

Welcome to Pillsbury's Industry Insights: Higher Education Webinar

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Agenda

- Stimulus Funding / CARES Act
- Liability for Dorm Room Evictions
- Tuition / Fees Reimbursements
- Labor & Employment Law
- Privacy / Cybersecurity
- Public Health
- Q&A Session

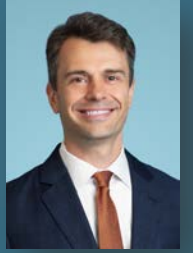
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CARES Act: Higher Education Emergency Relief Fund & Education Relief Act

Higher Education Emergency Relief Fund (Pub. L. 116-136 §§ 18004 – 18007)

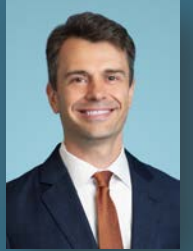


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\$12.56B for Higher Education Distributed Based on Student Enrollment

- 50% for institutional use “to prevent, prepare for, and respond to coronavirus”
- 50% for “emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student’s cost of attendance, such as food, housing, course materials, technology, health care, and childcare)”

Higher Education Emergency Relief Fund (cont'd)

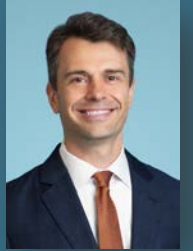


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April 9, 2020: Student Funds Made Available

- Cannot be used by institution to reimburse itself for any costs or expenses, including “any refunds or other benefits that Recipient previously issued to students”
- Institutions have discretion to determine individual awards, but Secretary recommends maximum of Pell Grant (\$6,195)
- Reporting requirements:
 - how grants were distributed to students
 - the amount of each grant awarded to each student
 - how the amount of each grant was calculated
 - any instructions or directions given to students about the grants
- Institution must document that it “continued to pay all of its employees and contractors ... to the greatest extent practicable” (§ 18006)

Education Relief Act (Pub. L. 116-136 §§ 3501 – 3519)



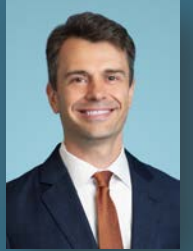
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Significant Provisions

- § 3508: Relaxes rules around return of federal financial aid
- § 3505: Institutions may continue to make Federal Work Study (FWS) payments to students unable to work due to coronavirus
- § 3503: Waiver of matching requirement for FWS & Federal Supplemental Educational Opportunity Grants
- § 3504: IHEs may use FSEOG funds for emergency financial aid to students

Waiting for further guidance from Education Department

Additional Sources of Recovery



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Department of Treasury

- **Loan Grants Program:** \$454B available for loans to mid- to large-sized businesses and nonprofits with between 500 and 10,000 employees that have not “otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act”
- **Main Street Lending Program:** \$600B program for loans to businesses of up to 10,000 employees or \$2.5 billion in revenues*

Insurance

FEMA

NIH / CDC Research Grants

HHS Provider Relief Funds



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Liability for Dorm Room Evictions Tuition / Fees Refund Claims

University Liability for COVID-19 Dorm Room Evictions



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Contractual Non-Performance (Contracts 101)

- The Agreement
 - offer and acceptance
 - university housing contract matters
- Performance by Plaintiff
 - most housing contracts specify why and when a student can be removed from housing
- Non-Performance by the Defendant
 - did the university tell students they couldn't stay?
- Damages?
 - some students will have little in the way of out-of-pocket expenses
 - moving home

Note: there are significant distinctions in housing contracts for traditional dorms as opposed to apartment style accommodations

University Liability for COVID-19 Dorm Room Evictions (cont'd)



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The Force Majeure Clause

- Most have them but few address epidemics or pandemics
 - Pepperdine contract states, “Refunds will not be granted for temporary suspension of housing services that result from emergency...”
 - Very few schools specifically call out pandemics and says no refunds
 - However, most university housing contracts are silent on the issue

Contractual Frustration

- But narrowly construed and difficult to show “impossibility”
- SIP orders don’t mandate the emptying out of the dorms
- In fact, most universities have allowed international students to stay if they desire
- Even if impossibility proven, a refund might still be ordered under the doctrine of restitution

University Liability for COVID-19 Dorm Room Evictions (cont'd)



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Contracts of Adhesion

- For many years, the trend has been to uphold contracts of adhesion
- Necessary in the modern business world but still a small opening if the result is unconscionable
- Stronger case for students if living in dorm was mandated and departure was mandatory – unjust enrichment

Public Relations Considerations

- Finally, regardless of the legal analysis, there are always public relations issues
- Is there a Goldilocks solution, credit for meals or housing next year, partial refund, other benefits for next year?

Note: Sovereign Immunity

Tuition/Fees Refund Claims



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The Plaintiff's bar is all over these claims already

- Class action lawsuits filed:
 - March 27th – against University of Arizona in Arizona federal court
 - April 8th – against Drexel and the University of Miami in South Carolina federal court
 - April 9th – against Purdue in the Northern District of Indiana
 - Many more to come

Tuition/Fees Refund Claims (cont'd)



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Premise

- On-line instruction is no substitute for face-to-face interaction with professors
- Students denied access to unique campus facilities and hands on learning experience

Claimed damages

- Tuition refund
- Return of specific fees that students are no longer able to benefit from (rec fees, lab fees, library fees, dedicated building fees, parking fees, on campus meal fees) and diminution in value of degree

Tuition/Fees Refund Claims (cont'd)



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- Rich history of cases based on failure to provide adequate education dating back to the 1970s
 - Misrepresentation
 - Breach of contract
- These claims are largely not misrepresentation cases
 - Compare to string of lawsuits against law schools from 2012-2016
 - allegations law schools misrepresented post-graduation employment statistics
 - These claims failed early, only one made it to MSJ where it too failed

Tuition/Fees Refund Claims (cont'd)



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- Breach of Contract (general rule has emerged)
 - Viable Claims
 - based on specific, identifiable promises or specific promised services that are not delivered
 - Non-Viable Claims
 - claims generally attacking the quality of education

In sum, look for specific statements or promises about residential campus life, in-person instruction, etc. (website, recruiting brochures, prospective student tours)

Tuition/Fees Refund Claims (cont'd)



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- A word about diminution in value of a degree
 - Affirmative action cases are instructive
 - A very hard measure of damages to prove
- Finally, as with the student housing contract claims, sovereign immunity may provide some defense

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Paula Weber

Partner



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Employment Law

Labor & Employment Law

Workplace Safety: Sick Employees

- Ill or symptomatic employees should be required to tell employer ASAP
- Send the worker home – until tested and cleared, or isolation time has passed
- Deep clean if they came to work (closing to the public, if necessary)
- Notify co-workers who had direct contact with employee and advise of signs of the virus
- Depending on nature of business and interactions between employees, consider whether other employees need to be sent home as well to self-quarantine
- Raises PR and communications issues
 - best practice for high visibility clients is to develop communications and protocols now



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Workforce Restructuring: Telework



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- Extraordinary Circumstances --> Changed [Short Term?] Practices
- Telework is THE preferred option for all but essential on-site functions
- Raises employer concerns re:
 - Post-COVID requests for telework
 - Heightened cyber-security and trade secret risks
 - Employee productivity
- Raises “off the clock” issues for non-exempt workers
- Expense reimbursement laws unclear

Workforce Restructuring: Pay/Hours Reductions



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- Typically fueled by short-term lack of available work; revenue shortfalls
- Workers remain employed at-will, with reduced wages/salaries and/or hours (prospectively)
- Reduction must satisfy minimum wage and exempt salary basis rules/minimums
- Reduced work hours raise compliance risks under other employment laws, including WARN

Workforce Restructuring: Furloughs



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- Lack of available work (anticipated to be short term)
- Workers remain as employees, receive no wages
- Benefit continuation depends on plans
- Federal WARN implications if over 6 months and no set return (and Mini-WARN issues, e.g., CA)
- Issues re payout of accrued vacation (in some states)
- Furloughed employees generally qualify for state unemployment insurance benefits

Workforce Restructuring: Layoffs/RIFs



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Partner
Employment Law

- Lack of available work (anticipated to be long term/permanent)
- Workers terminated
- WARN implications and requirements for Covered Establishments and triggering RIFs
- Payout of final wages and vacation (required in certain states)
- Employees generally qualify for state unemployment insurance benefits
- Benefits cease per plans; COBRA notices required

EEO Risks

- Federal and State EEO laws not suspended in COVID-19 era
 - Heightened concerns re ADA (disability discrimination)
 - Heightened risks of age and national origin discrimination
- ADA medical confidentiality rules still apply
- Employer rights for medical exams are broader in a pandemic
- Employees with chronic health conditions entitled to accommodations due to heightened risk
- Leave beyond FMLA, FFCRA may be a reasonable accommodation



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Paid Sick Leave Patchwork



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- FFCRA (500 or less employees)
- Pre-COVID State and Local PSL
- State and Local Emergency PSL
- Existing Employer Policies and Practices
- PSL laws may require payment, but some laws do not permit forced use of PSL by employer

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Privacy/Cybersecurity
Public Health

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PRESS RELEASE

United States Secret Service
Department of Homeland Security

Secret Service Issues COVID-19 (Coronavirus) Phishing

WASHINGTON - Criminals are opportunists, and as seen in the past, any major news event can be exploited by groups or individuals with malicious intentions. The Coronavirus is no different. In fact, the Coronavirus has become a target for enterprising criminals because it plays on one of the most basic human instincts: the desire for individuals to let their guard down and fall victim to social engineering and phishing fraud scams.

The United States Secret Service is proactively taking steps to protect the public from Coronavirus. The Secret Service's Global Investigative

"Phishing" is the fraudulent practice of sending emails to reveal personal information, such as passwords and email communication and e-commerce. Cyber criminals use phishing emails posing as legitimate medical and or health organizations purporting to be from a medical/health organization regarding the Coronavirus. This leads to either unsuspecting victims providing system, or prompting the victim to enter their email credentials. This type of incident enables further compromise (BEC), PII theft, ransomware and access to sensitive data, which furthers the reliance on email for communication. More of these incidents are expected, and increased vigilance is required.

DJIA 21237.38 5.20% ▲ S&P500 29291.9 6.00% ▲ Nasdaq 7334.78 6.23% ▲ U.S. 10 Yr -3.26/32 Yield 1.083% ▼ Crude Oil 26.82 6.55% ▼ Euro 1.1007 0.09% ▲

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PRO CYBER NEWS

Hackers Target Companies With Coronavirus Scams

Phishing emails are used to install malware that can give hackers access to company systems

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ABUSING FEAR —

The Internet is drowning in COVID-19-related malware and phishing scams

Emails and websites promise info about the pandemic. In reality, they're shams.

DAN GOODIN - 3/16/2020, 4:02 PM



Enlarge

24

Emails and websites are promising vital information about keeping safe from the coronavirus pandemic that's sweeping the globe and threatening millions. In fact, a flood of them are scams that push malware, ransomware, and disinformation, attempt to steal passwords, and personal



Brian Finch
Partner
Cybersecurity

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2. Which Cleaning Supplies Damage Your Phone? We Wiped for Hours to Find Out
3. Getting Tested for Coronavirus at a Drive-Through Clinic
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1. A Generational War Is Brewing Over Coronavirus

Social Engineering Threats



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- People are desperate for information
 - Searches for COVID-19 information are dominating the Internet
- Criminals have taken notice
- Deploying a variety of techniques
 - Some are sophisticated, like fake infection maps
 - Fake domain registrations are spiking as well
- Aims are simple:
 - Credential theft
 - Fraudulent payments

The Second Wave – Expert Hacking



Brian Finch
Partner
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- The mass increase in telework is causing unprecedented strain on networks
- IT personnel are struggling to expand capacity
- Most efforts are focused on reliable, stable connections
- Nation states have been laying the groundwork for years to exploit just that situation

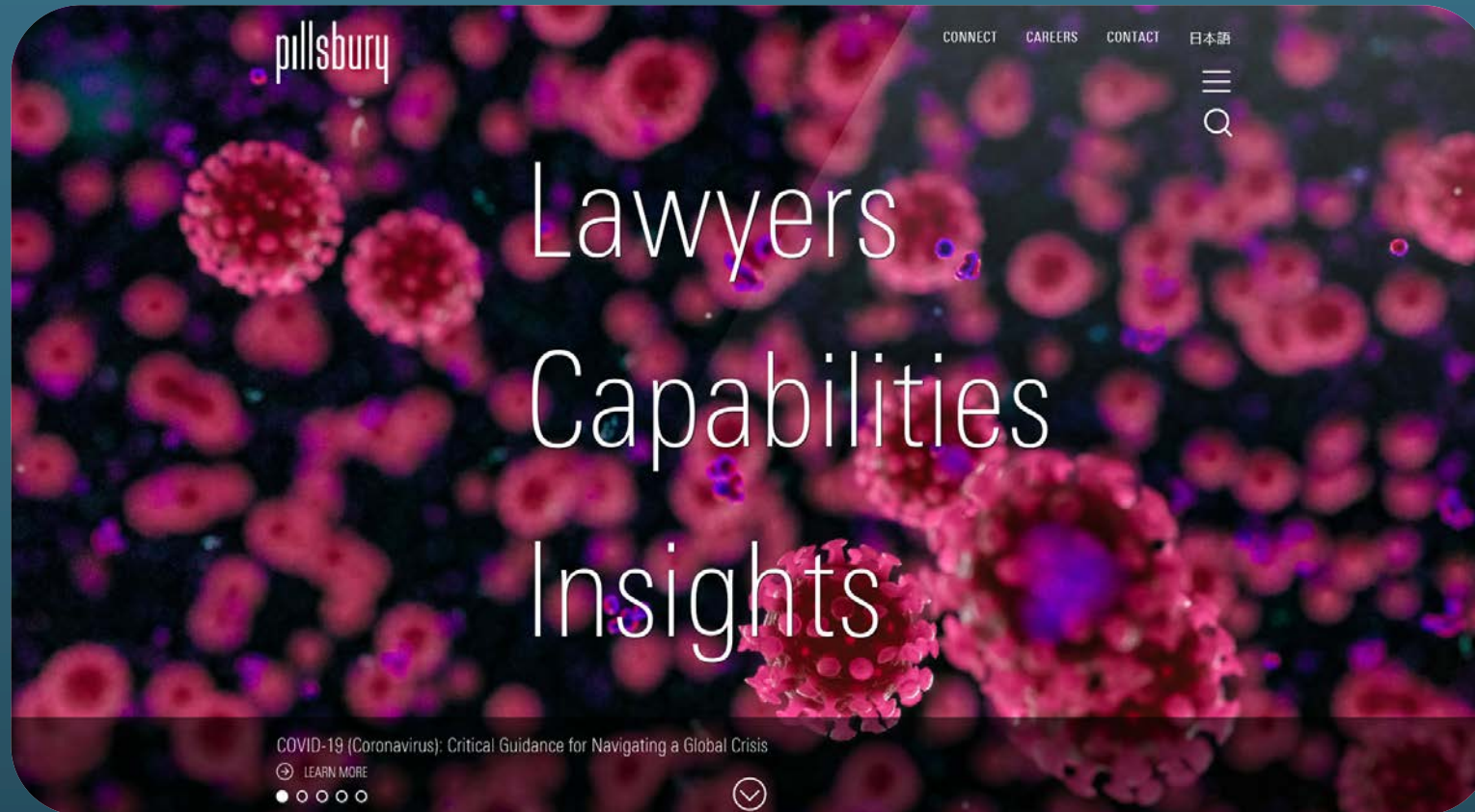
Initial Source Of Funding



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- CARES Act “Public Health and Social Services Emergency Funds”
 - Public Health and Social Services Emergency Fund provides \$100 billion for “health care related expenses or lost revenues that are attributable to coronavirus”
- Key provisions include:
 - No payments for otherwise reimbursable costs
 - Must “submit reports” and “maintain records” related to payments
 - Eligible entities include “public entities, Medicare or Medicaid suppliers and providers, and for-profit and not-for-profit entities specified by HHS”
- Initial payments being made to 2019 Medicare fee-for-service participants

Please visit Pillsbury's COVID-19 (Coronavirus) Resource Center @ www.pillsburylaw.com



Q&A Session



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