

FLORIDA SMALL BUSINESS LEGAL ISSUES RELATED TO COVID-19

Provided by:



Brick Business Law, P.A.
Florida Litigation and Counsel

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1. Introduction

As part of the Federal Coronavirus Aid, Relief and Economic Security Act ("CARES"), enacted March 27, 2020 for emergency relief from coronavirus disease 2019 ("COVID-19") issues, Congress enacted over 800 pages of new federal legislation which is generally targeted at providing relief for American workers, family and businesses. Additionally, the Families First Coronavirus Response Act ("FFA") was enacted March 18, 2020. There have been numerous State and Local government orders issues in the past several weeks which also affect Florida small businesses.

As with any new legislation, there is a significant amount of ambiguity regarding interpretation and implementation, which have been compounded by a difficult economic and social environment.

The following is intended as a high-level review and resource of related legal issues to assist small businesses in Florida with accessing resources and understanding relevant issues. This paper does not address every issue. Each situation is different and the issues are evolving quickly. This is also not intended to constitute legal advice. Please consult an attorney regarding your specific situation.

At the time of publication, Congress was considering additional stimulus packages which are not addressed herein.

2. Financial Resources For Small Businesses

The CARES Act amended the Small Business Act (“SBA”) to create a new small business loan program which is generally in effect from February 15, 2020 through June 30, 2020. However, due to significant demand and resources, potential applicants are encouraged to apply as quickly as possible. The Act generally applies to small businesses with 500 employees or less, including sole proprietors, independent contractors, and self-employed individuals.

a. The Paycheck Protection Program

The Paycheck Protection Program (“PPP”) is a Loan program authorized by the CARES Act, managed by the SBA and administered through approved banks. In basic terms, it allows for a loan to be provided to small businesses based on a multiple of their monthly payroll. The loan can be forgiven to the extent (1) it is used for allowable purposes within the first eight weeks of receipt of the funds and (2) all employees remain on the payroll. Allowable purposes include payroll, rent, mortgage and utilities. Businesses can obtain a loan in the amount of 2.5 times the average monthly payroll costs of the business. The cost calculation would generally include salary, wages, commissions, tips, benefits and state and local taxes assessed on compensation. Each employee’s salary is capped at \$100,000 per year as part of the calculation. For businesses which were in business in 2019, the calculation could be based on the one year prior to loan application or year-end 2019. Banks are generally recommending that applicants provide documentation to substantiate their calculations, such as W-2s, 940, 941 or payroll processing documentation. The SBA is providing regular guidance to banks on the calculation of such costs due to applicant’s questions and some ambiguities in the application. The application does not require a personal guarantee, credit check or other collateral. Business owners are required to certify the information provided. To the extent loans are forgiven, they are not treated as taxable income. To the extent loans are not forgiven, they are subject to a 1% interest rate for a 2-year term.

Small business owners should obtain the supporting documentation from their accountant and submit it, with the application, to their commercial bank.

b. Disaster Loans

The CARES Act permits for loans to be made to small businesses which have suffered substantial economic injury as a result of the COVID-19 pandemic. Loan forgiveness of up to \$10,000 is permitted for allowable purposes, which include (a) providing sick leave to those employees unable to work due to COVID-19; (b) maintaining payroll through a substantial slowdown or business disruption; (c) meeting increased costs to obtain materials unavailable due to supply chain disruptions; (d) making rent or mortgage payments or (e) repaying business obligations that cannot otherwise be met due to revenue losses. Although the forgivable “grant” portion is limited to \$10,000, the loan portion can include up to \$200,000. There are several other provisions and restrictions, but one noteworthy restriction is that forgiveness is limited by any amounts received under the PPP (discussed in Part 2(a) above).

Small business owners should speak with their bank about whether it is advisable to obtain a disaster loan.

3. Human Resources and Employment Issues

a. Working Remotely

Governor DeSantis' statewide Executive Order 20-91 relates to sheltering in place. The order itself basically encourages anyone who can work from home to do so. It provides a long list of essential service providers who are exempt from the work at home requirements. The Order is in place through April 30, 2020. Employers should determine whether their business is clearly an "essential business" or whether their employees conduct "essential activities" under the Order. If so, and they seek to require their workers to work at their places of business, they should incorporate all of the 'social distancing' protocols for safety. However, businesses should be aware that having employees work at their places of business may cause exposure to liability if an employee or third party becomes ill as a result of the employer's requirements.

Individual Florida counties have also enacted local orders similar to the governor's which may impose additional local restrictions. Generally, if any employer who can permit its workers to work from home, it should do so. If not, it should assess the risk of running a business with workers present and should mandate and communicate clear social distancing and hygiene (i.e. handwashing, disinfection of workplace common areas) protocols for its employees who must work at a place of business or elsewhere.

If possible, businesses should issue clear policies and guidance relating to these matters. Small business advisors should speak with their general counsel or HR advisor about these issues.

b. Employee Sick Leave

The FFA generally requires employers of fewer than 500 employees to provide paid sick leave and expanded family and medical leave, up to specified limits, to employees unable to work or telework due to certain circumstances related to COVID-19. It also provides tax credits to the employer for each calendar quarter in an amount equal to 100 percent of qualified leave wages paid by the employer plus qualified health plan expenses with respect to that calendar quarter.

c. Terminations and Furloughs

Some small businesses may be required to terminate or furlough employees as a result of the business slowdowns. Prior to making any employment decision, employers should review employment contracts of each employee to determine whether the termination or furlough of specific employees would constitute a violation of any contract or the loss of any contractual rights (such as, for example, the right to enforce a non-compete agreement). With regard to certain terminations, it may be advisable to enter into severance or other end of employment types of agreements to minimize exposure to liability or public relations backlash.

4. Real Estate and Lease Issues

a. Payment of Rent

Many businesses and individuals have made headlines by their public declaration of refusal to pay rent. While some larger companies with many leased locations may have the leverage to renegotiate, many smaller businesses do not. Normally, a slowdown of business, standing alone, will not excuse a rent payment obligation. Questions have arisen regarding whether the COVID-19 pandemic, coupled with the government orders, would trigger the “force majeure” or “act of god” clauses in their leases. There is not specific guidance on this issue yet in Florida with regard to the current issues; however, the analysis likely starts with the lease language as well as the type of business at issue and how it has been affected. A secondary argument may be available for “frustration of purpose” with regard to certain situations where businesses have been required to be shut down by government order.

This best approach is likely to determine first if the landlord and tenant can agree to amend the lease or otherwise address the issue. If no agreement can be reached, the business should consult with an attorney regarding options and alternatives based on the specific lease and situation. Business owner tenants and commercial property owners should consult with their general counsel regarding their specific lease and situation.

b. Evictions

Normally evictions are accomplished through a summary procedure process which allows for them to proceed more quickly through the court system than a typical lawsuit. However, on April 2, 2020, Governor DeSantis entered order 2020-94 which suspends residential foreclosures and evictions. At the time of publication, the suspension did not include commercial evictions. Thus, there is not a ‘ban’ on commercial evictions; however, there may be one forthcoming given the current business and social environment. Current restrictions in courts and throughout the State may still cause logistical slowdowns in the ability of commercial landlords to evict tenants.

c. Property Taxes

Property tax payments due to be paid to the counties on March 31, 2020 were delayed until April 15, 2020 by DOR Executive Director Jim Zingale pursuant to 20-52-DOR-001. This change extends the time period by two weeks for making payments to counties prior to such payments becoming delinquent. This order does not affect any hard date requirement for payment of property tax as set out within any lease agreement. In other words, payment of taxes may still be required on a date certain under the terms of lease agreement.

Challenges to an assessor’s valuation of property related to the effects of the COVID-19 pandemic will be related to forthcoming valuations based upon a January 1, 2021 assessment date and should proceed through the regular VAB appeals process at the appropriate time.

Real estate owners (and tenants) should consult with their counsel or property tax advisor for additional information.

5. Business Contracts and Performance Issues

a. Deliveries, Performance and Payment

The legal analysis of contract delivery, performance and payment (or the failure to do so) due to the COVID-19 pandemic and government-ordered restrictions is similar to the analysis of lease payment obligations in section 4(a) above. It could be true that performance is excused or a delay is excusable (or not) pursuant to the specific contract language and situation. Risk of loss, breach, damages, force majeure, available defenses and the right to terminate are all issues which should be addressed by business owners' counsel with regard to deliveries and performance of contractual obligations impacted by current events.

Separately, businesses may want to look to their insurance policies to determine whether they have business interruption or other insurance coverage which may apply to provide relief from performance or payment obligations and any other damages caused by or due to COVID-19.

b. Injunctions and Non-Monetary Court-Ordered Relief

In a typical environment, parties affected by non-performance or non-payment could seek damages and also injunctions or other court-ordered relief such as a declaration about the parties' contract rights. However, during the COVID-19 pandemic, many Florida courts are operating in a limited or altered capacity. Most hearings are done telephonically and many in-person functions have been restricted. Obtaining a court-ordered injunction (to prevent or compel certain actions of the adverse party) may be more difficult than normal depending on the specific court, judge and whether the issue is an "emergency". Businesses seeking a court-ordered injunction should consult with their litigation counsel regarding these matters. (See also Section 4(b) regarding evictions specifically).

6. **Federal Tax Matters**

There are several favorable tax provisions available to businesses under the CARES Act. A technical analysis and review of the various tax changes are beyond the scope of this paper. The more significant provisions include a refundable tax credit for employers related to employee retention, delayed payment of payroll taxes, carrybacks of net operating treatment, deferral of non-corporate taxpayer loss limits, acceleration of corporate AMT liability credit, relaxation of the business interest deduction limit, depreciation treatment for interior building improvements and accelerated payment of credits for required paid sick and family leave. Small business owners should consult with their accountant or tax preparer regarding the applicability of any favorable tax treatment.

7. Brick Business Law, P.A. - General Counsel Services

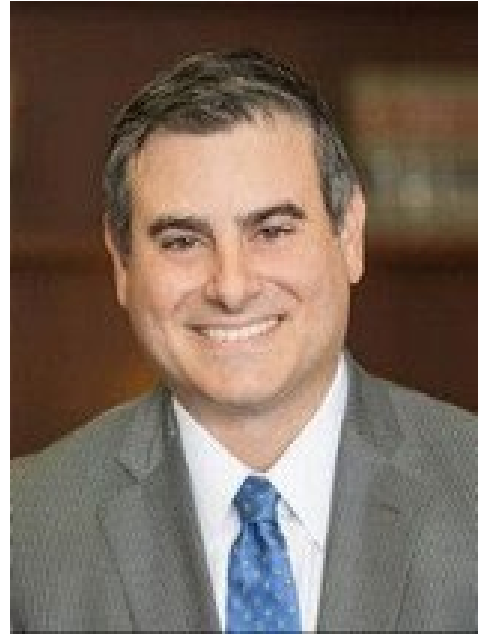
Brick Business Law, P.A. is a Florida law firm with offices in Tampa and St. Petersburg Florida. Tampa business lawyer Kevin Brick recognized that small businesses need economical and practical legal assistance to avoid and minimize exposure to business-related legal problems and, when necessary, to litigate and resolve business-related legal disputes. For this reason, Brick Business Law focuses its practice on two areas of service: Business Counseling and Business Litigation

Often the most cost-effective approach to legal issues is to minimize and avoid them by using knowledgeable business counsel before any problem arises. Brick Business Law's Legal Counseling practice assists businesses to help them identify areas of risk exposure regarding potential future legal issues. We provide advice and guidance on corporate governance, business planning, contract drafting and formation, research and advice on legal questions and representation in pre-litigation dispute resolution. Typical issues of consultation involve business formation and structure, employment and other business contracts, intra-business officers-directors-shareholders issues, negotiating and structuring the purchase and sale of businesses, making demands from others for payment or performance and other related legal issues.

Even with the best planning and guidance, businesses often need to pursue others or defend themselves in litigation. Brick Business Law's Business Litigation practice focuses on leveraging its courtroom litigation experience, thorough legal research capabilities, and proven strategic case planning methods to consistently obtain successful results for its clients. We believe that, for any case to be successful, the case must be prepared for trial from day one. This strategic approach should guide all decisions and actions in the case. We formulate, research and confer with our clients on our case litigation strategy throughout the representation so that we can ensure we are working together to meet our clients' litigation goals. Typical business litigation issues involve contract disputes, breaches of fiduciary duty, defamation, business fraud, defense of consumer and employment claims, shareholder and member derivative lawsuits, business property theft, non-compete issues, interference with business and contractual relationships, and claims under the Florida Unfair and Deceptive Trade Practices Act, among others.

KEVIN G BRICK

Kevin is the founder and managing attorney of Brick Business Law. Kevin is AV-rated by Martindale Hubbell by his peers as pre-eminent for his legal ability and ethics. He has also been recognized as part of the "Florida Legal Elite" by Florida Trend Magazine in 2014 and 2018 (top 2% of Florida Bar members), and a "Rising Star" by Super Lawyers publication (top 3% of attorneys under age 40) in 2015, 2016 and 2017. He also received the Client Choice Award from Avvo.com, which also rates him 10/10 in the areas of business law and litigation. Kevin has contributed to various community and legal service organizations, including the American Inns of Court, Hillsborough County Bar, Big Brothers Big Sisters and the Leukemia and Lymphoma Society. He is also a member of Westtown Church. He was also a graduate of Hillsborough County's 2014 Bar Leadership Class. Prior to founding the firm, he was an associate with two AV-rated Tampa law firms and was an in-house attorney for a property tax consulting firm. He gained extensive trial experience as a Hillsborough County assistant state attorney, where he took over 100 cases to trial with substantial success. He lives in Tampa with his wife, Katie and daughter, Ava.



BAR ADMISSIONS:

Florida, 2005

Georgia, 2009

U.S. District Court, Middle District of Florida

U.S. Southern District of Florida

EDUCATION:

Rhodes College, B.A. International Business, 2000

Florida State University, M.B.A. and J.D *cum laude*, 2004

JOHN S KODA

John received his B.A. from Purdue University in 1984 and J.D. from the University of Florida College of Law in 1989. John is a member of the Florida Bar and is a charter member and Past-President of the Venice-Englewood Bar Association (now the South County Division of the Sarasota County Bar Association). John's practice areas include general civil litigation in the areas of business, corporate, real estate, construction, and consumer protection. For over 20 years, John was lead litigation counsel for south Sarasota county's oldest law firm, and he also served as senior staff counsel for Florida's Division of Consumer Services and litigated consumer protection cases statewide. He has extensive experience at all levels of Florida courts including appellate courts, administrative hearings and arbitration.



John's community activities have included board memberships with the American Heart Association; Venice Area Beautification, Inc.; Sertoma Club, and the School Advisory Council for Pine View School for the Gifted. He is a two-time past-president of Big Brothers Big Sisters of the Sun Coast. He is also a recipient of a national award for community volunteerism from the National Down Syndrome Society. John speaks Hungarian.

BAR ADMISSIONS:

Florida, 1989

U.S. District Court, Middle District of Florida

EDUCATION:

Purdue University, B.A., 1984

University of Florida College of Law, J.D. 1989

JOSEPH KENNETT

Joe concentrates his legal practice on resolving disputes for small to medium-sized businesses. He has vast courtroom experience managing cases from inception to completion and has taken nearly 150 trials to verdict. His business litigation practice focuses on complex litigation involving business fraud, breach of contract and other business disputes.

Joe grew up in Palm Harbor, Florida, eventually receiving his undergraduate degree in public relations from Florida State University and his law degree from Florida Coastal School of Law. In law school, he was a member of both the top nationally ranked Moot Court and Mock Trial teams. He was champion of the Spohrer-Dodd Trial Advocacy Scholarship Competition and received the Book Award for highest grade in trial advocacy. While at Florida Coastal, Joe worked over 900 hours as an intern in a wide variety of legal fields including business litigation, labor, and employment law.



After law school, Joe worked for several years as an Assistant State Attorney in Tampa, eventually prosecuting hundreds of felony cases. He prepared and directed law enforcement, expert, and lay witnesses for testimony in over 150 jury and non-jury trials, ranging from misdemeanors to life felonies, only losing one jury trial during his time at the office. Prior to joining Brick Business Law, Joe worked for several years with an AV- rated Tampa area business law firm, where he focused his practice exclusively on the litigation and resolution of business-related disputes. Joe brought his business litigation talents to Brick Business Law in 2018 where he continues to focus his practice on counseling and litigating business-related issues.

BAR ADMISSIONS:

Florida, 2010

U.S. District Court Middle District of Florida

EDUCATION:

Florida State University, B.S., 2006

Florida Coastal School of Law, J.D., 2010

JOCELYN C SMITH

Jocelyn Smith is a member of the Florida and Virginia Bars and has practiced in state and federal court for the past thirteen years. She has experience in litigating a variety of business contract disputes, as well as intellectual property, consumer class actions, restrictive covenant enforcement, and consumer and commercial debt collection.

Jocelyn grew up in Gainesville, Florida and received her B.A. from the University of Florida before obtaining her J.D. from Georgetown University in Washington, D.C. At Georgetown, Jocelyn participated in Moot Court, the Harrison Institute Public Policy Clinic, and the Georgetown Gilbert & Sullivan Society.

After law school, Jocelyn returned to Florida and represented businesses in a variety of disputes ranging from single-plaintiff consumer protection claims to class actions and complex, multi-year intellectual property disputes in federal courts. She has represented clients in over 100 mediations and numerous arbitrations before AAA and JAMS. She also spent five years representing low-income individuals in a non-profit during the foreclosure crisis.

BAR ADMISSIONS:

Florida Bar, 2007

Virginia Bar, 2012

United States District Court for the Middle District of Florida

United States District Court for the Southern District of Florida

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EDUCATION:

Georgetown University Law Center, J.D.

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