

## **MLG COVID-19/PANDEMIC RAPID RESPONSE TEAM**

All of our clients are impacted at some levels by the COVID-19 Pandemic. All Americans are. We are too.

Our firm is here to advise you – rapidly - regarding the unprecedented legal and regulatory changes that are happening fast at the federal, state and local levels.

Here are the primary issues that are arising as a result of the COVID-19 Pandemic:

### **Legal and Regulatory Compliance Regarding Employment and Workplace Safety**

#### Employment

##### *Family and Medical Leave Act*

Under the Family and Medical Leave Act (“FMLA”), employers who have more than 50 employees are required to provide up to twelve (12) weeks of unpaid leave to a qualified employee who has a “serious health condition” and allow any such employee to return to the same or equivalent position upon his return to work. An employee who contracts COVID-19 will most likely have a “serious health condition” under the FMLA warranting the unpaid leave.

##### *Emergency Family and Medical Leave Expansion Act*

The Emergency Act amends and expands the FMLA on a temporary basis. Between April 2, 2020 and December 31, 2020, the FMLA is expanded to apply to all employers with less than 500 employees (versus the current application to employers with 50 or more employees). Thus, employers not previously subject to the FMLA may be required to provide (1) job-protected leave and (2) paid leave.

Regarding job-protected leave, employers with 25 or more employees will have to provide twelve (12) weeks of unpaid leave and an opportunity to return to the same or equivalent position. Although employers with fewer than 25 employees are excluded from the “return to work” requirement if the employee’s position no longer exists due to economic downturn or public health emergency, those employers must first take reasonable attempts to return the employee to work for up to a year after the employee’s leave.

Regarding paid leave, under the Emergency Act, the first ten (10) days of leave may be unpaid (if an employee has accrued paid leave (sick, vacation, or PTO), he may use that to cover the ten (10) day period). However, a business employing fewer than 500 employees is required, at the request of the employee, to pay a full-time employee for 80 hours of mandated emergency paid sick leave. After the initial

ten (10) days, the employer generally must pay a full-time employee at the rate of two-thirds of the employee's regular pay for the number of hours normally worked (subject to certain per day and total caps). Employers must pay part-time employees based on the average number of hours an employee worked for the six months prior to leave. Paid leave is required for employees who are:

1. subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. experiencing COVID-19 symptoms and seeking medical diagnosis;
4. caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. 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.

#### *Americans with Disabilities Act*

The Americans with Disabilities Act ("ADA") provides certain protections to employees who may have physical, mental or emotional "disabilities" but who are otherwise qualified to perform the essential functions of their jobs. Typically, a disability is an impairment which substantially limits one or more of the major life activities of an individual (e.g., breathing, working, speaking) which is chronic in nature. The ADA may be triggered where an employee develops a disability as a result of COVID-19 and cannot return to his pre-disability work duties. The employer must then engage in an "interactive process" with the employee regarding the employee's ability to return to work, appropriate work restrictions and accommodations, or whether the employee's disability presents a direct threat to the health or safety of the employee or other employees. Because we know so little about the long-term effects of COVID-19 patients, we recommend that employers prepare to apply the ADA in certain situations.

#### Workplace Safety

## *Occupational Safety and Health Act*

Under the Occupational Safety and Health Act (“OSHA”), employers have a legal duty to provide a safe and healthy workplace. The “General Duty Clause” of OSHA requires employers to protect their employees against “recognized hazards” to safety or health that may cause serious injury or death. In order to determine employers’ obligations under the General Duty Clause, OSHA utilizes outside nationally-recognized standards or sources, such as guidelines from the CDC. If employees at a workplace are reasonably likely to be “exposed” to the virus, OSHA will require the employer to develop standard operating procedures (“SOPs”) to protect its employees.

## *Premises Liability*

The adoption of SOPs to better ensure workplace safety will also help avoid premises liability to “invitees” who are on your property temporarily. We expect that some states will provide immunity or create a heightened standard or burden of proof for invitee claims, given how novel and unknown COVID-19 is to the community. Regardless, we expect claims to happen and there are actions you can take to mitigate your risk.

## **Contractual Obligations Related to Default and Force Majeure**

Most supply chain agreements excuse the delay or failure to perform (or provide relief from liability for such delay or failure) as a result of an event of force majeure, which is generally an event outside the reasonable control of the affected party. When a party invokes a force majeure clause, it usually permits a delay in the performance of obligations, adjustment to project schedules (and, potentially, costs), or the termination of the agreement. In order to mitigate risk and cost, it is wise to evaluate the potential for force majeure to apply in your key supply chain agreements (whether “offensively” or “defensively”) and develop a strategy.

## **Estate/Financial Planning**

The COVID-19 Pandemic does not change our recommendations regarding estate/financial planning. Rather, it makes the process a higher priority. We recommend that you ensure that you have appropriately implemented (or updated) the following components of your estate/financial plan (as applicable):

1. Last Will and Testament and Trusts

A Will generally allows you, and not a Probate Court, to decide how to distribute your assets upon your death. Additionally, it allows you to state your wishes regarding the care of your children.

A trust is a versatile estate planning tool that is used for a variety of factors. Some of the reasons to have a trust may include asset protection, asset control, tax mitigation or Probate avoidance. Having a Trust allows for the efficient disposition of your property at death or otherwise with little to no government involvement.

2. General/Durable/Financial Power of Attorney (“POA”)

A POA allows your agent to make financial decisions on your behalf if you are incapacitated, without the need to have a Probate Court appoint a guardian or conservator, which is a time-consuming and expensive process. A POA specifically grants your agent the power to handle all financial matters on your behalf.

3. Healthcare Advance Directive / Health Care Power of Attorney & Living Will

Your agent under a Healthcare Advance Directive or POA can make decisions about your medical care if you become unable to make those decisions yourself. A Healthcare Advance Directive or POA does not limit your right to make your own health care decisions, and as long as you are able to express your own wishes, they control.

A living will is a declaration made during life as to what your wishes are regarding life and death. These are typically used in situations where a patient may be in a coma or otherwise in a permanently unconscious state or terminally ill.

4. IRA and 401k Beneficiary and Life Insurance Designations

If you have completed beneficiary designation forms without input from your estate planning and financial advisors, there can be unintended, unanticipated, and unfortunate consequences.

5. Joint Account Designations

Joint Account Designations allow you to avoid Probate and efficiently and immediately distribute inheritance at the time of death.

6. Business Continuity Planning

Business continuity planning is designed to ensure the smooth transition of businesses upon disability or death. By using agreements among shareholders/members/partners, the parties can avoid costly, time-consuming, and uncertain litigation, creating certainty and preserving business value.

## 7. High Net Worth Estate Plan

The recent stock market events mean that the time is ideal to consider significant gifting, trust planning and other advanced planning strategies using depressed asset values.