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COVID-19 Legal Digest: NJ Legislative Update; How are Family Courts Addressing the Coronavirus Crisis?; Update on NJ Child Care Centers; Getting Tax-Free Income to Employees

Client Advisories

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New Jersey Legislative Update

On March 24, 2020, the New Jersey Office of Emergency Management entered an Order expanding the list of "essential businesses" permitted to operate under Governor Murphy's Executive Order 107 to now include the following:

- Mobile phone retail and repair stores
- Bike shops (for service and repair only)
- Livestock feed stores
- Nurseries and garden centers
- Farming equipment stores

A copy of the order can be found here.

Governor Tom Wolf Extends Pennsylvania 'Stay-at-Home' Order to 10 Counties

Governor Tom Wolf on Wednesday, March 25th expanded his "stay-at-home" order to Lehigh and Northampton Counties, bringing the state total to 10 counties under the directive. Philadelphia and its collar counties were already under the order, as were Erie, Monroe, and Allegheny Counties.

How are Family Courts Addressing the Coronavirus Crisis?

The coronavirus pandemic has shuttered businesses and led to mass unemployment. Intact families are struggling to make ends meet. The crisis has also affected many spousal and child support obligors, who may be unable to pay their family obligations. How will family courts address this crisis, and what remedies are available to those struggling to pay support?

Consistent with *Lepis v. Lepis*, support obligations may be modified upon a substantial change of circumstances. Obviously, a very broad standard, as family judges are given significant discretion to determine whether a change of circumstance has occurred based upon a fact specific analysis. Typically, a family judge will review the financial resources available at the time an application is filed, as well as the historical income to both the obligor and obligee. However, income is only part of the equation. Individual lifestyle and attempts to mitigate wage losses are equally critical factors. Specifically, in *Donnelly v. Donnelly*, the court noted the obligor, despite claiming his law practice was experiencing a downturn, "adopted a lavish lifestyle," which included the purchase of an expensive new car and new house. Particularly in a global crisis, courts will likely expect both the obligor and obligee to modify their expenses as part of an overall solution. In *Mills v. Mills*, the court analyzed a situation where the obligor had accepted a lower paying job after months of unemployment. *Mills* established a two-part test to address this scenario: was the obligor's decision to accept a lower paying job reasonable under the circumstances? If the job acceptance was reasonable, what change, if any, is just and reasonable to both obligor and obligee? It is clear that the Court's analysis will include a review of the totality of the circumstances and the specific actions and re-actions of those involved.

A court may also consider the specific industry in which the obligor has been historically employed. Those trained to work in the food service industry may suffer permanent losses as a result of the pandemic, whereas other industries may slowly return to normal operation.

But what amount of time must an obligor wait before seeking relief from the court? Consistent with New Jersey statute *N.J.S.A.* 2A:34-23(b), in circumstances where an obligor suffers a loss of employment, and is unable to find alternative work with comparative earnings, an obligor must wait a period of 90 days from the job loss to file an application seeking modification of a support obligation. Critically, the statute empowers judges to retroactively modify support to the date of employment loss, if the facts warrant such a remedy. The court in *Larbig v. Larbig* indicates there is no "bright line rule" for the length of time an obligor's situation must be changed to warrant a modification, and instead, family judges are given significant discretion to make such a determination.

Some unpublished New Jersey cases following the economic crash in 2008 suggested temporary measures might be appropriate for obligors suffering lost wages as a result of a recession. Some temporary remedies might include a temporary support reduction for a set period of months, directing support be paid from assets for a set period of time, or a periodic continuous review of the circumstances in an individual matter.

Given the fluid nature of the current crisis, it is likely the courts will expect both the obligor and obligee to work together to insure the family's most vital expenses are paid. These matters are extremely fact sensitive and require a nuanced plan taking into account the variety of factors in every case.

NJ Child Care Centers Can Only Remain Open to Serve the Children of Essential Workers

On March 25, 2020, Governor Murphy issued Executive Order 10, requiring child care centers to certify by Friday, March 27, 2020 that they will only serve the children of essential workers. All other child care facilities must close by April 1, 2020. For details on the order, see here.

Getting Tax-Free Income to Employees, with a Corresponding Deduction for the Employer

Internal Revenue Code Section 139 (entitled "Disaster Relief Payments") was enacted following the events of September 11th. It has since been extended to provide relief to victims of natural disasters such as Hurricane Katrina and others. With COVID-19 having been declared a disaster under the Stafford Act, the benefits of Section 139 are now available with respect to certain reimbursement payments made by employers to their employees. The two benefits are: (1) an income tax deduction to the employer, but perhaps most importantly (2) the payments are tax-free to the employees (i.e., no withholdings, no FICA taxes, not reportable on W-2s - - no taxes whatsoever).

The types of payments which qualify are those paid to, or for the benefit of, an individual:

1. To reimburse or pay reasonable and necessary personal, family, living or funeral expenses incurred as a result of the COVID-19 pandemic.
2. To reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence, or the repair or replacement of its contents to the extent that the need for such repair, rehabilitation or replacement is attributable to the coronavirus disaster.

Section 139 tax relief is NOT available as a substitute for lost wages (those payments are always taxable to employees). Examples of qualifying Section 139 expenses would include reimbursements for: medical expenses, critical care expenses, prescription and over-the-counter medicines, increased home care costs (e.g., hand sanitizers, soaps and disinfectants), child care and tuition expenses incurred as a result of school closings, increased home office expenses required in order to work remotely (e.g., internet, printers, home office set up and, in some cases, cell phones) and funeral expenses. Thus, to the extent an employer is inclined to assist its employees along these lines, know that there are tax benefits associated with doing so. And in today's world, every dollar helps!If you have any questions, please contact **Gordon Moore**, who heads up Archer's Tax Group, at 856- 354-3087 or gmoore@archerlaw.com, or any of your contacts here at Archer.

Please reach out to your Archer contact or any member of Archer's COVID-19 Task Force with any questions you may have.

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