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**Subject:** Labor and Employment Law Alert - March 2020

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## SNIFFEN & SPELLMAN, P.A.



### LABOR AND EMPLOYMENT LAW ALERT

March 2020

In lieu of the regular edition of the labor and employment law alert, Sniffen and Spellman brings you an updated and comprehensive breakdown of issues related to the Coronavirus.

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#### ***EEOC Guidance for Disability Discrimination during the COVID-19 Pandemic***

During our special alert earlier this month, our firm did a brief review of the Equal Employment Opportunity Commission's (EEOC) guidance regarding disability discrimination during the COVID-19 pandemic. As we previously informed you, employers can request information from employees that call in sick regarding the symptoms that they are exhibiting, require employees who are exhibiting symptoms to have their temperature taken, and require employees exhibiting symptoms of COVID-19 to stay home. Additionally, the EEOC and Centers for Disease Control (CDC) has determined that the COVID-19 pandemic meets the requirements of being a direct threat to the workplace, and can thus require that medical examinations can be required of employees exhibiting symptoms of COVID-19.

Specifically, if an employer is hiring during the pandemic, it may screen applicants for symptoms of COVID-19, provided that it does so for all entering employees for the same or similar type of job and after a conditional offer has been extended. Additionally, an employer may require an employee to have their temperature taken or undergo a medical exam after receiving a conditional offer of employment. Finally, an employer may delay the start date of a job or withdraw an offer of employment to individuals who have been diagnosed with COVID-19 or is exhibiting symptoms of COVID-19. This stated, the EEOC has only provided advice related to the withdrawal of job offers when the employer is required to start immediately, and has not provided advice regarding the withdrawal of employment offers with a later start date.

Finally, the EEOC has recommended that all guidance provided by the CDC regarding COVID-19 in the workplace be followed, and has advised that the ADA does not interfere with employers following the recommendations or advice of the CDC or other public health authorities. To see the EEOC's current guidance, please refer to [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html). Guidance for employers from the CDC, which has been endorsed by the Florida Department of Health, is available at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

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#### ***Update on Impact on Unemployment Benefits***

New guidance has been announced by the U.S. Department of Labor outlining flexibilities that states have in administering their unemployment insurance (UI) programs to assist Americans affected by the COVID-19 outbreak.

Under the new guidance, federal law permits significant flexibility for states to amend their laws to provide UI benefits in multiple situations related to COVID-19. As an example, federal law allows states to pay benefits where (1) an employer temporarily ceases operations due to COVID-19, preventing employees from coming to work; (2) an individual is quarantined with the expectation of returning to work after the quarantine is over; and (3) an individual leaves employment due to a risk of exposure or infection or to care

for a family member. Additionally, federal law does not require an employee to quit to receive benefits due to the impact of COVID-19. Under the new federal law passed by Congress, states may extend UI benefits to self-employed and contract workers, and provide an extra \$600 per week across-the-board increase, as well as an additional 13 weeks of benefits.

Under the new guidance, states have greater assurance about the circumstances in which they are authorized to extend unemployment insurance benefits to Americans whose employment has been disrupted by the coronavirus. Providing clarity to the flexibility in which a person may be eligible for unemployment insurance benefits during the coronavirus outbreak will ease financial burdens for those workers who are affected by the virus.

For more information about the coronavirus or COVID-19 and unemployment benefits, please visit: <https://www.careeronestop.org>

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***The Impact of COVID-19 on Workers Comp  
Florida Workers' Compensation Issues – COVID-19***

In general, diseases and sickness are excluded from workers' compensation (WC) in the state of Florida. However, Florida does give an exception to Occupational Diseases in [statute 440.151](#).

The first issue to be addressed is the occupation of the claimant. In order to secure compensability, the disease must result from the "nature of the employment" AND the employee must actually contract the disease while working AND the nature of the employment must be the major contributing cause.

For the corona virus to result from the nature of employment means there is a "**particular hazard**" of getting COVID-19 within the Claimant's occupation. The likelihood of contracting the disease is compared to other occupations within the state. The Claimant must show that the incidence of people getting it in that occupation is higher than in other occupations. The claimant has the burden of proving all of those items by the heightened standard by clear and convincing evidence. In regular WC claims, it's a preponderance of the evidence, a "more likely than not standard".

Don't confuse occupation with job (where you actually work) it's the career and not the position with the specific employer. For example, if a plumber contracts COVID-19, it would likely not be compensable because the incidence would not likely be higher in that occupation than the general public. The claimant has the burden also of proving Major Contributing Cause, meaning medical evidence that shows they got sick at work. There is case law that supports the proposition that mere speculation or a logical relationship between the disease and the Claimant's work is generally insufficient to meet the required test.

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***Georgia Workers' Compensation Issues – COVID-19***

Generally speaking, diseases and illnesses are not considered to be compensable under the Georgia Workers' Compensation Code. However, [O.C.G.A. § 34-9-280\(2\)](#), carves out an exception for "occupational diseases." Therefore, a Claimant would have to prove that COVID-19 is an occupational disease.

The Georgia Workers' Compensation Code defines, "occupational disease" as those diseases **which arise out of and in the course** of the particular trade, occupation, process, or employment in which the employee is exposed to such disease...." This burden is more difficult for the employee to prove than occupational injuries, as they not only have to prove that the disease simply "arises" out of the course of their employment, but also that their particular trade, position, job duties or employment were the cause of it.

Bear in mind that both Florida and Georgia have special laws that may apply to first responders, or those that may have been exposed to the disease as a matter of regular course due to hazards associated directly with their job. These are highly fact specific scenarios, so if you have questions regarding this issue, please do not hesitate to contact our firm.

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***Coronavirus Aid, Relief, and Economic Security (CARES) Act  
Provides Relief for Small Businesses***

For those businesses having trouble covering payroll and operating expenses because of the COVID-19 pandemic, the new law called the CARES Act provides some relief. The CARES Act creates a cornerstone Small Business Administration (SBA) loan program called the "Paycheck Protection Program" (PPP), which

is a nearly \$350-billion program designed to create new tax credits to assist in covering the cost of paid leave and payroll, assist with payments on existing SBA loans and create greater eligibility and benefits for SBA disaster loans. The PPP affords small businesses with zero-fee loans of up to \$10 million to cover operating expenses and payroll for employees. Up to 8 weeks of mortgage interest, rent, utility costs and payroll can be forgiven. For one year, payments on principal and interest are deferred. If a small business was harmed by COVID-19 between February 15, 2020 and June 30, 2020, they are eligible to apply. To help bring employees who have already been laid off back on onto the payrolls, the PPP is retroactive to February 15, 2020. You are eligible if:

- (1) Your business or entity was in operation on February 15, 2020;
- (2) You are a small business, a 501(c)(3) nonprofit organization, a 501(c)(19) veterans organization, or tribal business concern that has fewer than 500 employees;
- (3) You are self-employed, a sole proprietorship, or an independent contractor;
- (4) You are a franchise business that employs not more than 500 employees per physical location and your business has an NAICS code beginning with 72, for which the affiliation rules are waived.

In terms of the size of the loans available, the loan maximum in all cases is \$10 million. Your maximum loan size is 250% of your average monthly “payroll costs” for the one-year period before the loan is made. For those not in business this time last year, the maximum loan is equal to 250% of your average monthly payroll costs between January 1, 2020 and February 29, 2020. “Payroll costs” for determining your loan size include: (1) compensation, (2) payment for sick, medical, family or parental leave, (3) payment required for group health benefits, including insurance premiums, (4) payment of retirement benefits, (5) allowance for separation, and (6) payment of state or local tax assessed on compensation of workers. The maximum loan term is 10 years. The maximum interest rate is 4%, and there are zero loan fees, and zero prepayment fees.

Small business may use the loans for rent, utilities, interest on any other debt obligations that were incurred before February 15, 2020, employee’s salaries and commissions, costs related to group health care benefits, payroll costs, and payments of interest on any mortgage.

For more information about SBA loan programs, click here: <https://www.sba.gov/funding-programs/loans>

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### ***Guidance on Workplace Standards and COVID-19***

Federal, state, and local governments and agencies have issued useful guidance on workplace standards in response to the COVID-19 pandemic. The Occupational Safety and Health Administration (OSHA), an agency under the U.S. Department of Labor, developed and has available a “[Guidance on Preparing Workplaces for COVID-19](#).” This resource contains recommendations by OSHA, as well descriptions of mandatory safety and health standards, for the workplace.

The U.S. Centers for Disease Control and Prevention (CDC) also maintains an “[Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019](#).” This guide includes sections on Preparing Workplaces for a COVID-19 Outbreak, Maintaining Healthy Business Operations, and Maintaining a Healthy Work Environment. The CDC has also issued “[Community Mitigation Plans](#),” including one [specific to the State of Florida](#) based on Florida’s number of COVID-19 cases and in consideration of Florida’s large older adult population. This Florida mitigation plan includes a section on recommended strategies for the workplace including reviewing, updating, or developing workplace plans to include liberal leave and telework policies; limiting large work-related gatherings (e.g., staff meetings, after-work functions); and cancelling non-essential work travel.

The State of Florida’s Department of Health now has a “[2019 Novel Coronavirus Response \(COVID-19\)](#)” website. The site has a section with resources specific to Businesses and Employers. The Executive Office of the Governor also maintains a “[COVID-19 Resources](#)” section on its website. This section includes a list of recently issued Executive Orders specifically addressing COVID-19, several of which impact certain workplaces and businesses.

Throughout Florida, counties have issued their own guidance and orders in response to COVID-19. Eight counties so far have issued “stay at home/safer at home” orders according to the Florida Institute for County Government “[COVID-19 Resources](#)” website. The website maintained by the Institute includes a comprehensive summary of “[County COVID-19 Policies & Orders](#),” which has direct links to orders, declarations, and other guidance issued by each specific county. In addition to county efforts, most cities

have also issued their own orders, declarations, and guidance in response to COVID-19.

All levels of government are using all their efforts to assist employers and businesses in these uncertain times. Take advantage of the various resources and guidance provided by the federal, state, and local governments as a way to operate and maintain your workplace safely.

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### ***Legal Considerations for Layoffs***

Unfortunately, job loss, and potential mass job loss, might be a product of the COVID-19 pandemic. Employers must take care to tread very carefully however in these situations.

First, employers need to be cognizant of their obligations under the federal WARN Act. The Worker Adjustment and Retraining Notification (WARN) Act requires certain notices be provided to employees in the event of mass layoffs. There are a few restrictions though on to whom the law applies and when it applies. First, it only applies to employers with 100 or more full-time employees. Next, it applies when there is a plant closing or mass layoff, which can potentially be implicated when there is a layoff of at least 50 employees. The act requires specific notice requirements in those circumstances and notice of at least 60 calendar days prior to the layoff. While there are some exceptions, those exceptions are typically hotly litigated. There are also notice requirements to unions and governmental entities.

It should be noted that Florida does not have a mini-WARN act, like many states do. Of course, in the event of any layoff, employers must be sure to comply with the notice obligations under COBRA and make sure that if severance is being offered, that all laws applicable to the provision of severance and concerning the release of claims, if a waiver and release is sought, are complied with.

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### ***Update on Families First Coronavirus Response Act***

Beginning April 1, 2020, all private employers with fewer than 500 employees and public agencies with one or more employees must start implementing the Emergency Family and Medical Leave Expansion Act (EFMLEA) and Emergency Paid Sick Leave Act (EPSLA) created in the Families First Coronavirus Response Act (FFCRA). Under these new provisions, a qualifying employee is entitled to EFMLEA leave if they are unable to telework and must care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The first 10 days of leave are unpaid, or employees may substitute any accrued leave they have under their employer's policy. For the following ten weeks, employees will be paid for their leave at an amount no less than 2/3 of their regular rate of pay, capped \$200 per day or \$12,000 in the aggregate.

Under the EPSLA all covered employers must provide employees up to 80 hours of paid sick leave. We have previously provided the details on how these new laws apply in our past special alerts. Employees are to be compensated their regular wage up to \$511 a day and \$5110 in the aggregate if the employee is unable to work or telework because they are subject to a federal, state or local quarantine or isolation order due to COVID-19; they have been advised by a health care provider to self-quarantine related to COVID-19; or they are experiencing COVID-19 symptoms and are seeking a medical diagnosis. If an employee is using emergency paid sick leave because they are caring for an individual subject to a quarantine or isolation order from a government official or doctor or they are caring for their child whose school or place of care is close due to COVID-19 or they are experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services, then they are to be compensated at 2/3 their normal rate of pay up to \$200 a day an \$2,000 in the aggregate.

The U.S. Department of Labor has issued some updated guidance on various coronavirus issues. First, the Department said that the emergency paid sick leave and the expanded family medical leave may be used intermittently. The Department of Labor has also clarified that employers may pay employees more than they are entitled to under the Act, however employers cannot claim tax credit for the additional amount.

Under both provisions of the Act, employers of health care providers and emergency responders can exempt such employee from emergency paid sick leave and expanded family and medical leave. The Department of Labor has defined "health care provider" to mean anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. An "emergency responder" is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19.

The Department of Labor clarified the requirements for the small business exception to the leave provisions. An employer with fewer than 50 employees is exempt from providing paid sick leave and/or expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. The employer may only claim this exemption if an authorized officer of the business has determined that either (a) the provisions of either leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; (b) the absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or (c) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The Department of Labor has issued a [poster](#) on employee rights under the new provisions as well as [FAQs](#) regarding these new laws.

To assist employers with the with increased costs associated with the FFCRA's paid sick leave and paid FMLA benefits, eligible small and midsize companies will be able to retain as "tax credits" payroll taxes they would otherwise collect and deposit with the IRS.

Eligible employers who pay qualifying sick or child care leave will be able to retain federal payroll taxes equal to the amount of qualified leave wages paid, plus qualified health plan expenses and the employer's share of Medicare tax imposed on those wages. The payroll taxes that can be retained include all federal employments taxes, including federal income taxes and both the employee and employer share of Social Security and Medicare taxes. If these withheld payroll taxes are not enough to cover the leave paid, businesses will be able file a request for an expedited credit from the IRS. Employers must keep documentation supporting each employee's leave to substantiate the credit.

The IRS has recently released an [FAQ](#) providing additional information regarding these tax credits and how employers can claim them.

### **Past Issues of the Labor and Employment Law Alert Available on Website**

You may view past issues of the Labor and Employment Law Alert on the Firm's website: [www.sniffenlaw.com](http://www.sniffenlaw.com). After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.

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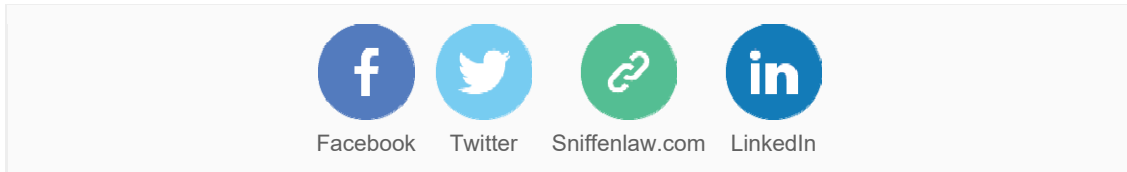
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