GIARMARCO, MULLINS & HORTON, P.C.

ATTORNEYS AND COUNSELORS AT LAW

COVID-19 Help for Businesses

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If your small business is struggling to keep up with the ever-changing legal landscape resulting from the COVID-19 pandemic, join attorney Liza Favaro on Wednesday, April 1 at 10:00 a.m. for a free, informational Facebook live Q&A for small businesses. Topics of discussion include the CARES Act, the Families First Coronavirus Relief Act, and Michigan's Stay at Home Order. All are welcome! Details at this link: https://lnkd.in/gJhX6kt

1. Employment Law Update: EEOC, Wage / Hour and DOL Guidance

a. Equal Employment Opportunity Commission (EEOC) Guidance:

Before COVID-19, employers typically were prohibited from inquiring about their employees' health conditions. Now, the EEOC not only says employers can take an employee's temperature if they present at work and appear ill, but they can also bar someone from work who refuses the temperature test. The identity of workers with COVID-19 should not be shared with other employees, unless the information is shared for the purpose of protecting the health of others and reducing the virus' spread.

But what about teleworkers? The EEOC clarified that employers should refrain from asking teleworkers about their health condition unless such questions are aimed at establishing the basis for leave under the Families First Coronavirus Response Act.

And what about requests to telework from people deemed "vulnerable" to the virus, such as workers who are over the age of 65, pregnant, or disabled? Employers need not grant such requests from people who are over the age of 65. They should grant such requests from pregnant employees if similar accommodations are made to similarly situated workers. And they should grant such requests from disabled workers unless the request is unreasonable and creates undue hardship.

b. Wage/Hour Considerations:

For businesses seeing a dip in work as a result of COVID-19, some employees may have less work to do, and the there is a temptation to pay those employees less. Before doing so, remember that the Fair Labor Standards Act (FLSA) distinguishes between non-exempt (hourly) and exempt (salary) employees. If the employee is hourly, but works fewer hours, he or she should only be paid for the hours actually worked. This includes hourly employees who are permitted to work remotely. But if an employee is salaried and works fewer hours, the employee must be paid his or her full salary for each

week in which any work is performed. An exception for salaried employees arises when the employee chooses not to work, even when work is available.

c. Even More Department of Labor (DOL) Guidance for Leave:

Please remember that the sick and family leave provisions of the Families First Coronavirus Response Act take effect tomorrow. Information about these provisions is available on our website, and the DOL has now published 59 FAQs with answers, as well as a poster that must be posted or emailed to employees beginning tomorrow. Note, the DOL amended some of the previously-issued guidance – for example, guidance as to what documents the employer should collect from the affected employees (FAQs 15 and 16) now defers to the IRS requirements. Links to the current versions of these materials are:

FAQ: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

Poster: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

2. Unforeseen Circumstances Affecting Contract Performance (Force Majeure)

The viability and trust required in commercial relations forms the basis of contract law and the sets the backdrop for government enforcement of damages for contract violations. Just as ancient and carried over into the Roman Code is the principle that "that which becomes impossible to perform is no longer expected."

Today companies of all industries, both service and production, are facing the same global crisis as families and individuals; namely, how to go about carrying on with their normal and expected operations and routines. The matter of existing contractual performance obligations and how (or whether) to continue fulfilling such obligations is coming to the forefront of many companies.

In the points below we address some of the issues being faced and point out areas of concern that may need legal guidance to establish a means to respond to issues moving forward, some of which require timely action.

- Contract provisions and enforcement are generally controlled by State, not federal law.
- "Force majeure" derives from the French Code derivative of the Gregorian maxim allowing a greater unforeseeable force (an act of God-type force) to excuse failed contract performance.
- Under common law (American or English) there is no doctrine of "force majeure." This implies that a contract with no force majeure clause is strictly enforced.
- Common law is grounded on the principle of strict liability for non-performance of contractual obligations. This allows monetary damages to the party expecting performance under a contract.

- Parties to contracts governed by laws of the U.S. States are, generally, entitled to bargain and agree on terms as they wish, including provisions allowing forgiveness or delay of contract performance for certain unforeseeable circumstances such as events of force majeure. Therefore, awardable damages and excused performance depend on how the force majeure clause is defined / drafted in the contract.

- Does the COVID-19 pandemic excuse a party's failure to perform contact obligations?

- The terms and language of each contract will control most outcomes barring a magisterial order from a State governor forgiving certain or specific contract obligations.

- This is already apparent in landlord-tenant cases and mortgage contracts where some terms may not be enforceable for an undefined period. For example, the CARES Act suspends eviction proceedings for 180 days on mortgages and leases where underlying mortgage is backed by a federal agency.

- Does the contract contain a force majeure clause?

- In many construction and project development contracts events such as labor strikes, lockouts, power failure (not caused by the non-performing party) and other similar events may allow for delayed performance, often requiring notice to the other party of triggering the force majeure delay.

- Courts in the States have generally agreed that no particular event or instance of force majeure will interfere with written contract obligations but will instead review the events defined in the contract's forgiveness or delayed performance terms. This means that generally there are no specific events which a court would find to be force majeure without reference to whether or how it is defined or drafted in a contract.

- Michigan courts review force majeure provisions as any other contract terms.

- Cases have allowed forgiveness of performance only if specifically contained in the force majeure clause or if the event occurring was substantially similar to those included in the contract.

- Quite opposite these contractual legal standards are excuse provisions of the Uniform Commercial Code, governing the sale of goods outside of contractual terms. Most sale of goods transactions between commercial parties are governed by the Uniform Commercial Code adopted by each State. The UCC allows sellers delays in delivery or non-delivery of purchased goods if performance becomes "impracticable" by the occurrence or non-occurrence of an event which was a basic assumption of both parties at the time of contracting. (UCC §2-615(a)).

- The United Nations Convention on the International Sale of Goods (CISG) is an international treaty, ratified by the United States in 1986, that sets out the rules governing certain international

sale of goods transactions and the rights and obligations of the parties, similar to the UCC for sales within the United States

- Article 79 of the CISG specifies the criteria for excused performance. Article 79 requires the non-performing party to prove: (a) its failure was caused by an "impediment beyond [its] control" that it could not reasonably have taken into account when entering into the contract, and (b) the consequences could not have been avoided or overcome. As applied to the COVID-19 outbreak, therefore, a party would be excused if the COVID-19 outbreak prevented it from manufacturing and delivering the goods, and that the party had *no way* to avoid or overcome the impediments confronted (italics added).

- In parties contracting with the U.S. Government under FAR and DFAR regulations, 48 CFR §52.249-14 provides for excusable delay if failure arises from events beyond the control of contractor and without its negligence.

- Specific events stated as examples include acts of God, acts of Government order, acts of public enemy, *epidemic, and quarantine restrictions (*emphasis added).

- Now that the COVID-19 crisis in the United States has been with us at least a month, parties must take steps to alleviate and find channels to allow for continuing contract performance or to declare an event of force majeure as soon as possible if allowed under contract terms to avoid liability or greater damages.

We welcome your questions and discussion of your business issues related to this important issue.

GMH's Coronavirus Task Force is here to answer your questions. While GMH is complying with Governor Whitmer's Executive Order, we are working remotely and available to assist you. Please contact any of the below lawyers for more Coronavirus support.

THE LOCAL, STATE AND FEDERAL GOVERNMENT REQUIREMENTS RELATED TO COVID-19 MAY CHANGE, AND ADDITIONAL GUIDANCE, RULES, LAWS AND REGULATIONS MAY BE ISSUED OR AMENDED, AT ANY TIME. ACCORDINGLY, OUR GUIDANCE OR POSITION ON THESE TOPICS MAY ALSO CHANGE, WITH OR WITHOUT NOTICE, AND THE ABOVE INFORMATION IS FOR EDUCATIONAL PURPOSES ONLY AND SHOULD NOT BE INTERPRETED OR RELIED UPON AS LEGAL ADVICE. EACH SITUATION IS UNIQUE AND SHOULD BE REVIEWED WITH THE ASSISTANCE OF COMPETENT PROFESSIONALS.

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