COVID-19 Checklist for Indiana Businesses

Presented by:
Amy J. Adolay
Robert A. Greising
Alexander L. Mounts
Matthew D. Neumann

April 16, 2020
These materials should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult an attorney on any specific legal questions you may have concerning your situation. This document may constitute advertising materials in some jurisdictions. If you forward this document, please designate it as such.

© 2020 Krieg DeVault LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Krieg DeVault LLP. It may not be reproduced, in any form, without the express written consent of Krieg DeVault LLP.

This constitutes attorney advertising. Krieg DeVault LLP, Indianapolis, Indiana is responsible for this content.
About Our Speaker

Amy J. Adolay focuses her practice on employment law counseling and litigation and school law. Ms. Adolay serves as the Chair of the firm’s Labor and Employment Practice Group. She counsels employers on complex human resources issues that arise on a daily basis in the workplace and defends employers before administrative agencies and in state and federal courts. Ms. Adolay handles a wide variety of types of claims, including discrimination, harassment, retaliation, family and medical leave, disabilities, unemployment compensation, wage and hour, and restrictive covenants. Ms. Adolay also routinely reviews, revises, and drafts employment related documents such as employee handbooks, employment policies and procedures, employment agreements, severance and retention agreements, and non-compete and non-solicitation agreements.

Ms. Adolay’s extensive employment law experience has included representing employers in collective actions and litigating complex claims relating to discrimination, restrictive covenants, and various other employment and contract disputes.

DISCLAIMER:

The contents of this presentation should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your situation and specific legal questions you have.
COVID19 – Business Checklist: Obligation to Create Safe Workplace

• Obligations under OSHA
• Following CDC Guidance
• Obligations under FMLA/ADA

• Questions:
  • Can my employee get unemployment if they refuse to come to work due to fears of contracting COVID-19?
  • Can my employee get workers compensation if they contract COVID-19?
COVID19 – Business Checklist: Employee Absences Due to COVID-19

• Employer leave policies
• Furlough/WARN Act issues
• Families First Coronavirus Response Act (FFCRA)
  • Emergency Family and Medical Leave Expansion Act (EFMLEA)
  • Emergency Paid Sick Leave Act (EPSLA)
  • Which employers are covered by FFCRA?
  • What are the qualifying reasons for taking FFCRA leave?
  • How much leave do these laws provide?
  • How much do I have to pay my employees who take these leaves?
COVID19 – Business Checklist: Exemptions under FFCRA

• Small Business Exemption
• Health Care Provider Exemption
• Emergency Responder Exemption
COVID19 – Business Checklist: Employer Tax Credits Under FFCRA and CARES ACT

• FFCRA Payroll Tax Credits/Refunds
• CARES Act Employee Retention Tax Credits/Payroll Tax Deferrals
COVID19 – Business Checklist: Employee Return to Work Issues

• When should I allow employees to return to work post-exposure or post-positive COVID-19 test?
• What can I ask employees who return to work?
• Can I require a doctor’s note for return to work?
• Can I test all employees for COVID-19?
About Our Speaker

Robert A. Greising(devotes his practice primarily to general corporate, corporate finance, business, healthcare technology, and education areas. Mr. Greising is one of the Firm’s leads on the COVID-19 response, with a focus on the impact of the Coronavirus pandemic on small and mid-sized businesses.

Mr. Greising has served as lead counsel in many merger and acquisition transactions and in the sale of numerous publicly and privately-held businesses across a broad spectrum of industries. He is actively involved in the firm’s efforts to serve family-owned and closely-held businesses as well as entrepreneurial and development stage companies. In addition, he has been the lead on joint ventures and strategic alliances in the healthcare and community mental health sectors, as well as for the financial services industry, the education sector, technology and software, and energy fields and on outsourcing projects and public/private partnerships involving governmental services and information technology.

DISCLAIMER:

The contents of this presentation should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your situation and specific legal questions you have.
COVID19 – Business Checklist: General Key Steps

- Force Majeure
  - What is it?
  - What are the implications?
  - Where to look?
  - Is COVID-19 likely a Force Majeure event?
COVID19 – Business Checklist: General Key Steps

- MAC Considerations
  - What is it?
  - What are the implications?
  - Where to look?
  - Does COVID-19 likely trigger a MAC clause?
COVID19 – Business Checklist: General Key Steps

• Financing Considerations
  • Existing facilities: multiple default risks
    • Covenants
    • Borrowing base draw certifications
    • Payment misses
    • Other defaults
  • Commitments
  • Incentive financing employment targets
COVID19 – Business Checklist: General Key Steps

• Fiduciary Duties and Decision Making
  • General duties to shareholders/members
  • Possible expansion to other creditors during financial stress

• Decision Process
  • Reasonable business judgment
  • Be informed
  • Can include multiple constituencies in the decision grid
  • Consider special committee
COVID19 – Business Checklist: Paycheck Protection Program

• Maximum amount: lesser of 2.5 average payroll over past 12 months or $10M
  • US Based employees
  • Up to $100K of cash compensation for each employee
• General terms:
  • 1% interest per annum
  • 6 month deferral
  • 2 year maturity
• Waiver of normal SBA requirements for guaranties, collateral and “credit elsewhere” limit
COVID19 – Business Checklist: Paycheck Protection Program

• First Come / First Served
  • $349B – much of it already allocated
• Employee Count and Affiliation Rules
  • Generally 500 employee cap
  • Affiliation: broader control concepts
COVID19 – Business Checklist: Paycheck Protection Program

• Permitted Uses
  • Payroll Costs: salaries, wages, benefit costs and state/local employment taxes
  • Rent, Utilities and Interest on Mortgages [all must be in place by 2/15/20]
  • Interest on debt incurred before 2/15/20
  • Refinance EIDL debt incurred between 1/31/20 and 4/2/20
COVID19 – Business Checklist: Paycheck Protection Program

• Forgiveness
  • Principal and interest
  • Maximum of amounts spent on payroll costs and permitted rent, utilities and interest on mortgage
  • Reduction in forgivable amount tied to reduction in headcount and wage base

• Timeframes
  • 8 weeks to incur forgivable costs
  • 6 months deferral before first payment
  • 2 years maturity for PPP loan
COVID19 – Business Checklist: 5 Key Business Tax Items

• PPP Forgiveness Not Taxable Income
• New Refundable Payroll Tax Credit
• Deferral of Timing for Deposit of Payroll Taxes
• NOL Carryback Increased to 5 Years
• Immediate Write-off of Costs for Improving Facilities
About Our Speaker

Alexander L. Mounts
amounts@kdlegal.com
317.238.6335

Alexander L. Mounts is chair of the firm’s Employee Benefits and Employee Stock Ownership Plans (ESOPs) Practice Groups. His practice includes counseling both for-profit and not-for-profit clients on a wide spectrum of employee benefits-related matters, including but not limited to, drafting and designing qualified retirement plans; counseling on tax and benefit issues in mergers and acquisitions; interacting with the IRS and DOL on correction of operational and plan document failures; responding to IRS or DOL plan audits; or requesting IRS or DOL guidance through private letter rulings, advisory opinions or prohibited transaction exemptions.

Mr. Mounts also has a focus on employee stock ownership plans (ESOPs) and spends significant time working with companies, trustees, lenders and sellers on issues surrounding ESOPs including design and implementation, sales of ESOP companies, ongoing advice and fiduciary and governance counseling. His practice is also focused on executive compensation matters including designing and implementing nonqualified deferred compensation plans and equity and non-equity-based incentive compensation programs for public, private, and not-for-profit companies.

DISCLAIMER:

The contents of this presentation should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your situation and specific legal questions you have.
COVID19 – Business Checklist: CARES Act and Certain Retirement Plan Distributions

Coronavirus-Related Defined Contribution Retirement Plan Distributions

- Certain retirement plans (401(k) plans, 403(b) plans, 457(b) plans maintained by governmental entities) can be amended to provide for distributions of up to $100,000 in 2020 to address coronavirus-related hardships for participants who:

  - Are diagnosed with SARS-CoV-2 or COVID-19 (using a CDC-approved test)
  - Has a spouse or dependent that is also diagnosed with such virus; or
  - Experience adverse financial consequences as a result of quarantine, furlough, layoff, reduction in work hours, being unable to work due to a lack of child care, closing or reducing hours of a business due to such virus or disease.
COVID19 – Business Checklist: CARES Act and Retirement Plan Distributions

**Coronavirus-Related Retirement Plan Distributions**

- Companies may rely on participant certification of eligibility;
- The 10% excise tax applicable to early distributions is waived;
- The distribution is included in a participant’s income ratably over a 3-year period (unless the participant elects complete taxation for the year of receipt);
- Participants may repay a distribution to the plan over a 3-year period; and
- The $100,000 limit applies, in the aggregate, to all plans maintained by a company and members of any controlled group that includes the company.
COVID19 – Business Checklist: CARES Act and Retirement Plan Loans

**Coronavirus-Related Retirement Plan Loans**

- The provisions below apply to an individual who meets the requirements discussed above during the 180-day period beginning on March 27, 2020.

- The maximum loan a participant may take is the lesser of $100,000 (increased from $50,000) or the value of the individual’s vested account balance under the plan (the 50% limitation has been removed).

- Due dates for repayment of participant loans falling between March 27 and December 31, 2020 are delayed for one year, and subsequent due dates are adjusted to reflect such delay.

- If the individual had an existing retirement plan loan in place, the company may allow repayment to be delayed for a one-year period.
Temporary Waiver of Required Minimum Distributions

• Required minimum distributions (RMDs) do not apply for the 2020 calendar year 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.

• The 5-year and 10-year distribution periods for beneficiaries are determined without regard to the 2020 calendar year.

• Any distributions made in 2020 that would have otherwise been RMDs had the minimum distribution requirements applied during 2020, may be treated as eligible rollover distributions.
COVID19 – Business Checklist: CARES Act and Defined Benefit Plans

Temporary Waiver of Minimum Funding Requirements

- Allows for a plan sponsor to elect to treat the plan's adjusted funding target attainment percentage for the last plan year ending before Jan. 1, 2020, as the adjusted funding target attainment percentage for the plan year that begins in calendar year 2020.

Delay of Required Minimum Contributions

- Required minimum contributions (RMCs) that would otherwise be due during the 2020 calendar year (including quarterly contributions not yet paid); are now due Jan. 1, 2021, and are subject to increase by interest (at the plan's effective rate of interest for the plan year) accruing for the period between the original due date and the payment date.
Exemption for Telehealth Services

• For plan years beginning on or before December 31, 2021, a health plan may, but is not required to, provide first dollar coverage for telehealth and remote care services without it losing its high deductible health plan status or disqualifying an individual’s ability to contribute to an HSA.

Certain Over-The-Counter Medical Products Treated as Qualified Medical Expenses

• Retroactive to January 1, 2020, HSAs, Archer MSAs, health flexible spending arrangements, and health reimbursement arrangements can now permanently provide coverage for qualified reimbursement of amounts paid for (i) menstrual care products and (ii) over-the-counter drugs without a prescription. Under these new provisions, “menstrual care products” means a “tampon, pad, liner, cup, sponge, or similar product used by individual with respect to menstruation or other genital-tract secretions.”
COVID19 – Business Checklist: CARES Act and Welfare Benefit Plans

Expanded Coverage and Reimbursement Rules for COVID-19 Testing and Immunizations

• Expands the requirement that group health plans provide first-dollar coverage of COVID-19 testing and to reimburse providers of COVID-19 testing according to rates negotiated as of January 31, 2020.

• Requires group health plans and health insurers to cover any “qualifying coronavirus preventive service” at no cost-share.

• For more information, America’s Health Insurance Plans has compiled a comprehensive list of prevention, testing, and treatments of COVID-19 that fully-insured carriers have announced they will cover at no cost-share to their members.

• While not required, some of the nation’s largest health insurance carriers (e.g. Anthem, Cigna, Humana and UnitedHealthcare) are waiving cost-sharing of COVID-19 treatment for their fully-insured members.
Partial Plan Terminations

- Participants who have not terminated who are on leave of absence or furlough are not included.

- In general, if 20 percent or more of your employees terminate due to a downturn in business, a “partial plan termination” is likely to have occurred.

- There are nuanced rules regarding how you determine who is counted as a terminated employee.

- The result of a partial plan termination is that the terminated participants become 100% vested in their plan accounts.

- If a partial termination occurs and the affected participants do not become 100% vested, terminated participants may be paid less than they are due. If this occurs, your plan has a qualification issue which would need to be addressed.
COVID19 – Business Checklist: Impact of Reductions on Benefits Plans

Other Retirement Plan Considerations

• Leave time and hours of service requirements
• Reductions of workforce and partial plan termination
• Minimum coverage testing and contribution limits
• Effect of payments under FFCRA and Emergency FMLA on eligible compensation

Health and Welfare Plan Matters

• Reviewing eligibility for participation in the plan
COVID19 – Business Checklist: Recent IRS Benefits Guidance

- Contributions to Health Savings Accounts (HSAs) made on or before July 15, 2020 may be designated as 2019 contributions.

- Employers with a federal income tax return due date of April 15, 2020 may make deductible contributions to a qualified retirement plan that are treated as made on account of the 2019 tax year, until July 15, 2020.

- While the individual tax return deadline was postponed from April 15, 2020 to July 15, 2020, information returns (e.g., Form 5500) due April 15, 2020 are NOT automatically extended.

- Similarly, the April 15, 2020 deadline for removing 2019 excess elective deferrals from an employer’s retirement plan has not been extended.
About Our Speaker

Matthew D. Neumann
mneumann@kdlegal.com
317.238.6210

Matthew Neumann focuses his practice in the areas of insurance coverage, risk management, environmental, health & safety, government investigations and crisis management. Matthew is part of the Firm’s COVID-19 Task Force, with a focus on the impact of COVID-19 on insurance coverage, workplace safety and risk management. Matthew’s practice includes litigation, transactional and regulatory components, and he has represented entities of all sizes, from conglomerated, multi-national corporations, municipalities and universities, to smaller family-owned companies, to startups, entrepreneurs and individuals.

Matthew represents policyholders in varied insurance coverage matters, including claims handling matters, coverage disputes, coverage litigation, cost recovery matters, and risk management and policy procurement counseling. Matthew’s work for policyholders extends to all types of commercial coverages, including Commercial General Liability (CGL), Property, Pollution/Environmental, Directors & Officers (D&O), Fiduciary Liability, Employment Practices, Cyber Liability, Health Care, Life Science, Product Liability, Fidelity/Crime and Umbrella/Excess policies.

DISCLAIMER:

The contents of this presentation should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your situation and specific legal questions you have.
COVID19 – Business Checklist: Insurance Coverage

• Fact-Specific Inquiry
  • COVID-19’s particular impact on your business
  • Your particular coverages
• First-Party v. Third-Party Coverages
• Act promptly. Be mindful of late notice issues and deadlines in ‘claims made’ policies
COVID19 – Business Checklist: Coverages Potentially Implicated

• Business Interruption
• Worker’s Compensation
• Property
• Commercial General Liability (CGL)
• Professional Liability
• Directors & Officers / Employment Practices
• Specialized Coverages
  • Cyber
  • Event Cancellation Coverage
  • Civil Authority Coverage
COVID19 – Business Checklist: Potential Exclusions

• Virus, Fungi or Bacteria Exclusions
• Communicable Disease Exclusions
• Pollution Exclusions
COVID19 – Business Checklist: Action Plan

**Step 1. Inventory Your Policies:** Know what coverages you have. Get organized. Collect and inventory your policies. Create a coverage chart. (Rely as much as possible on your insurance agent for these items.)

**Step 2. Identify the Impacts:** Identify the impact COVID-19 is having on your business. Identify future impacts and future claims that may result from COVID-19.

**Step 3. Talk with Your Counsel and Agent:** Talk with your attorneys. Engage with a skilled coverage attorney. Talk with your insurance agent generally about potential coverage for a hypothetical COVID-19 circumstances or claims.
Step 4. Identify Trigger: Work with your attorneys to identify when the impact of COVID-19 is sufficiently acute to “trigger” coverage. Generally we recommend to “over” notify (i.e., better to notify sooner rather than later and better to notify under all/more of your policies, than just some).

Step 5. Give Notice: Once coverage is triggered, promptly (i.e., immediately) give written notification to your agent and carriers.

Step 6. Do Not Assume No Coverage: Do not assume coverage is not available. Do not accept at face value a statement from an agent or carrier there is no coverage. Have coverage determinations reviewed by coverage counsel.
COVID19 – Business Checklist: Claims Handling 101

• Over-notify
• Over-communicate
• Minimize your losses
• Understand the coverage issues on the front end and control the dialogue
• In external discussions, always assume and act like there is coverage. Do not assume there is not coverage
• Do not accept at face value a statement from insurance agent or insurance carrier there is no coverage. Have coverage counsel review
COVID19 – Business Checklist: Final Thoughts

• Limited downside to giving notice of a circumstance/claim
• Generally, worst that can happen is get a denial (though be aware of potential for declaratory judgment action)
• Likelihood of impact to your premiums is low
• You can always withdraw the claim
• Difficult to predict how coverage for COVID-19 will unfold. Lot of developments underway
• Act now. Be positioned for future developments
  • Examples: Early court victories by policyholders (Hurricane Katrina). Legislative developments
COVID19 – Business Checklist: Insurance Coverage Takeaway

• Be Proactive – Act Now
• Keep an Open Mind
• Over-Notify
• Position Your Business for Future Developments
Questions?

Robert A. Greising
rgreising@kdlegal.com
317.238.6215

Amy J. Adolay
aadolay@kdlegal.com
317.238.6330

Alexander L. Mounts
amounts@kdlegal.com
317.238.6335

Matthew D. Neumann
mneumann@kdlegal.com
317.238.6210

Krieg DeVault LLP COVID-19 Insights Webpage
https://www.kriegdevault.com/info/covid--insights