






# Legal Issues in EC Industry related to COVID-19



## Introduction



- Questions can be submitted through the Q&A box on on your screen
- To be cognizant of time, all questions will be answered in written form following the webinar.
- The recording of this webinar will be made available to all attendees within 24 hours.
- If you have any technical difficulties, please reach out via the Q&A box or via email to [education@necanet.org](mailto:education@necanet.org).





## Construction Impacts – Gather and review construction contracts

- Force majeure/excusable delay provisions
- Notice and claim requirements
- Suspension by Owner
- Contractor/Subcontractor suspension and termination rights



## Construction Impacts – Force majeure/excusable delay

- Limited list vs broad definition
- Triggering events that could cover COVID-19 impacts
- Required impact
- Mitigate impacts
- Relief afforded
  - Excused performance
  - Time
  - Money
  - Subcontracts: limited to recovery from Owner



## Construction Impacts – Notice and claim requirements

- Strict compliance
- Subcontracts: time requirements in Prime Contract
- Required detail and support
- Clarify known vs unknown impacts
- Document and update



## Construction Impacts – Suspension/Termination

- Suspension by Owner
  - Same as with force majeure claim, but right to money is more likely
- Contractor/Subcontractor termination rights
  - Late payment
  - Lengthy suspension
  - Other material breaches



## Executive COVID-19 Orders

- Essential businesses/critical infrastructure workers
  - Order wording
  - Supplemental guidance
  - Cybersecurity and Infrastructure Security Agency (CISA) guidance
- Written designation from employer/project owner



## FFCRA Phase 2 Revisited

A photograph of a worker in a yellow safety vest on a ladder, working on a structure. A circular icon with a wrench and pencil is overlaid on the image. The text "FFCRA Phase 2 Revisited" is written in white on a dark blue background. The NECA logo is in the bottom right corner.

# FFCRA Phase 2 Eligibility Issues

What are the basics of the sick and FMLA coverage?



## Closures and Furloughs

If a contractor closes a worksite either before or after April 1, does it still have to paid sick leave or expanded family and medical leave?

If a contractor furloughs an employee on or after April 1, does it need to pay sick leave or expanded family and medical leave?

Can a contractor furlough some employees, but remain open for others while not paying furloughed employees the FFCRA wages?



## How do NECA chapters and contractors handle the issue of fringe benefits under the FFCRA?

Is the mandatory paid leave just wages or benefits as well? In other words, are fringe benefits in the CBA, regardless of how they are calculated, owed on the pay either from the FMLA or Emergency Sick Leave Act?



## How do the tax credits work?

If a contractor pays sick or FMLA wages, how will it get reimbursed and when?



# **DOL guidance on 50 and less hardship exemption from FFCRA wages**

**Has the DOL provided any of the promised guidance on the small  
business exemptions?**



# **Phase 3 (H.R. 748): The Coronavirus Aid, Relief, and Economic Security Act (CARES Act)**



## Phase 3 (H.R. 748): The Coronavirus Aid, Relief, and Economic Security Act (CARES Act)



Total cost: \$2 trillion

- **Direct payments to individuals:**
  - \$1,200 per adult, with an additional \$500 per child
  - The full amount will go to individuals who earn >\$75,000/year or \$150,000 for married couples; the payments scale down for higher-earning individuals, phasing out completely at \$99,000 for individuals, \$146,500 for heads of households with one child, and \$198,000 for joint filers without children
- **Hospital investments**
  - \$100 billion for hospitals
  - \$1 billion to Indian Health Service
  - \$16 billion for building a stockpile of medical equipment
  - Increases reimbursements by 20% for treating Medicare patients with coronavirus
- **\$500 billion lending funds for industries, states, and localities**
  - Loans for companies with more than 500 employees
  - \$25 billion in loans to airlines; \$4 billion to cargo carriers
  - Bans loans to businesses owned by the president, vice president, heads of executive departments, or members of Congress
- **\$350 billion in loans for small businesses**
  - Loans to small businesses would be forgiven if payrolls are maintained
- **Unemployment benefits increased \$600/week for four months**
- **New Treasury IG and Congressional Oversight Board**
- **State and Local Funds**
  - \$150 billion for state and local funds, including \$8 billion for tribal governments



## Business Assistance Provisions

- Small business loans
- Economic stabilization provision
- Business tax provisions





## The Paycheck Protection Program (PPP)

- **General Description:** Allows any business or nonprofit 501(c)(3) entities with 500 or fewer employees to access the SBA 7(a) loan guaranty program. Provides \$349 in additional funding with 100% government guarantee.
- **Loan Amounts :** The maximum amount of a loan equals 2.5 months of regular payroll expenses up to \$10 million (subject to a cap of \$100,000 annual salary per employees).
  - There are a variety of provisions which help define payroll – and health care contributions, PTO, etc. are included.



## The Paycheck Protection Program (PPP)

- **Loan uses:** Loan proceeds can be used to cover payroll support, such as employee salaries, paid sick or medical leave, insurance premiums, and mortgage, rent, and utility payments incurred from February 15, 2020 through June 30, 2020.
- **Eligible businesses:**
  - Businesses with fewer than 500 employees.
  - Franchises with fewer than 500 employees at each physical location.
  - Sole proprietors and independent contractors.



## The Paycheck Protection Program (PPP)

- **Loan forgiveness:** Borrowers are eligible for loan forgiveness equal to amount spent by the borrower during an eight week period after the origination date of the loan on
  - Payroll costs.
  - Interest payment on any mortgage incurred prior to February 15, 2020.
  - Payment of rent on any lease in force prior to February 15, 2020.
  - Payment on any utility for which service began before February 15, 2020.
  - The amount forgiven will be reduced proportionally by any reduction in employees retained compared to the prior year. To encourage employers to rehire any employees who have already been laid off due to the COVID crisis, borrowers that re-hire workers previously laid off will not be penalized for having a reduced payroll at the beginning of the period.



## The Paycheck Protection Program (PPP)

- Borrower and lender fees are waived.
- Collateral and personal guarantee requirements are waived.
- Maximum interest rate is 4% and loan maturity can be as long as 10 years.
- Loan payments can be deferred 6-12 months.



## The Paycheck Protection Program (PPP)

- **Application process:** Current lenders through the SBA 7(a) are authorized to make determinations on borrower eligibility.
  - For eligibility purposes, lenders will not be determining eligibility based on repayment ability but rather whether a business was operations on February 15 2020 and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor.



## The Paycheck Protection Program (PPP)

- **Timeline:** SBA is required to issue implementing regulations within 15 days and the Treasury Department will be approving new lenders. Currently there are 800 lenders.
- **Warning:**
  - Receiving a PPP loan disqualifies the borrower from obtaining certain payroll tax credits to which the borrower may have otherwise been entitled under the CARES Act, and having a PPP loan forgiven renders an employer ineligible for deferral of the employer's share of Social Security Taxes that the employer may have otherwise been able to take advantage of under the CARES Act.
  - A borrower cannot receive both a PPP loan and an EIDL loan for the same purpose. However, the program allows a borrower who received an EIDL loan after January 31, 2020 and before the date on which PPP loans are made available to refinance the EIDL loan under the PPP program.



## Economic Injury Disaster Loans (EIDL)

- **Covered Period:** January 31, 2020 through December 31, 2020.
- **Eligible Entities:** Basic SBA eligibility is expanded for business with less than 500 employees and individuals operating as sole proprietor or an independent contractor during the covered period.
- **Waiver of Certain Limitations:** The bill waives certain limitations and requirements that are built into basic SBA 7(b)(2) EIDLs – most notably the requirement that the business have been operational for one (1) year and the requirement that the business be unable to obtain “credit elsewhere”.



## Economic Injury Disaster Loans (EIDL)

- **Fast-Track Underwriting:** The Administrator is authorized to accept credit scores of applicants (in lieu of tax returns, tax transcripts, etc.) for small dollar loans.
- **Use of Funds:** EIDL funds may be used for payroll costs; for paid sick leave; to meet increased costs due to supply chain disruption; and to repay obligations which cannot be repaid due to revenue loss.
- **Emergency Grants:** The Administrator is authorized to issue up to \$10,000 in emergency grants within 3 days from application, provided applicant self certifies (under oath) that it is an eligible entity.
  - These emergency grants do not need to be repaid, even if ultimate loan approval is denied and if spent on paid leave, maintaining payroll, increased costs due to supply chain disruption, mortgage or lease payments, or repaying obligations that cannot be met due to revenue losses.



## Economic Injury Disaster Loans (EIDL)

- **National Scope:** Bill generally defines all states and subdivisions (counties) as being subject to a disaster/emergency and deems each state/subdivision to have sufficient economic damage to qualify for 7(b)(2) grants.
- **Maximum Loan Amount:** Maximum EIDL loan limits (\$2 million) continue to apply.
- **Interest Rate:** 3.75%.
- **Term:** SBA disaster loans may be long-term, up to a maximum of 30 years. Terms are determined on a case-by-case basis, based upon each borrower's ability to repay.
- **Repayment:** There are no loan forgiveness provisions in the EIDL program (other than the \$10,000 emergency grant). The loan must be repaid to SBA.
- **How to Apply:** Applications are online, submitted directly to SBA by the borrower. Background financial information on the business is required to be submitted. <https://disasterloan.sba.gov/ela/>



## Economic Stabilization and Assistance to Severely Distressed Sectors of the US Economy

- **General Description:** Title IV of the CARES Act provides authorities to support particularly hard-hit industries, flexibility for banks and financial institutions to deal with a rapidly evolving environment, and tools for the federal government to ensure the supply of critical materials. The bill states that for purposes of a loan or loan guarantee for passenger air carriers, cargo air carriers, and “businesses critical to national security” “the eligible business must have incurred or is expected to incur covered losses such that the continued operations of the business.”



## Economic Stabilization and Assistance to Severely Distressed Sectors of the US Economy

- The bill authorizes as much as \$454 billion, and any other unused loan funds, to be used to make loans, loan guarantees, and other investments to support programs or facilities established within the Federal Reserve “for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, States, or municipalities.



## Mid-Sized Businesses

- The Treasury loan program also includes a section pertaining to support for “mid-sized businesses.” The bill states, the “Secretary shall endeavor to seek the implementation of a program or facility [under the \$454 billion program described above] that provides financing to banks and other lenders that make direct loans to eligible businesses including, to the extent practicable, nonprofit organizations, with between 500 and 10,000 employees”
  - Annualized interest rate that is not higher than 2 percent per annum.
  - For the first 6 months after any such direct loan is made, or for such longer period as the Secretary may determine in his discretion, no principal or interest shall be due and payable.”



## Mid-Sized Businesses

- Eligible entities applying for a direct loan under this program are required to make a number of certifications, including, but not limited to, that:
  - “the uncertainty of economic conditions as of the date of the application makes necessary the loan request to support the ongoing operations of the recipient;
  - the funds it receives will be used to retain at least 90 percent of the recipient’s workforce, at full compensation and benefits, until September 30, 2020;
  - the recipient intends to restore not less than 90 percent of the workforce of the recipient that existed as of February 1, 2020, and to restore all compensation and benefits to the workers of the recipient no later than 4 months after the termination date of the public health emergency declared by the Secretary of Health and Human Services on January 31, 2020;”
  - “the recipient will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing repayment of the loan;” and
  - “the recipient will remain neutral in any union organizing effort for the term of the loan.”



## Main Street Lending Facility

- Federal Reserve is authorized to create a Main Street Lending Facility for small and mid-size businesses with none of the requirements described above.



## Business Tax Provisions

- **Employee retention credit for employers subject to closure due to COVID-19:** The provision provides a refundable payroll tax credit for each calendar quarter for 50 percent of qualified wages paid by employers to employees for such a calendar quarter during the COVID-19 crisis. The credit is available to employers whose
  - operations were fully or partially suspended, due to a COVID-19-related shut-down order, or
  - gross receipts declined by more than 50 percent when compared to the same quarter in the prior year.
- **Warning:** Employers are not eligible for this credit if the employer receives PPP SBA loans.



## Business Tax Provisions

- The credit is based on qualified wages paid to the employee.
  - The number of full-time employees is determined based on the average number of FTEs employed by the employer during 2019.
  - For employers with greater than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above.
  - For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order.
  - The credit is provided for the first \$10,000 of compensation, including health benefits, paid to an eligible employee. In effect this means the maximum amount of credit attributable to any employee is \$5,000.
  - Qualified wage includes the pre-tax portion of payments by the employer to provide and maintain a group health plan, generally allocated pro rate among employees and pro rata basis of periods covered.
  - Qualified wages do not include any wages taken into account as qualified sick leave or qualified family leave on FFCRA.
  - Qualified wages can not exceed the amount an employee would have been paid for working an equivalent duration the 30 days immediately proceed such a period.





## Business Tax Provisions

- **Delay of Payment of Employer Payroll Taxes:** The bill defers employer payroll and railroad retirement tax payments through the end of 2020. Deferred funds would be paid over two years in 2021 and 2022.
  - 50% of delayed payroll taxes will be due by December 31, 2021 and 50% due by December 31, 2022
  - The measure defers 50% of self-employed Social Security tax payments
- **Warning:** Deferral would not apply to employers with small business loan debt forgiven under the bill.



## Business Tax Provisions

- **Modifications for Net Operating Losses:** The bill relaxes the limitations on use of losses. Net operating losses (NOL) are currently subject to a taxable-income limitation, and they cannot be carried back to reduce income in a prior tax year. The provision provides that an NOL arising in a tax year beginning in 2018, 2019, or 2020 can be carried back five years. The provision also temporarily removes the taxable income limitation to allow an NOL to fully offset income.



## Newly Required Leave for COVID-19 Reasons

### • Interaction with Multi-Employer Plans

- You can satisfy this leave requirement through a multiemployer fund/plan/program
- The fund “must allow employees to secure or obtain their pay for the related leave they take under the Act.” Will the funds cooperate? Would they require an additional contribution?
- The new law does not *require* you to use a fund. You can provide leave directly to employees unless the CBA or plan documents require otherwise.
  - You probably have to bargain about this with the union



## Bargaining with Unions over COVID-19 Issues

### • The National Labor Relations Act Still Applies

- If you want to deviate from the CBA, you need the Union’s consent
- If you want to change something not addressed in the CBA (even improvements for employees), you first need to give the Union “notice and the opportunity to bargain”
  - These requirements are relaxed (but not eliminated) during “exigent circumstances”
- If the Union makes an information request, you need to answer it (but there are some ways to push back)



# Contact

**Jef Fagan**  
**General Counsel**  
*National Electrical Contractors Association*  
(301) 944-4399  
[JEF@necanet.org](mailto:JEF@necanet.org)

