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THE NEW NORMAL

A Credit Union's Guide to the COVID-19 Pandemic

LATEST UPDATE

 SILVERMAN
THEOLOGOU

Gary Silverman, Esq.
Milt Theologou, Esq.

 BERENZWEIG
LEONARD

Seth Berenzweig, Esq.

 THE
CAPITAL
GROUP

Kevin FitzPatrick
Christopher Staub
Jonathan Silverman

The Law Offices of
Ronald S. Canter, LLC

Ronald S. Canter, Esq.



Adjusting to the New Normal

The world has changed significantly in the last 60 days and may never again be the same. How we work, how we live, how we do business, and how we interact with our co-workers and members has all changed

- An updated poll taken since the COVID-19 outbreak indicates that approx. 1/3 of those polled have been forced to take pay cuts due to the pandemic which will cause a significant shortfall when trying to pay monthly bills, and 53% of those polled said they did not have 3 months of saving to pay their monthly bills
- Since mid-March over 30 million Americans, roughly 20% of the labor force, filed unemployment claims, making it the largest and most dramatic rise in claims on record

Today we will look back on the last 60 days and evaluate what has occurred and discuss what potentially comes next. To that end today we will review:

- **Recent actions taken by state and local authorities that effect collections and lending, including Executive Orders and Attorney General actions on court hearings, garnishments, stimulus checks and credit reporting**
- **New credit reporting challenges that result from CFPB and states' positions regarding credit reporting and dispute resolution, and insight into future CFPB actions**
- **Recent changes that impact employee benefits and their funding, including the reduction of benefit costs**
- **HR updates relating to CARES Act paid sick leave, family leave and medical leave, and the Virginia Values Act**



Legal Considerations - 60 Days of Pandemic Where We Are and What's Been Done?

To combat this situation Federal, State and Local governments have rushed to provide grants and loans and pass legislation to stem the tide:

- **State of Maryland:** By Executive order, all foreclosure, eviction and repossession activity has been suspended for both original creditors and debt collectors; all Court hearings, except those involving criminal, family matters and requests for injunctive relief, have been suspended although new filings may be accepted electronically; in a recent Executive Order Banks and Credit Unions are barred from attaching or setting-off against stimulus checks (the State of Maryland will only enforce the set-off provisions against Maryland chartered Banks and Credit Unions)
- **District of Columbia:** By order of the DC Council, all collection activities including outbound calls, lawsuits and post judgment proceedings have been suspended until the emergency ends plus 60 days. All Courts are closed as to all hearings except those involving criminal, family matters and requests for injunctive relief; in a recent Court Order all collections related actions have been stayed until July 14, 2020
- **Commonwealth of Virginia:** Most Court hearings, except those involving criminal, family matters and requests for injunctive relief, have been suspended although new filings may be accepted electronically ; please see the link below for an update as to each individual Court
- **Commonwealth of Massachusetts:** In March, the Massachusetts attorney general adopted a regulation deeming it illegal for a debt collector to telephone a Massachusetts resident to request payment of a debt or for a debt collector *or a creditor* to file a lawsuit to collect a debt. This past week, a Federal Judge issued a TRO enjoining the MA AG from enforcing the new regulation ruling that it violated “free speech” thus permitting debtor calls to resume in MA. This is significant as the MA regulation is similar to the recent action of the DC Council, and as such the action of the DC Council may also be challenged, further updates to follow
- A more comprehensive list of State and Local action can be found at:
<https://docs.google.com/spreadsheets/d/1fGU1H2HPd4miayKBil-NeXnta4sB95gUoxPjjAThERY/edit#gid=1273627032>



Legal Considerations – The Next Round Congressional Action Under Consideration

UPDATE - Currently Congress is considering two bills modifying the FDCPA including HR 6379 and S 3565:

- HR 6379 the "Take Responsibility for Workers and Families Act" is a 1400 page coronavirus supplemental appropriations act, where in the section entitled "suspension of other consumer loan payments" (pages 534-541) the bill seeks to amend the FDCPA as follows:
 - That original creditors are now defined as "debt collectors" for the purpose of the Act
 - A moratorium is placed on all consumer debt collection (calls, letters, suits, post judgement) for the duration of the declared emergency, plus 120 days (although letters can be sent as payment reminders the letter must note that **no action** will be taken if payment is not remitted)
 - FDCPA violations are now **10x** the current statutory rate (this would apply to original creditors, collection agencies and law firms)
 - Board of Governors of the Federal Reserve System shall set up a facility used to make payments to "covered" financial institutions to pay documented financial losses due to the suspension of debt collection (this section would not assist CU's as they are not part of the FRS)
- S 3565 the "Small Business and Consumer Debt Collection Emergency Relief Act" is a stand alone bill that substantially mirrors the 9 pages of the House bill noted above other than it **does not** provide for compensation to financial institutions for losses
- Both bills have gained little traction as Congress has not returned to D.C. Most likely we will see the sponsors of the FDCPA related portions of these bills seek to incorporate this language into the next stimulus bill, currently being referred to as Stimulus 3.0



Legal Considerations – Practical Responses to a Difficult Situation – What’s Next?

Credit Unions to “re-think” their approach to lending and collections:

- Credit Unions need to create new policies to deal with members and their hardships, and adapt to the new normal we are seeing almost every day as a result of Federal, State (Governors and Attorney’s General), and local legislation and action
- Provide new guidance concerning settlement and extending payment plans
- Despite the debate over whether to attach stimulus checks, Credit Unions need to think about the optics of attaching funds designed to pay for rent and food
 - Refer to recent article “Maryland Attorney General Brian E. Frosh Tuesday joined a coalition of 22 attorneys general warning the nation’s three consumer reporting agencies they will not hesitate to enforce safeguards set in place to ensure consumers’ credit is properly protected and their credit reports are fairly and accurately reported during the COVID-19 pandemic”
- Balance collections and managing bad debt with the optics of lawsuits, court hearings and judgments against sick and/or unemployed individuals – many courts are not processing lawsuits, but once they start to do so, do you really want to file 200 lawsuits in a day?
- Need to start thinking about POST PANDEMIC collections and customer care to deal with member unemployment and the potential exponential rise in bankruptcy filings
- Prepare for the coming wave - POST PANDEMIC bad debt portfolio - new policies, more flexibility, additional staffing (collections vs. customer service reps)
- Finally Credit Union’s need to start thinking about bringing employees back safely and the potential liability with bringing back employees too soon



Crediting Report and CFPB – Credit Reporting Challenges

- March 27, 2020 CARES Act amends FCRA to impose new credit reporting requirement
 - If an accommodation is made between a lender and a borrower to modify payment terms, the debt modification must be reported as “current” or as the last status reported prior to the accommodation
 - Accommodation means any agreement to defer one or more payments during the pandemic
 - Accommodations must be in writing and this FCRA amendment shall be in place from 01/31/20 through 120 days after the end of the declared national emergency
- April 1, 2020 CFPB releases a Policy Statement regarding the CARES Act FCRA amendment
 - Recognizes operational disruptions may preclude furnishers from responding within 30 days (or 45 days if additional information provided by consumer)
 - CFPB pledges to consider individual circumstances and acknowledge furnisher’s good faith efforts to investigate disputes as quickly as possible
 - Mentions that dispute investigations may take longer than statutory requirements
 - Reminds that disputes need not be investigated if they are determined to be frivolous or irrelevant
 - Policy statement is a non-binding document exempt from notice and comment requirements under The Administrative Procedures Act



Credit Reporting and CFPB - States Attorney General Action and Tension Between the Federal and State Governments

- April 28, 2020, letter From 20 state attorneys general
 - Stresses states will continue to enforce all federal laws
 - States will monitor furnishers to ensure proper credit reporting and timely investigation of disputes “we will not hesitate to hold CRAs accountable if they failed to meet these obligations.”
- Tension between the federal and states position:
 - States are authorized to bring actions for violations of FCRA
 - Federal preemption addresses conflicting state laws in private enforcement actions only
 - Federal law exempts Massachusetts and California statutes from preemption



Credit Reporting and CFPB – CFPB Action – Where is the CFPB Headed

- To promulgate rules under the Fair Debt Collection Practices Act
- Advance Notice of Public Rulemaking 2013
- Publish Notice of Intent to Promulgate Final Rule 2019
- Potential rollout of final rule May 2020
- Rulemaking process can be overturned within 12 months by Congress
- Recent example was rejection of rules on consumer arbitration
- The Supreme Court is considering whether the CFPB's structure of a single director and removable only "for cause" violates Article II of the Constitution
- Expect ruling in June 2020



Credit Reporting and CFPB – Possible Outcomes of Seila Law

- Statute upheld as constitutional
- Court rules statute unconstitutional but severs offending “for cause” removal provision
- Court severs removal provision and provides no relief
- Court severs provision but grants relief by dismissing case
- Court holds statutes “for cause” removal unconstitutional and declares CFPB has no power to act



Insurance Carrier Premium Defaults and Relief – COVID-19 Insurance Update

- Carrier premium relief continues
 - Several carriers are providing refunds for unused premiums
 - Met Life Dental leading the industry – 25% premium refund
 - PPP Loan repayment strategy
 - Important to have a strategy on the timing of accepting premium relief vs. PPP loan forgiveness guidelines
- Healthcare cost projections for 2020/21
 - Claims will dip in 2nd QT with rebound into the 3rd and 4th QTs
 - Impact on 2020/21 renewals?



Insurance Carrier Premium Deferrals and Relief – 2020/2021

Slowdown in Economic Activity

- Downward pressure to control healthcare and employee benefit costs
 - Decrease in revenue but not a corresponding decrease in cost to insure an employee and/or dependent
 - Trend & medical inflation are anticipated in the 6 to 8% range
 - COVID-19 impact on employer premiums?
- 2021 is going to require employers thinking outside the box
 - Employers will be closely looking at premiums and renewal increases in the upcoming year
 - Level funding and self funding will take on increased importance



Insurance Carrier Premium Deferrals and Relief – Healthcare Funding Options

Fully Insured

Most conservative model -
risk transfer to the insurance
carrier

Pay same premium every
month

Premium increases every year

LIMITATIONS

No premium refund

Very limited reporting data

Insurance carriers can
increase premiums with little
to no justification

Limited to BUCKA

State premium taxes and fees
– 5% added to premium.



Level Funding

Receiving trend increases for
24-month time frame – could
be good candidate

Conservative first step for
employer to retain unused
claims fund

**Employer receives a refund of
unused premium**

Employee experience is the
same as the fully insured
model

**Employers save 5% on ACA
taxes**

LIMITATIONS

Limited reporting

Carrier keeps a portion of
unused claims fund

Single stop loss options



Graded Funding (Carrier Ecosystem)

Fund claims as incurred each
month rather than paying to
the maximum

More transparency in claims
and utilization

Employers save 5% on ACA
taxes

Premiums based on claims
and experience of employer,
not insurance company

LIMITATIONS

Single stop loss option

PBM limitations

Disease management
programs aren't as
sophisticated as TPA

No option for metric-based
pricing network



Self-Funding TPA Model

Flexibility to market each
component independently

International mail order
reduces pharmacy spend

Opportunity to receive
pharmacy rebates to offset
fixed costs

More transparency in claims
and utilization

Employers save 5% on ACA
taxes

Metric-base pricing for
surgeries

LIMITATIONS

Administratively, a bit more
work is required from HR and
Accounting to run a true self-
funding program



Insurance Carrier Premium Deferrals and Relief – Bridging the Gap with Benefits Pre-Funding

Using benefits pre-funding to bridge the gap between declining returns and rising employee benefits costs

- How do Credit Unions take advantage of these changes in the market and hedge against declining interest income and the increasing cost of employee benefits ... Benefits Pre-Funding
- In 2003, the National Credit Union Administration amended Regulation 701.19, giving federally chartered credit unions the ability to place assets earmarked for future employee benefits costs into investment funds that are normally impermissible, or otherwise non-traditional Investments
 - A non-traditional investment is an investment that strays from the Traditional Bond investment, which can have a higher yield to be used to pay for and enhance your employee benefits
- What constitutes a "Benefit" under this program
 - The term benefit when it comes to Pre-Funding is very broad. It can include:
 - Employee group healthcare
 - 401(k) matching contributions
 - Long-term and short-term disabilities
 - Dental and vision insurance
 - Benefit pension plan investments



Insurance Carrier Premium Deferrals and Relief – Market Conditions and Benefits Prefunding

Current market conditions and benefits pre-funding

- NCUA has given Credit unions a means to make smart investments that produce a higher yield and pay for their benefits. Right now with the market state it is a good time to take advantage and enter the market using non traditional investments.
- Benefits pre-funding can improve Credit Union Financials and increase ROA
- Benefits pre-funding could create a situation where your employee benefits expense is budget neutral
- Benefits pre-funding allows Credit Unions to offer a more robust benefits package despite rising employee benefits costs



Human Resources – Emergency Paid Sick Leave and Expanded Family and Medical Leave Act

- Employers under the new Relief Acts are to provide up to 2 weeks of paid sick leave at the regular payrate to employees who need to take leave from work for certain specified reasons related to COVID-19, including:
 - Employee or someone the employee is caring for is subject to a government quarantine order or has been advised by a health care provider to self-quarantine;
 - The employee is experiencing COVID-19 symptoms and seeking medical attention; or,
 - The employee is caring for a son or daughter whose school/place of care is closed or whose childcare provider is unavailable to reasons related to COVID-19.
- Act also provides up to an additional 10 weeks of paid expanded family and medical leave where an employee is unable to work due to need for leave to care for a child whose school or childcare provider is closed or unavailable due to COVID-19
- As a practical matter, it is an economic disincentive for employees to take family leave to care for a child – temporary furlough under the new benefits provides higher pay
- In addressing these kinds of ongoing situations, close communications with the employee is key



Human Resources – Leave Requests

- Employers must document the following for their records:
 - The name of the employee requesting leave;
 - The date(s) for which leave is requested;
 - The reason for the leave; and
 - Statement from the employee that he or she is unable to work because of said reason
- If an employee is requesting leave due to being subject to a quarantine or isolation order or to care for an individual subject to such an order, employer within reason should also request and document the name of the government entity that issued the order.
- If an employee requests leave to self-quarantine based on advice of a health care provider or to care for an individual who is self-quarantined based on such advice, employer should additionally document the name of the health care provider who gave the advice.
- For employees requesting leave to care for a child whose school or place of care is closed, or childcare provider is unavailable.



Human Resources – Practical Considerations

- Company need not deplete operating capital in light of the new temporary furlough provisions, which provide more money for a longer period of time.
- Employer has unique discretion to check employees' health for maintenance of safe work environment, including temperature checks if necessary and appropriate.
- Should consider pursuing funds which may be available under the new Paycheck Protection Act (PPP). Round two of PPP is underway and will be depleted soon.
- If PPP funds are used for core purposes such as payroll and rent, the loan becomes a grant and does not need to be repaid.
- New Congressional provisions do not supplant an employer's continued authority to remove employees for reasons of inadequate performance.
- The company should adopt a resolution articulating and demonstrating the PPP need.



Human Resources – The Virginia Values Act

- The Virginia Values Act amends the Virginia Human Rights Act (“VHRA”) to create a cause of action for unlawful discrimination in public accommodations, employment, housing practices, and credit on the basis of sexual orientation and gender identity, as well as other recognized factors.
- This act allows that every employer in Virginia with more than 5 employees is now subject to the VHRA, and not just for claims of gender identity and sexual orientation discrimination.
- Allows the causes of action to be pursued privately by the aggrieved individual or, in certain circumstances, by the Attorney General.
- The Virginia Values Act has removed the caps placed under the VHRA and courts may award prevailing employees “compensatory and punitive damages” and uncapped “reasonable attorney fees and costs.” The court may also issue injunctive relief.
- Before civil action can be taken, the aggrieved individual must file a complaint with the Division of Human Rights of the Department of Law, participate in an administrative process, and retrieve a notice of their right to commence a civil action.
- Virginia is also enacting new HR rights related to pregnancy discrimination and accommodation with immediate right to sue.



For Additional Information



Gary Silverman, Esq.

(301) 468-4990

gsilverman@silvermanlegal.com

Milt Theologou, Esq.

(301) 468-4990

mtheologou@silvermanlegal.com

silvermanlegal.com



Seth Berenzweig, Esq.

703-760-0624

sberenzweig@berenzweiglaw.com

berenzweiglaw.com



Kevin FitzPatrick

301-214-7666

kfitzpatrick@capgroupfinancial.com

Jonathan Silverman

301-214-7666

jsilverman@capgroupfinancial.com

capgroupfinancial.com

The Law Offices of

Ronald S. Canter, LLC

Ron Canter, Esq.

301-424-7490

rcanter@roncanterllc.com

roncanterllc.com