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A report on emerging legal trends from the attorneys of DBL Law

COVID-19 Issue Summer 2020

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Businesses Facing Bankruptcy During COVID-19 Outbreak

by Betsy Weber | bweber@dbllaw.com

Many small businesses will struggle to survive the financial challenges brought on by the novel coronavirus. Historically, Chapter 11 of the Bankruptcy Code was an option that was more attractive to large businesses. But recent changes in the Code may make it a good option for small businesses during the COVID-19 outbreak. The Small Business Reorganization Act of 2019 added a provision known as Subchapter V to Chapter 11. As originally enacted, to be eligible for relief under Subchapter V, a business could have no more than \$2,725,625 in non-contingent liquidated secured and unsecured debt. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act expanded the application of Subchapter V by raising the debt ceiling of qualifying businesses to \$7.5 million. After March 26, 2021, the qualifying debt ceiling will revert to the original \$2,725,625 limit.

Based on this provision of the CARES Act and the number of small businesses negatively affected by COVID-19, the number of small businesses seeking relief under Chapter 11 will undoubtedly increase significantly. But there are preventative steps that an unsecured creditor can take prior to the filing of a customer's bankruptcy case which may significantly reduce the creditor's ultimate exposure.

Avoid the Preference Claim. Unsecured creditors may be liable to a debtor's bankruptcy estate when they have received payments within the 90 days before the debtor filed bankruptcy. The creditor is not, however, without defenses to these actions. For instance, payments that constitute contemporaneous exchanges or payments made in the ordinary course of the parties' business terms will not be considered preferential. As such, you should keep your accounts current and follow your ordinary billing practices. If an invoice is due within 30 days, do not allow the account to slip beyond contractual terms. If you know a filing is imminent, discuss with your legal counsel which invoice any payment should be applied against.

Monitor Customers' Solvency. If you extend trade credit to a customer that represents a significant source of your revenue, intermittently request credit opinions from a financial service firm relative to the customer's ability to meet obligations as they come due.

Establish Protective Payment Requirements. Upon learning that a particular customer is an imminent potential credit risk, institute payment requirements such as advance payments or cash on delivery for shipments. Such payments will provide insulation from a preference claim. Alternatively, establish an evergreen retainer or cash deposit system, or consider conditioning the provision of further goods and services upon the guarantees of the customer's principals.

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Considerations For Employers Reopening Business

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As states begin to lift social distancing restrictions and stay at home orders, many employers face the reality of how a post-quarantine work environment and workforce will look. It is important that employers develop a plan to reopen. These policies should comply with CDC, WHO, and individual state guidance, while also complying with employment laws. Below is a checklist that employers should communicate, train, and enforce when preparing for reopening.

Prepare for Re-Opening

- Designate a point person for questions or concerns.
- Place posters around the office indicating proper procedures for social distancing, screening, hand-washing, and cleaning, and proper use of personal protective equipment (PPE). (The CDC has printable posters).
- Provide soap, sanitizer, disinfecting wipes, thermometers, and PPE.
- Sanitize the office regularly.
- Communicate new guidelines and procedures with employees before allowing any employee to return to work.

Review and Implement Policies related to:

- Attendance, leaves of absences, the Family Medical Leave Act, and paid time off in anticipation of COVID-19 related absences. (This also includes leave requests under the Families First Coronavirus Response Act).
- Telework options and guidelines.
- Reporting safety issues.
- Tracing COVID-19 cases and providing notice for any employees possibly exposed to the virus within the workplace.
- Establish return to work guidelines for employees that have been diagnosed with COVID-19 or suspected COVID-19.
- Ensure that employees and supervisors are aware and understand current and new policies and how these policies will be monitored and enforced.

Protect Employees at Work

- Maintain telework if possible.
- If it is not possible to maintain telework, continue to hold meetings virtually or over the phone to reduce face-to-face interaction.
- Use electronic communications in lieu of paper.
- Institute screening procedures.
- Require temperature checks upon entrance to the workplace
- Require employees with possible COVID-19 symptoms to stay home.
- Institute and require similar screening for any visitors prior to entrance.
- Maintain social distancing practices.
- Maintain the recommended 6 foot distance between employees in the workspace and common gathering areas.
- Consider closing common areas where employees are likely to congregate or limit the number of people allowed in such areas.
- Stagger break times so there is limited congregating in break rooms or other common areas.
- If the business requires face-to-face

interaction between the employee and a customer, utilize clear shield and barriers to protect employees.

- Emphasize proper cleaning and hygiene.
- Encourage employees to avoid unnecessary contact with others such as handshakes.
- Require employees to disinfect common surfaces and devices after use, such as keypads, computers, tablets, remotes, or any device that may be touched by others.
- Require employees to wear masks as they enter and leave the office and when they may encounter others, such as in the bathrooms, hallways, in the kitchen or break-room.
- If the workplace requires use of PPE, ensure that employees understand proper use.

BACK TO BUSINESS



Understanding the Main Street Lending Program

by Patrick Hughes* | phughes@dbllaw.com

The Federal Reserve is rolling out a \$600 billion program to provide loans to eligible small and mid-sized businesses.

The Main Street Lending Program (MSLP) will allow small and mid-sized businesses to apply for new or increased loans of not less than \$500,000 from eligible lenders. It will be comprised of three programs: the Main Street New Loan Facility ("MSNLF"), the Main Street Priority Lending Facility ("MSPLF"), and the Main Street Expanded Loan Facility ("MSELF"). Under the MSNLF, eligible businesses may seek new loans from eligible lenders. In contrast, the MSELF will allow businesses with existing loans with an eligible lender to have their loans increased.

Eligible Borrowers. - U.S. businesses with up to 15,000 employees or \$5 billion in 2019 annual revenues are eligible for an MSLP loan. The three loan programs under the MSLP are mutually exclusive, such that a business may not participate in the programs simultaneously, nor may a MSLP borrower participate in the Primary Market Corporate Credit Facility. Eligible lenders are U.S. insured depository institutions, U.S. bank holding companies, and U.S. savings and loan holding companies.

Eligible Loans. - Businesses may apply for new or upsized tranche loans under the MSLP. Businesses must apply for a minimum loan amount of \$500,000 under the MSNLF and MSPLF programs or \$10 million under the MSELF. Maximum loan amounts vary between the MSNLF, MSPLF, and MSELF programs from \$25 million to up to \$200 million. The MSLP loans are four-year loans with adjustable interest rates of LIBOR + 3%. The amortization of principal and interest will be deferred for one year, however, prepayment is permitted without penalty. These loans are not eligible for forgiveness, which is one of many distinguishing factors between the MSLP and the PPP programs as discussed in detail below.

Loan Participation. - A Federal Reserve Bank will set up a Special Purpose Vehicle (SPV) to purchase 95 percent participation in loans originated by eligible lenders under the MSELF and MSNLF programs. Eligible lenders will retain 5 percent of the loans. Under the MSPLF program, the SPV will purchase 85 percent participation in eligible loans. Eligible lenders will retain 15 percent of each eligible loan. The SPV and eligible lender will

share risk in the new or upsized tranche loans on a pari passu – or equal footing – basis.

For a list of required certifications and covenants for use of MSLP Loans visit <https://www.dbllaw.com/news/covid-19-business-resources/>

Loan Fees. - MSNLF and MSPLF eligible lenders will pay to the Main Street SPV a transaction fee of 100 basis points of the principal amount of the MSNLF and MSPLF loan at the time of origination, and may pass on a fee to eligible borrowers an origination fee of 100 basis points of the principal amount of the loan. In addition, the eligible borrower will pay the eligible lender a fee of up to 100 basis points of the principal amount of the MSNLF or MSPLF loan at the time of origination. Eligible lenders have discretion over whether and when to charge eligible borrowers this fee. MSELF eligible lenders will pay the Main Street SPV a transaction fee of 75 basis points of the principal amount of the upsized tranche at the time of upsizing and may pass this fee to eligible borrowers. In addition, the eligible borrower will pay an eligible lender a fee of up to 75 basis points of the principal amount of the MSELF upsized tranche at the time of upsizing. Eligible lenders have discretion over whether and when to charge eligible borrowers this fee. The SPV will pay the eligible lender 25 basis points of the principal amount of its participation in the new loan or upsized tranche of the loan per year. There are also non-payroll operating costs, strictly limiting what small business owners can do with their PPP loan.

Conclusion. - The MSLP appears to be a promising alternative for some small to mid-sized businesses who did not receive funding under the PPP; however, many small businesses will not be

eligible for this program. The MSLP minimum loan amount of \$500,000 makes it impracticable for many small and mid-sized businesses to apply. This is especially true in light of the SBA's Paycheck Protection Program (PPP) Report, released on April 16, 2020, which estimated that approximately 75% of applicants for PPP loans requested \$150,000 or less. Furthermore, the lack of loan forgiveness, higher interest rates, and mandatory fees make the MSLP an unworkable solution for many small businesses.

**DBL Law clerk Emma Gripshover, J.D., contributed to this article.*





KY Liquor Licensing During COVID-19

by Danyel Rickman | drickman@dbllaw.com

Every aspect of business has been affected by this pandemic. Obtaining a liquor license for either a new facility, transferring a license, or obtaining a license for prospective events has likewise been affected. State and local ABC administrators continue to conduct business as usual while following social distancing guidelines and implementing their own work from home or staff reduction policies. The following are things to expect:

1. Obtaining a liquor license in Kentucky is a two-step process. First, the Local Alcoholic Beverage Control office administrator ("Local ABC") has to approve the application. Then the Kentucky Alcoholic Beverage Control office ("State ABC") will undertake a review. With COVID-19 requiring social distancing, local administrators are most likely working from home or cycling into offices every few days, businesses should expect a delay in response to inquiries regarding application contents or receiving local approval.

2. The State ABC will undertake its review after the Local ABC has provided its approval. Like other state entities, State ABC administrators are working remotely due to COVID-19.

3. Based upon the type of application, Local ABC administrators may require an inspection of the facility to be licensed. Depending on each locality's COVID-19 policy, these inspections may be done in a manner which follow social distancing guidelines. For new facilities, the State ABC also requires an enforcement officer to coordinate an inspection. These inspections remain in person while following social distancing guidelines.

4. As annual license renewal applications become due, businesses already licensed should ensure that materials and fees are timely submitted. State ABC has extended a rule allowing licensees to operate under expired licenses through May 31, 2020. Licenses expiring on May 31, 2020 will now remain effective until June 30, 2020.



HR Checklist When Employee Tests Positive For COVID-19

by Kelly Holden | kschoening@dbllaw.com

As most of us return to our respective workplaces, human resources professionals will face many new challenges, including what to do when an employee tests positive for COVID-19. Below is a checklist to consider as you approach this situation:

- Inform other employees that someone has tested positive. Those who worked closely with the person must be notified. Do not disclose the employee's name. Keep in mind that the infected worker may choose to tell his/her coworkers and disclose his/her identity.
- Sanitize and deep clean areas where the employee may have been. You can consider closing for a day or so to let any active virus die, but that may depend on your business needs.
- Remind workers about proper and constant use of PPE, hand-washing, sanitizing, etc.
- Also remind workers that they need to monitor their temperature every day prior to work.
- Those who are showing any signs of illness, should leave immediately or not report to work.
- When employees are not at work, they should be isolating as much as possible. Every time they go out or interact with

people, they risk becoming infected and/or spreading the virus.

- For healthcare-related employers, if the employer believes that the person contracted the virus in the workplace, it must be recorded per OSHA guidelines.
- Also, Kentucky has issued an Executive Order stating that if certain workers including but not limited to healthcare workers and first responders contract COVID-19 and it can be possibly linked to work, they may be eligible for worker's compensation pay without a waiting period. However, employees may choose to take sick leave or file for unemployment where benefits paid are more generous.
- For employers required to provide FMLA (those with 50 or more employees), this will count as an FMLA-covered absence. The proper paperwork (Notice of Rights/Responsibilities and Healthcare Certification Form) must be submitted within five business days. This applies to eligible employees, those who have worked more than 12 months in past 7 years and worked 1,250 hours in past 12 months. Employers can and should run FMLA concurrent with sick/vacation or worker's comp.
- If you are subject to the Families First Coronavirus Response Act, you must provide paid sick leave pursuant to the Act.



Force Majeure Clause In Contracts

by Jim Dressman* | jdressman@dbllaw.com

The disruptive effects of a global pandemic are all too real today considering social distancing and stay-at-home order requirements imposed to mitigate the spread of COVID-19. These mitigation efforts have resulted in transitions to distance learning, closures of non-essential businesses and delays of construction activity, just to name a few. And, the effects are undoubtedly felt in all aspects of daily life. Of increasing concern is how this will impact contract obligations and the duties imposed thereunder. Because a global pandemic is not typically contemplated when executing a contract, parties may look to the force majeure clause, if the contract includes one, to determine how to proceed.

What is a Force Majeure Clause?

A force majeure clause seeks to address the parties' rights and obligations under the contract if events beyond the parties' control occur. These clauses typically dictate that neither party is in default nor liable for damages for any failure to perform caused by an act of God, force of nature, strike, war, act of terrorism, insurrection, or governmental regulatory action. Although not often invoked, examples of a force majeure event may include a hurricane destroying a contracted-for construction project or a longshoremen strike delaying the importation of contracted-for goods.

Is a Pandemic a Force Majeure Event?

It depends. While pandemics are not typically provided for in force majeure clauses, some jurisdictions and parties may have included pandemics, epidemics, quarantines or other health crises explicitly. Courts interpret force majeure clauses narrowly, and some jurisdictions require explicit reference to the force majeure event. Therefore, if a pandemic is not specifically included, a court may not excuse delayed performance.

Depending on the industry, government regulatory action may be a more applicable force majeure event. Interventions by the federal government through travel and import restrictions may be the most compelling arguments for invoking a force majeure clause that does not explicitly include pandemics, epidemics, quarantines or other health crises.

It is possible, however, that pandemics may become standard force majeure language in all jurisdictions. For example, after the September 11th terrorist attacks, New York real estate leases and contracts incorporated acts of terrorism in force majeure clauses. The inclusion of such acts as force majeure events is now standard.

How do Courts Analyze Force Majeure Clauses?

When a force majeure clause is invoked in a contract governed by Kentucky law, the court performs a three-step analysis. First, the court inquires whether there has been an event that meets the definitions within the contract's force majeure clause. Second, the court determines whether the event was reasonably beyond the control of the party in default. Finally, the court considers whether the party in default could have continued performance, without unreasonable cost or expense, despite the force majeure event.

If the party in default satisfies these three elements and the court finds that a valid force majeure event did occur, the party in default may not be liable for damages. However, most jurisdictions, including Kentucky and Ohio, do not consider adverse economic conditions as a qualifying force majeure event. Courts will not excuse performance because it has become "difficult, burdensome, or economically disadvantageous." Therefore, it is unlikely that courts will accept the economic conditions caused by the spread of COVID-19 as a valid force majeure event.

What to do Going Forward

Review the contract and determine whether it has a force majeure clause and, if so, what that force majeure clause specifically includes. If performance can continue despite a force majeure event, the parties may nevertheless want to renegotiate the terms of performance if the terms would adversely and materially impact the purpose of the contract.

Whether or not there is a force majeure clause, performance may be impossible. In that event and where able, the parties should consider either amending the force majeure clause or renegotiating the terms of the contract. Considering that courts interpret force majeure clauses narrowly and a majority of courthouses are closed except to emergency issues, amending or renegotiating may be preferable to terminating.

Absenteeism and loss of productivity caused by stay-at-home orders, illness, or family responsibilities are just two of the critical issues created by the spread of COVID-19. If pandemics, epidemics, quarantines or other health crises do not become standard force majeure events, the parties may elect to include such events in future contracts in light of this current health crisis and in preparation for any future health crisis.

**DBL Law clerk Rebecca McDonough, J.D., contributed to this article.*



Executive Order Temporarily Suspends New Green Cards

by Rebecca Sheehan | rsheehan@dbllaw.com

On April 22, 2020, President Trump signed an Executive Order temporarily banning from entry into the U.S. for 60 days, any person currently outside the United States who does not possess a valid immigrant visa. President Trump has stated that the Executive Order is designed to protect American workers in an economy damaged by the coronavirus pandemic.

Who Is Covered by the Ban?

- All immigrants currently outside the U.S. seeking legal permanent residence (a "green card") through the U.S. consulate in their home country. This includes:
 - Spouses of U.S. green card holders and their children.
 - The extended family (e.g., parents, siblings, and adult children) of U.S. citizens and U.S. green card holders.
 - All employment-based green cards (except immigrant investor visas).
 - Participants in the Diversity Visa Lottery program, which issues 50,000 green cards annually.

Who Is Not Covered by the Ban?

- All green card holders and applicants already present in the U.S. Applicants may continue the process of adjusting status.
- Spouses of U.S. citizens and the unmarried children of U.S.

citizens who are under the age of 21.

- Persons holding or seeking temporary visas (e.g., work visas, H-1B visas, and student visas). This is because many persons holding or seeking temporary work visas are those who work in industries closely related to the coronavirus pandemic, like food processing, agriculture, and healthcare.

- Persons seeking immigrant investor visas.



The Executive Order leaves open the possibility that the ban can be extended beyond the initial 60 days, and permits the Secretary of State and Secretary of Labor, in consultation with the Secretary of Homeland Security, to take additional steps to protect the U.S. labor market.

The U.S. is among many other countries who have issued travel and immigration restrictions in an effort to contain the coronavirus pandemic. For example, the U.S.-Mexico and U.S.-Canada borders are closed to all non-essential travel, and countries across the world have closed their borders to U.S. citizens and people who have travelled in the U.S. It is estimated that over 90% of the world's population currently lives in a country or territory that is subject to some type of travel restriction.

DBL Law's Employment Law practice attorneys are available to provide advice to employers on the current green card ban and other immigration issues.

HR Collaborative 2020 **Virtual Conference:** **Thursday, July 30, 2020**

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