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COVID-19 and Maine Construction Contractors:

*A Roundtable Video Conference on
Legal, Financial and Tax Developments*

April 8, 2020

9:00AM to 10:30AM

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Meet the Speakers

Matt Marks, CEO, AGC Maine

Robert Brooks, Esq., Verrill

John Giffune, Esq., Verrill

Marie Mueller, Esq., Verrill

David Jean, CPA, Albin Randall & Bennett

Moderator: **Robert Ruesch**, Esq., Verrill

Contractor Resources

- [Construction Industry Best Practices](#)
- [Safe Passage Letter for Essential Employees](#)
- [Hotels/Motels Open for Essential Workers](#)
- Daily Update Email
Signup: team@agcmaine.org
- COVID-19 Webpage for Contractors:
www.agcmaine.org/covid19
- State of Maine:
<https://www.maine.gov/governor/mills/covid-19>
- City of Portland:
<https://www.portlandmaine.gov/AlertCenter.aspx>



Employment Law Issues

Robert Brooks, Esq., Verrill



**Likely Employment
Issues During
Coronavirus Pandemic**



Job Site Safety



**Families First
Coronavirus
Response Act**

Paid sick leave

Paid family leave

New Poster of
Employee Rights

Maine Stay at Home Order

- On March 30, Gov. Mills issued Stay Healthy at Home directive that requires people living in Maine to stay at home at all times unless for an essential job or an essential personal reason as of April 2 until at least April 30.
- Construction is expressly recognized as an “essential business.”
- Enforcement
 - This Order shall be enforced by law enforcement as necessary and violations are a class E crime subject to up to six months in jail and a \$1,000 fine.
- Travel restrictions:
 - Prohibits the use of public transportation unless for an essential reason or job that cannot be done from home
 - Limits the number of people traveling in private vehicles to persons within the immediate household unless transporting for medical necessity.

Managing the workforce during a pandemic – likely issues

- Exclusion of employees from the workplace
- Scheduled Employee Vacations/Out-of-state Travel
- Mandated Overtime
- Employees Calling Out
- Sharing Information about Employee Health (i.e. positive cases)
- Workers' Compensation for COVID-19

Job Site Safety Issues

- COVID-19 Toolbox Talk
- Social Distancing Guidelines
- Use of Masks/PPE

Quarantine/Suspected/Confirmed Cases

- Out-of-State Contractors/Travel by Employees
 - What is a “hot spot?”
- Employees with known/suspected contact
- Employer obligations after report of known/suspected contact
- GC reporting obligation to subs/vendors on site

Families First Coronavirus Response Act (FFCRA)

- (1) expands the FMLA temporarily to provide 12 weeks of leave needed for the care of children out of school because of COVID-19 and makes weeks 3 through 12 paid leave at 2/3 of regular rate;
- (2) creates 2 weeks (80 hours) of paid sick leave for childcare and other leave related to the coronavirus at 100% regular rate; and
- (3) provides for tax credits related to the paid leave provisions created by FFCRA.
- Effective April 1, 2020—**NOT** retroactive

Families First Coronavirus Response Act

- Applies to private employers with **fewer** than 500 employees.
- Businesses with fewer than 50 employees can seek an exemption if leave requirements would jeopardize the viability of the business.

Families First Coronavirus Response Act

- Qualifying Reasons for Leave Related to COVID-19:
 1. Is subject to a Federal, State or local quarantine or isolation order.
 2. Has been advised by a health care provider to self-quarantine.
 3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis.
 4. Is caring for an individual subject to an order described in (1) or quarantine as described in (2).
 5. Is caring for his/her child whose school or place of care is closed (or childcare provider unavailable) due to COVID-19 reasons.
 6. Is experiencing any other substantially similar condition specified by DHHS.

Note: Reason 5 is the only basis for extra 10 weeks of **paid** family leave

Families First Coronavirus Response Act

- **Tax Credit:** Each quarter, employers are entitled to a refundable tax credit equal to 100% of the qualified emergency sick leave paid to eligible employees.
- Posting requirement – published March 25, 2020:
<https://www.dol.gov/agencies/whd/posters>

National Savvy. Local Sensibility.

COVID-19 LEGISLATION

High-Level Review

David Jean, CPA
Albin Randall & Bennett

SUMMARY

- Coronavirus Aid, Relief, and Economic Security Act – the CARES Act
 - Signed into law on March 27, 2020
 - LARGEST STIMULUS BILL IN U.S. HISTORY - \$2.2 TRILLION
 - Targeting individuals and businesses
 - Key components include:
 - Paycheck Protection Program (PPP) loans
 - Employee Retention Tax Credit
 - Expanded unemployment benefits
 - Favorable business and individual income tax provisions
 - Advance refunds to all individual taxpayers

EID LOANS

- SBA EID Loans
 - Originates with SBA
 - Changes qualifications to 500 or fewer employees
 - Stringent underwriting and application process made easier
 - Maximum Loan Amount = \$2,000,000
 - Term loan
 - 30 year amortization period
 - 3.75% interest rate
 - Deferred payments
 - All principal and interest is deferred through 2020

EID LOANS / EID LOAN GRANTS

- Not prohibited from obtaining both EID and PPP loans
 - Loan amounts cannot be used for same costs
- EID Loan Grants
 - Generally EID Loans are not forgivable
 - \$10,000 grant (tax-free) delivered within 3-days
 - Loan not approved, then keep \$10,000
 - Website changes to accommodate loan grant on application
- Rollover to PPP loan – favorable rates

PPP LOANS

- PPP Loans
 - Originate with authorized SBA Bank
 - Normal SBA channels
 - Expanded SBA channels for this loan
 - Contact your bank...YESTERDAY!
 - Already contacted? Contact them again!
 - Most banks are processing
 - No personal guarantees or collateral
 - Interest rate is 1% per annum for 2 years

PPP LOANS

- Eligibility – 500 or fewer employees as of date of loan
 - Definition of employee = anyone
- Payroll costs DO include:
 - Salary, wage, commission or similar compensation
 - Cash tips or equivalent
 - Vacation, parental, family, medical or sick leave
 - Allowance for dismissal or separation
 - Group health care benefits, including insurance premiums
 - Payment of any retirement benefit
 - Professional Employer Organization (PEO)

PPP LOANS

- Payment of state or local tax assessed on compensation of employees (SUTA)
- Sole proprietors/Independent Contractors = Sum of payments of any compensation to or income that is a wage, commission, net earnings from self-employment, or similar compensation
 - limited to \$100,000/year as prorated for the covered period
 - Need further guidance
- Payroll costs do NOT include:
 - Compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period
 - Employer FICA
 - Compensation for employees living outside the U.S.
 - Payments made to independent contractors
 - Temporary help (current interpretation)
 - No double dipping on paid leave under the Families First Coronavirus Response Act (applies if you requested the credit)

PPP LOANS

- PPP Maximum Loan Calculation
 - Average monthly payroll costs for the 12 month period ending on the day the PPP loan is originated or 2019 calendar year
 - X 2.5
 - Not to exceed \$10,000,000
 - Add EID loans related to COVID-19 between January 31, 2020 and April 3, 2020. The grant award of up to \$10,000 is not added to the loan

PPP LOAN APPLICATION

- Other eligibility requirements
 - Were you in business as of February 15, 2020
 - Have employees to whom you paid wages and on behalf of whom you've paid payroll taxes
- SBA Size Standard (Small Business Concern)
 - N/A if below 500 employees
 - If over 500 employees, may qualify if meets the standard size revenue-base or employee-base threshold
 - Number of construction firms improperly rejected due to revenue size
- Good Faith Certification
 - Uncertainty of current economic conditions
 - Retaining workers and maintaining payroll, making mortgage payments, lease payments, and utility payments
 - No applications already pending for a loan under this subsection for the same purpose
 - From February 15, 2020 through December 31, 2020 won't receive duplicative amounts

PPP LOANS

- Allowable uses of loan proceeds
 - Payroll costs as previously defined
 - Payments of interest on any mortgage obligation
 - Rent (including rent under a lease agreement)
 - Utilities
 - Interest on any other debt obligations that were incurred before February 15, 2020
 - At least 75% of the loan proceeds must be used for payroll costs

PPP LOANS

- Loan Forgiveness
 - Amounts expended on the following items during the 8-week period following loan origination are eligible for forgiveness (not to exceed the original principal balance and accrued interest on the loan):
 - Payroll costs as previously defined
 - Interest on mortgages that existed as of February 15, 2020
 - Rent for leases that existed as of February 15, 2020
 - Utilities that existed as of February 15, 2020
 - Accrued interest
 - No more than 25% of the loan forgiveness can be attributable to non-payroll costs
 - Planning opportunities

PPP LOANS

- Reductions to amounts forgiven
 - Headcount
 - Salary reduction
- Re-hire provisions
 - No reduction in debt forgiveness if re-hired and compensation is restored before June 30, 2020
 - Certain conditions required
- Complicated and poorly written law. We're hoping for clarification in the Regulations

PPP LOANS

- Taxation of amounts forgiven

TAX-FREE

PPP LOANS

- Remaining balances on loan
 - Continues to be guaranteed
 - Maximum amortization period of 2 years
 - Interest not to exceed 1%
 - No prepayment penalties
- Deferral of payments
 - Principal and Interest
 - Deferral 6 months
 - Interest accrues

FAME LOAN PROGRAMS

- Relief Interim SBA Finance Loan Program
 - Bridge loan until SBA financing has been funded
 - Up to \$100K, WSJ minus 1%, 90 day term
 - Interest only
 - Security and guarantees required
- Relief Business Direct Loan Program
 - Up to \$50K, WSJ minus 1%
 - Program capped at \$5M
 - 12 month term with extension if necessary
 - Security and guarantees required
 - As of April 2nd, requests have exceed \$5M, but not all approved

CARES TAX PROVISIONS

- Employee Retention Credit
 - Credit for employment taxes for a business that is forced to suspend or close due to COVID-19 but continues to pay its workers during this time. The credit is 50% of qualified wages paid during this time. Qualified wages are limited to \$10,000 per employee or
 - In a calendar quarter after December 31, 2019, gross receipts are less than 50% of gross receipts of same quarter in prior year
 - The employee retention credit is not available if the taxpayer takes a payroll protection loan.
- Payroll Tax Deferral
 - Employment taxes due through December 31, 2020 can be paid one-half on December 31, 2021 and one-half on December 31, 2022. Self-employed individuals can defer paying 50% of his/her self-employment tax with one-half the deferral due December 31, 2021 and the remainder due December 31, 2022.
 - The payroll deferral is not available if the taxpayer takes a payroll protection loan.

CARES TAX PROVISIONS

- Net Operating Losses (NOL)
 - Net operating losses from 2018, 2019, and 2020 can be carried back 5 years and net operating losses in 2018 carried forward to 2019 and 2020 can offset 100% of taxable income in those years. The \$500,000 net business loss limitation has been eliminated retroactive to January 1, 2018.
- Qualified Improvement Property (QIP)
 - The technical correction was made to correct the life of qualified improvement property to 15 from 39 years retroactive to January 1, 2018. This will allow bonus depreciation to be taken on qualified improvement property.
- Opportunities to amend tax returns to claim refunds

Legal Issues for Construction

John Giffune, Esq. and Marie Mueller, Esq., Verrill



STATE AND
LOCAL ORDERS



FORCE
MAJEURE
CLAUSES



CONTRACT
ISSUES



INSURANCE
COVERAGE

State/Local Orders

- Stay Informed – These are Subject to Change
- AGC Communicating with State for clarifications
- Does a stricter local order supersede a state order?
 - E.g., Marty Walsh to contractors: “Shut it down”

Contract Clauses

- AIA Force Majeure: *If the Contractor is delayed at any time in the commencement or progress of the Work . . . by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control . . . then the Contract Time shall be extended for such reasonable time as the Architect may determine.*
- EJCDC Standard General Conditions: *Where Contractor is prevented from completing any part of the Work within the Contract Times due to delay beyond the control of Contractor, the Contract Times will be extended in an amount equal to the time lost due to such delay if a Claim is made therefor as provided in Paragraph 12.02.A. Delays beyond the control of Contractor shall include...epidemics...*

Contract Issues

- Supply Chain/Vendor Issues – Access to out-of-state suppliers/vendors
- Project Delays
- Ongoing bidding – provisions to include?
- Subcontractor delay/non-performance
- Enforcement of safety among subcontractor crew
- Project suspension by owner
- Mobilization/demobilization costs
- Bonding

Insurance Coverage Issues

- Business Interruption Insurance
 - Virus exception
- Civil Authority
- Ingress/Egress
- Contingent Business Interruption Coverage
- Communicable or Infectious Disease
- Workers' Compensation
- CGL
- Review your policies and talk to your agent. Make all possible claims you think may arise to ensure timely reporting.

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Visit www.verrill-law.com/covid-19-resources for more information and insights.

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Questions?

Please contact us with any additional questions:

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Portland, ME/Boston, MA/Westport, CT

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