the distributed amounts equally over a three-year period.

Retirement Plans: Coronavirus-Related Distributions

- Individual will be required to certify that he/she is eligible to receive a coronavirus-related distribution. No supporting documentation is needed.
- Individual may (but is not required to) repay the coronavirus-related distribution back to the distributing plan, to another employer’s tax-qualified retirement plan or to an IRA, within three years after receipt of the distribution.
  - IRS is expected to issue future guidance on how participants can recoup any income tax that was paid on repaid coronavirus-related distributions.
- The plan’s regular hardship distribution provisions will continue to apply in addition to this new coronavirus-related distribution.
Retirement Plans: Coronavirus-Related Distributions

- The plan sponsor is not required to offer Coronavirus-Related Distributions from its employer-sponsored retirement plans.
- For 401(k) plans, most employers will offer Coronavirus-Related Distributions.
- All IRAs are expected to offer Coronavirus-Related Distributions.

Retirement Plans: Required Minimum Distributions

- Required minimum distributions are those distributions required to be made upon an individual attaining age 72 (previously, 70-1/2) and, for plans other than IRAs, retiring.
- The Act waives required minimum distributions for defined contribution plans (but not defined benefit plans) and IRAs for 2020 and for any 2019 required minimum distributions that have not yet been made (which were due no later than 4/1/2020).
- It is uncertain whether the IRS will allow 2019 required minimum distributions that were already distributed to be repaid back into the distributing plan or IRA.
Retirement Plans: Extended Loan Provisions

- The Act doubles the current retirement plan loan limits to the lesser of $100,000 or 100% of the participant’s vested account balance.
- Only applicable to eligible individuals described for Coronavirus-Related Distributions above.
- Individuals with an outstanding loan from their plan with a repayment due from the date of enactment of the Act through Dec. 31, 2020, can delay their loan repayment(s) for up to one year, without violating the loan term limit rules of the Code.
  - However, interest must continue to accrue on those loans.
- The plan sponsor is not required to offer the extension of current loans or loans under the increased limits, although we anticipate that most plan sponsors will want to provide at least the one-year delay in loan repayments.

Health Plans: Testing Requirements

- Mandate began March 18 and will continue until the end of the public health emergency.
- Coverage without cost sharing, preauthorization, or medical management requirements for testing products for SARS-CoV-2 or COVID-19.
  - The tests must have been approved by the FDA or developed by a company that has requested emergency use authorization by the FDA and haven’t been denied that request or developed in and authorized by a state that has notified HHS of its intention to review the test or otherwise determined by HHS to be appropriate.
  - The testing must be reimbursed at either:
    - The negotiated rate in effect before the public health emergency was declared, or
    - The cash price as publicized by the provider on a public website or a lower, negotiated rate.
Health Plans: Testing Requirements

- Coverage without cost sharing, preauthorization, or medical management requirements for the administration of the test
- Coverage without cost sharing, preauthorization, or medical management requirements for items and services furnished to an individual during health care provider office visits (both in office or by telehealth), urgent care visits, emergency room visits that result in an order for or administration of the test (but only to the extent the items and services relate to the furnishing or administration of such products or the evaluation of the individual to determine whether the test is needed).

Health Plans: Preventive Services and Immunizations

- Mandate will begin 15 business days after the recommendation is made and will continue indefinitely
- Coverage without cost sharing for qualifying coronavirus preventive services (items, services or immunizations intended to prevent or mitigate COVID-19) and
  - Is an evidence-based item of service that has been given an A or B recommendation by the US Preventive Services Task Force or
  - Is an immunization that is recommended by CDC’s Advisory Committee on Immunization Practices
- No preventive services or vaccines for COVID-19 have been recommended at this time
- In other circumstances, a preventive service or vaccine doesn’t need to be covered until first plan year beginning on or after the date that is one year after the new recommendation or guideline is issued
Health Plans: Treatment

Treatment will be covered pursuant to the terms of the plan. May be subject to:

- Copays
- Deductions
- In-Network/Out-Of-Network Rules
- Preauthorization
- Case management requirements
- Experimental/Investigational Limitations

FSAs/HSAs

- Qualified medical expenses that can be reimbursed from an HSA/FSA now include over-the-counter drugs (without a prescription).

- High deductible health plans can provide for payment of testing, treatment and telehealth without requiring a copay without disqualifying a participant from contributing to a health savings account.
Education Assistance Plans

- Education assistance plans can be amended to allow employers to pay employees' educational loans without including it in income.
- All education assistance still is limited to $5,250 per calendar year per employee.
- Permitted through December 2020.

Qualified Disaster Relief Payments

- Employees may exclude “qualified disaster relief payments” from taxable income under Code Section 139.
- Can be used to reimburse or cover reasonable and necessary “personal, family, living, or funeral expenses” incurred as a result of COVID-19.
- Because of its limited application, there is little guidance about how to apply Code Section 139, but many professionals believe that this provision can be used to cover reasonable and necessary expenses, including:
  - childcare expenses where schools are closed due to COVID-19 or where parents must work extended hours for COVID-19 relief;
  - work from home expenses where working from home is necessary due to COVID-19;
  - medical expenses not reimbursed by insurance or medical supplies related to COVID-19; and
  - housing, transportation and living expenses incurred as a result of moving or isolation required by COVID-19.
- There is no cap on the amount of expenses that can be excluded from taxable income.
- Employees are also not required to substantiate actual expenses in order to qualify for the exclusion, as long as the amount of payments from the employer can be reasonably expected to be commensurate with the expenses that are incurred. However, payments cannot be reimbursed or reimbursable by insurance or otherwise.
- Employers are not required to adopt a written plan in order to provide qualified disaster relief payments, but a written program explaining the terms would be advisable.
A sample force majeure provision:

“The parties’ performance under this Contract is subject to acts of God, war in the continental US, government regulation, terrorism, disaster, strikes and civil disorder, all within a five (5) mile radius of Hotel, curtailment of transportation where forty percent (40%) of attendees are unable to travel on peak night of event, or any other emergency beyond the parties’ control making it illegal or materially affecting a party’s ability to perform their obligations under this contract. Either party may cancel this contract for any of the above reasons within seven (7) days of such occurrence.”

Giving notice:

▶ when is a FM provision triggered?
▶ to whom?
▶ mutual cancellation
Practical considerations:

- how much $ is involved?
- how important is the relationship?
- possibility of re-scheduling?

Other issues:

- return of deposit
- liquidated damages provisions
- what if there is no FM provision?
Focus Of This Webinar

- Time Element Coverages
- Event Cancellation Coverage
- D&O Considerations

Time Element Coverages

- Commercial property insurance coverage
- Cover loss of income from an interruption of business activities
- Example: The Coronavirus shuts down your business and, as a result, your business loses income from its inability to operate
Time Element Coverages - Types

- Business Interruption (damage to your property)
- Contingent Business Interruption (damage to a supplier’s property)
- Civil Authority (damage to nearby property)
- Ingress/Egress (damage to nearby property)

Key Coverage Issues

- Direct Physical Loss
- Virus Exclusion
Direct Physical Loss

- Coverage requirement: Direct Physical Loss
- Policies typically do not define “direct physical loss”
- Key Issue: Whether Coronavirus contamination constitutes “direct physical loss”

Direct Physical Loss – Argument for Coverage

- The Coronavirus has contaminated equipment rendering the business premises unusable
- The contamination constitutes “direct physical loss”
Direct Physical Loss – Argument Against Coverage

- Coronavirus contamination does not cause any physical injury to tangible property
- Proof that virus contaminated specific surfaces within a business

Legal Activity

- 6 lawsuits filed as of April 6, 2020
  - Louisiana/California/Oklahoma (2)/Illinois/Florida
- 5 bills introduced in state legislatures
  - New Jersey/Ohio/Massachusetts/New York/Louisiana
Direct Physical Loss - Conclusion

- No clear answer
- Case law addressing analogous situations go both ways

Virus Exclusion

- Found in most commercial property policies
- Precludes coverage for losses caused by various pathogens – including viruses
**Virus Exclusion**

- Exclusion added in early 2000s in response to the SARS outbreak
- Not all policies contain a virus exclusion
- Not all virus exclusions are broad
- Important to review your policy closely

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**Event Cancellation Coverage**

- Purpose: Cover loss of revenue arising from cancellation of an event beyond your control
- Keys
  - Cancellation
  - Cause beyond your control
Event Cancellation Coverage

- Key Issue – Virus Exclusion (communicable disease)
- Language of exclusion various – read the policy
- Communicable Disease Endorsement
  - Exists in some policies
  - Typically purchased for additional premium

D&O Considerations

- Two Types Of Policies
- Public Companies: D&O insurance
- Private Companies: Management liability insurance
D&O Renewals

- Renewal Season (1Q/2Q)
- Pay Close Attention To Renewal Application Questions
- Provide direct and complete responses
- Risk: Denial based on false/incomplete answers

D&O Notice of Circumstance

- D&O policies are claims made policies
- Industry anticipates broad COVID-19 exclusions
- Consider sending notice of circumstance
- Preserve coverage under current policy year
ECFA.org/Content/ECFA-COVID-19-RESOURCES

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