

COVID-19 TOWN HALL FOR THE INDIANA OPTOMETRIC ASSOCIATION: KEY BUSINESS AND EMPLOYMENT LAW TOPICS

Presented by:

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About Our Speakers



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Bob Greising devotes his practice primarily to general corporate, corporate finance, business, healthcare technology, and education areas. He is one of the Firm's leads on the COVID-19 response, with a focus on the impact of the Coronavirus pandemic on small and mid-sized businesses.

Bob has served as lead counsel in many merger and acquisition transactions and in the sale of numerous publicly and privately-held businesses across a broad spectrum of industries. He is actively involved in the firm's efforts to serve family-owned and closely-held businesses as well as entrepreneurial and development stage companies. In addition, he has been the lead on joint ventures and strategic alliances in the healthcare and community mental health sectors, as well as for the financial services industry, the education sector, technology and software, and energy fields and on outsourcing projects and public/private partnerships involving governmental services and information technology.



About Our Speakers



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Shelley M. Jackson is a member of Krieg DeVault LLP's Health Care and Labor and Employment Law practice groups and serves on the firm's COVID-19 Task Force. She concentrates her practice in the areas of pharmaceutical regulatory compliance, health care professional license defense, data privacy and security, and employment law on behalf of employers of all sizes. Shelley brings a diverse set of professional experiences to her work, including time spent both in a law firm setting and in-house as an assistant general counsel and chief privacy officer for a multi-national corporation.

Whether providing day-to-day compliance advice, navigating disputes, or representing clients in high-stakes legal or regulatory matters, Shelley strives to combine broad substantive expertise with cost-effective, practical strategies. She routinely advises clients on regulatory compliance matters involving various state and federal regulatory frameworks and administrative bodies, including the Indiana Professional Licensing Agency, U.S. Department of Labor, U.S. Office of the Inspector General, and U.S. Drug Enforcement Administration. She routinely writes and speaks on health care and employment law topics, including with respect to COVID-19.



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CARES Act: Overview of Paycheck Protection Program

- *Purpose: Help Small Businesses Adversely Impacted by Pandemic Maintain Employment and Wages – Keep Money in the Economy*
- *Eligible Borrower: Business Concerns with Under 500 Employees (with some industries allowed more)*
- *Benefit: Low Rate Loans and Loan Forgiveness*
- *Available Funds: \$349 billion*
- *Program Expires June 30, 2020*

CARES Act: PPP Loans > How Do I Get One?

- *One Loan Per Employer*
- *Apply “Now” > First Come First Served*
 - *Small Businesses: April 3, 2020*
 - *Sole Proprietors and Independent Contractors: April 10, 2020*
- *Apply with SBA Lender*
 - *Check with your lender first*
- *Application Source:*

<https://home.treasury.gov/system/files/136/PPP-Lender-Application-Form-Fillable.pdf>

CARES Act: PPP Loans > Terms

- *Maximum Amount: 2.5 average payroll up to \$10M, plus amount of EIDL that is refinanced*
- *Interest: 1% per annum*
- *Term: 2 years (for amounts not forgiven)*
- *Payments Deferred for 6 Months*
- *Collateral: No*
- *Personal Guaranty: No*
- *“Credit Elsewhere” Requirement: Waived*

CARES Act: PPP Loans > Calculate Maximum Amount

- *Determine total payroll for last twelve months for US based employees*
- *Delete amounts over \$100,000 for any employee*
 - *Guidance indicates this covers salary, wages, commissions, and tips*
- *Divide by 12*
- *Multiple by 2.5*
- *Add EIDL Amounts Borrowed in between January 31, 2020 and April 3, 2020 (less Emergency Grant)*

CARES Act: PPP Loans > Permitted Uses

- *Payroll Costs: At least 75% of proceeds*
 - *Wages and Compensation*
 - *Benefits*
 - *Employment Taxes*
- *Others: Not more than 25%*
 - *Interest on preexisting mortgages*
 - *Rent on leases in place before February 15, 2020*
 - *Utilities based on service agreements in place before February 15, 2020*

CARES Act: PPP Loans > Eligibility Issues

- *Employees*
 - *Full Time*
 - *Part Time*
 - *Not Independent Contractors*
- *Aggregated with Affiliates [with some limited waivers]*
 - *Equity Control*
 - *Management Control*
 - *Economic Collaboration*
 - *Totality of Circumstances*

CARES Act: PPP Loans > Forgiveness

- *Up to Full Amount of Principal Plus Interest*
- *Not More Than 25% for Non-Payroll Costs*
- *Subject to Reduction*
 - *Decrease in headcount compared to prior period*
 - *Decrease in wages and salary by more than 25% for employees making less than \$100,000*
- *Petition Lender*
- *Forgiven Debt Excluded from Employer's Income for Tax Purposes*

CARES Act: Overview of EIDL Loans

- *Purpose: Cover Losses from Disaster*
- *Eligible Borrower: Business Concerns with Under 500 Employees (with some industries allowed more)*
- *Benefit: Low Rate Loans but NOT Loan Forgiveness*
- *Available Funds: \$10 billion*
- *Program Term: December 31, 2020*

CARES Act: EIDL Loans > How Do I Get One?

- *Apply with SBA, Not SBA Lender*
- *Application Source: <https://covid19relief.sba.gov/#/>*

CARES Act: EIDL Loans Terms

- *Maximum Amount: \$2 million*
- *Interest: 3.75% per annum for businesses*
- *Term: up to 30 years (based on ability to repay)*
- *Collateral: Yes*
- *Personal Guaranty: Yes, but waived for loans under \$200,000*
- *“Credit Elsewhere” Requirement: Waived*
- *\$10,000 Emergency Grant [need not be repaid]*

CARES Act: Sole Proprietors and Independent Contractors

- *Sole Proprietors and Independent Contractors are Eligible Borrowers for PPP Loan and EIDL Loan*
- *Payments to an Independent Contractor Not Considered Payroll Costs for Payor*
- *Payroll Cost for S/P and I/C: wages, commissions, income, or net earnings from self-employment, capped at \$100,000 on an annualized basis for each employee*

Other Small Business Considerations

- *Check Loan Documents*
- *Check Force Majeur Provisions*
- *Consider Business Interruption Insurance*
- *Consider Changes in Scope of Fiduciary Duties*

Part II: Key Employment Law Topics*

- Indiana's Unemployment Insurance Program
- Coronavirus Aid, Relief, and Economic Security (CARES) Act
- Families First Coronavirus Response Act (FFCRA)
- Worker Adjustment and Retraining Notification Act of 1988 (WARN Act)
- Key Resources

* Relevant sources are listed at the end of the presentation.

Indiana's Unemployment Insurance (UI) Program

- Otherwise eligible claimants experiencing layoffs (whether temporary or permanent) due to COVID-19 likely will qualify for benefits. DWD makes all eligibility and benefit determinations.
- General UI benefit payment parameters:
 - One-week waiting period currently waived
 - Work search requirement currently waived for claimants who are in medical quarantine or caring for claimant's own child while school/daycare is closed (or caregiver is unavailable) due to COVID-19
 - More flexibility on late applications – but encourage prompt filing
 - Minimum \$50 benefit per week/maximum UI weekly benefit of \$390 (but we will discuss federal supplements)
 - Calculation based on “base period” (first four of last five quarters of employment prior to filing), divided by 52 and multiplied by .47

Indiana's Unemployment Insurance (UI) Program

- How work/payments may impact UI benefits (very fact-specific):
 - Employees forced to work reduced hours may qualify, but benefit amount will be reduced by any work done during the week the work is performed (not the week when payment is received)
 - Sick pay (including FFCRA pay), vacation pay, severance pay, payment in lieu of notice, and holiday pay are typically deductible income
- Employees who quit or who are discharged “for cause” (statutorily defined term) generally are not eligible for UI benefits. (Note: Keep in mind employer’s obligation to provide accurate information to DWD upon request.)
- Self-employed/independent contractors are not eligible for UI benefits; however, may be eligible to receive benefits under the CARES Act.

Indiana's Unemployment Insurance (UI) Program

- Employers are required to notify employees of UI rights (letter, email, text message, flyer/poster) prior to layoff/termination. Approved language:

Unemployment Insurance (UI) benefits are available to workers who are unemployed and who meet the requirements of state UI eligibility laws. You may file a UI claim in the first week that employment stops or work hours are reduced.

For assistance or more information about filing a UI claim or questions about the status of your UI claim once filed, visit www.Unemployment.IN.gov. You will need to provide the state UI agency with the following information in order for the state to process your claim:

- **A valid email account – your email address will become your Uplink Username.**
- **Driver's license or valid ID, address, Social Security number, date of birth and phone number.**
- **Last employer's name, mailing address, phone number, dates of employment and reason you are unemployed.**
- **Bank routing number and account number if choosing direct deposit as your payment option (NOTE: Key2Benefits prepaid MasterCard® is also available).**



Indiana's Unemployment Insurance (UI) Program

- Effect of COVID-19 UI claims on employers' contribution rates/reimbursement:
 - Contributory employers - Not charged to individual employers; instead, all COVID-19 claims will be mutualized to the entire employer pool
 - Reimbursable employers – Charged dollar-for-dollar to individual employers; retroactive credit of 50% of charges applied once reimbursement is received by DWD under federal CARES Act
- Q1 reporting/contribution payments must be made by May 31, 2020 (31-day extension) to avoid penalties and interest.
- Employers with questions about being an “essential business” for shutdown/layoff purposes may call business/industry-only hotline at 877-820-0890 or via email at covidresponse@iedc.in.gov.

(Federal) CARES Act

- Coronavirus Aid, Relief, and Economic Security (CARES) Act includes, among other things, expanded unemployment benefits:
 - Pandemic Unemployment Assistance (PUA) – Provides benefits to individuals not traditionally eligible under state UI programs, such as self-employed, independent contractors (including “gig economy” jobs), limited work history; benefits available through December 31, 2020; must be able and available to work, except for specific COVID-19 related reasons
 - Emergency unemployment relief for governmental entities/certain non-profits/Indian tribes for UI payments made between March 13, 2020 and December 31, 2020; reimbursement of 50% of payments made
 - Federal Pandemic Unemployment Compensation (FPUC) – Additional \$600/week for individuals already collecting UI benefits; available from date State enters program through week ending on or before July 31, 2020. (Note: Maximum benefit entitlement applies.)

(Federal) CARES Act

- Expanded unemployment benefits (continued):
 - Temporary full federal funding of first week of compensable regular UI benefit for states with no waiting week – Begins when State enters program through December 31, 2020.
 - Pandemic Emergency Unemployment Compensation (PEUC) – Up to 13 weeks of extended UI benefits, beginning when State enters program through December 31, 2020 for individuals who have exhausted all rights to state UI, are not receiving federal or Canadian UI benefits, and are able/available/actively seeking work (states must be flexible with availability when due to COVID-19). (Note: Maximum benefit entitlement applies.)
 - Temporary financing, agreements, and grants for Short Time Compensation/Shared Work/Work Share programs –
 - ✓ Reimbursement of 100% of program wages paid by employers through December 31, 2020
 - ✓ Reimbursement of 50% of program UI benefits to states implementing such a program, plus eligibility for a portion of \$100 million in grants to implement and administer program
 - ✓ Mechanism for states without such a program (including Indiana) to implement if desired

(Federal) CARES Act

- Some other key CARES Act employment-related provisions
 - Student loans – Student loan payments made by employer between March 27, 2020 to December 31, 2020 are tax free for employee, up to \$5,250 annually.
 - Tax credits for employee retention –
 - ✓ Employers whose operations were fully or partially suspended due to COVID-19 shutdown order or whose gross receipts declined by more than 50% from the prior year
 - ✓ Refundable payroll tax credit for 50% of wages incurred from March 13, 2020 through December 31, 2020 for first \$10,000 of compensation (including benefits) paid to each eligible employee
 - ✓ Employers with 100 or fewer full-time employees receive credit for all employee wages, even if not shut down (100+ employees = credit available only when not providing services)
 - Deferred Payroll Tax Payments – Employers and self-employed individuals can defer payment of the employer share of Social Security payroll taxes for two years, with half of deferred amount due by December 31, 2021 and the other half due by December 31, 2022.
 - SBA Forgivable Loans for Payroll and Grants for Emergency “Economic Injury Disaster Loans” (already discussed)

(Federal) FFCRA

- Families First Coronavirus Response Act (FFCRA) introduced two new emergency paid leave programs: Emergency Family and Medical Leave Expansion Act (EFMLEA) and Emergency Paid Sick Leave Act (EPSLA), both covering employers with fewer than 500 employees and effective from April 1, 2020 through December 31, 2020
- Basics of EFMLEA:
 - Amends existing Family and Medical Leave Act (FMLA) to include (a) additional COVID-19 qualifying reason for leave (i.e. unable to work or telework while caring for employee's child due to school/childcare closed or caregiver unavailable due to COVID-19 emergency); (b) shorter eligibility window of 30 days of employment, no minimum hours worked; and (c) paid leave after first 10 days (during which other available paid, including EPSLA, leave may be used)
 - Paid at 2/3 of employee's regular rate of pay for hours employee would normally be scheduled to work
 - Total benefit of up to \$200/day and \$10,000 for entire EFMLEA paid leave period

(Federal) FFCRA

- Basics of EPSLA:
 - Ten days of paid leave provided for all employees of covered employer
 - Provides emergency paid sick leave when employee is unable to work (or telework) for the following reasons: (a) employee is subject to a mandatory ordered or health care provider-advised quarantine/isolation due to COVID-19; (b) employee is experiencing COVID-19 symptoms and seeking medical diagnosis; (c) employee is caring for individual subject to above quarantine/isolation due to COVID-19; or (d) employee is caring for the employee's child due to unavailability of school, place of care, or care provider due to COVID-19 precautions (note: federal government given authority to expand leave eligibility to include employees "experiencing any other substantially similar condition")
 - Pay is employee's regular rate of pay (or minimum wage, if greater), up to \$511/day and \$5,111 total, when taken for first two reasons
 - Pay is 2/3 of employee's regular rate of pay (or minimum wage, if greater), up to \$200/day and \$2,000 total, when taken for third or fourth reason

(Federal) FFCRA

- Topics relevant to both EFMLEA and EPSLA:
 - When counting employees, use FMLA integrated employer and FLSA joint employer tests
 - “Varying schedule” calculation available under EFMLEA and EPSLA
 - Employer required to post posters and should establish a reasonable process for documenting and administering leave policy
 - Certain employees are exempt from leave provided under EFMLEA and EPSLA: “health care providers” and “emergency responders” – use caution when denying leave on this basis
 - U.S. Department of Labor (USDOL) has issued multiple resources to assist employers with compliance
 - CARES Act clarifies parts of EFMLEA and EPSLA and amends FFCRA (eligibility for individuals temporarily laid off between February 29, 2020 and June 30, 2020)
 - Tax credit for eligible employers of 100% of eligible payments; non-penalty provisions for cash strapped businesses who elect to withhold certain payroll tax payments
 - Temporary non-enforcement period from March 18, 2020 to April 17, 2020 (compliance is still required!)

A Brief Word on the (Federal) WARN Act

- Employers with 100+ employees must provide 60 days' notice in advance of large-scale (generally, at least 50 at single location/unit/facility) reductions in force, unless exception applies
- Triggered when there is a “plant closing” or a “mass layoff” that results in “employment loss” at a “single site of employment” (all defined terms under WARN)
- Employment loss: “(i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.”
- Rolling 90-day look-back and look-forward period – issue-spotting is critical

Key Resources

Tips for utilizing COVID-19 web-based resources:

- Set up a defined process and responsible stakeholder(s) to monitor and communicate key updates
- Select authoritative and frequently updated sources
- Look for details on when last updated and method for communicating updates (e.g. can you tell from looking at the page?)
- Confirm information among multiple sources when appropriate
- If available, sign up to receive alerts when new content is published
- Look for hotlines and other ways to obtain specific feedback
- Seek additional guidance when needed

Key Resources

Indiana DWD Resources:

- FAQ for employers:
[https://www.in.gov/dwd/files/Indiana Unemployment FAQ Employers.pdf](https://www.in.gov/dwd/files/Indiana_Unemployment_FAQ_Employers.pdf)
- COVID-19 page: <https://www.in.gov/dwd/19.htm>
- Claims information page (<https://www.in.gov/dwd/3474.htm>)
- Employer's Handbook
([https://www.in.gov/dwd/files/Employer Handbook.pdf](https://www.in.gov/dwd/files/Employer_Handbook.pdf))
- Claimant's Handbook
([https://www.in.gov/dwd/files/Claimant Handbook.pdf](https://www.in.gov/dwd/files/Claimant_Handbook.pdf))

Key Resources

USDOL CARES Act Resources:

- Unemployment Insurance Program Letter No. 14-20:
https://wdr.doleta.gov/directives/attach/UIPL/UIPL_14-20.pdf
- Unemployment Insurance Program Letter No. 15-20:
https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20.pdf

Key Resources

USDOL FFCRA Resources:

- COVID-19 resource page (includes fact sheets, Q/A, posters, field assistance bulletin, USDOL webinar):
<https://www.dol.gov/agencies/whd/pandemic>
- FFCRA Temporary Rule:
<https://www.dol.gov/agencies/whd/ffcra>
- FFCRA Questions and Answers:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Key Resources

Federal WARN Act Resources:

- USDOL WARN Act compliance assistance page:
<https://www.dol.gov/agencies/eta/layoffs/warn>
- Employer's Guide:
<https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/EmployerWARN2003.pdf>

Key Resources

- Krieg DeVault's COVID-19 Novel Coronavirus Resource Center:
<https://www.kriegdevault.com/info/coronavirus-covid--resource-center>
- KD's COVID-19 Task Force:
<https://www.kriegdevault.com/info/coronavirus-covid--resource-center#COVID-19 Task Force>
- KD's COVID-19 Hotline: (317)238-6281 (monitored 24/7)

Questions?



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