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DGS ALUMNI NETWORK:
HOW COVID-19 HAS IMPACTED COLORADO BUSINESSES

AUGUST 25, 2020

A LexMundi Member

WELCOME TO THE DGS ALUMNI NETWORK

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- To convey our gratitude and our desire to stay connected, the firm has launched a DGS Alumni Network. You now have access to a password-protected DGS alumni web portal, complete with a DGS alumni directory, a list of upcoming firm events, job opportunities, DGS alumni newsletters, and more.
- To create an online profile, visit dgslaw.com/alumni. Please email info@dgslaw.com with any questions.
- Thank you for being a member of the extended DGS family!

TODAY'S SPEAKERS

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PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS

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PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS

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- SBA issued FAQs on August 4: <https://home.treasury.gov/system/files/136/PPP--Loan-Forgiveness-FAQs.pdf>
 - General Loan Forgiveness
 - Q3: No loan interest is payable if loan fully forgiven. But if not forgiven or only partially forgiven, loan principal and interest payable at maturity.
 - Payroll Costs
 - Q1: Payroll costs paid after the end of the Covered Period (“CP”) or Alternative Payroll Covered Period (“APCP”) are forgivable if they are incurred during the CP or APCP and paid on or before the next regular payroll date.
 - Q2: Payroll costs paid before the CP are forgivable if they are paid during the CP.
 - Q4: The gross amount (before deductions for taxes, employee benefit payments, etc.) of cash compensation is used, not the net amount.
 - Q5: All forms of cash compensation (including tips, commissions, bonuses, and hazard pay), up to \$100,000 annualized, are forgivable.
 - Q6: Group healthcare benefits paid by employees, or accelerated from periods outside the CP or APCP, are not forgivable.
 - Q7: Similarly, retirement benefits paid by employees, or accelerated from periods outside the CP or APCP, are not forgivable.
 - Q8: Compensation for business owners is capped, and depends on the type of business (C-corp, S-corp, self-employed, partners) and whether borrower is using an 8-week or 24-week CP.

PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS CONT.

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- Non-payroll Costs
 - Q1: Costs for eligible mortgage interest, rent or lease payments, and utilities, incurred before the CP but paid during the CP are forgivable.
 - Q2: Costs paid after the end of the CP are forgivable, but only if paid on or before the next regular billing date.
 - Q3: APCP applies only to payroll costs, not to non-payroll costs.
 - Q4: Interest payments on unsecured credit is not eligible for forgiveness. Loans must be secured by real or personal property to have interest payments forgiven.
 - Q5: Renewed lease payments and interest on refinanced mortgages related to pre-February 15 leases and mortgages are forgivable.
- Loan Forgiveness Reductions
 - Q1: Reductions in full time equivalent (FTE) employees during the CP may be mitigated if offers to rehire are made, even if the offer is declined.
 - Q4: Reductions in pay during the CP may reduce amount of forgiveness. See examples in FAQ.
 - Q5: Only decreases in salary or wages in excess of 25% are counted to reduce forgiveness amount, not any other forms of compensation.

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CYBERSECURITY RISKS

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PRIVACY AND DATA SECURITY

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Top 3 Impacts of COVID-19:

1. Increased cybersecurity risks
2. Challenges in managing a remote workforce
3. Privacy implications of health monitoring

COVID-19 IMPACTS ON CYBERSECURITY

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- Increased security risk from remote working
 - New and additional connection points to company systems
 - Increased use of mobile or personal devices for company business
- Potential delays in cyberattack response
 - IT teams working remotely may face challenges in timely detecting and responding to cyberattacks
- Targeted phishing attacks and scams
 - Phishing emails increasingly taking advantage of COVID anxiety or offering fake products and services
 - Impersonation of employees to perform fraudulent wire/bank transfers or securities transactions on the rise



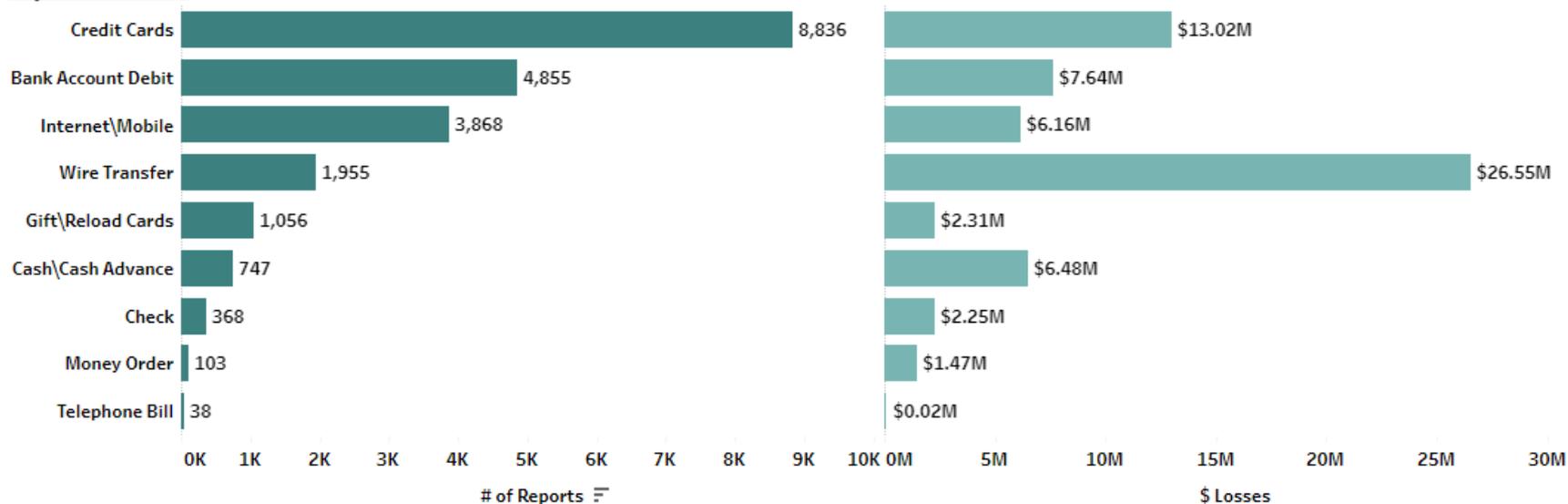
FTC COVID-19 and Stimulus Reports

Fraud Reports

*Data from January 1, 2020 to August 23, 2020

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Payment Method:



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MANAGING A REMOTE WORKFORCE

RISKS FROM TELEWORKING

- Employee remote access
 - Use of personal devices or BYOD devices
 - Access to company networks from home WiFi
- Removal of data and physical devices from offices
 - Laptops, removable media, and physical documents at heightened risk of theft, loss, or exposure
- Adoption of new technologies
 - Shift to remote work necessitated quick adoption
 - Limitations on ability to appropriately vet vendors for privacy and data security risk

New tech adoption to enable remote work as a result of COVID-19

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	Yes	No	Unsure
Legal Services	68%	24%	8%
Education/Academia	67%	22%	11%
Health care	60%	32%	8%
Government	60%	28%	13%
Banking	54%	34%	12%
Insurance	40%	46%	13%
Software and services	32%	59%	9%
Tech hardware/equipment	22%	66%	13%
Marketing	22%	72%	6%
Materials	0%	60%	40%
OVERALL	45%	46%	9%

Statistically significant difference from the overall total.

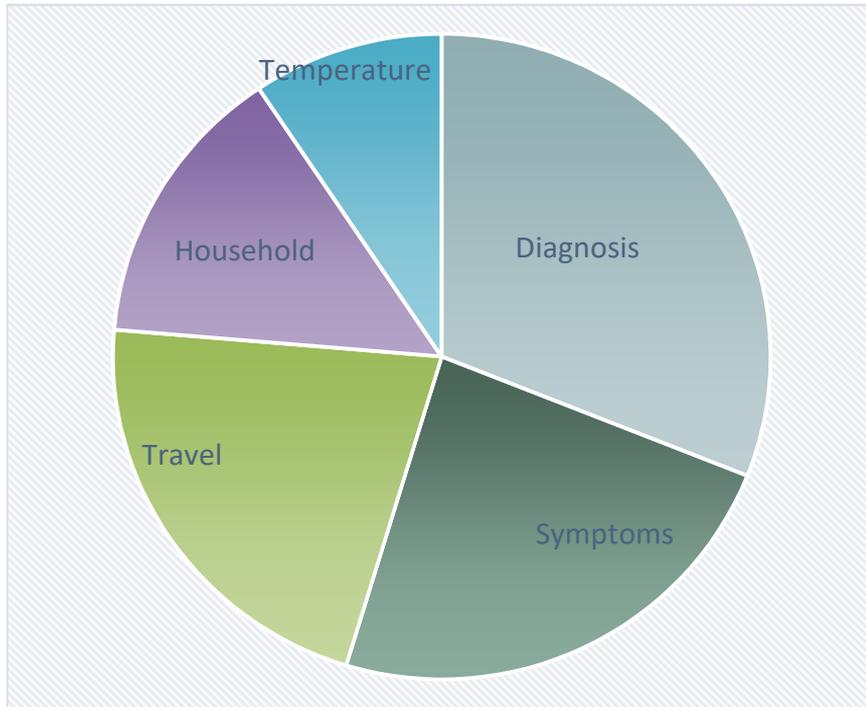
Source: https://iapp.org/media/pdf/resource_center/iapp_ey_privacy_in_wake_of_covid_19_report.pdf

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HEALTH MONITORING OF EMPLOYEES

TYPES OF INFORMATION COLLECTED

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- Most employers ask about diagnosis and/or symptoms
- A large proportion track employee travel
- Some ask about household members and whether they have experienced symptoms
- Less frequently, employers take employee temperature

CONTACT TRACING APPS

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- Proximity tracking
 - Apps available to employers to track employees' proximity to each other
 - These apps typically rely on Bluetooth or WiFi to transmit anonymous user ID numbers to other app-installed devices within range
 - App alerts the user when they have come into contact with someone who tested positive for COVID-19
- Advantages: speed, reliability
- Disadvantages: accuracy, false positives, the human factor (is the device on and charged?)

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MANAGING RISKS

1. Review company policies and update as necessary
 - Information Security Policy
 - Remote Work Policy
 - Business Continuity Plan
 - HR Policies/Employee Handbook
2. Communicate regularly with employees
 - Communicate policies and expectations of remote work
 - Facilitate employee access to IT resources, spam-check, etc.
 - Conduct company-wide and targeted training

3. Test Internal Procedures for Security Incident Response

- Engage in table-top exercises
- Update Incident Response Plan (including making sure stakeholder contact information is up to date)

4. Engage in risk assessments

- New technologies should be assessed for privacy and data security risks; can go back and review any assessments that were expedited
- Assess risk of any contemplated new uses of personal information, including defining the purpose and scope of data collection, period of retention, and security of data
- Identify overlap with other legal frameworks (e.g., privacy and employment law) and ensure compliance with all frameworks

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EMPLOYMENT LAW

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HEALTHY FAMILIES AND WORKPLACES ACT

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- The HFWA has two components:
 - Sick pay benefits until 12/31/20 that largely mirror those in the Families First Coronavirus Response Act;
 - Sick pay benefits after 1/1/21 up to 48 hours per year.
 - Covers employers with more than 16 employees on 1/1/21.
 - Covers all employers on 1/1/22.

HEALTHY FAMILIES AND WORKPLACES ACT

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- Employers in Colorado must provide paid leave to an employee who:
 - (1) has COVID-19 symptoms and is seeking a medical diagnosis;
 - (2) is instructed by a government agent or a health provider to quarantine or isolate due to COVID-19 risk; or
 - (3) is taking care of someone else due to COVID-19 precautions, *i.e.*, someone ordered to quarantine or isolate, or a child whose school, place of care, or childcare is closed or unavailable.

HEALTHY FAMILIES AND WORKPLACES ACT

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- Employees can take up to 2 weeks of paid leave (up to 80 hours, depending on weekly hours):
 - Paid leave is at the employee's regular pay rate at $\frac{2}{3}$ pay for category #3 above (care for someone else);
 - The pay rate does not include overtime or bonuses; and
 - If pay is all or partly sales-based, paid leave must be either at the employee's hourly or salaried rate, or at the applicable minimum wage (whichever is higher).
- If an employee already received paid leave in 2020 for COVID-19-related needs, that counts as part of the 2 weeks that HFWA requires; however, leave for non-COVID reasons does not count toward HFWA requirements.

HEALTHY FAMILIES AND WORKPLACES ACT

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- Starting January 1, 2021:
 - An employer must provide a minimum of 1 hour of sick pay time for every 30 hours worked up to a maximum of 48 hours per year;
 - Sick pay may be used as soon as it accrues and may be used in hourly increments;
 - Carry over of up to 48 hours per year, but an employer may prohibit use of more than 48 hours of paid sick leave per year.

HEALTHY FAMILIES AND WORKPLACES ACT

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- An employee may take paid sick leave for the following reasons:
 - (1) Mental or physical illness, injury, or health condition that prevents employee from working;
 - (2) Obtaining preventive medical care, or medical diagnosis, care, or treatment of any mental or physical illness, injury, or health condition;
 - (3) Caring for a family member who has a mental or physical illness, injury, or health condition, or who needs the kind of care or treatment in (2) above;
 - (4) The employee or family member has been a victim of domestic abuse, sexual assault, or criminal harassment, and needs leave for related medical attention, mental health care or other counseling, victim services (including legal services), or relocation; or
 - (5) Due to a public health emergency, a public official having closed either:
 - (A) the employee's place of business; or
 - (B) the school or daycare provider of the employee's child, requiring the employee to be absent to care for the child.

- Other considerations:
 - An employer may have more generous provisions at its option, such as granting all 48 hours at once;
 - Sick leave paid at the same hourly rate or salary as the employee normally earns;
 - No obligation to pay employees for unused sick leave upon separation or at any other time;
 - HFWA adds 32 more hours of paid leave (80 total) in public health emergencies.

HEALTHY FAMILIES AND WORKPLACES ACT

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- Notification and recordkeeping:
 - Employers must post the approved poster issued by the Colorado Division of Labor Standards and Statistics.
 - Records must be retained for a two-year period documenting hours worked, sick leave accrued, and sick leave used.
 - An employer may have written policies/procedures, including requiring documentation; however, an employee may not be denied leave for failing to follow the employer's policies.

HEALTHY FAMILIES AND WORKPLACES ACT

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- An employer cannot fire, threaten, or otherwise retaliate against, or interfere with, an employee who:
 - (1) requests or takes HFWA leave;
 - (2) informs another person about HFWA rights, or supports that person's exercise of HFWA rights;
 - (3) files a HFWA complaint;
 - (4) cooperates/assists in an investigation about a potential HFWA violation; or
 - (5) makes an unjustified request for paid sick leave if the employee's belief was reasonable and in good faith.
- HFWA leave cannot be waived by an employee.

- An employer/business that engages 5 or more employees or contractors may not retaliate against, or interfere with, the following acts during, and related to, a public health emergency:
 - (1) raising reasonable concerns, whether a formal complaint or informally to any person, about workplace violations of government health or safety rules, or about a significant workplace threat to health or safety;
 - (2) opposing a violation (of the type in category 1); or
 - (3) testifying, assisting, or participating in a proceeding about a violation (of the type in category 1).
- If a worker's PHEW complaint, request, or other activity is incorrect, an employer need not agree or grant it, but the employer cannot fire or take other action against the worker if the worker's belief was reasonable and in good faith.

- A worker must be allowed to voluntarily wear their own PPE, such as a mask, faceguard, or gloves, if that PPE:
 - (1) provides more protection than equipment provided at the workplace;
 - (2) is recommended by a government health agency (federal, state, or local); and
 - (3) does not make the worker unable to do the job.

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IMPACTS ON LITIGATION

DAVE HOLMAN

A LexMundi Member

COVID has affected all litigation in some way:

- Official and informal discovery stays
- Remote hearings and depositions
- Postponement of jury trials
- Remote arbitration hearings

- Discovery stays and delays:
 - March-May: Many courts imposed official discovery stays, extended all deadlines, and tolled statutes of limitations
 - Many cases took unofficial discovery holidays
 - Many parties are still delaying deposition discovery because they want in-person depositions
 - “COVID delays” were extremely common and courts accepted that excuse
- Significant increase in the volume of discovery disputes

Remote hearings:

- Courts expect remote video hearings—and scold attorneys who aren't ready for video
- Smooth so far, particularly in Colorado state court
- Smaller states on the leading edge (Oklahoma vs. California)

Remote depositions—the “new normal”:

- Biggest COVID development for how we litigate
- Can't afford to wait for in-person depositions
 - Significant cost savings
 - Likely here to stay
- Rules of civil procedure already allow this by stipulation or court order

Remote depositions—the “new normal”:

- Rules of civil procedure already allow this by stipulation or court order
- Colorado’s enactment of Senate Bill 20-096 allows remote notarizations—and thus for court reporters to be remote

Remote depositions—the “new normal”:

- Before COVID, we used to ship or email documents to the witness
- New cottage industry of remote deposition platforms emerged seemingly overnight

CHANGES TO JURY TRIALS

They are (almost) not happening:

- Federal court: All trials scheduled through October 2 are continued
 - Exception for pilot trials. Only one so far.
 - Some judges were supposed to preside over 4-5 trials during this time.
- State court: No jury trials until August 3
 - Denver had an exception, and successfully completed its Phase 1 start in July with two initial trials.
- Expect smaller juries (juries of six)
- Expect delays to last years

COVID'S SUBSTANTIVE IMPACT ON LITIGATION

COVID's business impacts quickly translated into litigation

- Force majeure: Strength of these claims depends on the specific clause and the facts
 - Causation is key! A poor business environment is not enough.
- Impossibility: In Colorado, a governmental order does not render performance “impossible” unless it makes performance actually illegal
- Impracticability (UCC): A mere increase in cost or collapse in the market is probably not enough. Need to cite a specific intervening event, such as a shortage of raw materials.

Examples of COVID in litigation

- Contract with state agency—budget gap causes state agency to breach
- Buyers wanting to re-trade asset purchase agreements, especially in energy sector
- Debtors whose cash flow disappeared and just can't pay now

We aren't seeing the flood of lawsuits directly related to COVID—*yet*

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