



COVID-19, Agriculture, & the Law: Taking Stock of the Road Behind and Ahead

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Today's Presentation:

Will Address

- Setting The Stage: Background & Context
- Proposed/Enacted federal legislation
- Noteworthy federal regulatory/programmatic status updates
- Overview of state liability protection proposals
- Overview of key litigation filed as result of COVID-19

Will Not Address

- “Deep dive” on mechanics of Paycheck Protection Program or Economic Injury Disaster Loan
- Recent federal legislative proposals regarding state meat inspection
- Commodity-by-commodity mechanics of payment formulas for Coronavirus Food Assistance Program



Outline:

- ✓ Setting The Stage: Background and Context
- Enacted and Proposed Federal Legislation
- Federal Regulatory/Programmatic Developments
- Overview of State Liability Proposals
- Overview of Key Litigation

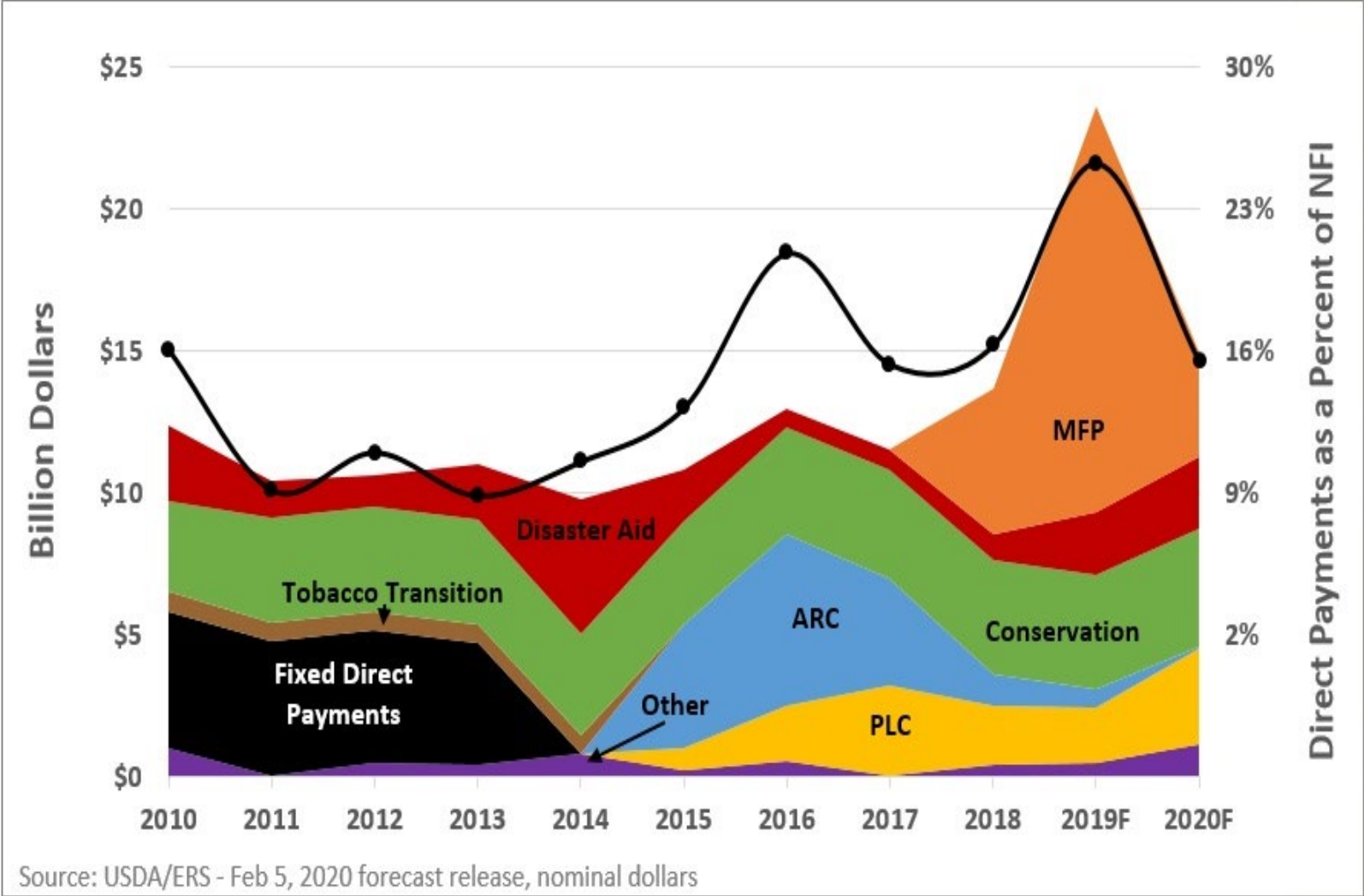


Economic/Market Picture

- Pre-COVID-19: Overall depressed commodity prices, ongoing trade tensions, and weather events all conspired against ag economy
 - 2020 was bound to be much better, right???
- Post-COVID-19: “Everything Else” + COVID-19 = Abrupt pressure on both supply and demand, creating massive food supply chain disruptions
 - Schools and restaurants abruptly closing in spring of 2020
 - Stay-at-home measures affected gasoline/ethanol purchases, among other things
 - Milk dumping, animal depopulation in some areas, rising food retail prices, meatpacking plant closures
- Recent University of Missouri Food and Agricultural Policy Research Institute (FAPRI) report was pretty much all “not good” news



Economic/Market Picture



Source: USDA/ERS - Feb 5, 2020 forecast release, nominal dollars



COVID-19: Overview

- First known U.S. case was in/around January 20, 2020
- First reported (at that time) U.S. death occurred was February 28
 - Approx. 100,000 reported deaths as of May 31
 - CDC reports 116,140 deaths as of 6/16/2020
- CDC reports more than 2 million reported cases in the U.S.
- Infection, hospitalization, and death rates falling in much of U.S., but those same rates rising in other parts of the country



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Federal Legislation: Enacted

Big Picture: What COVID-19 legislation has already been enacted?

- Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020 (H.R. 6074; **March 4**)
- Families First Coronavirus Response Act (H.R. 6201; **March 18**) --
- Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (H.R. 748; **March 27**)
- Paycheck Protection Program and Health Enhancement Act (H.R. 266; **April 24**)
- Paycheck Protection Program Flexibility Act of 2020 (H.R. 7010; **June 5**)



Federal Legislation: Key Highlights & Updates

- Paycheck Protection Program Flexibility Act of 2020 provided new flexibility to PPP program, primarily:
 - Extended application from June 30 to December 31, 2020
 - Extended time period to use loan proceeds from 8 weeks to 24 weeks
 - Extends loan repayment period from 2 years to 5 years (for new loans)
 - Reduced amount that had to be used for payroll from 75% to 60%
- Economic Injury Disaster Loans (EIDL)
 - Agriculture largely left out initially, but Paycheck Protection Program and Health Enhancement Act cleared confusion
 - EIDL portal open to agriculture businesses on May 4 (and processed those submitted prior to April 15)



Federal Legislation: Proposed

Big Picture: What COVID-19 legislation has already been **proposed**?

- A considerable amount, with more to come in the days and weeks ahead
- Important differences, but proposals' common themes are reflect supply chain disruptions, liability, and significant funding authority/appropriations
- The most significant development thus far is the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act



Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act (H.R. 6800)

- Passed the House on May 15, by a 208 to 199 margin
- \$3 trillion and 1,800+ pages long
- Contains many ag-related provisions, but notably does not include increased borrowing authority for the Commodity Credit Corporation
- Next step is the U.S. Senate and White House to coordinate and develop its own strategy/approach



HEROES Act (H.R. 6800)

- For a great run down on of ag-related provisions, visit the House Ag Committee website (<https://agriculture.house.gov/covid19/heroesactagricultureprovisions.htm>)
- \$2.5 million to USDA Office of Inspector General “for conducting audits and investigations of projects and activities carried out with funds” appropriated to USDA
- Would amend the Packers and Stockyards Act to create a dealer trust
- Would amend the CCC Charter Act such that Congress must be notified prior to disbursement of CCC funding
 - Evidences underlying tension about overall expenditure of funds, including pre-COVID (i.e., Market Facilitation Payments)



HEROES Act (H.R. 6800)

- An additional \$16.5 billion for payments to specialty crops and other commodities, building off the Coronavirus Food Assistance Program (CFAP) that is currently underway
 - Weighted to cover losses incurred in 2nd Quarter of 2020
- Payments to offset losses for intentional depopulation market-ready livestock and poultry
 - Note: excludes packer-owned animals
- Makes biofuel industry eligible for payments of 45 cents per gallon for any fuel produced during January 1 to May 1 2020 time period
 - For those plants unable to produce for at least a month, the 45 cent payment would be based on one-half of production during January 1 to May 1 2019 time period



Farming Support to States Act (H.R. 6956; S. ---)

- Proposed 5/19 and referred to House Ag Committee; introduced in Senate 5/20
- Would appropriate \$1 billion to “eligible entities” (primarily including state ag departments) “to carry out activities to respond to urgent and emerging issues in the agriculture economy and food supply chain impacted by the Coronavirus Disease 2019 (referred to in this section as “COVID–19”) and related food system threats”
 - \$ available for supply chain issues, local/regional food systems, responding to farmer stress, assisting with livestock depopulation and indemnification, securing food necessary for food assistance programs
- Would require Secretary to establish the “Food and Agriculture Emergency Response and Resiliency Program” (USDA AMS would oversee)
- Note: Would **not** require approval of a state legislature before spending \$



Raising CCC Borrowing Limit (H.R. 6728)

- Proposes to amend the Commodity Credit Corporation Charter Act to raise the borrowing limit of the CCC from \$30,000,000 to \$68,000,000
- Rep. Austin Scott (30 co-sponsors), proposed 5/5 and referred to House Ag Committee



Supplemental Appropriations to USDA (H.R. 6611)

- \$50 billion in FY2020 supplemental appropriations for USDA to support producers impacted by COVID-19 pandemic
- Would prohibit USDA applying any payment limitations to payments made to producers using funding provided by this bill, so long as total payments to producers do not exceed the total damages related to the COVID-19 pandemic
- Rep. Austin Scott (32 co-sponsors), proposed 4/23 and referred to House Appropriations and House Budget Committees



Emergency Assistance to Covered Producers for Market-Ready Swine Losses (H.R. ---)

- Would require Secretary to use \$1.2 billion to provide emergency financial aid to pork producers caused by intentional depopulation triggered plant processing plant closures/reduction
- Would cover losses that occurred on or after April 19, 2020



Spot Market Purchases of Livestock by Packers (S. 3693)

- Proposes to amend the Agricultural Marketing Agreement Act of 1946 to require that of “the quantity of livestock that is slaughtered by a covered packer during each reporting day in each plant, the covered packer shall slaughter not less than 50 percent of the quantity through spot market sales from nonaffiliated producers.”
- Would create an exemption to currently existing federal preemption language in the AMAA so that states (or political subdivision of states) could require a higher percentage than that required by federal law
- Proposed by Senator Chuck Grassley (and 6 cosponsors) and referred to Senate Ag Committee on 5/12



Home-Based Telemental Health Care Act of 2020 (S. 3917)

- This proposal would establish a home-based tele-health care demonstration program in order to provide mental health services in rural areas in need
- Targets individuals in farming, fishing, and forestry occupations
- Senator Mike Rounds (8 co-sponsors), proposed 6/9/ and referred to Committee on Health, Education, Labor, and Pensions

(Note: expect to see proposals along these lines in next farm bill debate)



To Provide Payments to Offset Cattle Losses (S. 3552)

- Would require FSA to make payments producers that sold feeder cattle or live cattle during any month in calendar year 2020 to offset losses due to COVID-19 for up to 10,000 cattle in calendar year 2020
- Payments would trigger for feeder cattle, if the average national sale price per hundredweight month(s) at issue is less than \$150
- Payment would trigger for live cattle, if the average national sale price per hundredweight for month(s) at issue is less than \$121
- Senator Mike Rounds (9 co-sponsors), proposed 3/20 and referred to Senate Ag Committee



Relief for America's Small Farmers Act (S. 3602; H.R. 6683)

- Would provide loan forgiveness (for up to \$250K) for eligible producers whose 5-year average annual adjusted gross income is less than \$300K
- Applies to USDA direct farm ownership, direct operating, and emergency loans made prior to March 19, 2020
- Provides pathway to have forgivable amount to be excluded from gross income for tax filing purposes
- Introduced 5/1 in House (Rep. Sean Maloney) and 5/5 in Senate (Senator Kirsten Gillibrand)



Waiving Matching Funds for USDA Grants (H.R. 6682)

- Would eliminate requirement of matching funds Farmers Market and Local Food Promotion Program and the Value-Added Producer Grant Program
- Would apply to those grants awarded from January 1, 2019 through December 31, 2021
- Introduced 5/1 and referred to House Ag Committee (Rep. Ann Kuster)



Food Bank Access to Farm Fresh Produce Act of 2020 (S. 3605)

- Would award state ag departments specialty crop block grants in order to support states' food banks and food access networks
- Targets direct purchases from producers in the state, at exclusion of packers, shippers, brokers, and terminal markets
- Proposes that no less than \$100,000,000 be provided to each eligible state
 - Top 20 specialty crop producing states in the most recently preceding 3-year period
- Introduced 5/5 and referred to Senate Ag Committee (Senator Gillibrand)



Farmers Feeding Families Coronavirus Response Act (H.R. 6725; S. 3655)

- Would require Secretary to use at least \$300,000,000 in Section 32 Funding to purchase eligible specialty crop, dairy, meat, and poultry products that was packaged, marketed, intended to be harvested, or harvested for sale:
 - to commercial or food service industries; or
 - through direct-to-consumer, direct-to-institution, direct-to-retail, or direct-to-restaurant-or-store marketing channels, including local and regional food enterprises like food hubs, agricultural cooperatives and producer associations; and
 - for which decreased demand exists for such a product due to the COVID-19 outbreak.
- Most funding would target purchases to support food assistance programs
- Introduced 5/5 in the House (Rep. Kim Schrier) and 5/7 in the Senate (Senator Robert Casey), both referred to respective Ag Committees



Protecting Protein Production and Consumer Access Act of 2020 (H.R. 6883)

- General Rule: Provides that “a meat processing facility shall not be liable under Federal or State law for any act or omission of the facility with respect to any harm arising from exposure to, or infection by, the virus that causes COVID–19 during a public health emergency with respect to COVID–19”
- Would not apply for harm “caused by an act or omission constituting willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the entity”
- Would seek to expressly preempt “the laws of a State or any political subdivision of a State to the extent that such laws are inconsistent with this section, unless such laws provide greater protection from liability”
- Introduced 5/15 by Rep. Vicky Hartlzer, referred to House Judiciary Committee



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Coronavirus Food Assistance Program (CFAP)

- \$19 billion overall, **mostly** in direct payments to producers of eligible agricultural commodities who:
 - Have suffered at least a 5% price decline from January 15 to April 15, OR
 - Who had losses due to market supply chain disruptions due to COVID-19 and face additional significant market costs (including unsold inventories)
- 4 quick takeaways:
 - <https://www.farmers.gov/cfap> -- **MUST** check/recheck this site
 - Enrollment ends COB August 28
 - Unique payment limits for LLCs, Corporations, LLPs
 - Somewhat fluid process that is based on self-certifying subject to review, in-person inspection, and penalties (**SEE 9 C.F.R. §§ 9.6, 9.7, & 9.8**)



CFAP: Key Resources

- (1) Coronavirus Food Assistance Program, **7 C.F.R Part 9** (85 Fed. Reg. 30825; **May 21**)
- (2) Coronavirus Food Assistance Program; Correcting Amendments (85 Fed. Reg. 35799; **June 12**)
- (3) Notice of Funding Availability; Coronavirus Food Assistance Program Additional Commodities Request for Information (85 Fed. Reg. 31062; **May 22**)
- (4) Notice of Funding Availability; Coronavirus Food Assistance Program Additional Commodities Request for Information (85 Fed. Reg. 35812; **June 12**)
- (5) *USDA's Coronavirus Food Assistance Program (CFAP) Direct Payments*, Congressional Research Service (R46395, **June 4**)



CFAP: Funding

Direct Payment Program (2 statutory authorities, 2 purposes, but consolidated into one payment and process):

- CARES Act appropriated to USDA **\$9.5 billion** “to prevent, prepare for, and respond to coronavirus by providing support for agricultural producers impacted by coronavirus, including producers of specialty crops, producers that supply local food systems, including farmers markets, restaurants, and schools, and livestock producers, including dairy producers” (a/k/a, decline in prices)
- **\$6.5 billion** came from Commodity Credit Corporation via the CCC Charter Act “to partially compensate producers for the purchase of materials and facilities required in connection with the production and marketing of agricultural commodities and disposal of surplus commodities from normal marketing channels that may be currently unavailable”
 - An additional \$14 billion is available from the CCC in **July 2020**

(\$637 million of \$16 billion reserved for commodities that are later covered)

Farm to Family Food Box Program:

- \$3 billion came from Families First Coronavirus Response Act
 - For FY20, “the Secretary of Agriculture may purchase commodities for emergency distribution in any area of the United States during a public health emergency designation.”



CFAP: Funding

- USDA updates payment information daily, by commodity and state-by-state
 - <https://www.farmers.gov/cfap>
- As of June 15, 2020, USDA FSA reports that it had processed **\$2,895,127,039** in payments to **220,280** producers nationwide
- 80% of payments made on the front end
 - Largest share of payments going to livestock, dairy, and specialty crop producers



CFAP: Eligible Commodities

- **Non-specialty Crops** (malting barley, canola, corn, upland cotton, millet, oats, soybeans, sorghum, sunflowers, durum wheat, and hard red spring wheat)
- **Wool**
- **Livestock** (cattle, hogs, and sheep (lambs and yearlings only))
- **Dairy**
- **Specialty Crops**
 - **Fruits** (apples, avocados, blueberries, cantaloupe, grapefruit, kiwifruit, lemons, oranges, papaya, peaches, pears, raspberries, strawberries, tangerines, tomatoes, watermelons)
 - **Vegetables** (artichokes, asparagus, broccoli, cabbage, carrots, cauliflower, celery, sweet corn, cucumbers, eggplant, garlic, iceberg lettuce, romaine lettuce, dry onions, green onions, peppers, potatoes, rhubarb, spinach, squash, sweet potatoes, taro)
 - **Nuts** (almonds, pecans, walnuts)
 - **Other** (beans, mushrooms)



CFAP: Ineligible Commodities

- Sheep more than two years old
- Eggs/layers
- Soft red winter wheat, hard red winter wheat, white wheat
- Rice, flax, rye, peanuts, and feed barley
- Extra Long Staple (ELS) cotton (recall that upland cotton is eligible)
- Alfalfa, forage crops, hemp, and tobacco

- USDA encourages submission of credible evidence of 5% or greater price decline (Jan. to Apr.) and face additional marketing costs regarding commodities currently excluded
 - \$637 million already set aside in anticipation of this process



CFAP: Eligibility

- Person or legal entity must:
 - 1) Submit application and any required documentation;
 - 2) Be a “producer” having a share in the commodity b/t January 15 to April 15, OR April 16 through May 14
- “Producer” defined at 7 C.F.R. § 9.2
 - “Person or legal entity who shares in the risk of producing a crop or livestock and who is entitled to a share in the crop or livestock available for marketing or would have shared had the crop or livestock been produced and marketed”
 - Contract grower who does not own livestock at issue can be a “producer” “if contract allows the grower to have risk in the livestock”
- Federal, state, and local governments are not eligible
- Crop insurance (including Noninsured Crop Disaster Assistance Program) is NOT required
- Not affected by EIDL or PPP payments or other program enrollment*



CFAP: Eligibility/Payment Limits

- Payments subject to \$250,000 payment limit, applicable to total amount issued for all commodities
- **VERY IMPORTANT**: Unique payment limit rules apply to Corporations, Limited Partnerships, and LLCs
 - Can receive up to **\$750K** for up to three members who each provide at least 400 hours of active personal management or personal active labor
 - Note: This is self-certifying BUT “under penalty of perjury”



CFAP: Eligibility/Adjusted Gross Revenue

- Person/entity NOT eligible IF average AGI for 2016, 2017, and 2018 tax years exceeds \$900,000
- If 75% or more of AGI derives from farming/ranching/forestry, person/entity is eligible to receive CFAP payments up to allowed payment limits
- If applicant is a joint venture or general partnership, AGI requirements apply to each member of JV or GP



CFAP: Miscellaneous & Noteworthy

- Applicants must comply with Conservation Compliance (“Swampbuster”/“Sodbuster”)
- Producer can apply, and then submit necessary documentation within 60 days (payments won’t flow until all documentation is submitted)
- Pay close attention to documentation requirements, including for those that do not require submission with application
- Potential exists for producers to be compelled to refund payments (portion or full amount) later determined in excess
- “Participants receiving CFAP payments *or any other person who furnishes such information to USDA must permit*” USDA representatives or the GAO to enter ag operation” and inspect/copy records to verify participant claims



CFAP: Miscellaneous & Noteworthy

- For non-specialty crops, pay close attention to the types of contracts in eligibility process
- All applications are through USDA FSA, but specialty crop applications will be spot-checked by AMS
- CFAP not subject to offsets
- Don't forget that USDA's CCC borrowing authority automatically increases \$14 billion in July



CFAP: Recent Regulatory Corrections

See 85 Fed. Reg. 35799 for all changes, but:

- For livestock:
 - USDA amended definition of “Slaughter Cattle-Fed Cattle” to now be defined as cattle weighing 1,200 pounds or more that are intended for slaughter
- Amended eligibility for specialty crops to include:
 - crops that were harvested and shipped but later spoiled *or unpaid*
 - Clarification that donated crops are included
- Specifies that dairy operations that dissolved on or before March 31, 2020 are eligible (and after that date, but on different payment calculation formula)



Other USDA Developments/Announcements

General Information:

- USDA working with SBA (i.e., PPP and EIDL), but also providing increased options and flexibility via programs administered by FSA, NRCS, and RMA
- Current and Updated information available at <https://www.farmers.gov/coronavirus>



USDA Farm Loans

- Could become more of a factor, if economic/public health conditions persist or worsen
- USDA has generally relaxed farm loan process
 - March 26: USDA temporarily suspended loan accelerations, referring foreclosures to the DOJ, and non-judicial foreclosures
 - Allowed lenders with guaranteed loans more flexibility, including self-certification to allow producers emergency lines of credit
- Existing law permits Secretary, under extraordinary circumstances out of producers' control, to delay producers' principal and interest payments in lieu of foreclosure
 - Policy rationale is to help prevent producer from having to dig a deeper hole
 - On **May 21**, USDA implemented this provision, allowing producers flexibility in the *timing* (not loan forgiveness) of principal and interest payments on FSA direct loans



April 28 Executive Order & Defense Production Act

- Defense Production Act of 1950
- “. . . provides the President with an array of authorities to shape national defense”
- For example:
 - Gives federal government priority in contracts and orders
 - Allows President to establish guaranteed loan programs for private institutions and private businesses
 - President can provide “appropriate incentives to develop, maintain, modernize, restore, and expand the productive capacities of domestic sources for . . . materials”



April 28 Executive Order & Defense Production Act

- April 28, 2020 Executive Order highlights:
 - *meat and poultry in the food supply chain* meet the criteria specified in § 4511(b) of the Act
 - “. . . the Secretary of Agriculture shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with guidance for their operations jointly issued by CDC and OSHA.”
 - Secretary “may identify additional specific food supply chain resources that meet the criteria” in § 4511(b)
 - Enumerates several specific powers under Subchapter III of DPA “with respect to food supply chain resources, including meat and poultry, during the national emergency caused by . . . COVID-19 within the United States”



April 28 Executive Order & Defense Production Act

- What is the criteria at § 4511(b)?

“. . . (1) that such material is a scarce and critical *material* essential to the *national defense*, and (2) that the requirements of the *national defense* for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.”



April 28 Executive Order & Defense Production Act

- Other quick DPA highlights:
 - Authorizes the President to “prescribe such regulations and issue such orders as the President may determine to be appropriate to carry out” the Act
 - **Note: The DPA exempts this process from the Administrative Procedures Act**
 - “No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this chapter, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. . . .”



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State Liability Proposals/Enactments

- About 25 states have proposed or enacted some kind of liability protection statute, including:
 - Healthcare, medical workers, medical services (some provide civil *and* criminal liability protections)
 - Extension of “Good Samaritan” Laws
 - Protection for architects, engineers, contractors, subcontractors, and unions
 - Liability protection for restaurants, bars, breweries
 - Protection for distributors/distributing of donated foods
 - Addiction service providers
 - Some include “minimum injury” requirements
 - Some seek to provide protection to employers w/ respect to employees and customers
 - Some seek to apply retroactively
 - Manufacturers of PPE and COVID-related medical products
 - Several are in tandem with Executive Orders (Governor and Presidential)



Liability: Negligence 101

- Negligence: the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation
- Elements of negligence:
 - Defendant owed a duty of care to the plaintiff
 - Defendant breached the duty of care
 - Plaintiff suffered an injury
 - Defendant's breach caused the injury at issue



State Liability Proposals/Enactments

- At least 4 states have enacted laws applicable private-sector wide that seek to provide businesses liability protection
 - Utah, Wyoming, Oklahoma, and North Carolina
 - Iowa legislature has passed law that specifically includes liability protection for food processors
 - Louisiana legislature has passed some bills as well



Utah: U.C.A. 1953 § 78B-4-517

- General rule: “Subject to the other provisions of this section, a person is immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the premises owned or operated by the person, or during an activity managed by the person.”
- Does not apply to “willful misconduct”, “reckless infliction of harm” or “intentional infliction of harm”
- Does not apply to Utah Workers’ Compensation Act or Governmental Immunity Act
- Is in addition to any other “immunity protections that may apply in federal or state law”



Oklahoma: OK ST T. 76 § 111

- General rule: “A person or agent of the person who conducts business in this state shall not be liable in a civil action claiming an injury from exposure or potential exposure to COVID-19 *if the act or omission alleged to violate a duty of care of the person or agent was in compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance applicable at the time of the alleged exposure.* If two or more sources of guidance are applicable to the conduct or risk at the time of the alleged exposure, the person or agent shall not be liable if the conduct is consistent with any applicable guidance.”
- “Guidance” means written guidelines related to COVID-19 issued by the Centers for Disease Control and Prevention, Occupational Safety and Health Administration of the United States Department of Labor, Oklahoma State Department of Health, the Oklahoma Department of Commerce, or any other state agency, board or commission



North Carolina: N.C. St. § 66-460 et. seq.

- General Rule: “An *essential business* that provides goods or services in this State with respect to claims from any customer or employee for any injuries or death alleged to have been caused as a result of the customer or employee contracting COVID-19 while doing business with or while employed by the essential business.”
- Immunity shall not apply if the injuries/death caused by an act/omission constituted “gross negligence, reckless misconduct, or intentional infliction of harm.”
- “Essential Businesses” = “Businesses, not-for-profit organizations, educational institutions, and governmental entities identified in the COVID-19 essential business executive order” *and any business the Department of Revenue determines is essential.*



Louisiana: HB 826 (Sent to Governor 6/3)

- General Rule: “No natural or juridical person, state or local government, or political subdivision thereof shall be liable for any civil damages for injury or death resulting from or related to actual or alleged exposure to COVID-19 in the course of or through the performance or provision of the person's, government's, or political subdivision's business operations”
- Does not apply if person/entity failed to ***substantially comply with the applicable COVID-19 procedures established by the federal, state, or local agency which governs the business operations*** and the injury or death was caused by the person's, government's, or political subdivision's gross negligence or wanton or reckless misconduct”



Louisiana: HB 826

- Also applies to a “business event strategist, association meeting planner, corporate meeting planner, independent trade show organizer or owner, or any other entity hosting, promoting, producing or otherwise organizing an event of any kind”
- If COVID-19 contraction is injury covered by workers’ compensation, then no tort liability against employer (and others, listed below) absent an intentional act
- If COVID-19 contraction not covered by workers’ compensation, employees “shall have no remedy in tort for such exposure against their employer, joint employer, borrowed employer, statutory employer, any other person or entity listed in R.S. 23:1032(A)(1)(b), and any other person or entity potentially liable pursuant to the Louisiana Workers' Compensation Law unless the exposure was caused by intentional act”



Other Highlights: Minnesota (S. 4606, prior to adjournment)

- Proposed “*no duty of care*” owed by “an owner, lessor, lessee, or occupant of commercial, business, industrial, governmental, recreational, or residential premises, who:
 - directly or indirectly invites or permits any person onto the premises” to “eliminate or reduce the risk related to COVID-19” or
 - “warn persons entering the premises of a risk related to COVID-19.”
- “Any person conducting business in this state *shall not be liable in a civil action for injury, damage, death of a person, or economic loss related to COVID-19 if the act or omission at issue complied or was consistent with guidance applicable at the time of the alleged act or omission.* If two or more guidances are applicable to the same alleged act or omission, this section applies if the act or omission at issue complied or was consistent with any written guidance”



“Minimum Injury” Requirement

- (a) No person may file a civil action alleging injury, damage, death of a person, or economic loss related to COVID-19 if that person was:
 - (1) not diagnosed with or did not experience symptoms consistent with COVID-19;
 - (2) diagnosed with COVID-19 when that person was asymptomatic; or
 - (3) diagnosed with COVID-19 but that person did not require inpatient hospitalization or experience a serious illness or death. For purposes of this section, "serious illness" means a medical illness, physical injury, or condition that causes an inability to engage in a person's usual or customary daily activities for at least 14 days.



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Key Litigation: Overview

- Litigation can (and has) arise from numerous situations, i.e.:
 - Employment/Labor law – retaliation, discrimination, whistleblower complaints, wage and hour disputes, “failure to pay”
 - Contract disputes
 - Prison petitions
 - Negligence, wrongful death
- Check out “COVID-19 Complaint Tracker” (Hunton Andrews Kurth)
 - <https://www.huntonak.com/en/covid-19-tracker.html>
- More than 2,700 complaints filed nationwide



Key Litigation: Ag-Related

- Rural Community Workers Alliance and Jane Doe vs. Smithfield Foods, Inc. and Smithfield Fresh Meats Corp., No. 5:20-CV-06063-DGK (W.D. Mo. May 5, 2020)
- Plaintiffs filed action on 4/23, alleging that meatpacking plant was a public nuisance and that defendants breached duty to provide a safe workplace
 - Sought a TRO (no monetary damages sought) to compel defendant to provide masks, ensure social distancing, give employees chance to wash hands, provide PPE during shift, provide tissues, and allow alternate places for breaks to avoid social distancing
- CDC/OSHA *Meat and Poultry Processing Workers and Employers – Interim Guidance* (“the Joint Guidance”) issued on the 4/26 and the EO under DPA issued on April 28



Key Litigation: Ag-Related

- Court dismissed without prejudice, stating:

“In sum, the Court holds that the issue of Smithfield’s compliance with OSHA’s guidelines and regulations falls squarely within OSHA/USDA’s jurisdiction. The Court finds dismissal without prejudice is preferable to a stay here so that Plaintiffs may seek relief through the appropriate administrative and regulatory framework.”



Key Litigation: Ag-Related

- *United Farm Workers, et al v. Washington Dep't of Health and Labor & Industries* (April 17)
 - Sought injunctive relief to require state to issue emergency rulemaking to better protect farmworkers from standards set forth in existing guidance
- *Vu Le and Julie Thi Le, Individually, and § Thuy Van Le, Individually and § as Representatives of the Estate of § Camha Thi Vu, Deceased vs. Tyson Foods, Inc.*, 2:20-cv-00131-Z (N.D. Tex. May 21, 2020)
 - Wrongful death action
 - At least 2 other wrongful death actions filed
- Workers Compensation claim brought in Iowa against Tyson Foods by family of Kenneth Jones (deceased)



Looking Ahead/Conclusion

- If there is another round of assistance, it may be the last
 - Liability protection issue could be critical
 - Election year adds wild dynamic
 - Expect the unexpected
 - Will there be another round of Market Facilitation Program payments?
- Agriculture industry may need to be more proactive than normal for post-November 2020 world
- Future of “Phase I” of U.S.-China deal
- State and federal checkoff programs – increased role for helping demand side of pandemic side of equation?

