



WISCONSIN
**VETERANS CHAMBER
OF COMMERCE**

COVID-19 LEGAL BRIEFING:

WHAT BUSINESSES SHOULD KNOW ABOUT INSURANCE COVERAGE,
CONTRACTING CHALLENGES, THE CARES ACT AND THE FFCRA

Christopher K. Schuele

414-298-8323

cschuele@reinhardtlaw.com

Guy R. Temple

414-298-8121

gtemple@reinhardtlaw.com

Shannon Toole

414-298-8526

stoole@reinhardtlaw.com

Reinhart Boerner Van Deuren s.c.

1000 North Water Street, Suite 1700, Milwaukee, WI 53202

www.reinhartlaw.com

Disclaimer

This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues.

Additional facts and information or future developments may affect the subjects addressed in this presentation.

You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.

Insurance Coverage for COVID-19 Losses & Commercial Contracting Challenges

Guy R. Temple

Attorney in Reinhart's Litigation Practice

414-298-8121

gtemple@reinhartlaw.com

Insurance Coverage that May Apply to COVID-19 Losses

- Business Interruption
- Civil Authority
- Contingent Business Interruption

Business Interruption Coverage for COVID-19 Losses

- What is Business Interruption Coverage?
 - Generally through property policy and requiring physical damage to insured property caused by a “covered peril”
 - May cover damage to business premises or other business equipment
 - But physical loss or damage to property not confined to physical destruction or structural damage (such as fire, water damage, etc.)
 - Usually also includes conditions that make the property unusable

Business Interruption Coverage for COVID-19 Losses

- What might be excluded?
 - Policy may contain exclusions for pollutants, contaminants, bacteria, mold, pathogens
 - But may not specifically cite *viruses*
- What might be covered?
 - Quantifiable losses due to interruption, including lost profits
 - Measured by time period needed to restore or repair property
 - Interruption coverage may extend for period after property damage has been repaired to allow the business to resume normal operations

Civil Authority Coverage

- Policies may include coverage endorsement for interruption caused by orders by civil authorities
- Coverage could apply to perils arising out of actions of civil authorities (e.g. shelter in place orders)
- Government or military authorities restrict access to insured property
- Even Civil Authority provisions may require direct physical damage to property as the impetus for the government restriction
- Wisconsin's "Safer at Home" Order notes that "COVID-19 is present throughout Wisconsin" as a basis for the restrictions

Contingent Business Interruption

- Protects against disruptions in your supply chain
- Provides coverage if suppliers or other companies upon which you rely are shut down due to physical damage to property
- May include COVID-19 contamination of your supplier's facility
- In some cases, may include loss of market for your products due to damage to your customer's property

The Current Landscape on COVID-19 Claims

- Insurers preemptively stating COVID-19 losses not covered
- BI claims are typically being denied
- Insurance industry insists exclusions exist for reason – insurers are not capable of paying out to every insured business *at same time*
- Wisconsin Office of the Commissioner of Insurance (OCI) statement
 - “OCI cannot mandate that insurers cover business interruption insurance cover losses associated with COVID-19 . . . Insurers could become insolvent and be unable to meet the obligations that are currently included in their contracts with policyholders.”

Legislative and Legal Challenges

- State (7 thus far) and federal legislative action; but likely to be challenged in court by insurers
- Lawsuits by local businesses against insurers in federal and state court
 - *Rising Dough Inc et al vs Society Insurance* (Eastern District of Wisconsin)
 - *Colectivo Coffee Roasters, Inc. et al vs Society Insurance* (Milwaukee County)

What Should Your Business Do?

- Review policy language carefully, including all endorsements and exclusions, to determine if there is potentially coverage
- If you are unsure, best to go ahead and file a claim with your insurer
- Looking forward, carefully review your liability coverage
 - As businesses reopen, liability risk for customer exposure to infection on the premises
 - Although employee infection at workplace may fall under workers' compensation, subsequent infection of employee's family may give rise to claims

Suspending Contract Obligations

- Force Majeure
- Impossibility
- Frustration of Purpose
- Commercial Impracticability

Force Majeure

- Common clauses in commercial contracts
- Excuse one or both parties from performing when circumstances beyond their control intervene
- They can be broad and general, referring to circumstances beyond the party's control, or refer to specific scenarios, like strikes or acts of terrorism.
- May simply refer to Acts of God
- The specific language matters – does it include pandemics, quarantines, etc.?

Impossibility

- Condition which at time of contracting both parties assumed would continue, ceases to exist
- Courts will not enforce an obligation that is impossible to perform
- Usually must be objectively impossible
 - Example: Entertainment company books performer to sing national anthem at Brewers home opener; game cancelled and impossible for singer to perform

Frustration of Purpose

- Contractual performance remains possible, but such performance would produce a dramatically different result from what the parties anticipated when the contract was signed
- Example: Company books shuttle bus to take employees from offices to Brewers game; game cancelled and purpose of shuttle bus reservation ceases to exist

Commercial Impracticability

- Performance has been made impracticable by the occurrence of an *unforeseeable* contingency
- Delay or nonperformance is not a breach where performance made impracticable by an event which was assumed would not occur
- Must have been unforeseeable; impracticable does not simply mean “got more expensive to perform”

What Should Your Business Do?

- Review your supplier and customer contracts carefully
- Be aware of possible force majeure or impossibility/impracticability claims within your supply chain
- Be prepared to allocate product among customers and research sourcing options
- Keep **good documentation** of your efforts to mitigate (i.e., finding new supply sources or delivery options)
- Communicate with your suppliers and customers and keep them informed; Courts will look favorably on parties that act reasonably and promptly

Questions?

Visit our Coronavirus Resource Center for more detail & daily updates

<https://www.reinhartlaw.com/coronavirus/>



Families First Coronavirus Response Act (FFCRA)

Shannon M. Toole

Attorney in Reinhart's Labor & Employment Practice

414-298-8526

stoole@reinhartlaw.com

Timeline of FFCRA Legislation

March 18: FFCRA signed into law

April 1: FFCRA goes into effect, employer begin administering leave

April 17: Department of Labor begins enforcing the FFCRA

December 31: FFCRA coverage ends

FFCRA Coverage

- Applies to employers with fewer than 500 employees *in the United States*
- Employers must determine whether they are covered by the FFCRA each time an employee takes leave
- “Employees” include:
 - full-time employees;
 - part-time employees;
 - employees on leave;
 - temporary employees; and
 - day laborers supplied by a temporary agency.

Types of Leave

Emergency Paid Sick Leave (EPSL)

Expanded Family and Medical Leave (E-FMLA)

Emergency Paid Sick Leave (EPSL)

Emergency Paid Sick Leave (EPSL)

An employee qualifies for EPSL if he or she meets one of six conditions.

Emergency Paid Sick Leave (EPSL)

1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Emergency Paid Sick Leave (EPSL)

4. The employee is caring for an individual who:
 - (a) is subject to a federal, state or local quarantine or isolation order related to COVID-19; or
 - (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

Emergency Paid Sick Leave (EPSL)

5. The employee is caring for a son or daughter younger than 18 years old whose school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.

Emergency Paid Sick Leave (EPSL)

6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Emergency Paid Sick Leave (EPSL)

- Full-time: up to 80 hours of EPSL
- Part-time: average hours worked over a two-week period

Emergency Paid Sick Leave (EPSL)

Employees who take leave for conditions 1-3 must be paid at their regular rate of pay but cannot receive more than \$511 per day (\$5,110 in total).

Employees who take leave for conditions 4-6 must be paid at two-thirds their regular rate of pay. Paid leave for conditions 4-6 is limited to no more than \$200 per day (\$2,000 in total).

Expanded Family and Medical Leave (E-FMLA)

Expanded Family and Medical Leave (E-FMLA)

An employee may take E-FMLA if:

- The employee has been employed for at least 30 days; and
- The employee is caring for a son or daughter younger than 18 years old whose school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.

Expanded Family and Medical Leave (E-FMLA)

- Up to 12 weeks of E-FMLA
- First 10 days of E-FMLA is unpaid
- Remaining E-FMLA is paid at \$200/day, a maximum of \$10,000 total, per employee.

Expanded Family and Medical Leave (E-FMLA)

- Employees have the right to return to their positions when their leave expires.
- Exception for employers with fewer than 25 employees.
 - Exception applies when an employer with fewer than 25 employees must eliminate the position due to economic circumstances caused by the COVID-19 pandemic and there is no equivalent position available.

Tax Credit

Tax Credit

Employers may claim a tax credit against the employer portion of Social Security taxes for up to 100% of leave wages paid by an employer for leave offered under the FFCRA.

Tax Credit

To claim the tax credit, employers must obtain the following information from the employee:

- The employee's name;
- The date or dates for which leave is requested;
- A statement of the COVID-19 related reason the employee is requesting leave *and written support for such reason*; and
- A statement that the employee is unable to work, including by means of telework, for such reason.

Additional Tax Credit Resources

IRS FAQs: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

Reinhart Coronavirus Resource Center:
<https://www.reinhartlaw.com/coronavirus/>

Reinhart Tax Law Group:
<https://www.reinhartlaw.com/practices/tax/>

Intermittent Leave

Intermittent Leave - Unable to Telework

- Employees who are *unable to telework* may take intermittent EPSL or E-FMLA if:
 - the employee is caring for a minor son or daughter whose school or child care provider is closed, or whose child care provider is unavailable; *and*
 - Both the employer and the employee agree to the intermittent leave.

Intermittent Leave - Able to Telework

- Employees who are *able to telework* may take intermittent EPSL or E-FMLA for any qualifying reason as long as both the employer and the employee agree to the intermittent leave.
- The agreement between the employer and the employee does not have to be in writing. A clear and mutual understanding between the parties is sufficient.

Employers with Fewer Than 50 Employees

Exemption for Employers With Fewer Than 50 Employees

Applies if providing EPSL leave for childcare or E-FMLA to employees would jeopardize the viability of the business as a going concern.

Enforcement

Enforcement

- Began on April 17, 2020
- Failure to provide leave or properly compensate employees for leave could result in monetary penalties

Questions?

Thank You!

This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this presentation. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.

reinhartlaw.com • 800.553.6215

MILWAUKEE • MADISON • WAUKESHA • CHICAGO • ROCKFORD • MINNEAPOLIS DENVER • PHOENIX

What the CARES Act and Other COVID-19 Legislation Means for Wisconsin Employers

Christopher K. Schuele

Attorney in Reinhart's Labor & Employment Practice

414-298-8323

cschuele@reinhartlaw.com

Timeline of COVID-19 Legislation

- **March 3:** Coronavirus Preparedness and Response Supplemental Appropriations Act
- **March 18:** Families First Coronavirus Response Act
- **March 19 - 23:** Shelter-in-Place Orders (e.g., CA; NY; IL; WI)
- **March 27:** Coronavirus Aid, Relief and Economic Security Act
 - The “CARES” Act
- **April 15:** 2019 Wisconsin Act 185
- **April 24:** Paycheck Protection Program and Health Care Enhancement Act

Coronavirus Preparedness and Response Supplemental Appropriations Act (March 4)

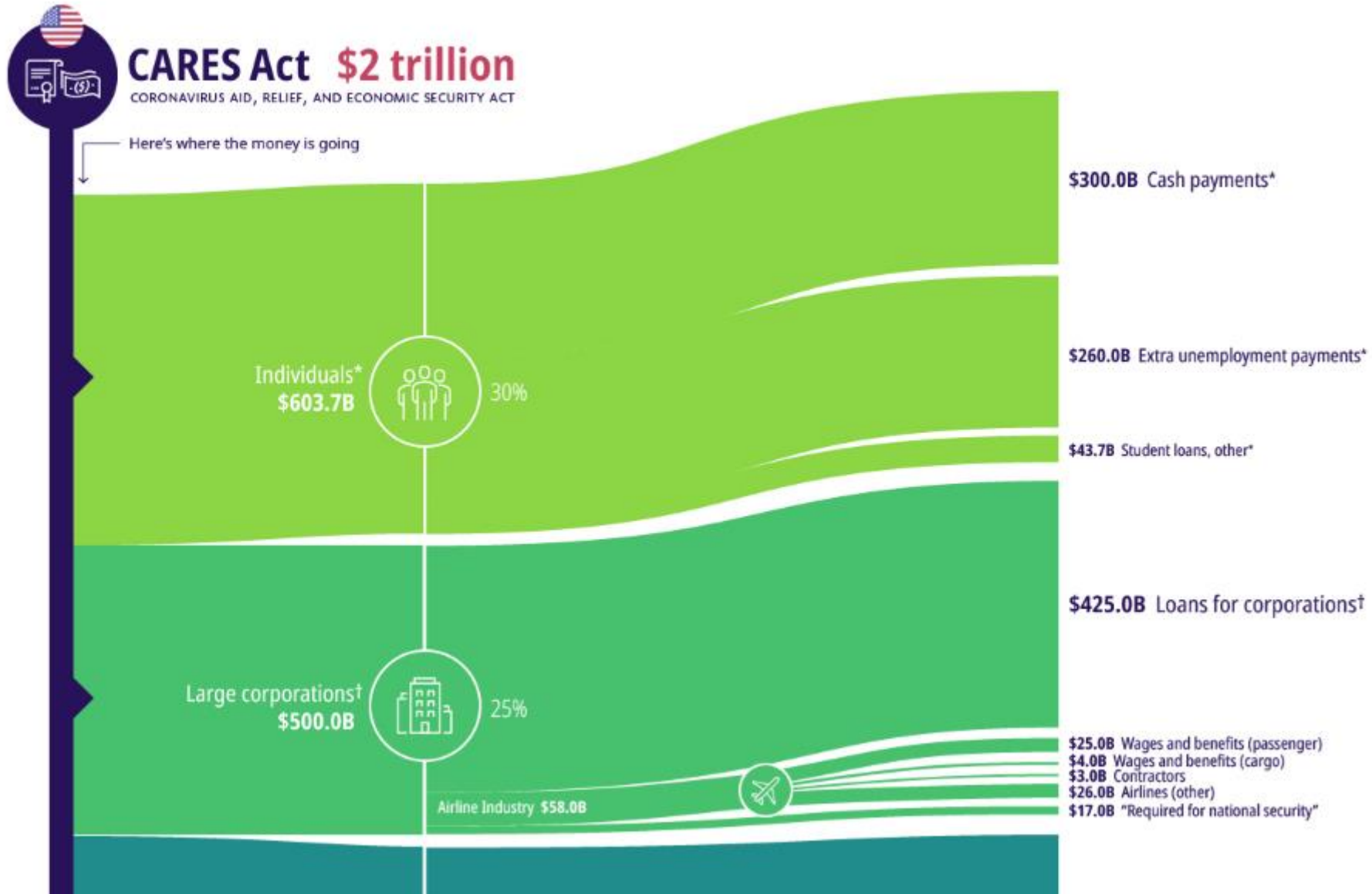
- \$8.3 billion for federal agency response to the COVID-19 pandemic
 - \$6.7 billion (81%) designated for domestic response
 - Small Business Administration; Centers for Disease Control and Prevention; Food and Drug Administration, etc.
 - \$1.6 billion (19%) designated for international response

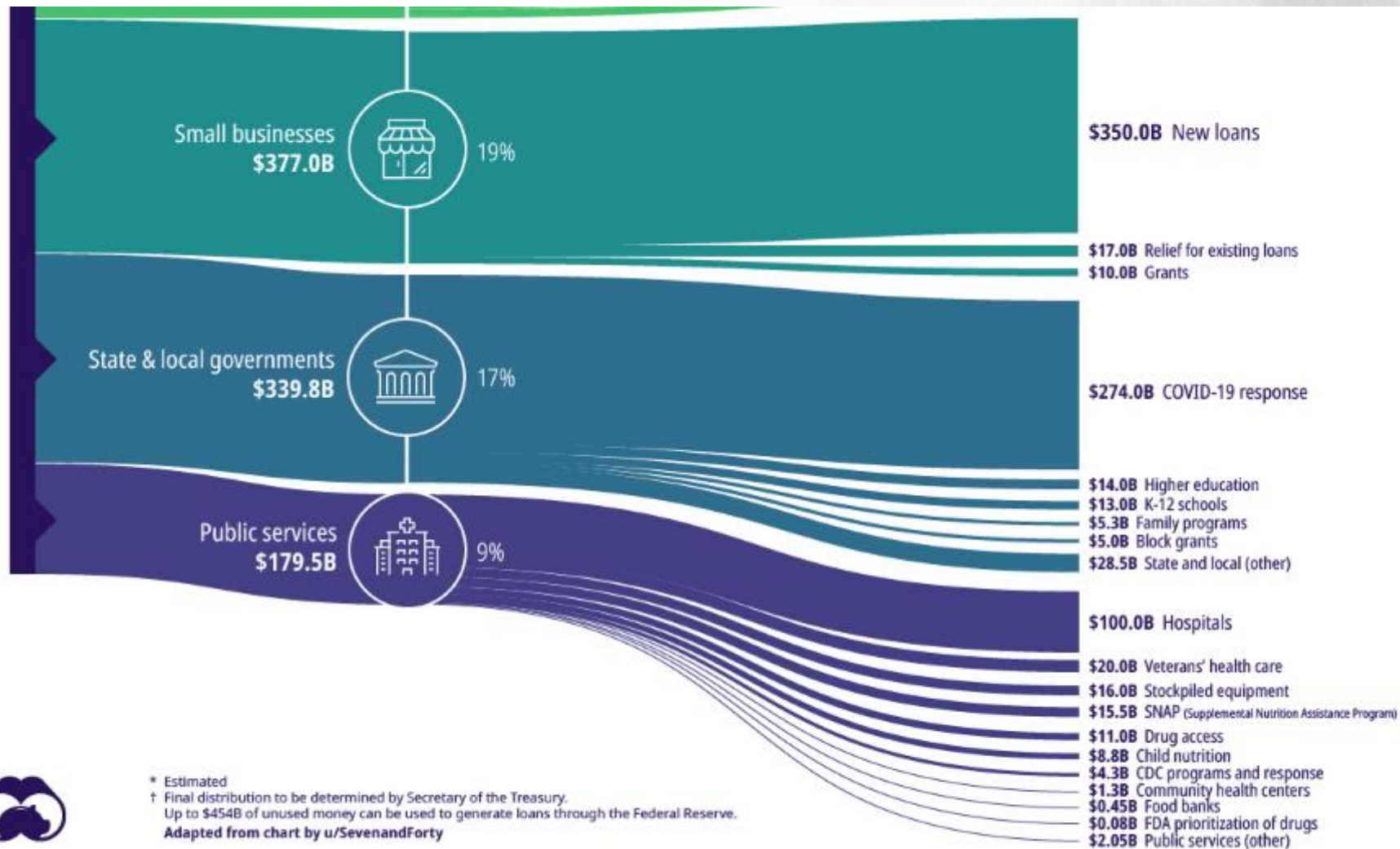
Families First Coronavirus Response Act (March 18)

- Expands the Family Medical Leave Act by requiring employers with fewer than 500 employees to provide up to 12 weeks of partially paid family medical leave to care for children due to school or daycare closures
- Requires employers with fewer than 500 employees to provide up to 2 weeks of paid leave to employees directly affected by the COVID-19 pandemic

The CARES Act (March 27)

- \$2 trillion stimulus package
- Key Provisions for small employers:
 - Paycheck Protection Program (“PPP”) (\$350 billion)
 - Economic Injury Disaster Loan Emergency Advance (\$10 billion)
 - Expanded Unemployment Insurance Benefits (\$260 billion)





The CARES Act (March 27)

- Paycheck Protection Program
 - Who is eligible?
 - Business with 500 or fewer employees
 - Businesses who satisfy the SBA's size standard
 - Exceptions for businesses in the hospitality and dining industries: 500 or fewer employees per location
 - Shake Shack ~ 8,000 employees; 189 restaurants
- Survey:
 - Did you or your company apply for a PPP loan?
 - If “yes,” did you or your company receive a PPP loan?

The CARES Act (March 27)

- **Paycheck Protection Program**
 - Permissible uses of PPP loan funds:
 - Payroll costs
 - Continuation of group health care benefits during periods of paid sick, medical or family leave and insurance premiums
 - Interest on mortgage obligations
 - Rent/lease agreement payments
 - Utilities
 - Interest on debt incurred before the loan origination date

The CARES Act (March 27)

- **Paycheck Protection Program Forgivable expenses:**
 - Payroll costs
 - Interest on mortgage obligations
 - Rent/lease agreement payments
 - Utilities
- 75% of PPP loan must be spent on payroll costs to be forgiven
- Limitations regarding reductions to:
 - The number of current employees
 - Salary/wages of current employees

The CARES Act (March 27)

- **Expansion of Economic Injury Disaster Loan (“EIDL”) Program**
 - Temporarily expanding eligibility for SBA’s EIDL program through December 31
 - Maximum of \$2 million per applicant
 - 3.75% interest
 - Up to 30 years
 - EIDL Emergency Advance—grants of up to \$10,000 to EIDL applicants within 3 days of submitting an application

The CARES Act (March 27)

- **Expansion in available unemployment insurance (“UI”) benefits**
 - Providing an additional \$600 per week in UI benefits through July 31
 - Providing an additional 13 weeks of UI benefits through December 31
 - Providing 39 weeks of UI benefits through December 31 to claimants who are ineligible for UI benefits under applicable state law and who are unable or unavailable to work because of the COVID-19 pandemic

2019 Wisconsin Act 185

- Complement to the CARES Act's expansion in available UI benefits
 - Temporary suspension of Wisconsin's one-week waiting period for UI benefit eligibility (March 12, 2020 to February 7, 2021)
 - Non-charging of employer UI accounts for unemployment caused by Gov. Evers' Safer-at-Home Executive Order
 - Easing work share program requirements:
 - General reduction in hours in lieu of targeted layoff
 - Workers receive pro-rated UI benefits (including UI benefits provided under the CARES Act)

Paycheck Protection Program and Health Care Enhancement Act (April 24)

- PPP ran out of money by April 16 (less than two weeks after President Trump signed the CARES Act into law on March 27)
 - Reports of too many small businesses being denied PPP loans; large “small” businesses prioritized by banks
 - 94 publically traded companies received a total of \$365 million
- \$310 billion to the PPP (\$60 billion earmarked for small, medium and community lenders)
- \$60 billion to the SBA’s EIDL program

Questions?

Thank You!

This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this presentation. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.

reinhartlaw.com • 800.553.6215

MILWAUKEE • MADISON • WAUKESHA • CHICAGO • ROCKFORD • MINNEAPOLIS • DENVER • PHOENIX