

COVID-19: Small Business Overview

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PREPARED BY

Laura Skaar
Skaar Law Office

(630) 232-6000

INFO@SKAARLAW.COM

WWW.SKAARLAW.COM/COVID-19/BIZ/

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To our clients:

The current COVID-19 pandemic has obviously raised a lot of issues for small businesses; aside from the financial impact, there are many other important things that we will all need to address in the coming months, including new government programs and policies designed to stem the outbreak and help small business stay afloat.

Although these new programs and policies continue to evolve day by day, our office has put together this brief overview of issues that we believe all small business owners should be aware of.

This overview contains a brief outline and comments for a variety of topics relating to the COVID-19 pandemic, including:

- Operating your business during the COVID-19 pandemic;
- Healthy employees who refuse to work;
- Handling employee health information in compliance with state and federal law;
- New federal sick leave policies (created by the "Family First Coronavirus Response Act");
- Layoffs, payroll, and unemployment compensation issues;
- Resources to help businesses continue to pay rent or operating expenses, and payroll; and
- State and federal loans available to small businesses.

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This overview is not meant to serve as an exhaustive resource, but rather as a preliminary guide to help you to identify important considerations as you develop a plan for your business in light of the COVID-19 pandemic. Of course, because the situation continues to evolve day to day, it would be advisable for us to discuss these issues as they arise to determine the best course of action to protect you and your interests.

As a small business ourselves, we understand what you are going through, and we want to help you navigate these issues however we can. You can contact us at any time – whether you have specific questions or just want to check in to make sure you're complying with current laws and policies, just know that we're here as a resource for you whenever you need us. As usual, you can reach us by phone and email, and will also be available for video conferences during this time. We are all in uncharted territory here, so please don't hesitate to contact us for any question you might have, no matter how small. We will get through this together.

We will continue to research the new state and federal policies being implemented on COVID-19, and we will provide periodic updates as new information becomes available. In the meantime, please feel free to reach out to us with any questions, and stay safe.

Sincerely,


Jim Skaar
Attorney


Laura Skaar
Attorney

OPERATING DURING THE PANDEMIC

- What is an **"essential business"** under the Illinois stay-at-home order?
 - The March 20 executive order only allows "essential businesses" to operate during the stay-at-home order. A list of essential business types can be found [here](#).
 - Non-complying businesses have recently been given 24-hour closure notices ([example](#)). Those failing to close after 24 hours may be subject to civil or criminal charges.
- Workplace safety
 - OSHA only requires employers to take "reasonable steps" to protect employees during the COVID-19 pandemic. Unless you are a healthcare provider, you are not required to provide personal protective equipment (PPE) to your employees or customers.
- Employee issues generally
 - You should make an effort to document all information about employee issues and how they were resolved (including keeping your own records and providing written notice to the employee, when appropriate). This will be very helpful in protecting your business if any disputes arise.
- **Healthy employees who won't come to work**
 - Under most circumstances, **an employee who refuses to come into work will be deemed to have quit**, rather than fired or laid off.

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OPERATING DURING THE PANDEMIC

- **Healthy employees who won't come to work (continued)**
 - Employees may refuse to work only if they believe that they are in "imminent danger," which includes conditions that could cause death or serious physical harm in a very short period of time. A healthcare worker being required to work with COVID-19 infected patients without PPE would meet this standard; most other situations will not.
 - In this situation, you should issue a written notice to the employee confirming that he/she has quit and was not laid off or fired; this will be very helpful in any related disputes.

- Working from home/remote work
 - Only the employer has the right to determine where an employee's work may be performed (not the employee).
 - Employees with underlying disabilities that put them at high risk for complications relating to COVID-19 may request to work from home as a reasonable accommodation under the ADA.

- **Reimbursing employees** who work remotely (work from home)
 - **Illinois law may require some employers to reimburse employees for their remote work expenses.**
 - This may include not only setting up equipment in the employee's home workspace, but also **recurring costs** such as phone and internet usage.
 - If you have employees who are currently working from home, or may be in the future, consider implementing a policy requiring employees to have remote work expenses preapproved prior to purchase.

EMPLOYEE HEALTH ISSUES

- **Quick info & action items**

- You can now ask employees for medical information related to COVID-19, but there are strict **confidentiality** requirements that must be met.

- When you inform your staff that an employee has tested positive for COVID-19, **you may not disclose the infected employee's name or any medical/identifying information about the employee.**

- Employee medical information

- Employers who do not handle this information properly could be subject to strict **fines or penalties** under the ADA. (HIPAA does not apply to employment.)

- Employee medical information is any information regarding an employee's medical symptoms, medical conditions, or diagnoses.

- **Requirements** for handling employee medical information:

- Confidentiality: employers may not share or disclose employee medical information.

- Non-discrimination: an employer's knowledge of the information cannot unfairly impact the employee.

- Separation: **employee medical information must be stored separately from employee personnel files.**

- Employers may ask employees about their medical condition as it relates to exposure, symptoms, and diagnosis of COVID-19.

EMPLOYEE HEALTH ISSUES

CAN MY BUSINESS...

Ask an employee questions about symptoms/diagnosis?

✓ **YES**, as long as the information is related to COVID-19.

Send an employee home from work for coughing?

✓ **YES**, if the employee is showing COVID-19 symptoms.

Take an employee's temperature at work?

✓ **YES**. This is normally prohibited by federal law, but the rule has been temporarily suspended during the COVID-19 pandemic.

- Employees with COVID-19 symptoms or diagnoses
 - Sick employees should be encouraged not to come to work, and in many states (including Illinois) they are required by law to stay home.
 - **New federal sick leave policies will likely come into play (see the following "Sick Leave Policies" section).**
 - An employee cannot be required to work from home on days that he is using any kind of sick leave or time off.
 - Ensure compliance with CDC and state guidelines for contagious period and return to work.
- **Informing your staff of COVID-19 exposure when an employee tests positive**
 - **You must keep all employee health information confidential, including the infected employee's name, any identifying information, and medical information.**
 - Most industries do not have state or federal government reporting requirements for COVID-19.

SICK LEAVE POLICIES

- **Quick info & action items**

- Consider providing all employees with **written notice** of existing leave policies, available time off, and new federal leave policies.
 - **New federal leave policies will give employees up to 2 weeks paid sick leave and up to 10 weeks paid childcare leave during the COVID-19 pandemic.**
 - **Your business will be eligible to receive a 100% federal tax credit for wages paid under the new leave policies.**
- Best practice: give employees a written notice explaining:
 - How much sick leave/time off the employee currently has available;
 - A summary of the company's current sick leave policy;
 - A summary of the new federal sick leave policies;
 - How the new federal policies will work with existing company policy; and
 - Any notice procedures you'd like employees to follow when they need to take sick leave.

SICK LEAVE POLICIES

- **Families First Coronavirus Response Act (“FFCRA”)**
 - General
 - Federal law passed in March 2020 providing COVID-19 relief — including important new federal sick and childcare leave policies.
 - Applies to private employers with less than 500 employees, with some exceptions.
 - Takes effect on April 1 and lasts the rest of the year.
 - IMPORTANT: leave policies are **not retroactive**
 - Any sick leave taken prior to April 1 will not count against the allowed total number of days in FFCRA.

NEW FEDERAL POLICIES AT A GLANCE:

| | <u>SICK LEAVE</u> | <u>CHILDCARE LEAVE</u> |
|-------------------------------------|--|---|
| Official name of federal act | Emergency Paid Sick Leave Act | Emergency Family & Medical Leave Act |
| Available for... | Quarantine or illness of employee or family member, or childcare | School/childcare provider is closed due to COVID-19 |
| Eligibility | Immediate | 30 days on payroll |
| Max duration | 2 weeks (10 work days) | 12 weeks (60 work days) |
| Percentage of base pay | Employee illness: 100% Family/child care: 67% | First 2 weeks: unpaid Subsequent weeks: 67% |
| Employer tax credit applies? | 100% of wages paid during leave | 100% of wages paid during leave |
| Retroactive? | No (begins April 1) | No (begins April 1) |

SICK LEAVE POLICIES

- Families First Coronavirus Response Act (“FFCRA”)
 - **Sick leave policy.**
 - Employees are immediately eligible for FFCRA sick leave (no waiting period).
 - All employees are entitled to take up to 2 weeks of paid leave for the following:
 1. Employee is subject to quarantine or isolation order (more than general state “stay at home” order);
 2. Employee is advised to self-quarantine by a medical professional due to potential exposure;
 3. Employee is experiencing COVID-19 symptoms;
 4. Employee is caring for a family/household member experiencing #1-3 above; or
 5. Caring for a child whose school/childcare provider is closed due to COVID-19.
 - Amount of pay depends on reason for leave/who is sick:
 - For #1-3 above, the employee is entitled to 100% of his regular pay
 - For #4 and 5 above, the employee is entitled to 67% (2/3) of his regular pay
 - Employee can't be required to use accrued sick days/PTO before using FFCRA sick leave.
 - Under the current rules, once an employee returns from FFCRA sick leave, he forfeits any remaining days (note: this is likely to be changed in the near future).
 - **Employer tax credit applies (see below).**

SICK LEAVE POLICIES

- Families First Coronavirus Response Act (“FFCRA”)
 - **Childcare leave policy**
 - Different from federal FMLA
 - Employees are eligible if they have been on the company’s payroll for at least 30 days prior to the leave.
 - Eligible employees are entitled to up to 12 weeks of leave to care for a child whose school/childcare provider is closed due to COVID-19.
 - The first 2 weeks are unpaid, but can be supplemented by sick days/PTO from employer or FFCRA sick leave (employee’s choice).
 - The subsequent 10 weeks are paid at 67% of the employee’s regular pay.
 - There is a potential exemption to FFCRA childcare leave for businesses with less than 50 employees (federal guidance forthcoming).
 - Employer must restore employee to the same or comparable position upon return from leave, with a potential exception for small businesses.
 - **Employer tax credit applies** (see below).
 - **Employer tax credit**
 - **Employers are eligible for a 100% federal tax credit for all wages paid under FFCRA sick and childcare leave.**
 - Tax credit cap:
 - Sick leave:
 - Employee quarantine/illness: \$511/day, \$5,110 total
 - Family care: \$200/day, \$2,000 total
 - Childcare leave: \$200/day, \$10,000 total
- **You must provide notice to employees of the new FFCRA leave policies** (federal fine/penalty for noncompliance).

LAYOFFS & STAFFING ISSUES

- Layoffs vs. furloughs: what's the difference?

| | LAYOFF | FURLOUGH |
|-----------------------------------|---|--|
| General definition | Indefinite (often permanent) break in the employment relationship | Suspension of work without pay for a limited time period |
| Employee's status | Officially separated from company | Still employed but inactive/reduced hours |
| Can employee continue to work? | No | Reduced hours possible |
| Paid? | No | No (or reduced) |
| Health insurance? | No | Yes |
| Eligible for unemployment? | Yes | Yes |
| Final paycheck & vacation payout? | Yes | No |

- Implications
 - IMPORTANT: **final paycheck requirements must be strictly observed** – failure to do so can result in severe fines and penalties to the employer.
 - Make sure you know how to handle requirements under COBRA, the Affordable Care Act, and the WARN Act.
- Unemployment claims
 - Laid off, furloughed, or terminated employees are **eligible to apply for unemployment benefits** in Illinois (including temporary layoffs due to COVID-19).
 - The rules for **employer contributions** in these circumstances have not yet been adjusted, but **further guidance is expected soon**.

FINANCIAL DIFFICULTIES

- Business interruption/income insurance
 - Current issues involve whether physical damage has been sustained — we will need to review the policy documents.
- **"Force Majeure" & "Act of God" clauses**
 - Contract provisions that excuse performance when an extraordinary and unforeseeable event prohibits one party from performing its obligations under the contract.
 - The wording varies in each contract, so a **case-by-case review will be necessary** to determine if this may apply.
- Paying creditors & vendors
 - Private/public short-term financing
 - We may be able to negotiate the terms of your agreement to help deal with payment issues related to COVID-19.
- Payroll interruptions
 - Several of the **federal and state loans** have provisions for payroll assistance (some can be converted to grants).
- Rent forbearance
 - Residential leases
 - Evictions have been suspended in Illinois through April 7, 2020. This date is likely to be extended in conjunction with extensions to the "stay at home order."
 - Some property owners with Fannie/Freddie loans (along with a handful of private mortgage companies) may be eligible for a **payment deferral of up to 90 days**.
 - Commercial leases
 - We may be able to work with your landlord or tenant to negotiate amended lease terms to help deal with payment issues related to COVID-19.

LOANS & ASSISTANCE PROGRAMS

- State information sharing
 - Illinois has an online form that allows small businesses to provide information that will be used to determine proper allocation of state resources.
 - Participation is optional, but highly encouraged.
- State aid
 - **Illinois Small Business Emergency Loan Fund**
 - Low-interest loans up to \$50,000 to support **working capital** (rent, payroll, accounts payable, etc.).
 - Eligible businesses
 - Less than 50 employees
 - 2019 revenue of less than \$3 million
 - 5 year duration: first 6 months at 0% interest, with fixed payments for the remaining term
 - Availability
 - Interest form available now
 - **Full application available starting Wednesday, April 1**
 - Final decision will be made within 10 business days, and loan funds will be available within 2 business days.
 - Hospitality Emergency Grant Program
 - Grants to bars and restaurants of up to \$25,000 (scaled based on 2019 revenue) to support working capital
 - Lottery applications due by 5:00 PM on Wednesday, April 1
 - Downstate Small Business Program
 - Grants of up to \$25,000 available now on a rolling basis
 - Kane County businesses are not eligible for this grant.

LOANS & ASSISTANCE PROGRAMS

- Federal aid
 - Small Business Association ("SBA"): Economic Injury Disaster Loans ("EID" loans)
 - Loans of up to \$2 million to support **working capital** (rent, payroll, accounts payable, etc.).
 - Amount based on **economic injury to business** caused by COVID-19 pandemic, less any business interruption insurance payout.
 - Loan terms
 - Maximum of 30 years
 - Interest rate capped at 3.75%
 - Cannot be used to refinance existing debts
 - Filing deadline: **December 21, 2020**
 - CARES Act
 - **Paycheck Protection Program ("PPP")**
 - Forgivable loans available to businesses that maintain payroll during the COVID-19 pandemic.
 - **Up to 8 weeks of payroll forgiveness.**
 - Eligibility requirements are more complex than other loan/assistance programs.
 - **The deadline to apply is June 30, 2020, so contact us ASAP if you are interested in applying for the PPP.**
 - Small Business Debt Relief Program
 - Cover initial costs, principal, interest, and fees on some SBA loans for up to 6 months.
 - Emergency advances of SBA loan funds
 - Free business counseling services

CONTACT US

This is an unprecedented and uncertain time for all of us, and small business owners are certainly no exception. Please know that our office is here to help you in any way we can – from answering your questions, researching an issue, helping you handle an emergent situation, or just discussing ways you can prepare, we want to be here for you during this difficult time.

While we are working remotely in compliance with federal and state recommendations, our entire staff is still fully available and ready to help. You can call our regular office number, (630) 232-6000, which is set to forward to our remote workstations, or you can contact any of us directly as follows:

Jim: (630) 387-9167 (phone)
 jim@skaarlaw.com (email)

Laura: (630) 277-9509 (phone/text)
 laura@skaarlaw.com (email)

Christina: (630) 387-9132 (phone)
 christina@skaarlaw.com (email)

Please feel free to reach out to any of us whenever you need. Stay safe and be well.