ROPES & GRAY

COVID-19 | FAQs for PE Portfolio Companies

April 1, 2020

Topic	Question	Answer
Essential Business Orders	▪ Is there a state-by-state registration process for registering a business as an "essential business" when there is a shutdown? How does someone determine what is an "essential business"?	▪ There is only an application for "essential business" designation in NY state, which companies may apply for through the Empire State Development Authority. In other states, it is left up to the business and business executives to determine whether it is "essential", but the business should have a reasonable basis for acting as an "essential business". ▪ It is an extremely state-by-state or county-by-county, fact-specific analysis as to which businesses are considered essential. It is up to the businesses to make a judgement call. The current enforcement procedures employed in states have largely been sheriffs knocking on doors and telling places to close down; however, violating an order is generally a misdemeanor. Liability and reputational risks associated with staying open should also be kept in mind.
	▪ In jurisdictions where a shelter-in-place or other essential business order has been adopted or may be adopted in the future, are there any specific steps that employers should take if they remain open?	▪ Employers should write a short letter or other similar certification addressed to the relevant enforcement authority describing the reasoning as to why the business is essential and providing such a letter or certification to employees along with company contact information for an executive such as the CEO or general counsel, in case employees are stopped on the way to work or questioned at work as to why the business is open.
	▪ If a business is considered "essential", does this designation flow down to all of its subcontractors who produce goods for that business (which it may in turn sell to others)?	▪ Each subcontractor is going to have to do its own analysis, but there is a good-faith argument that an essential subcontractor for an essential business is itself "essential".

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SBA Loan Eligibility	▪ Which businesses could be eligible to receive Small Business Administration (SBA) loans under the CARES Act?	▪ In order to be eligible to receive SBA loans, a business must generally have less than 500 employees. Aside from businesses in the accommodation and food services industries, SBA-approved franchises, and businesses that receive financial assistance from SBIC funds, all of which have received special exceptions as part of the CARES Act, portfolio companies will generally be aggregated with their sponsors under broad SBA affiliation rules for purposes of determining the number of employees, and therefore unable to take advantage of SBA loans under the CARES Act, absent unique facts and circumstances.
	▪ How large can the SBA-backed loans be and what can the funds be used for?	▪ The loan amount is determined based on the average monthly payroll of the borrower business over the one year period preceding the loan, multiplied by 2.5 times, and subject to a cap of $10 million. The proceeds can only be used for payroll costs, health benefits, salaries (up to $100,000 for employees earning more than $100,000), mortgage payments, rent, utilities and interest on other debt facilities. The loan amounts are eligible to be forgiven, subject to certain limitations and scale backs.
	▪ Are SBA-backed loans secured or unsecured, and will preexisting lenders be required to relinquish their collateral rights?	▪ The loans are unsecured, so pre-existing lenders are not required to relinquish their collateral rights.
Distressed Companies Loans	▪ Are there any loans available under the CARES Act to businesses with more than 500 employees?	▪ $454 billion has been made available under the CARES Act to support Federal Reserve emergency lending programs. $25 billion has been made available for direct loans from the Treasury to passenger air carriers, $17 billion for cargo air carriers, $3 billion for airline contractors, and $4 billion for direct loans from Treasury for businesses important to maintaining national security. Treasury has wide latitude to use the $454 billion to support existing and new lending programs. ▪ Further detail is expected on the nature of the lending programs, but any funds provided will come with certain requirements that portfolio companies and their sponsors may not be able to comply with, such as specific requirements with respect to workforce retention levels, a moratorium on stock buybacks (for listed companies) and common stock dividends during the term of any loan and for 12 months thereafter, compensation freezes (subject to limits} and collateral requirements. The loan amounts are not eligible to be forgiven.
Real Estate – Rent Deferral/No Eviction Policies	▪ Have states or municipalities instituted any rent deferral or no eviction policies for businesses (as opposed to individuals)?	▪ Legislation on rent deferral and no eviction policies for businesses has been or is being introduced in various states. The approach varies state by state or county by county. For example, in New York State, a three-month suspension of all commercial and residential evictions has been enacted, and mortgage payments for people who are out of work for 90 days have been suspended. In New York City, although evictions are paused, New York City landlords can

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		still file new eviction cases even though all new cases are being postponed for at least 45 days.
	▪ To what extent, if at all, does a force majeure event forgive the payment by a tenant of rent? If malls are closed, is a tenant of that mall justified in citing this as grounds for refusing to pay rent?	▪ It is very fact dependent and state law specific, but many landlords are providing short term relief as a practical matter. It is generally very hard to get out of rent payments, but a mall closing may provide an argument. Regardless of the existing contractual arrangement, many businesses are seeking rent holidays.
Business Interruption Insurance	▪ To what extent could business interruption insurance coverage be available in these circumstances?	▪ Since business interruption insurance is traditionally part of commercial property insurance that requires direct physical loss as a trigger for lost business income, insurers are likely to deny coverage due to no physical damage to property. An insured may argue that virus contamination is a "direct physical loss," but a coverage dispute is likely. Policies also often exclude virus-related loss, which is another independent basis on which coverage may be denied. For product manufacturers, there may be the potential for coverage if an infected employee contaminates product or equipment leading to a recall and/or shutdown as that may be covered under product recall and/or traditional business interruption insurance policies. Specialty insurance products may cover business interruption without physical damage, but such policies are rare and expensive. ▪ There are legislative efforts underway in at least three states (OH, NJ and MA) to compel insurers to cover business interruption losses due to COVID-19 despite lack of physical damage and virus exclusions. If those are successful, insurers would likely be reimbursed with public funds. The insurance industry is likely to put up a significant fight with arguments including a constitutional challenge to the proposed infringement on freedom of contract. It would be advisable to submit claims for all potential business interruption losses while these legislative efforts play out.
Tax	▪ What tax refunds might be available to businesses under the CARES Act?	▪ The CARES Act contains a number of provisions that are designed to help businesses get additional liquidity through certain tax relief. Generally, these provisions have the effect of retroactively reducing businesses' tax liabilities, potentially entitling portfolio companies to claim tax refunds for prior years. Two items of relief allow (1) net operating losses generated with respect to the 2018, 2019 or 2020 taxable years to be carried back up to five years and (2) interest expense for the 2019 and 2020 taxable years to be deductible up to 50% of EBITDA. Sponsors and their portfolio companies should evaluate each portfolio company's tax profile to determine whether it is eligible to apply for tax refunds as a result of these new provisions.

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	▪ Could recently acquired portfolio companies be obliged to pay over to sellers any tax refunds received under the CARES Act?	▪ It depends on the pre-closing tax refund provisions in relevant acquisition agreements that may remain in force. Many acquisition agreements require the buyer to pay over to the seller tax refunds relating to pre-closing tax periods. Often a refund provision will contain carve-outs stating that the seller is not entitled to refunds resulting from carrybacks of tax attributes from a post-closing period to a pre-closing period. Sometimes other offset rights are also available to the buyer.
	▪ Will businesses be eligible to defer payroll taxes under the CARES Act?	▪ Under the CARES Act, all employers (regardless of the number of employees) are able to defer payment of employer social security payroll taxes from March 28, 2020 to January 1, 2021 (6.2% of wages for each employee, capped at approximately $138,000 per employee). The deferred amount will be due 50% on December 31, 2021 and 50% on December 31, 2022. Companies cannot take advantage of the deferral if they have had an SBA loan forgiven, but it is currently unclear whether this will apply retroactively (i.e., previously deferred amounts become immediately payable) or going forward (i.e., that a company cannot defer future amounts, but can wait until 2021/2022 to repay previously deferred amounts.
	▪ What payroll tax retention credits might be available to businesses under the CARES Act?	▪ All employers (regardless of the number of employees) will be eligible for the payroll tax retention credit under the CARES Act if its operations have been fully or partially suspended by a governmental authority due to COVID-19 or the business has experienced a 50% reduction in revenues as compared to the same calendar quarter in the prior year. ▪ The credit is a refundable credit equal to 50% of the wages paid after March 12, 2020 and before January 1, 2021 to employees who, generally speaking, are still on payroll but currently idle due to the effect of COVID-19 on the business, capped at wages of $10,000 in the aggregate (i.e., a maximum credit of $5,000). Credits will be applied against employer social security contributions, other payroll tax deposit obligations and federal income taxes withheld from employees. If credits exceed taxes due for any calendar quarter, the excess will be treated as a refundable overpayment. Employers who have received an SBA loan are ineligible to claim retention credits, and credits already taken will need to be repaid if an SBA loan is received later.
	▪ Can employers receive any tax benefits as a result of paying the expanded leave entitlements under the FFCRA?	▪ Employers will receive a refundable tax credit for amounts paid under the new leave provisions, subject to caps. Credits will be applied against employer social security contributions, other payroll tax deposit obligations and federal income taxes withheld from employees. If credits exceed taxes due for any calendar quarter, the excess will be treated as a refundable overpayment.

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Communications with Essential Business Partners	▪ What should a company do with respect to business partners that are essential to the company's operations?	▪ Companies should engage in continuing communication with essential business partners to understand their preparedness for COVID-19 infections, business continuity plans, and the potential impact of the COVID-19 virus on the business partner's operations. Companies should also review the implications of a potential loss of services/supplies/products from a key business partner and consider available alternative sources in the event emergent conditions arise.
Labor & Employment – Temperature Checks	▪ Can employers check employees' temperatures, as a test for COVID-19 infection?	▪ According to the COVID-19 EEOC guidelines published on March 19, 2020, employers may ask employees whether they are experiencing symptoms of COVID-19 and may mandate employee medical exams, including temperature checks. ▪ Employers should use temperature checks with caution, because temperature checks may not be an effective tool for COVID-19 assessment. For example, individuals may have COVID-19 without symptoms or the tester may not have adequate medical expertise to check the temperature correctly.
	▪ Can a person take the temperature of the mail carrier/delivery person before he or she enters their premises?	▪ With respect to the mail carrier/delivery person, there is no reason someone legally cannot take his or her temperature before they enter, but there are practical reasons not to do so (i.e., no control of them unlike an employer and employee relationship).
Labor & Employment – Collection of Data	▪ Do companies need to consider privacy and security laws when collecting data from employees as part of an effort to monitor and prevent the spread of COVID-19?	▪ Yes. Companies must remain compliant with applicable privacy and security laws. Employers should keep data related to COVID-19 infections confidential, store it securely, and dispose of it properly once it is no longer needed. As a best practice, companies should communicate with employees about their approach to collecting information about COVID-19 infections among employees. ▪ To ensure compliance with HIPAA, employers should not allow sharing of employees' or employee dependent health information between an employer-provided health plan and the employer itself. ▪ For employees in Europe, the GDPR generally prohibits the collection of health data without explicit consent by the data subject. Nevertheless, the GDPR provides an applicable exception to process health data without consent to protect against a serious cross-border threat to public health and, in particular, to prevent communicable disease.

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Labor & Employment – Positive Employee Test	▪ An employee tests positive for COVID-19. What are the next steps?	▪ If an employee tests positive for COVID-19, the employer should coordinate with a local and/or state public department of health to perform contact assessment, if possible. If the authorities are slow in conducting such contact assessment, the employer should coordinate with local doctors. The employer should also inform other employees that were exposed to the individual within 6 feet for more than 10-15 minutes. ▪ Employers should remain compliant with applicable data protection laws when disclosing identifiable employee data, especially health data, to a government entity. If a company is subject to a government-imposed reporting obligation, the company should ensure its reporting complies with applicable laws, is limited to the information legally required, and is made only to a legitimate government entity properly designated to receive such information. As a best practice, companies should communicate with employees about disclosures to government entities. Where possible, companies should notify and obtain an employee's permission prior to making a disclosure.
Labor & Employment – "High Risk" Employees	▪ Can employers require "high risk" employees (i.e., employees with existing pre-conditions, etc.) to stay at home?	▪ The threshold for requesting an employee to stay at home would be whether such employee poses a direct threat to himself or others in the worksite, based on objective evidence. Employers should use CDC or other applicable guidance in determining whether such threat exists, as opposed to their own assessment. If the evidence for requesting an employee to stay at home is not objective/based on applicable guidance, employers could be subject to liability under applicable disability or anti-discrimination laws.
Labor & Employment – Hazard Pay	▪ Are employers required to pay hazard pay to employees who work in environments presenting a higher risk of COVID-19 transmission?	▪ Federal law does not require employers to pay a premium to employees who work in environments presenting a higher risk of COVID-19 transmission. Employers should check applicable state or local guidance for any such requirements.
Labor & Employment – Implications of Layoffs	▪ What are the implications of layoffs due to the impact of COVID-19?	▪ Layoffs could have the following implications: ○ Layoffs could trigger federal WARN Act obligations for the employer, as well as other similar obligations under state law. ○ Layoffs may trigger employees' contractual severance entitlements. Even if there is no contractual right/policy, employers should consider whether to offer severance entitlements in exchange for a release, taking into account the following:

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		▪ Layoffs could create risk of claims for wrongful termination or discrimination. ▪ Selection criteria should be non-discriminatory and layoffs should not disproportionately affect workers in any protected category (e.g., age, gender, race, disability). ○ Layoffs may require payout of accrued unused vacation/PTO where required. ○ Layoffs may trigger employees' loss of health and welfare (and other) benefits and subsequent COBRA eligibility (with costs paid by employee). ○ Layoffs may trigger employees' eligibility for unemployment insurance benefits (will affect the employer's experience rating, but won't otherwise result in out-of-pocket costs). ○ For union employees, the employer will need to comply with the terms of collective bargaining agreements.
Labor & Employment - Furloughs	▪ What is a furlough?	▪ A furlough is a temporary leave of employees due to special needs of an employer (i.e., temporary layoff). Furlough doesn't involve a formal separation of employees and employers performing furloughs are not required to undertake certain procedures required for layoffs under applicable laws. ▪ A furlough could have the following implications: ○ Federal WARN Act notice obligations could be triggered if a company reduces employees' hours of work by more than 50% during each month of any 6-month period or the furlough extends beyond 6 months. Relevant state laws could have more stringent requirements. ○ Furlough may still require payout of accrued unused vacation/PTO (even if employment is not terminated). ○ Furlough may trigger ineligibility for participation in certain benefit plans and, if health insurance is lost, trigger COBRA coverage (to be paid by the employee). ▪ Employers should check plan terms and work with insurers to amend plan language, if necessary. ▪ If coverage continues, employers will need to consider approach to employee contributions. ○ Generally, employees will be eligible to collect unemployment benefits (subject to applicable waiting periods and caps).

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	▪ What should employers do if a furlough turns into a layoff?	▪ If an employer's furlough turns into a layoff that triggers the WARN Act (and applicable state equivalents) threshold for layoffs, such layoff may accordingly require compliance with the WARN Act (and applicable state equivalents) obligations, including providing a notice to the employees.
Labor & Employment – WARN Act	▪ What number of layoffs will trigger the WARN Act?	▪ Layoff of more than 50 employees at a single site could trigger the federal WARN Act obligations. Relevant state laws vary and could have lower thresholds.
Labor & Employment – Salary and Wage Reduction	▪ What should an employer reducing salary or wages consider?	▪ Salary and wage reductions must be prospective and comply with federal minimum wage law, as well as any state or local minimum wage laws. Although employees are generally permitted to reduce wages under federal law without prior notice, state and local wage and hour laws may impose certain limitations, including advance notice requirements. Collective bargaining agreements may restrict an employee's ability to reduce wages, and may require the employer to notify, consult with or obtain consent from the applicable union before implementing any such reductions. ▪ Exempt employees whose salaries are reduced below the $35,568 FLSA salary threshold will likely lose their exempt status. Exempt employees whose salaries are reduced in connection with a reduction in their hours may also lose their exempt status. ▪ If salary and wage reductions are done without the consent of the employee, they could present the possibility of triggering a breach of contract claim or good reason quit right under individual employment agreements. Employers should also take special consideration for employees on visas.
	▪ What should an employer reducing hours consider?	▪ Federal WARN Act notice obligations could be triggered if a company reduces employees' hours of work by more than 50% during each month of any 6-month period. State WARN Acts may apply lower thresholds. ▪ A reduction in hours may result in pay insufficient to cover the employee share of health insurance premiums or other benefits, or trigger ineligibility for participation in certain benefit plans. If reduction in hours results in the loss of health insurance coverage, this will trigger COBRA. ▪ A reduction in hours may also trigger eligibility for unemployment benefits (including the additional $600 weekly unemployment insurance benefit through July 31, 2020 under the CARES Act).

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Labor & Employment – Benefit Plan Considerations	▪ What are some of the employee benefit plan considerations in connection with changes in employment practices?	▪ **401(k) Plans** ○ Employee elective deferrals ▪ Compensation paid to employees during paid leave generally remains eligible to defer into 401(k) plans. If the employee wants to reduce their deferral election, they can follow the normal plan procedures. ▪ Employers should review plan documents to determine whether leaves of absence count for purposes of service crediting and/or vesting. ○ Employer contributions ▪ Changes to 401(k) plan contributions are generally permitted prospectively with appropriate notice. ▪ Limitations may apply if the plan is a safe harbor plan. ○ Fiduciary/investment committee ▪ Fiduciary/investment committees should monitor their investment menus in accordance with charter and investment policy, and consult with investment advisors where appropriate, making sure to document their efforts. ▪ Employers should also confirm that the committee charter allows for telephonic or video meetings, and if not, amend it as necessary. ▪ **Other Types of Plans** ○ Defined benefit pension plans ▪ Any changes that would cause a significant reduction in the rate of future benefit accruals under a defined benefit pension plan generally require at least 45 days' advance notice to employees (after the date of the vote by plan governing board). ○ Deferred compensation plans ▪ Prior deferral elections under deferred compensation arrangements for compensation payable in 2020 generally cannot be reversed or amended. ○ Health and welfare plans: ▪ Applicable health and welfare plans and policies may limit or preclude changes to eligibility criteria, at least outside of open enrollment periods.

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		▪ Meaningful changes in enrollment numbers as a result of layoffs or furloughs may trigger the ability of insurers/stop loss carriers to reprice benefit arrangements, depending on the terms and conditions of the policies. Similarly, insurers and stop loss carriers reserve the right to reprice/re-rate the group for changes to covered services and treatment. ▪ It is important for employers to obtain approval from the insurer for any plan design changes to cover 100% of COVID-19 claims. Otherwise, these claims may not be covered under the policy.
Labor & Employment – Expanded Leave Under FFCRA	▪ What is the new family and medical leave entitlement under the Families First Coronavirus Response Act (FFCRA)?	▪ Under the FFCRA, employees of companies with fewer than 500 employees can take up to 12 weeks of leave (two weeks unpaid and the remainder paid) if they are unable to work or telework due to care for a child whose school or place of care has been closed due to COVID-19. If an employee qualifies for such leave, the first two weeks will be unpaid (though the employee may elect, but can't be required, to use other accrued paid leave during this period, including the new emergency paid sick leave) and the remainder of the leave will be paid at no less than 2/3 of the employee's regular rate of pay, based on the number of hours the employee was scheduled to work, up to a maximum of $200 per day or $10,000 in the aggregate. The expanded leave will be in place through December 31, 2020.
	▪ What is the new sick leave entitlement under the FFCRA?	▪ Employees are entitled to two weeks of paid sick leave if they are not able to work or telework due to quarantine, diagnosis or care for individuals quarantined for COVID-19, or due to caring for a child because their school or place of care is closed due to COVID-19. The amount of paid sick leave will be as follows: (i) for full-time employees, 80 hours or (ii) for part-time employees, the average number of hours the employee works over a two-week period. Leave is paid at the regular rate of pay (up to a maximum of $511 per day or $5,110 in the aggregate) or, if caring for another individual, at 2/3 the regular rate of pay (up to a maximum of $200 per day or $2,000 in the aggregate). The expanded leave will be in place through December 31, 2020.
Labor & Employment – 500 Employee Test for FFCRA and SBA Purposes	▪ With respect to the FFCRA and the obligation for employers with less than 500 employees to comply with the expanded paid leave entitlements thereunder, is there any guidance on how to calculate the 500-employee threshold?	▪ The FFCRA uses the integrated employer test in determining whether an employer meets the 500-employee threshold. The integrated employer test is a facts and circumstances test, considering the following four factors: (1) common management, (2) interrelated operations, (3) centralized labor relations, and (4) common ownership and financial control. All employees of an employer should be considered in determining whether the employer meets the 500-employee threshold, whether the employees are located in the same or a different worksite, excluding foreign employees. Subsidiaries of an entity with separate EINs can be treated as one entity in determining the 500-employee threshold. Employment headcount is reassessed when employees request to

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		leave, so the determination of meeting the 500-employee threshold is subject to change.
	▪ Is this test different to the one used for determining Small Business Administration (SBA) loan eligibility?	▪ Aside from businesses in the accommodation and food services industries, SBA-approved franchises, and businesses that receive financial assistance from SBIC funds, all of which have received special exceptions as part of the CARES Act, portfolio companies will generally be aggregated with their sponsors under broad SBA affiliation rules for purposes of determining the number of employees, and therefore unable to take advantage of SBA loans under the CARES Act, absent unique facts and circumstances.
Labor & Employment – Paid Leave Benefits if Shutdown	▪ What happens if an employer shuts down when its employees are on paid leave, such as the expanded leave under the FFCRA?	▪ If an employer closes while its employees are on paid leave, such employees are entitled to maintain paid leave until the date of closure. Following the closure, the employees are not eligible for paid leave benefits, but may be eligible for unemployment benefits.
Labor & Employment – Voluntary Paid Sick Leave	▪ Can employers voluntarily offer paid sick leave? How does this interact with the expanded sick leave under the FFCRA?	▪ Yes, employers may voluntarily offer paid sick leave. Employers should provide such paid leave programs without discrimination and document the process to avoid any related liabilities. The expanded sick leave available under the FFCRA will be in addition to any sick leave policy already offered by employers.
Labor & Employment – Voluntary Quarantine	▪ Can employees receive benefits under the CARES Act if they are directed to self-quarantine by their employers, not healthcare professionals? What about if the employee quarantines themselves?	▪ If employees are self-quarantined by their employer rather than healthcare professionals, then such employees are not eligible for paid sick leave benefits under the CARES Act or the Family and Medical Leave Act. There is no legal obligation for employers to provide benefits to employees who are afraid of becoming ill; however, employers should consider providing benefits to employees with disabilities (e.g., immunocompromised employees) with caution.
Labor & Employment – Unemployment Benefit Enhancement	▪ What unemployment benefits are available under the CARES Act?	▪ The CARES Act makes funds available to the states, and each state needs to enter into an agreement with the federal government to receive such funds. Once a state enters into such an agreement, the CARES Act provides for payments to individuals who would not normally be eligible for (e.g., self-employed individuals or independent contractors), or who have exhausted, regular unemployment compensation and who are unable to work as a direct result of the COVID-19 public health emergency. Such individuals will receive the amount that would have been payable under the unemployment compensation law of their state of employment, plus an additional $600 payment per week until the end of July 2020. Individuals who have otherwise qualified for regular unemployment compensation in their applicable state will

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		also receive the benefit of the additional $600 payment per week for the same period. Unemployment benefits have also been extended by an additional 13 weeks through December 31, 2020.
	▪ Are the unemployment benefits under the CARES Act prorated for employees who are partially unemployed?	▪ The $600 weekly benefit enhancement under the CARES Act is not prorated for partially-unemployed employees. Subject to any contrary guidance that may come out regarding such benefits, so long as employees are eligible for unemployment benefits in their applicable state of employment, they are eligible for the additional $600 payment per week under the CARES Act.
Labor & Employment – Reopening Process	▪ What does the reopening process look like?	▪ Cleanliness protocols will not go away. Employers should consider a staged reopening with essential personnel returning first. Delayed arrivals are common because of continued social distancing requirements, so consider implementing a staggered workday schedule.