



COVID-19: Legal Issues for Tribal Housing

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Overview: COVID-19 Legal Issues

- Legislation: Employment, Funding, Flexibility
- Regulation: Eviction Moratoria
- Vaccine and testing requirements
- Legal Liability: Employees, Residents, Contractors

COVID-19

- First confirmed case in United States announced on January 21, 2020.
- The Secretary of the U.S. Department of Health and Human Services declares public health emergency for COVID-19 on January 31, 2020.
- President issues emergency declaration on March 13, 2020, pursuant to section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5191(b).
- States and Tribes begin issuing lockdown and quarantine orders during March 2020.

COVID-19 Legislation

- Coronavirus Preparedness and Response supplemental Appropriations Act (March 6)
- Families First Coronavirus Response Act (FFCRA) (March 18)
- Coronavirus Aid, Relief, and Economic Security (CARES) Act (March 27)
- Consolidated Appropriations Act, 2021 (December 27)

Coronavirus Preparedness and Response Supplemental Appropriations Act

- Provided for supplemental appropriations for (mainly) public health response to COVID-19
- \$8.3 billion in emergency funding for federal agencies to respond to the coronavirus outbreak.
- - \$6.7 billion (81%) for domestic response: HHS, CDC, FDA, with \$20 million to SBA.
 - Also authorized medicare waiver for telehealth
 - \$1.6 billion (19%) for international response

Families First Coronavirus Response Act (FFCRA)

- Established minimum FMLA and sick leave requirements for employers with employees who:
 - Have to take time off because they have COVID-19
 - Have to take care of a family member with COVID-19
 - Have to take care of a child whose school is closed due to COVID-19

Families First Coronavirus Response Act (FFCRA)

- Changes to employment laws, never clear whether these were mandatory for tribes and TDHEs (but did create eligibility for Employee Retention Tax Credit).
- Two types of leave.
 - 1. Emergency paid sick leave
 - 2. Expanded family leave

Families First Coronavirus Response Act (FFCRA)

Emergency paid sick leave

- 80 hour/2 workweek leave paid at 100% of wages, for employees for the following reasons:
 - where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or
 - experiencing COVID-19 symptoms and seeking a medical diagnosis;

Families First Coronavirus Response Act (FFCRA)

Emergency paid sick leave

- 80 hour/2 workweek leave paid at 2/3 rate of wages, for employees for the following reasons:
 - employee is unable to work because of a bona fide need to care for an individual subject to quarantine,
 - or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19,
 - and/or the employee is experiencing a substantially similar condition as specified by the Secretary of HHS, in consultation with Treasury and Labor.

Families First Coronavirus Response Act (FFCRA)

Expanded family leave

- 10 weeks of leave paid at 2/3 of the wages for the following reason:
 - an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Employee Retention Tax Credit (ERTC)

This leave is now optional, but ERTC is available if the employer provides the leave through March 31, 2021.

ERTC is a refundable tax credit against certain employment taxes equal to 50 percent of the qualified wages an eligible employer pays to employees between March 12, 2020 and Dec. 31, 2020. Extended to March 31, 2021

■ **IRS said ERTC applies to Tribes/Tribal organizations:**

- *Who experienced: Full or partial suspension of the operation of their trade or business during any calendar quarter because of governmental orders limiting commerce, travel, or group meetings due to COVID-19*

CARES Act

- Main purpose: economic stimulus and governmental support.
- Tribal governments: \$8 billion in Coronavirus Relief Funds (CRF).
 - Originally had to be spent by December 31, 2020
 - Extended by Consolidated Appropriations Act, 2021, for an additional year.
 - Some housing programs were provided CRF.

CARES Act

- Tribal Housing: \$300 million
 - \$200 million IHBG-CARES
 - \$100 million ICDBG-CARES (Imminent Threat).
- Involved waivers of certain affordable housing and eligibility requirements. Also provided similar flexibility for use of FY 2020 IHBG funds.
- Funds had to be used for activities to prevent, prepare for, and respond to COVID-19. Can go back to January 21, 2020 for eligible activities.

CARES Act

- Waivers in the statute, and subsequent waivers authorized by HUD under the statute, expanded use of these funds beyond standard NAHASDA “affordable housing activities”
 - Could serve over income families for certain temporary services
 - Could purchase food, PPE, other equipment
 - Could provide essential housing services to shelter residents including childcare, education services, employment assistance, outpatient health services, legal services, mental health services, and transportation

CARES Act

- Extended deadlines for IHP and APR submission
- Abbreviated public comment requirements for ICDBG-CARES
- Can use IHBG-CARES to “maintain normal operations” –
 - a means of helping tribes/TDHEs cover costs of operations that would normally be covered by program income that may have dried up due to rent or eviction moratoria

Consolidated Appropriations Act, 2021

- Established and funded the Emergency Rental Assistance Program (ERAP)
 - \$25 billion nationally; \$800 million for tribes.
- 90% of ERAP funding must be used for direct rental assistance or utility payments.
- 10% may be used for administration and/or supportive services

Emergency Rental Assistance

- Can be used to pay for rents and utilities.
- Can pay for prospective rents and utilities (up to three months at a time).
- If an applicant has rental or utility arrears, must pay those if providing assistance.
- Can only pay for arrears dating back to March 13, 2021 (declaration of National Emergency)

Emergency Rental Assistance

- Households must be at 80% or below of Area Median Income.
- Must provide preference to households at 50% or below.
- Can pay yourself for your tenants' rents and utility payments, and arrears – but cannot give yourself preference.
- Can establish other preferences.

Emergency Rental Assistance

- No geographic limitations, although you can limit to your formula area or service area.
- Cannot pay arrears for maintenance, only for rents and utilities.
- Likely can pay for rental deposits.
- Likely cannot pay for long-term hotel stays.
- Cannot make mortgage payments or provide other homeowner assistance.

Emergency Rental Assistance

- Very specific and detailed requirements for applicants.
 - Must be income-eligible.
 - Must face imminent eviction or threat of homelessness due to financial distress caused by COVID-19
 - Cannot simply self-certify, must provide documentation
 - Landlord can apply, but application must be signed by tenant.

Emergency Rental Assistance

- Deadlines for expenditures of ERAP Funding
- Must spend 65% by September 30, 2021, or lose what is left
- Final deadline for expenditure is December 31, 2021
 - However, can get a three month extension beyond that date.

Regulatory Action

- Office of Management and budget

Has issued guidance to federal agencies regarding:

Telework, travel

Interagency coordination and flexibility

Authorization for waivers of various federal
Administrative and procurement requirements

Regulatory Action

- HUD Office of Public and Indian Housing

Following CARES Act and OMB Waiver authority, issued Guidance setting out:

- Detailed instructions for use of CARES IHBG and ICDBG Funds.
- Waivers or extensions of various administrative and procurement requirements
- Eviction and foreclosure moratoria for federal programs (e.g., Section 184 loans)

CDC Eviction Moratorium

- September 4, 2020: CDC published an Eviction Moratorium in the form of an agency emergency order.
 - Applies nationwide: tribes and TDHEs included.
 - Prohibits all private and public landlords and property owners from evicting individuals from residential properties until December 31, 2020 for failure to make rental or housing payments.
 - Tenant must submit a declaration (in the form attached to the Moratorium Order).

CDC Eviction Moratorium

- Can still evict for other reasons (criminal activity, public nuisance, etc.)
- Does not remove obligation to pay rents or make housing payments – all rents, fees, penalties and interest may continue to accrue.
- Consolidated Appropriations Act, 2021, extended the Moratorium through January 31, 2021
- **President Biden directed CDC to extend to March 2021 and beyond – CDC has extended to March 31, 2021, for now. Likely to extend again.**

Vaccines and Testing

- Operation Warp Speed resulted in expedited development of vaccines, which are becoming more widely available.
- Can a TDHE/Tribe require its employees to obtain the vaccine as a condition of returning to workplace?
- Somewhat up in the air – best if the Tribe or Tribal health entity issues an order.

Vaccines and Testing

- Some steps to take if you want to require vaccination of housing employees:
 - Consult with your legal counsel.
 - Do so through a policy that clearly states that vaccination is job-related and consistent with business necessity as a provider of services to the public.
 - Include a medical exemption (not just for folks who have contraindications from vaccine, but for any medical reason not to take vaccine).
 - Include a religious exemption.

Vaccines and Testing

- What about COVID-19 testing for employees?
- Similar issues as with vaccine – can require but recommend having a policy, showing it is job-related and consistent with business necessity.
- But also must ensure confidentiality, although must also consider necessity of contact tracing.

COVID-19 Liability

- Many businesses going forward are going to face questions of potential liability:
 - i.e., allegations that a person was exposed to and infected by COVID-19 by a business – either from employees or other customers.
- Claims by
 - employees,
 - contractors/vendors, and
 - customers/tenants.

COVID-19 Liability

- Tribes and TDHEs will likely face similar claims.
- There has been some effort to establish liability protections by federal statute (stimulus bill).
 - Nothing yet – but efforts will continue.
- Tribes could also establish certain limits to liability by Tribal Code or common law.

COVID-19 Liability

- Tribes and TDHEs will have sovereign immunity as an initial line of defense to such actions.
- On substantive grounds, still an open question.
- Courts likely to look at it under a negligence or recklessness standard.
 - In other words, did your organization take reasonable steps to prevent exposure, infection and transmission?
 - Will likely be a fact-specific determination unless there is statutory provisions.

COVID-19 Liability

- Did you follow CDC recommendations regarding the requirement of masking, social distancing, and other measures?
- Did you follow Tribal, State and local guidance?
- Did you close when mandated to do so?
- Did you provide opportunities for telework and for non-contact interactions with your tenants?
- Did you provide PPE to staff who were interacting with public and with other staff?

COVID-19 Liability

- Did you mandate vaccines?
- Did you mandate testing?
- Did you disclose and take action when an infection/outbreak was discovered?
- Importance of understanding and following public health guidance, with knowledge that it has been and likely will be shifting terrain.

COVID-19 Liability

- None of these steps are a guarantee against liability.
 - However, the more you can demonstrate in a fact-specific manner that you took all the steps that public health officials were advising be taken
 - The stronger case you will have that you were not negligent and should not be held liable.

Conclusion

- Questions? Discussion?

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