

# Coronavirus Laws and Your Dealership

March 31, 2020

Brian Maas  
CNCDA President

Anthony Bento  
CNCDA Director of Legal Affairs

John Boggs  
Fine, Boggs, and Perkins LLP



## What are we covering today?



How do the state and local orders restrict dealership operations?



What do you need to do to protect your employees, customers, and vendors?



What are the wage-and-hour implications?



How do I handle reductions in workforce?



What do the new federal programs (FFCRA and CARES Act) mean for your business?

This presentation is for educational purposes. It is designed to provide a brief overview of many legal developments. For legal advice specific to your dealership, contact competent counsel.

## State and Local Orders

### ▶ Background

- ▶ On March 16, six Bay Area counties issued “Shelter in Place” orders
- ▶ In the following days, jurisdictions throughout California adopted similar orders.
- ▶ On March 19, Governor Newsom issued a statewide “Stay Home” order.
- ▶ The statewide order establishes statewide minimums.
  - ▶ If the statewide and local orders conflict, the more restrictive provision applies.

## State and Local Orders

- ▶ What departments can dealerships continue to operate?
  - ▶ Service? Yes.
  - ▶ Parts? Yes.
  - ▶ Vehicle Sales? Likely yes, but only in limited circumstances.

## State and Local Orders

- ▶ What's the problem with vehicle sales?
  - ▶ There is ongoing uncertainty on this issue, because the statewide and most local orders do not specifically allow vehicle sales to continue.
    - ▶ Current exceptions: Sacramento, Fresno
  - ▶ Local authorities are increasingly threatening to shut down or cite dealers that operate their sales department normally.
  - ▶ There is significant confusion among authorities at all level of government.
  - ▶ If you get an order to shut down, comply with the order, let CNCDA know, and contact competent counsel.

## State and Local Orders

- ▶ I want to continue to operate my sales department. What should I do?
  - ▶ Close showroom to passers-by/general public.
    - ▶ Add signage about your dealership's policy to close the showroom to "flatten the curve"
    - ▶ Inform customers of alternative access to your dealership (phone, Internet, service department)
  - ▶ Sales only allowed:
    - ▶ Through service department
    - ▶ By appointment
    - ▶ Online/home delivery (See Arent Fox memo distributed by CNCDA)
    - ▶ Skeleton-crew only
  - ▶ Given ongoing uncertainty on this issue, an enforcement action is still possible regardless of how you operate your sales department.

## State and Local Orders

- ▶ Protect your dealership
  - ▶ CNCDA has received reports of individuals potentially casing dealership lots.
  - ▶ If you close or reduce operations make sure that you take adequate precautions and protect your inventory and dealership.



## Safety Issues

- ▶ Keep the purpose of the Stay at Home orders in mind when operating your dealership. Take actions to avoid the spread of COVID-19.
- ▶ If a department stays open, it must practice “social distancing” and take other appropriate actions in light of the pandemic.

## Safety Issues

- ▶ Social distancing and basic infection prevention measures
  - ▶ Social distancing – maintain at least six-foot distance from others, whenever possible
  - ▶ Promote frequent hand washing (20 seconds with soap and warm water)
  - ▶ Make hand sanitizer available to customers and employees
  - ▶ Employees that are sick should stay home
  - ▶ Encourage coughing/sneezing etiquette (don't cough/sneeze into hands)
  - ▶ Customers and employees should have access to tissues and trash receptacles
  - ▶ Encourage remote work, if possible
  - ▶ Avoid direct contact with surfaces (e.g, use paper towel to open doors, avoid handshaking, etc.)
  - ▶ Discourage frequent use of communal equipment, and frequently disinfect all surfaces (with priority on surfaces frequently touched)

## Safety Issues

- ▶ Maintain the following items in stock
  - ▶ Tissues and paper towels
  - ▶ Hand sanitizer
  - ▶ Soap
  - ▶ Disinfectant wipes

## Safety Issues

- ▶ Travel

- ▶ All nonessential travel should be avoided
- ▶ Individuals returning from domestic and foreign hotspots should follow CDC guidance, and self-isolate if recommended.

## Safety Issues

- ▶ Visit CDC Website for most current guidance:  
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

## Safety Issues

- ▶ We MAY have exposure! Now what?
  - ▶ EEOC has relaxed certain employee privacy rules in light of the pandemic.
  - ▶ You can ask if employees if they have symptoms of COVID-19:
    - ▶ Dry cough
    - ▶ Fever
    - ▶ Shortness of breath
    - ▶ Tiredness or fatigue
  - ▶ You can test an employee's body temperature.
  - ▶ Information should be treated as a confidential medical record.
  - ▶ Other limits on medical examinations still apply.

## Safety Issues

- ▶ May we send home individuals who we believe may have been exposed to the virus?
  - ▶ If no symptoms, follow CDC guidelines
    - ▶ If a person traveled to an area with a high infection rate, self-quarantine for 14 days
  - ▶ If symptoms are present:
    - ▶ Person should self-isolate for at least seven days since the beginning of symptoms
    - ▶ Must wait until 3 days after the fever abates and symptoms diminish without medication
  - ▶ If tested positive:
    - ▶ Send home until they test negative twice (at least 24 hours apart)

## Safety Issues

- ▶ What if an employee tests positive?
  - ▶ The infected employee should not return to work and self-isolate.
  - ▶ Inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA).
  - ▶ The fellow employees should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).



## Safety Issues

- ▶ What about vulnerable employees?
  - ▶ Employees with pre-existing conditions may be entitled to accommodations such as time off or additional distancing in the workplace.
  - ▶ Handle like any other disability accommodation.
  - ▶ Handle discreetly to protect privacy.

## Wage and Hour Issues

- ▶ While we are in uncharted territory with much of this crisis, we should not assume that the normal rules will not apply.

## Wage and Hour Issues

- ▶ “Furloughs” under California law
  - ▶ Furloughs that are occurring throughout California are not contemplated by the law.
  - ▶ The California Labor Commissioner has taken the position that an indefinite interruption of work without an anticipated return date within the same pay period should be treated as a termination of employment.
    - ▶ Employers must pay all final wages.
    - ▶ Employers must pay out all accrued-but-unused paid leave balances.

## Wage and Hour Issues

- ▶ “Termination” does not need to end the relationship.
  - ▶ Many employers balk at “terminating” employees.
  - ▶ Concerns can be reduced by providing notices to employees that explain situation (current conditions require us to layoff employees; we anticipate the layoff as temporary; we will keep you updated).
  - ▶ Sample notices available on Fine, Boggs, and Perkins LLP website and from CNCDA.

## Wage and Hour Issues

- ▶ Reductions in Pay

- ▶ Salaried employees

- ▶ Exempt salaried managers and administrators are entitled to their full salary if they do any work during the week. (exception for PTO/vacation/sick leave)
    - ▶ If you want to reduce salary, must provide advance notice.
    - ▶ Salary cannot be less than 200% of state minimum wage @ 40 hour workweek. (\$1,040 per week @ \$13/hr)
    - ▶ Can consider moving salaried employees to hourly pay plans.

## Wage and Hour Issues

- ▶ Reductions in Pay
  - ▶ Pay Plan Changes
    - ▶ Employees subject to a written pay plan may have to have guaranteed payments adjusted.
    - ▶ A sample addendum to reduce minimum guaranteed payments is available at <https://www.employerlawyers.com/legal-updates/> or through HR Hotlink.
  - ▶ COBRA
    - ▶ An employee whose hours are reduced may fall outside of eligibility requirements for maintaining benefits (e.g., regularly scheduled for at least 30 hours per week)
    - ▶ This could trigger a qualifying event under COBRA.

## Wage and Hour Issues

### ▶ WARN Acts

- ▶ Federal and state laws that generally requires employers to provide 60 days' advance notice of a mass layoff.
- ▶ California WARN Act applies to "covered establishments" with more than 75 employees. (Site-specific count)
- ▶ California WARN Act suspended by Governor Newsom via executive order.

## Wage and Hour Issues

### ▶ WARN Act

- ▶ To take advantage of the Governor's suspension of the WARN Act, dealerships must comply with the following:
  - ▶ Provide the notices specified in Labor Code § 1401(a)-(b) to all employees of the covered establishment affected by the termination, relocation, or layoff, the California EDD, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or layoff occurs;
  - ▶ Give "as much notice as is practicable," and provide a brief statement of the basis for reducing the notification period;
  - ▶ Consistent with 29 U.S.C. § 2102(b)(2)(A) and its implementing regulations, the order for the mass layoff, relocation, or termination must be caused by COVID-19 related 'business circumstances that were not reasonably foreseeable as of the time that notice would have been required'; and
  - ▶ For written notices given after March 17, 2020, in addition to the other elements required by Labor Code § 1401(b), the notice must contain the following statement:
    - ▶ "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at [labor.ca.gov/coronavirus2019](http://labor.ca.gov/coronavirus2019)."



## Government Benefits - Overview

- ▶ Major actions by government over the past few weeks:
  - ▶ California eliminated the waiting time period for unemployment benefits.
  - ▶ Families First Coronavirus Response Act (FFCRA)
    - ▶ Creates coronavirus-related paid employee leave benefits
  - ▶ Coronavirus Aid, Relief, and Economic Security Act (CARES)
    - ▶ Creates new business loan program
    - ▶ Expanded UI benefits

## Government Benefits – Employee Leave

- ▶ The FFCRA

- ▶ Signed into law on March 18, 2020. Takes effect April 1, 2020 and remains in effect until December 31, 2020.
- ▶ Posting requirement
  - ▶ Federal notice must be posted in the workplace, emailed, or direct-mailed to employees.
  - ▶ It's available at: <https://www.dol.gov/agencies/whd/pandemic>

## Government Benefits – Employee Leave

- ▶ The FFCRA

- ▶ Applies to private sector employers with 500 or less employees.
- ▶ Applies to employees that have worked for employer for at least 30 days.
- ▶ The DOL provides guidance on how to count employees (and other issues) at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- ▶ Local concerns
  - ▶ LA City passed ordinance imposing leave requirements on large employers (no reimbursement!)
- ▶ Small Employer Exception: Employers with fewer than 50 employees may be exempt from providing both Paid Sick Leave and Expanded FMLA to employees whose leave is prompted by closure of schools or child care providers “when doing so would jeopardize the viability of the small business as a going concern.” Authorized officer must confirm that through one of three different conditions apply.

## Government Benefits – Employee Leave

- ▶ FFCRA paid leave requirements

- ▶ Generally, the FFCRA requires covered employers to provide to all employees:

- ▶ Up to 80 hours of paid sick leave at the employee's regular rate of pay (\$511 per day cap)

- ▶ When? If employee is unable to work because of quarantine (not stay home order) or experiencing COVID-19 symptoms and seeking a medical diagnosis;

- ▶ Up to 80 hours of paid sick leave at 2/3 the employee's regular rate of pay (\$200 per day cap)

- ▶ When? If employee needs to care for someone that is subject to a quarantine or care for a child who is not at school or with a child care provider due to COVID-19

- ▶ Up to 10 additional weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay (\$200 per day cap)

- ▶ When? To take care of a child whose school or child care provider is closed or unavailable for reasons related to COVID-19

- ▶ Learn more at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

## Government Benefits – Employee Leave

- ▶ FFCRA employer reimbursement
  - ▶ Employers providing qualifying paid leave under the FFCRA can receive tax credits, which are designed to fully reimburse the employer for its costs.
  - ▶ The program is designed to provide prompt reimbursement to employers:
    - ▶ The IRS has indicated on its website that employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave that they paid.
    - ▶ If there are not sufficient payroll taxes to cover the cost of qualified leave, employers will be able to file a request for an accelerated payment from the IRS, which the IRS expects to process in two weeks or less.

## Government Benefits – Employee Leave

### ▶ FFCRA Limitations

- ▶ FFCRA paid leave is limited and is not designed to replace unemployment benefits.
- ▶ An employee regularly scheduled to work must request such leave. You should not plan to use the leave as a substitute for furloughs/layoffs.
- ▶ Employees do not qualify for leave if their department was shut down because of statewide or local Stay Home orders.

## Government Benefits – Employee Leave

- ▶ FFCRA Limitations

- ▶ Reinstatement Rights

- ▶ Reinstatement obligations match those of FMLA historically.
    - ▶ If an employer choose to lay off an employee, that employer will bear the burden of demonstrating that the employee would have been laid off even if the employee had not take leave under this Rule.
    - ▶ Small-Employer Exception (less than 25) allows employers to not reinstate the employee under certain, very limited conditions.
    - ▶ This same set of limitations applies to employer treatment of “key” employees as defined under FMLA.

## Government Benefits – CARES Act

- ▶ The CARES Act

- ▶ Signed into law on March 27, 2020, the Coronavirus Aid, Recovery, and Economic Security Act (CARES) authorizes more than \$2 trillion in government resources to aid workers and businesses. Key elements include:
  - ▶ Small business loans (Paycheck Protection Program);
  - ▶ Enhanced unemployment benefits;
  - ▶ Changes to estimated tax payments and tax credits;
  - ▶ Special rules for the use of retirement funds.



## Government Benefits – CARES Act

- ▶ Small Business Loans (Paycheck Protection Program)
  - ▶ Purpose
    - ▶ Designed help businesses retain employees at their pre-crisis base pay.
  - ▶ Eligibility
    - ▶ Nearly every small business may qualify (employees 500 or less)
    - ▶ Dealership groups may be able to count employee totals by rooftop, if their OEMs register with the SBA (check with your OEM on whether they are registered as a franchisor with the SBA)
    - ▶ No personal guarantee or collateral required
  - ▶ Amount
    - ▶ Employers may borrow up to 250% of monthly pre-crisis payroll, up to \$10,000,000.
    - ▶ Interest rates limited to 4% / 10-year max term
  - ▶ Limitations
    - ▶ If a business wants the loan forgiven, it must use the loan for payroll (up to annual rate of \$100,000 per employee), interest payments on mortgages, rent payments, leases, and utility service agreements.

## Government Benefits – CARES Act

- ▶ Small Business Loans (Paycheck Protection Program)
  - ▶ Forgiveness
    - ▶ If a business keeps all its employees, the entirety of the loan will be forgiven.
    - ▶ If you layoff employees, the forgiveness will be reduced by the percent decrease in number of employees.
      - ▶ E.g., if total payroll expenses on workers making less than \$100,000 decreases by 25%, then forgiveness reduced by 25%.
    - ▶ If you have already laid off employees, you can still be forgiven the full amount if you rehire them by June 30, 2020.
    - ▶ Timing of forgiveness – 8 weeks after business takes out the loan.
  - ▶ Application Deadline – June 30, 2020
  - ▶ *Information in slides these slides is preliminary. Regulations and further guidance expected in the coming days.*

## Government Benefits – CARES Act

### ▶ Enhanced Unemployment Benefits

- ▶ CARES adds \$600 per week from the federal government on top of whatever amount a worker receives through State unemployment benefits
  - ▶ California's maximum now is \$450 per week
  - ▶ Thus, recipients would get \$1,050 per week in unemployment benefits
  - ▶ These benefits will last for four months (through July 31, 2020)
- ▶ CARES also adds 13 weeks of unemployment insurance, both for existing claimants and for potential new filers (resulting in a 39-week period for benefits)
- ▶ CARES allows self-employed, freelancers, and independent contractors to apply for special (temporary) Pandemic Unemployment Assistance benefits

## Government Benefits – CARES Act

- ▶ **Business Tax Relief**
  - ▶ **Employee retention credits**
    - ▶ Refundable tax credit for an employer's share of Social Security tax.
    - ▶ Eligible employers must have operations fully/partially suspended because of shut-down order, or gross receipts decline by more than 50%
    - ▶ May not qualify if you received forgivable loan (PPP)
  - ▶ **Payroll tax deferral**
    - ▶ Tax can be deferred into 2021 and 2022
    - ▶ May not qualify if you received a forgivable loan (PPP)
  - ▶ **Other changes (check with your accountant)**
    - ▶ Net operating losses, business interest deductions, AMT credits, depreciation changes

## Government Benefits – CARES Act

- ▶ Special Rules for Use of Retirement Funds
  - ▶ The CARES Act provides special rules for taking distributions from retirement funds.
  - ▶ Where applicable, the rule allows distribution without early-distribution penalty of up to \$100,000 from qualified requirement funds.

Thank you!

▶ Brian Maas, CNCDA President

[bmaas@cncda.org](mailto:bmaas@cncda.org)

916-441-2599

▶ Anthony Bento, CNCDA Director of Legal Affairs

[abento@cncda.org](mailto:abento@cncda.org)

916-441-2599

▶ John Boggs, Fine, Boggs, and Perkins LLP

[jboggs@employerlawyers.com](mailto:jboggs@employerlawyers.com)

650-712-8908