

# EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

---

*Established 1844* | Innovating Daily

## **COVID-19 Critical Care For Your Business**

Presented by  
Eastman & Smith Ltd.  
March 31, 2020

Disclaimer: This information has been prepared by Eastman & Smith Ltd. for informational purposes only and should not be considered legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney/client relationship

EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

*Established 1844 | Innovating Daily*

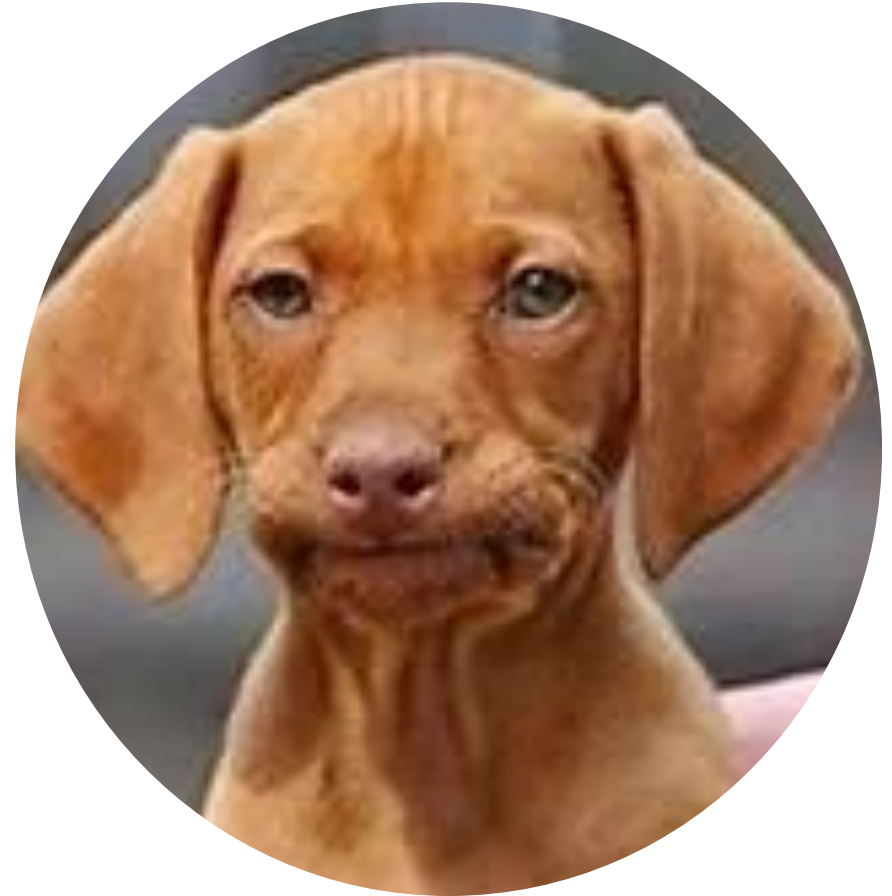
# THE OHIO STAY AT HOME ORDER - ARE WE ESSENTIAL?

Operating Your Business in Ohio During the COVID-19 Crisis

Graham A. Bluhm, Esq.  
Eastman & Smith Ltd.  
(419) 247-1591  
[gablum@eastmansmith.com](mailto:gablum@eastmansmith.com)

## How Long Do I Have To Put Up With These People?

- Effective March 23, at 11:59 – April 6, at 11:59
- Expect the Order to be Extended Soon
- Michigan's Initial Order extends through April 13

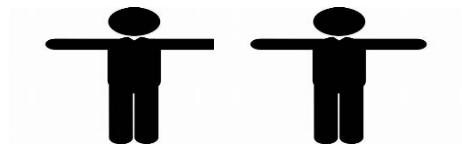


# EXCEPTION FOR SPECIFIED OPERATIONS

1. Home-Based and Remote Operations are Permitted.
2. Healthcare and Public Health Operations are Permitted.
  - a. Hospitals, clinics, doctor offices, dental offices, pharmacies, public health entities, biotech companies, etc.
3. Human Services Operations are Permitted.
  - a. State-operated, institutional and community-based service providers to aged, disabled, unemployed, veterans, addicted, etc.
4. Minimum Basic Operations are Permitted.
5. Essential Infrastructure Operations are Permitted.
6. Essential Government Functions are Permitted.
7. Essential Businesses and Operations are Permitted.

# MINIMUM BASIC OPERATIONS AND SOCIAL DISTANCING REQUIREMENTS

- Businesses may continue with “Minimum Basic Operations”, which includes necessary activities to: (a) maintain the value of inventory, (b) preserve the condition of facilities and equipment, (c) ensure security, (d) process payroll and employee benefits, and (e) conduct related functions.
- While performing Minimum Basic Operations, businesses must: (a) perform minimum necessary activities to facilitate employees being able to continue to work remotely from home; and (b) comply with Social Distancing Requirements.
- Social Distancing Requirements:
  - \* Employees and customers maintain a separation distance of 6 foot (use signs, tape, or other means)
  - \* Employees must frequently wash hands with soap and water or apply hand sanitizer (must be readily available)
  - \* Employees required to cover coughs and sneezes
  - \* Regularly clean and disinfect high-touch surfaces
  - \* No hand shaking
  - \* If open to the public, maintain separate hours for vulnerable population
  - \* Offer customers online and remote access to services as much as possible



# ESSENTIAL INFRASTRUCTURE OPERATIONS

- Businesses offering, providing, operating, maintaining, or repairing “Essential Infrastructure” are permitted to remain in operation.
- Essential Infrastructure includes, without limitation, the following:
  - Food production and distribution businesses
  - Building management and maintenance
  - Utilities operators and maintenance
  - Distribution centers
  - Roads and transportation operations
  - Cybersecurity operations
  - Waste and recycling collection and removal
  - Construction
  - Airports
  - Electrical providers
  - Refineries
  - Ports
  - Flood control
  - Internet and communications systems

# ESSENTIAL GOVERNMENT FUNCTIONS

- Entities and businesses providing “Essential Government Functions” are permitted to remain in operation.
- Essential Government Functions include, without limitation, the following:
  - First Responders
  - Legislators, judges, court personnel, and jurors
  - Hazardous material responders
  - Housing and shelter personnel
  - Emergency management and dispatchers
  - Law enforcement and corrections personnel
  - Child protection and welfare personnel
  - Military
- Essential Government Function Providers include, without limitation, the following:
  - All governmental authorities and their contractors
  - All entities needed to ensure the continuing operations of the governmental authorities that provide or perform Essential Government Functions

# ESSENTIAL BUSINESSES AND OPERATIONS

- Businesses and operations deemed to be “Essential” are permitted to remain in operation. Such businesses and operations must follow Social Distancing Requirements.
- Essential Businesses and Operations include, without limitation, the following:
  - Businesses and operations deemed essential in the *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response* published by the **U.S. Department of Homeland Security and the Office of Cybersecurity & Infrastructure Security Agency** on March 19, 2020 (the “CISA Memo”)
  - Grocery and Medicine
  - Charitable and social service providers
  - Media and other 1<sup>st</sup> amendment protected entities
  - Financial and insurance institutions
  - Educational institutions
  - Restaurants for off premises consumption
  - **Suppliers for Essential Businesses and Operations**
  - Home-based care
  - Professional services (attys, cpas, insurance, real estate)
  - Labor union functions
  - Funeral services
  - Food, beverage, and licensed marijuana production and agriculture
  - Religious entities
  - Gas stations and businesses needed for transportation
  - Hardware and supply stores
  - Laundry services
  - Home work supply providers
  - Transportation
  - Residential facilities and shelters
  - **Supply chain to essential and critical products**
  - Hotels and motels



# RECOMMENDATIONS TO BUSINESSES CONTINUING ON-SITE OPERATIONS

- **If a supply-chain business or operator** relying on a third party's business activities to continue on-site operations, obtain a **written letter or agreement** from such third party specifying the exact permitted reason for such third party's continued operations and your business or operation's need to continue manufacturing, supplying, distributing, or otherwise supporting such third party.
  - Letter or agreement should refer to the CISA Memo and the Ohio Stay and Home Order
  - Seek indemnification and hold harmless protection, if possible
- **If qualifying as an Essential Business or Operation**, prepare a **written letter or agreement** to send to the third party's in your supply-chain that need to continue operations to manufacture, supply, distribute, or otherwise support your continued business and operations.
  - Letter or agreement should refer to the CISA Memo and the Ohio Stay and Home Order
  - Seek to avoid issuing or offering indemnification and hold harmless protection, if possible
- Provide your employees with a **letter of explanation** outlining your business or operations right to continue to operate and remain open on-site, thereby justifying his or her need to travel away from home.
  - Instruct employees to carry such letter of explanation in their vehicles
- Strictly follow all **Social Distancing Requirements**.

# WHAT ARE THE CONSEQUENCES OF VIOLATING THE STAY AT HOME ORDER?

- ORC §3701.352 provides that “[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.”
- Violations are a second degree misdemeanor under ORC §3701.99(C).
- Second degree misdemeanors are punishable by up to 90 days in jail (ORC §2929.24(A)(2)) and/or up to \$750 in fines (ORC §2929.28(A)(2)(a)(ii), plus court costs.
- Some county authorities have been instructed to adopt a two strike policy. The first violation will draw a verbal warning, and any further violations will result in charges.
- Be aware – there are a number of incidents where employees and other third parties are reporting violations, especially business violators.
- Possible claims by employees that become ill (proof will be difficult).



Graham A. Bluhm, Esq.  
Eastman & Smith Ltd.  
(419) 247-1591  
[gabluhm@eastmansmith.com](mailto:gabluhm@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*



EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

---

*Established 1844 | Innovating Daily*

# BUSINESS INTERRUPTION INSURANCE - IS MY BUSINESS COVERED?

Chuck Collins, Esq.  
Eastman & Smith Ltd.  
(419) 247-1729

[mccollins@eastmansmith.com](mailto:mccollins@eastmansmith.com)

# Business Interruption Insurance

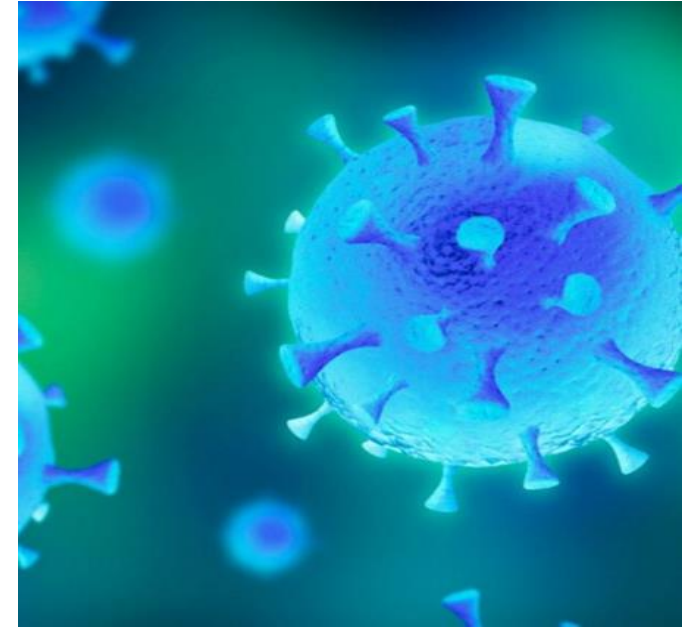
Is often is comprised of two components, business income and extra expense (which may or may not include payroll).

Is typically purchased as part of a commercial property policy, though it can be purchased separately as well.

- Commercial property policies that provide business interruption coverage typically require “direct physical loss of or damage to” covered property (or within a specified distance of that property, say 1,000 feet).
- The most common examples of such “direct physical losses or damages” are property fires and storm-related damages.
- At least one court has determined that release of a dangerous gas, ammonia, within a covered structure can constitute “direct physical loss” if such gas release renders the covered building uninhabitable.
- Potential arguments exist that contamination of telephones, office surfaces, etc. experience direct physical loss when contaminated with viruses if they are rendered unfit for their usual purpose.

- Further, the “direct physical loss of or damage to” covered property must typically be caused by or result from a “covered cause of loss”.
- One typical definition of a covered cause of loss is “risks of direct physical loss or damage not excluded or limited in this Coverage Form.”
- Therefore, if a cause of loss excluded, coverage for damages from that loss is likewise excluded.

- Since the Severe Acute Respiratory Syndrome (SARS) outbreak, caused by another coronavirus, many insurers have incorporated into their commercial property policies specific endorsements that exclude coverage for “Loss Due to Virus or Bacteria,” which exclusion often specifically includes business interruption coverage.
- As opposed to a separate endorsement, the property coverage form itself may specify, for example, that the insurer will not pay for any loss resulting from “mortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus.”
- These exclusions typically apply to all coverages, endorsements, and coverage extensions under the policy.





# Other potential policy coverages may exist for COVID-19 related losses

- **For example:**
- Some policies may provide for business interruption loss coverage under a Business Access Coverage extension for “necessary suspension of operations at a location if access to such location is impaired or obstructed”.
- However, such coverage is likely subject to the global virus exception, and may further require that such “impairment or obstruction” must:
  - ❑ arise from direct physical loss or damage to property;
  - ❑ be caused by or result from a covered cause of loss; and/or
  - ❑ occur within a specified number of miles from the insured location(s)

- Likewise, Civil Authority Coverage may provide coverage for “the actual loss of business income and necessary extra expense you sustain due to the necessary suspension of your operations caused by action of civil authority that prohibits access to a location”.
- Such coverage typically includes the same types of exclusions and requirements as does Business Access Coverage.

# Not all policy coverages may exclude virus as a cause of loss

- For instance, some policies provide coverage endorsements or extensions for Communicable Disease Coverage which, unlike all other coverages under the policy, may specifically *include* virus in its definition.
- One policy definition example - “Communicable disease means any disease, bacteria, or virus that may be transmitted directly or indirectly from human or animal to a human.”



# The coverage for Communicable Disease

## Coverage may include

- We will pay for direct physical loss or damage to Property Insured caused by or resulting from a covered communicable disease event at a location including the following necessary costs incurred to: ... Mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects [sic] the communicable disease.
- We will pay for the actual loss of business income and necessary extra expense you sustain due to [t]he necessary suspension of operations during the period of restoration[.] The suspension must be due to direct physical loss or damage to property at a location caused by or resulting from a covered communicable disease event.



# Typical supplemental definitions include

- “Communicable disease event means an event in which a public health authority has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease at such location”.
- “Public Health Authority means the governmental authority having jurisdiction over your operations relative to health and hygiene standards necessary for the protection of the public.

- To obtain coverage for cleanup of your facility, both real and personal property, for COVID-19 viruses, the Policy may require that the communicable disease and the evacuation be at your location.
- The recent statewide bans may meet the location requirement, but you may have to show existence of the COVID-19 at your property.
- Another consideration is the duration of coverage for business interruption insurance during the necessary suspension of operations during the period of restoration. If you are prohibited from entering your place of operation, an argument exists that the period of restoration exists now and continues until restoration is allowed and completed.

# Be aware - there is often a drastically reduced window of time to report communicable disease losses

- **For example:**
- “We will not pay under Communicable Disease Coverage for any loss, damage, or expense caused by or resulting from ... [a] claim that has been reported to us in writing after thirty (30) consecutive calendar days from the date the public health authority ordered the location to be evacuated, decontaminated, or disinfected due to the communicable disease event.”

- Ohio House Bill 589 - “A Bill to Require Insurers Offering Business Interruption Insurance to Cover Losses Attributable to Viruses and Pandemics and to Declare an Emergency”
- The proposed legislation would require insurers who issued business interruption policies to cover losses due to COVID-19, regardless of whether such coverage was excluded from the policies as issued
- Claims for loss could be filed by companies which 1) employ 100 or fewer workers who work 25 hours or more per week and 2) carried valid business interruption coverage as of the date of passage of the bill. Losses would be covered retroactively to March 9.
- Funding for the claims paid would apparently come from a statewide assessment against all insurers, whether such insurers wrote business interruption policies or not, based upon the amount of premiums the insurers had charged in 2019.
- The bill has only recently been introduced, and creates significant questions as to its retroactive application, interference with contracts, and its funding mechanism.





- Any coverage analysis necessarily involves the review of a company's individual and applicable insurance policy declarations, forms, endorsements, and any other documents or terms affecting coverage, often comprising hundreds of pages.
- This information is ultimately obtained from the carrier, often through the selling broker or agent's assistance, with a listing of forms and endorsements to ensure all policy documents are provided.
- All companies are strongly encouraged to undertake a review of their specific, individual policies for potential coverages.

Chuck Collins, Esq.  
Eastman & Smith Ltd.  
(419) 247-1729

[mccollins@eastmansmith.com](mailto:mccollins@eastmansmith.com)

*www.eastmansmith.com*



EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

---

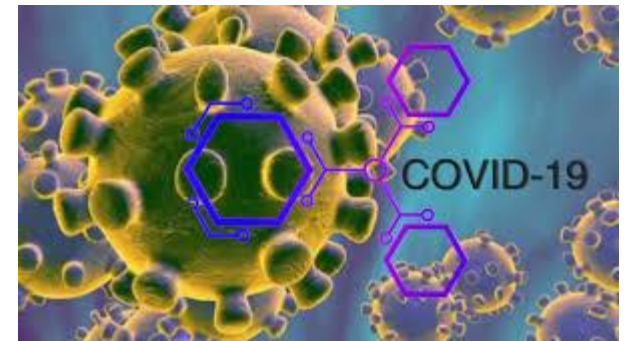
*Established 1844 | Innovating Daily*

# PRIVACY LAW COMPLIANCE IN LIGHT OF THE COVID-19 CRISIS

Breanne M. Rubin, Esq.  
Eastman & Smith Ltd.  
(419) 247-1754  
[bmrubin@eastmansmith.com](mailto:bmrubin@eastmansmith.com)

# State of the Law

- HIPAA Privacy and Security Rules still apply
- Secretary Azar waives certain sanctions and penalties for noncompliance with specific provisions of the HIPAA Privacy Rule
- CARES Act loosens the consent requirements pertaining to the disclosure of SUD treatment records under 42 CFR Part 2

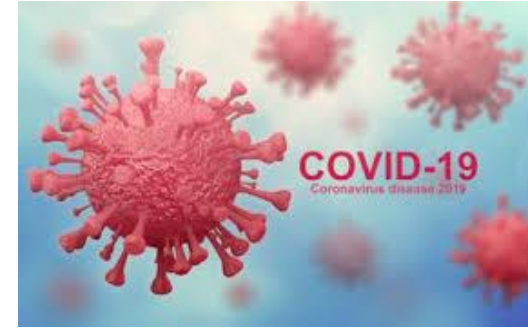


Secretary Azar exercised the authority to waive sanctions and penalties against a covered hospital that does not comply with the following provisions of the HIPAA Privacy Rule:

1. the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care. *See 45 CFR 164.510(b).*
2. the requirement to honor a request to opt out of the facility directory. *See 45 CFR 164.510(a).*
3. the requirement to distribute a notice of privacy practices. *See 45 CFR 164.520.*
4. the patient's right to request privacy restrictions. *See 45 CFR 164.522(a).*
5. the patient's right to request confidential communications. *See 45 CFR 164.522(b).*

# COVID-19 HIPAA WAIVER

Effective on March 15, 2020.



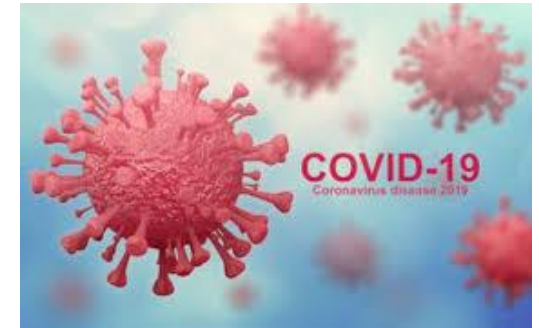
The waiver only applies:

- (1) in the emergency area identified in the public health emergency declaration;
- (2) to hospitals that have instituted a disaster protocol; and
- (3) for up to 72 hours from the time the hospital implements its disaster protocol.

When the Presidential or Secretarial declaration terminates, a hospital must then comply with ALL the requirements of the Privacy Rule for any patient still under its care, even if 72 hours have not elapsed since implementation of its disaster protocol.

# COVID-19 HIPAA WAIVER

Additionally, OCR provides waivers for all health care providers to allow them to use “everyday communications technologies, such as FaceTime or Skype, during the COVID-19 nationwide public health emergency” for the provision of patient care services



Even without a waiver, the HIPAA Privacy Rule always allows patient information to be shared for the following purposes and under the following conditions:

- Treatment
- Public Health Activities
  - To a public health authority
  - At the direction of a public health authority, to a foreign government agency
  - To persons at risk





*Continued...*

- Disclosures to Family, Friends, and Others Involved in an Individual's Care and for Notification
- Disclosures to Prevent or Lessen a Serious and Imminent Threat
- In very limited circumstances, disclosures to the Media or Others Not Involved in the Care of the Patient/Notification

## A few notes about EMPLOYEE privacy

- Generally, an employer may disclose a positive diagnosis of COVID-19 to employees, ***but must do so in a way that does not identify the infected employee.*** A combination of federal privacy laws prevent an employer from disclosing the identity of an infected employee without authorization.

- Employers may be subject to HIPAA if they are the **sponsor or administrator of self-insured health and wellness plans.**
- If the employer acquired information relating to the infected employee's diagnosis in its role as administrator of the health plan, then HIPAA prohibits the employer from disclosing the employee's positive COVID-19 diagnosis to other employees.

# ***Americans with Disabilities Act (ADA)***

- During a pandemic, information about an employee's positive COVID-19 diagnosis (even though not disability-related) should be treated as confidential medical records in compliance with the ADA.



# ***Family and Medical Leave Act (FMLA)***

- Expanded FMLA leave protections provided by the Families First Coronavirus Response Act (HR 6201)
- Allows employers to ask if an employee is taking FMLA leave for reasons related to COVID-19
- If yes, employers are prevented from disclosing the diagnosis of the employee, or their family member



## **CARES Act**

- Allows for additional care coordination by allowing disclosure of SUD treatment records upon initial patient consent.
- Requires HHS to issue guidance on what is allowed to be shared of patient record during the public health emergency related to COVID-19.

## Additional Resources:

- OCR Guidance on Permitted Disclosures to First Responders  
<https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf>
- FAQs on Telehealth and HIPAA during the COVID-19 nationwide public health emergency <https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf>

Breanne M. Rubin, Esq.  
Eastman & Smith Ltd.  
(419) 247-1754  
[bmrubin@eastmansmith.com](mailto:bmrubin@eastmansmith.com)

*www.eastmansmith.com*





# COVID-19 AND COMMERCIAL CONTRACTS

Force Majeure and More...

Scott A. Johnson, Esq.  
Eastman & Smith Ltd.  
(419) 247-1823

[sajohnson@eastmansmith.com](mailto:sajohnson@eastmansmith.com)

Kaitlin L. Hoop, Esq.  
Eastman & Smith Ltd.  
(419) 247-1823

[klhoop@eastmansmith.com](mailto:klhoop@eastmansmith.com)

HAS THE DUTY TO PERFORM THE CONTRACT BEEN DISCHARGED?

- FORCE MAJEURE
- IMPOSSIBILITY
- IMPRACTICABILITY
- FRUSTRATION OF PURPOSE





## Force Majeure

- French for “superior force,” and, in legal terms, means an event or effect that can be neither anticipated nor controlled; an act of God.





# STEP 1: What does the contract say? Has a force majeure event occurred?

- **Force Majeure**. *Seller shall not be responsible for its failure to perform under this Agreement if such failure results from causes beyond its reasonable control, including, but not limited to: acts of God; strikes or other labor disturbances; equipment failure; power failure; inability to obtain suitable supplies, material, or parts; war; acts of terrorism; epidemics; floods; fires; accidents or other similar events, the non-occurrence of which was a basic assumption at time the Agreement was made.*

STEP 2: What ELSE does the contract say?

Force Majeure provisions may even spell out additional terms for **remedies, notice, stipulated damages, exceptions**, and other provisions upon which the parties have already agreed. To the extent the parties have stipulated such terms by contract, a court will not interfere.

However, interpretation/application of such provisions is not always cut and dry.



# STEP 3: Other requirements to invoke force majeure

- Event must be:

- 1) Beyond the party's control; and
- 2) Without the party's fault or negligence; AND

**Force majeure provisions may not be invoked merely because performance may prove difficult, burdensome, or economically disadvantageous.** *Stand Energy Corp. v. Cinergy Servs., Inc.*, 144 Ohio App. 3d 410, 416, 760 N.E.2d 453, 457 (2001).



# No Force Majeure? No problem.

Common law defenses of **impossibility, impracticability, and frustration of purpose** may still apply to excuse performance.

- **Ohio generally requires performance to be “impossible”** rather than “impracticable” as adopted by the Restatement of Contracts. *Lehigh Gas-Ohio, L.L.C. v. Cincy Oil Queen City, L.L.C.*, 2016-Ohio-4611, 66 N.E.3d 1226.
- The frustration of purpose doctrine is not widely accepted in Ohio, (but has been enforced in Michigan).

# Discharge by Impossibility

- **After** the contract is made, an **unforeseen event** renders performance by a party **impossible**, and the **non-occurrence** of that event was a **basic assumption** of the agreement.
- Does not apply merely because performance may prove difficult, dangerous, or burdensome.
- **Example**: The Huntington Center cannot successfully sue Reba McEntire for failing to perform her concert on March 28, 2020 in Toledo, Ohio as such large events are currently banned under Ohio law ☹️. (And, unless the contract states otherwise, the same is true vice-versa.)





# Discharge by Impracticability

- Impracticability means more than impracticality.
- Obligations of contract become EXTREMELY difficult, causing undue hardship to the performing party.
- This defense is very difficult to prove via economic burden alone—105% cost overrun has been rejected. *See C&M Machine Products, Inc.*, ASBCA No. 43348, 93-2 BCA ¶ 25,748.
- Compare: Contractor breaks his arm and is unable to complete construction work by promised deadline; performance under the contract will be delayed until he is able to successfully complete the work.



# Discharge by Frustration of Purpose

*Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.* Restatement of the Law 2d, Contracts (1981).

- Not widely accepted in Ohio, but still a valid argument, and enforced in Michigan.
- Example: Tenant enters into a 5-year lease of a storefront where she sells exotic snakes. 2 years into the lease, the sale of exotic snakes becomes illegal. Tenant may be excused for the remaining 3 years, assuming Landlord was aware of the underlying purpose of the lease.
- Without knowing how long COVID-19 will prevent certain businesses from operating, and to what degree such operations are curtailed, it is unclear whether a court is likely to sympathize with frustration of purpose doctrine for long-term commercial leases in Ohio.

# Practical Solutions

- Moratoriums on foreclosures and evictions
- Many Lender's Are Willing to Provide Deferral (and some may be required to)
- Help Is On The Way: CARES Act – Loan Programs, Mortgage Deferrals, Grants



Scott A. Johnson, Esq.  
Eastman & Smith Ltd.  
(419) 247-1823

[sajohnson@eastmansmith.com](mailto:sajohnson@eastmansmith.com)

*www.eastmansmith.com*

Kaitlin L. Hoop, Esq.  
Eastman & Smith Ltd.  
(419) 247-1823

[klhoop@eastmansmith.com](mailto:klhoop@eastmansmith.com)

*www.eastmansmith.com*



EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

---

*Established 1844 | Innovating Daily*

# COVID-19 AND THE EMPLOYER'S RESPONSE: WHAT CAN WE DO?

James B. Yates, Esq., SHRM-SCP

Eastman & Smith Ltd.

(419) 247-1830

[jbyates@eastmansmith.com](mailto:jbyates@eastmansmith.com)

# Families First Coronavirus Response Act

- Enacted March 18, 2020 and effective April 1, 2020
  - Not retroactive
- Contains 2 leave provisions:
  - Expanded FMLA (up to 12 weeks total)
  - Emergency Paid Sick Leave (up to 80 hours in a 2-week period)
- DOL is currently working on regulations to be issued before April 1, 2020

# Coverage

Applies to public and private sector employers with **fewer** than 500 employees

DOL is authorized to and employers may exclude healthcare providers and emergency responders

DOL is authorized to exempt certain businesses with fewer than 50 employees if viability of business is jeopardized

# FMLA Expansion

## Reasons for Leave

- Employees unable to work (or telework) to care for son or daughter due to school or childcare center closing or unavailability of childcare provider

## Benefit

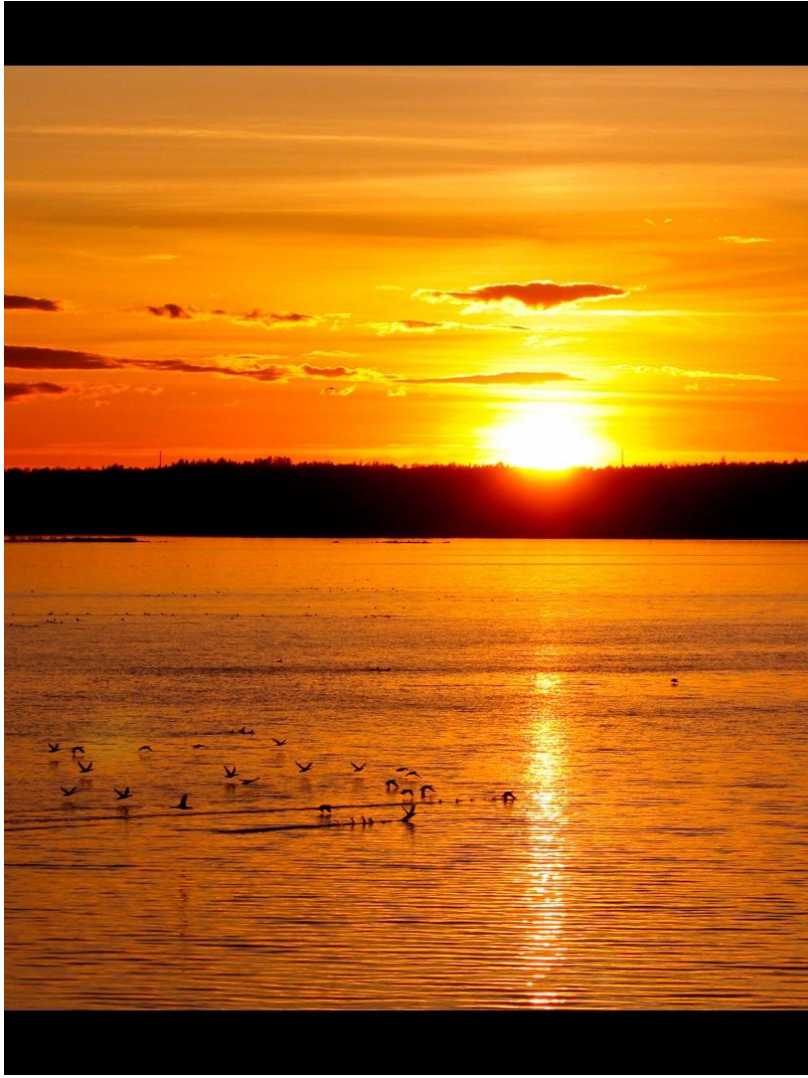
- 12 weeks of leave paid\* at not less than 2/3 of employee's regular rate subject to a \$200 per day/\$10,000 in aggregate cap

\*The first 10 days may be unpaid, but employees may (but are not required to) substitute paid leave or 80 hours emergency paid leave

## Employee Eligibility

Must be employed for 30 calendar days (on payroll as of March 2, 2020 including time as temp)





# Other requirements of FMLA Expansion

- Employees must provide notice of the need for leave “as soon as practicable” when leave is foreseeable.
- Employees are restored to same or equivalent position with limited exception for employers with fewer than 25 employees who meet certain criteria.
- Employers who are signatories to multi-employer CBAs may fulfill obligation by paying into plan and plan must enable employees to receive paid leave.
- Expanded FMLA leave sunsets on December 31, 2020.

# Emergency Paid Sick Leave Act

- Reasons for Leave

- 1) Employee is subject to government order to isolate or quarantine
- 2) Healthcare provider advises to self-quarantine
- 3) Employee is experiencing symptoms consistent with COVID-19 and is seeking a medical diagnosis
- 4) Employee is caring for individual subject to government order or being advised to self-quarantine by healthcare provider
- 5) To care for son or daughter due to school or childcare center closing or unavailability of childcare provider

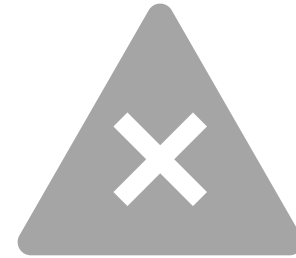
# Available Benefits



**Up to 80 hours of paid leave in a 2-week period (pro-rated for part-time employees) at:**

The employee's regular rate for employee's own leave (subject to \$511 per day/\$5,110 aggregate cap) or,

2/3 of employee's regular rate for leave taken to care for others or due to school and childcare center closings (subject to \$200 per day/\$2,000 aggregate cap)



**Paid leave is available immediately and employer cannot require that other paid leave is used first.**

# Other Emergency Paid Sick Leave Details

## Coverage

- Same as FMLA expansion with same potential exclusions and exemptions

## Employee Eligibility

- No length of service requirement

## Employee Notice

- After first day, employers may require employees to follow “reasonable notice procedures”

## Employer Notice

- Employees must post requirements of new law (DOL will prepare model notice)

# Other Emergency Paid Sick Leave Details

## Multi-Employer CBAs

- Same as FMLA expansion

## Restrictions

- No payment upon termination
- No carryover from year to year

## Expiration

- Sunsets on December 31, 2020 like expanded FMLA

# Governor DeWine Signs Unemployment Executive Order March 16, 2020

- Eligibility for unemployment:
  - If requested by a medical professional, local health authority, or employer to be isolated or quarantined as a consequence of COVID-19 even if not actually diagnosed with COVID-19.
  - If totally or partially unemployed, will not have to serve a waiting period.
  - Benefits charged to the mutualized account, except reimbursing employers.
  - Work search requirements waived.
  - Penalties for late reporting and payment will be waived.
  - Only applies to employees that do not have access to leave benefits.

# Unemployment due to COVID-19

Nearly any reason at all related to COVID-19

Tell employees to apply online

Use code 2000180 (mass layoff number) to expedite the filing

For contributing employers, it is charged to the mutualized account

Partial unemployment is available if an employee experiences reduced hours (subject to maximum benefit amounts).

# Pandemic Unemployment Assistance Program (under CARES Act)

Individuals unable to work due to public health emergency  
Also applies to independent contractors and self-employed

## Benefits

- **Additional** \$600 per week for first 4 months (over and above state unemployment) – sunsets July 31, 2020
- Additional 13 weeks if needed (39 weeks total)
- No waiting period
- Payable beginning January 27, 2020 – December 31, 2020



# Pandemic Unemployment Assistance Program (under CARES Act)

## Reasons

- Diagnosed with COVID-19 or symptomatic and seeking diagnosis
- Member of household is diagnosed with COVID-19
- Providing care for family or household member diagnosed with COVID-19
- Primary caregiver for child or other person in household unable to attend school or other facility
- Unable to reach place of employment because of quarantine order
- Unable to work because healthcare provider advised to quarantine
- Individual has now become major support for household
- Individual quit job as a result of COVID-19
- Employer closed because of COVID-19

James B. Yates, Esq., SHRM-SCP  
Eastman & Smith Ltd.

(419) 247-1830

[jbyates@eastmansmith.com](mailto:jbyates@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*



# EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

---

*Established 1844 | Innovating Daily*



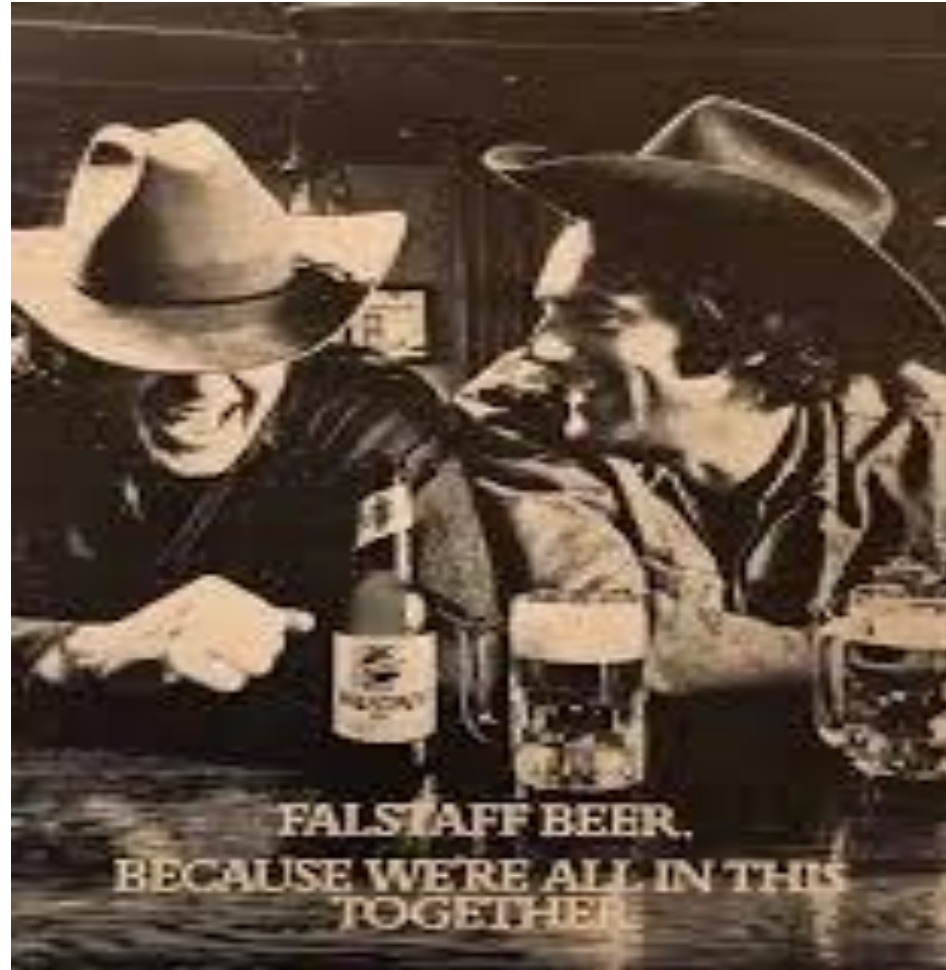
Gary M. Harden, Esq.

Eastman & Smith Ltd.

(419) 247-1677

[gmharden@eastmansmith.com](mailto:gmharden@eastmansmith.com)

# Our Purpose



# Filing and Payment Extensions

- **Federal**

- Payment: Income tax, SE tax, ES
  - If due April 15...are extended to July 15, 2020 (Notices 2020 -17 & -18)
  - No caps on payment amount
- Filing: Income tax, SE tax
  - If due April 15...are extended to July 15, 2020 (Sec Treas Tweet)
  - Deposit deferral on employer's share of FICA 50% to 12/31/2021, 50% to 12/31/2022 – provided no SBA loan forgiveness
  - SE Tax 25% to 12/31/21, 25% to 12/31/2022 – provided no SBA loan forgiveness
- FBAR filings deferred to 7/15/2020

# Continued...

- Extensions apply to all “persons”
- Extensions include
  - 1040, 1120, 1120S, 1041, 1065 tax returns
  - Transition taxes from the 2017 TCJA §965 repatriation taxes and installment payments
- Other taxes are not covered
  - File extensions as provided
  - Pay a good faith estimate of tax liability

# Continued...

- DOL extensions, not so much
- Potential future extensions
  - Estimated tax payments due between April 15 – July 15
  - July 15 due date may be pushed to October 15 or to yearend

# Continued...

## State Tax Extensions

- Many states adjourned legislatures without acting
- Ohio HB 197 extension & penalty/int waiver follows the Feds
  - Tax Commissioner can extend the May 11 CAT
  - June estimated payments are also extended
  - Tax Commissioner extended SD tax, pass-thru tax, all estimated tax payments individuals, trusts, estates, and certain businesses. Notice dtd 3/27/20
- Michigan– Executive Order 2020-26 3/27/20
  - Extends all State and City income tax filing/payment deadlines to 7/15
  - Michigan e-file website follows the filing extension approach below.
- Expect other states to extend. But be safe. If needed:
  - File protective Federal extension to trigger state extension
  - Pay a good faith estimate of the tax liability



# Payroll Tax Credits & Loan Programs

- Decision Tree: Choose Credit or Loan:
  - Payroll Credits
    - Families First Coronavirus Response Act (FFCRA)
      - FMLA: Emergency Paid Sick Leave (EPSL), and
    - Coronavirus Aid Relief and Economic Security Act (CARES)
      - Employee Retention Credit (ERC)
    - No double credit for an employee, cap on combined credit
  - Paycheck Protection Loan (SBA 7A guaranteed loan)
    - Principal is forgivable & not COD income
    - Must pay interest (this is the only Bank income, no fees)
    - Details later

# Continued

- Emergency Paid Sick Leave: FMLA 80 hrs paid sick time for full time employees (part time = prorated average hours 2 weeks). Self-employed also qualify.
  - Eligible for EPSL payroll tax credit if
    - subject to a governmental quarantine or isolation order,
    - has been advised by a health-care provider to self-quarantine,
    - is caring for an individual who is subject to governmental or self-quarantine,
    - is caring for the employee's child because the child's school or child-care provider is closed, or
    - is experiencing a substantially similar circumstance

# Continued

- Payroll Tax Credit
  - Employers with fewer than 500 employees
    - \$511 per day, and \$5,110 in aggregate, for paid sick time used by employee who experiences symptoms of COVID-19 or is required or advised to self-quarantine; or
    - \$200 per day, and \$2,000 in aggregate, for paid sick time used by an employee to care for the employee's child or other impacted person.

# Continued

- Employee Retention Credit (CARES Act)
  - Eligible: Must be in business 1/1/20, and
    - Fully/partially closed during a quarter due to orders from an appropriate governmental authority limiting commerce, travel or group meetings due to COVID-19; or
    - Gross receipts are less than half the receipts of the same quarter of the prior year.
    - 501(c) exempt orgs, receipts test applies on an annual basis.
  - Payroll Tax Credit
    - 50% of qualified wages/quarter (3/13 – 12/31/20 wages)
    - \$10,000 wage cap. Max credit \$5,000/employee/quarter.
    - No double benefit if credit is taken under FMLA provision
    - Cap per quarter is employer quarterly payroll, reduced by the FMLA payroll credits.

# Claiming the Payroll Tax Credits

- Eligible employers
  - Set off credit against all payroll taxes on Form 941
  - Request a quick payment from IRS for the rest
  - Article on E&S Website
  - Joint IRS/DOL News Release IR 2020-57 pertains to EPSL from FFCRA but substantially same approach taken in CARES Act

# Unemployment & SUB Plans

- FFCRA provided \$1B State Unemployment benefits funding
  - Immediate qualification for Fed/State benefits
  - No charge back to employers
- Consider alternative Payroll Tax Credits and Forgivable Paycheck Protection Loans
- Consider a SUB Plan
  - Income tax withholding only, no other payroll tax
  - RevRul 90-72, 56-249, CCA 201020018
  - Plan submission to OJFS required to avoid state clawback. OAC 4141-36-01.
  - E&S efforts through OSBA/Governor office to approve a prototype plan

# CARES Act Potpourri

- Corporate NOL Carrybacks 2018 through 2020
  - 5 years (includes stub years as a full year)
  - Set off up to 100% of income (retroactive to 1/1/18, 80% cap pushed to 2022)
- Business Interest Deduction §163(j)
  - 30% of adjusted TI limit increased to 50% for '19 & '20
  - May use 2019 adjusted TI for 2020 calculation
- Excess business loss cap IRC 461(l)
  - Noncorporate taxpayers
  - The \$250K - \$500K cap is suspended (retroactive to 1/1/18, cap pushed to 2021)

# Continued

- Qualified Improvement Property §168(k)
  - TCJA error, fix is retroactive to 1/1/2018
  - Depreciation 15 year life + bonus
- 401(k)/IRA Hardship Withdrawals up to \$100K
  - Waive 10% penalty
  - Pay income tax over 3 years; or
  - Pay back over 3 years treated as a rollover
  - Coronavirus-related distributions only
- Required minimum distributions (70 ½ yr +)
  - Plan can suspend making these to participants



# Continued

- Cash Payments to Individuals for 2020
  - \$1,200 for individuals (\$2,400 for joint taxpayers) plus \$500 per qualifying child.
  - Income based phase-out, disappears \$99K/\$198K
- Charitable deduction for 2020
  - Individuals \$300 above the line
  - 100% AGI cap for itemizers instead of 60%
  - Corp 10% TI limit increases to 25% & food inventory contributions limit increases from 15% to 25% of TI

# Like Kind Exchanges

- IRS has emergency authority to extend the 45 day designation and 180 day closing requirements for federally declared disasters
  - Rev Proc 2018-58
  - Watch for it

# IRS Operations

- 50% of IRS staff furloughed
- Remote operations, almost no face-2-face
- Service Center closings
  - Tax return processing and additional extensions
- Rulings and determination letters backlog
- Don't expect timely paper correspondence

# Continued

- People First Initiative (3/25/2020)
- IRS Collection & Audit Policies Postpones/suspends 4/1 until 7/15/20
  - Installment Agreement, Direct Deposit, and Offers in Compromise payments. Interest continues to run
  - Liens and levies by field revenue officers
  - Passport cancellation certifications to US State Dept
  - Private debt collection, new accounts
  - Field Office and Correspondence Audits, except unique circumstances
- Appeals continues to work remotely

# Don't Do This!



Gary M. Harden, Esq.  
Eastman & Smith Ltd.  
(419) 247-1677  
[gmharden@eastmansmith.com](mailto:gmharden@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*



EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

*Established 1844 | Innovating Daily*

# PAYCHECK PROTECTION PROGRAM LOANS UNDER THE CARES ACT

Scott A. Johnson, Esq.

Eastman & Smith Ltd.

(419) 247-1823

[sajohnson@eastmansmith.com](mailto:sajohnson@eastmansmith.com)

# LOAN PROGRAMS

- Paycheck Protection Program Loans
- Existing SBA Deferral Grants
- Economic Injury Disaster Loans
- Federal Reserve Loans (Air Carriers)
- Middle Market Loans



# Paycheck Protection Loans

- New Type of SBA Section 7(a) Loan
- Available until June 30, 2020
- Eligible Borrowers include
  - Traditional SBA Borrowers
  - Any Business With 500 or Fewer Employees
  - Special Rules for Restaurants and Hospitality
- Maximum Loan Amount Is Lesser of:
  - 2 ½ months payroll; or
  - \$10,000,000.00

# Paycheck Protection Loans, Cont'd

- Funds Can Be Used For:
  - Payroll Costs
  - Group Health Care Costs
  - Salaries & Commissions
  - Mortgage Interest
  - Rent
  - Utilities
  - Interest on Other Debt
- Borrower must certify loan is necessary to maintain operations due to uncertainty of economic conditions and will be used for authorized purpose.

# Paycheck Protection Loans, Cont'd

- Loan Terms:
  - Interest Not to Exceed 4%
  - Payments Deferred for 6-12 Months
  - Maturity of Not More Than 10 Years
  - No Personal Guaranty or Collateral
  - No Prepayment Penalty
- Differences from most SBA Section 7(a) Loans:
  - 100% Guaranteed by SBA
  - SBA Guaranty Fee and Annual Fees Waived
  - Lenders not previously approved to make SBA loans will be able to participate
  - “No Credit Elsewhere” Requirement Does Not Apply

# Definition of Payroll Costs

- Included:
  - salary, wage, and commissions
  - tips
  - payment for vacation, parental, family, medical, or sick leave
  - allowance for dismissal or separation
  - group health care benefits, including insurance premiums
  - retirement benefits
  - State or local tax assessed on the compensation of employees
- Excluded:
  - compensation in excess of an annual salary of \$100,000;
  - FICA and Income Tax Withholdings;
  - compensation of an employee lives outside of the United States;
  - qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act; or
  - qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act

# Forgiveness of Loan

The sum of the following incurred during the eight-week period following the date of the loan will be forgiven:

- Payroll Costs
- Mortgage Interest
- Rent
- Utilities

Amount forgiven cannot exceed principal of loan

# Reduction In Forgiveness

- Reduction in Workforce:

Reduce Forgiveness amount by fraction equal to

Avg. # of Employees During 8-Week Period

Avg. # of Employees From Either  
2/15/19-6/30/19 or 1/1/20-2/29/20

- Reduction in Payroll:

Reduce forgiveness in an amount equal to the reduction in salary or wages for any employee greater than 25% the total salary or wages during the immediately preceding quarter

# Continued

- Emergency Paid Sick Leave: 80 hrs paid sick time for full time employees (part time = prorated average hours 2 weeks). Self-employed also qualify.
  - Eligible if
    - subject to a governmental quarantine or isolation order,
    - has been advised by a health-care provider to self-quarantine,
    - is caring for an individual who is subject to governmental or self-quarantine,
    - is caring for the employee's child because the child's school or child-care provider is closed, or
    - is experiencing a substantially similar circumstance

# Exemption For Re-Hires

## The Reduction Will Not Be Applied If:

- There is a reduction in employment between 2/15/2020 and 4/26/2020 and that reduction is eliminated by 6/30/2020
- There is a reduction in wages or salary for 1 or more employees between 2/15/2020 and 4/26/2020, and that reduction is eliminated for such employees by June 30, 2020
- The SBA and Secretary of Treasury can issue regulations for additional de minimis exemptions



# Existing SBA Section 7(a) Loans

- May be deferred for 6 months
- SBA will pay interest and principal owed over the 6-month period

Scott A. Johnson, Esq.  
Eastman & Smith Ltd.  
(419) 247-1823  
[sajohnson@eastmansmith.com](mailto:sajohnson@eastmansmith.com)

*www.eastmansmith.com*



EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

*Established 1844 | Innovating Daily*

# EXPANSION OF SBA ECONOMIC INJURY DISASTER LOAN PROGRAM UNDER THE CARES ACT

Gene R. Abercrombie, Esq.

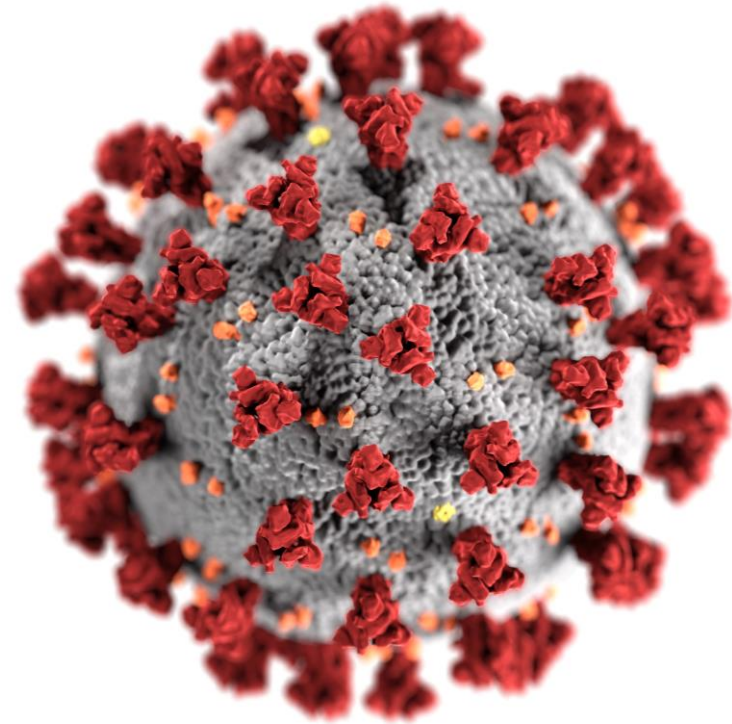
Eastman & Smith Ltd.

(419) 247-1619

[grabercrombie@eastmansmith.com](mailto:grabercrombie@eastmansmith.com)

# What Is It? How Long Is It Available?

- \$10 Billion expansion of EIDL
- Available until December 31, 2020
- Can provide up to \$2 million loan for permissible uses
- Must be an “eligible entity”



# What is an Eligible Entity?

- “Small businesses”
  - In business as of January 31, 2020
  - 500 or fewer employees
  - Includes sole proprietorships (with or without employees)
  - Independent contractors
  - Cooperatives
  - ESOPs
  - Tribal small business concerns
- Private non-profit entities

# Additional Requirements

- SBA must determine applicant has the ability to repay
- Guidelines are forthcoming but will likely involve some sort of credit score
- Entity must suffer an "economic injury" (i.e. business must be unable to meet its obligations and to pay its ordinary and necessary operating expenses) due to the COVID-19 pandemic.

# Permissible Uses

- Payroll expenses
- Paid sick leave
- Accounts payable
- Rent or mortgage payments
- Debt service
- Increased costs to obtain materials due to interrupted supply chains



# Prohibited Uses

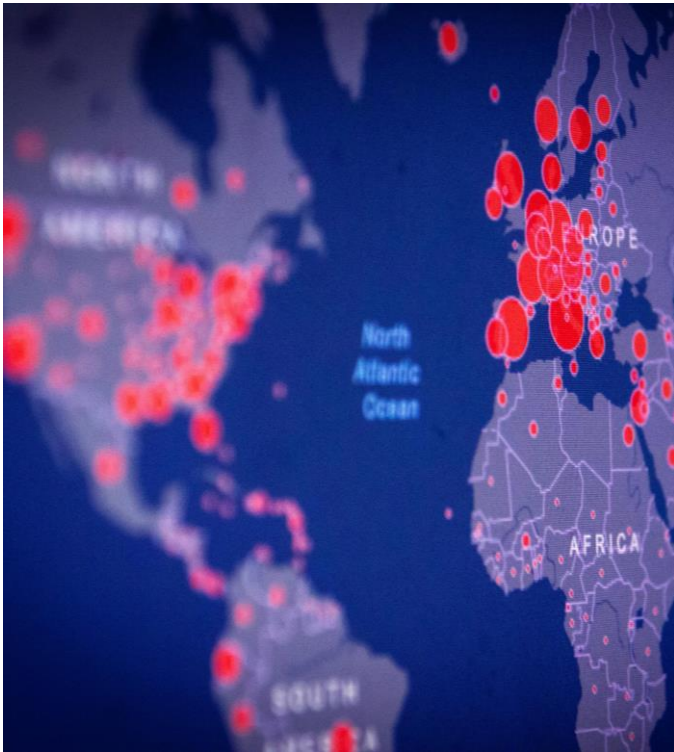
- Merely replacing lost sales or revenue
- Refinancing existing debt
- Making loan payments on other loans owed to Federal agencies
- Payment of tax penalties
- Repair of physical damages
- Payment of dividends or distributions to equity owners



# Loan Terms

- Interest rate of 3.75% (2.75% for non-profits)
- Term of up to 30 years (determined on a case by case basis)
- No forgiveness of debt (unlike the PPP)
- Security
  - Loan of over \$25,000: collateral requirements
  - Loan of over \$200,000: personal guaranty of all owners of 20% or more of the applicant
- No pre-payment penalty

# \$10,000 Emergency Advance



- Applicant can receive a \$10,000 emergency advance
- Within 3 days of application
- Still subject to verification of eligibility
- NOT subject to repayment (Even if loan is later denied)
- Can be received while a PPP loan application is pending

Gene R. Abercrombie, Esq.  
Eastman & Smith Ltd.  
(419) 247-1619

[grabercrombie@eastmansmith.com](mailto:grabercrombie@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*

EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

*Established 1844 | Innovating Daily*

# TITLE IV CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT

ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED  
SECTORS OF THE UNITED STATES ECONOMY

Stephen A. Roepke, Esq.

Eastman & Smith Ltd.

(419) 424-1970

[saroepke@eastmansmith.com](mailto:saroepke@eastmansmith.com)

# Treasury Loans/Guarantees - \$500B

## I. DIRECT LOANS/GUARANTEES

### A. BUSINESS TYPES

1. Air Carriers
  - a. Air Carriers & FAA Certified Business - \$25B
  - b. Cargo Air Carriers - \$4B
2. Business Critical to National Security - \$17B
3. Other Businesses, States, and Municipalities - \$454B

### B. ELIGIBILITY

1. Company Created in US or under US Law
2. Significant US Operations
3. Majority of Employees Based in US
4. Expected to Incur or Has Incurred Covered (Coronavirus) Losses That Jeopardize Operations

# Treasury Loans/Guarantees - \$500B

5. Other Credit Not Reasonably Available
6. Obligation Is Reasonably Incurred
7. Sufficiently Secured
8. At A Rate Reflecting Risk – Not Less Than Pre-Coronavirus Market Rate
9. Term is =/< 5 Years

## **C. LOAN/GUARANTEE CONDITIONS**

1. For Duration of Loan/Guarantee and 1 Additional Year
  - a. No Purchase of Listed Equity Security\*
  - b. No Purchase of Parent's Security\*
  - c. No Dividends
  - d. No Capital Distribution

# Treasury Loans/Guarantees - \$500B

- e. Officers/Employees: 2019 Total Compensation \$425K to \$3M
  - i. Any 12 Month Consecutive Period Total Compensation =/< 2019 Total Compensation
  - ii. If Terminated, Severance/Total Compensation =/< twice 2019 Total Compensation
- f. Officers/Employees: 2019 Total Compensation > \$3M
  - i. Any 12 Month Consecutive Period Total Compensation =/< \$3M Plus 50% of 2019 Total Compensation Over \$3M

***Total Compensation = Salary Bonus, Stock Options, and Other Financial Benefits***

***\*A Pre-existing Contractual Obligation Can Be an Exception***

- 2. Maintain 3/24/2020 Employment Levels Until 9/30/2020 as Practical (Absolute 90% Requirement)
- 3. Principal Amount May Not Be Reduced Through Forgiveness
- 4. Taxpayer Protection/Participation
  - a. Publicly Traded Companies – Treasury Must Have a Warrant or Equity Position
    - i. Treasury Free to Sell
    - ii. Treasury Shall Not Exercise Voting Power
  - b. Other Companies – Treasury Must Have Warrant/Equity/Senior Debt Position

# Treasury Loans/Guarantees - \$500B

## **D. LOAN PROCEDURES**

1. Stay Tuned
  - a. By April 6, 2020, Treasury To Publish Rules & Regulation

## **II. MID-SIZE BUSINESS LOAN/GUARANTEES THROUGH BANKS/LENDERS**

### **A. MID-SIZE BUSINESS ELIGIBILITY/TERMS**

1. Company Created in US or under US Law
2. Significant US Operations
3. Majority of Employees Based in US
4. Necessary To Support Ongoing Operations
5. Not a Debtor In Bankruptcy
6. Company/Not-For-Profit: 500-10,000 Employees
7. 6 Months – No Payments
8. Rate=<2%



# Treasury Loans/Guarantees - \$500B

## B. MID-SIZE BUSINESS CONDITIONS

1. For Duration of Loan/Guarantee and 1 Additional Year:
  - a. No Purchase of Listed Equity Security\*
  - b. No Purchase of Parent's Security
  - c. No Dividends
  - d. No Capital Distribution
2. For Duration of Loan/Guarantee and 2 Additional Years:
  - a. Will Not Outsource/Offshore Jobs
  - b. Will Not Abrogate Existing Collective Bargaining Agreements
  - c. Officers/Employees: 2019 Total Compensation \$425K to \$3M
    - i. Any 12 Month Consecutive Period Total Compensation =/ $\leq$  2019 Total Compensation
    - ii. If Terminated, Severance/Total Compensation =/ $\leq$  twice 2019 Total Compensation
  - d. Officers/Employees: 2019 Total Compensation  $>$  \$3M
    - i. Any 12 Month Consecutive Period Total Compensation =/ $\leq$  \$3M Plus 50% of 2019 Total Compensation Over \$3M

\*Total Compensation = Salary Bonus, Stock Options, and Other Financial Benefits

# Treasury Loans/Guarantees - \$500B

3. Maintain At Least 90% of Workforce as of 2/1/2020 at Full Compensation & Benefits Until 9/30/2020
4. Restore all Compensation and Benefits Within Four Months of the Termination of the Emergency
5. Intend to Restore 90% of the Workforce as of 2/1/2020
6. For Duration of Loan/Guarantee:
  - a. Will Remain Neutral in Any Union Organizing Effort

## **C. LOAN PROCEDURES**

1. Stay Tuned!
  - a. By April 6, 2020, Treasury To Publish Rules & Regulations

# FEDERAL RESERVE PROGRAMS/FACILITIES

## A. FUNDS ALLOCATED TO PROVIDE LIQUIDITY

1. Investments in Federal Reserve Programs/Facilities
  - a. Money Market Fund Liquidity Facility
  - b. Commercial Paper Funding Facility
  - c. Primary Market Corporate Credit Facility
  - d. Secondary Market Corporate Facility
  - e. Term-Asset-Backed Securities Loan Facility
2. Purchasing Obligations From Issuers
3. Purchasing Obligations From Secondary Markets
4. Making Direct Loans
5. **Authorizes the Federal Reserve's Creation of a Main Street Lending Program For Small to Midsize Companies – No Details**

Stephen A. Roepke, Esq.  
Eastman & Smith Ltd.  
(419) 424-1970  
[saroepke@eastmansmith.com](mailto:saroepke@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*



**QUESTIONS?**