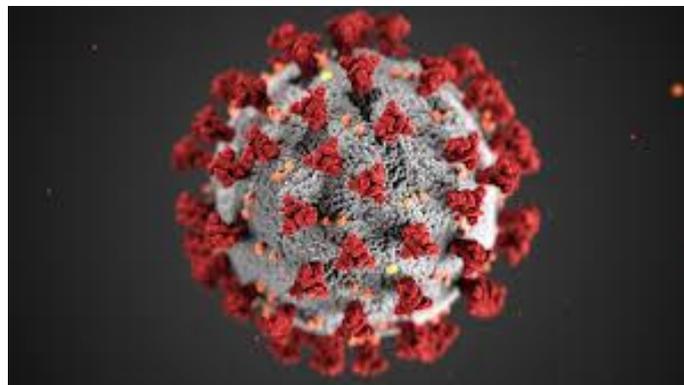


EMPLOYMENT LAW IN THE COVID-19 CRISIS



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TODAY'S AGENDA

- Workplace Safety Issues: OSHA and ADA
- National Labor Relations Act
- Remote Work Policies
- Furloughs and Layoffs
- Worker Adjustment and Retraining Notification Act (“WARN”)
- Wage & Hour Issues
- PPP Loans Under CARES Act
- Families First Coronavirus Response Act

WORKPLACE SAFETY ISSUES

Occupational Safety & Health Act

- No specific OSHA standard to address coronavirus or other airborne infectious disease
- General Duty Clause → employers are obligated to provide a safe workplace free from recognized hazards
 - Employer is obligated to eliminate recognized hazards
 - Employer must identify and assess workplace hazards, then identify control options
 - Elimination / Substitution
 - Engineering controls / Administrative Controls
 - PPE
- Section 13 → Employee has the right to refuse to work and travel based on imminent danger
- OSHA 300 and 300A Logs (for employers with more than 10 employees)

ADA CONSIDERATIONS

- COVID-19 is probably not a disability because of its temporary nature
 - Be careful not to “perceive” or “regard” an employee as disabled due to having symptoms or signs of coronavirus
- Taking temperatures is permitted
 - Considered a “medical examination” under the ADA
 - Confidentiality obligations
 - PPE requirements
- Do you have a request for a reasonable accommodation?
 - Don’t make assumptions
 - If request is related solely to avoidance of contracting COVID-19, then the request is not related to a disability and is not protected by ADA

NATIONAL LABOR RELATIONS ACT

- Unionized operations governed by CBA
 - Section 8(a)(5) bargaining obligation
 - Managements' rights clause / established past practice / owner-mandates
 - Layoff provisions and no strike/lockout provisions
 - CAUTION! → Information and bargaining requests not just a threat anymore!
- Section 7 right to protected concerted activity
 - Applicable to non-union employees
 - Refusal to work may be cloaked under protections of Section 7
 - May be triggered by ONE employee if group concern is raised
 - Don't forget about remote work options!

REMOTE WORK POLICIES

- Define at-home work parameters to limit exposure and liability
- Must include:
 - Employer discretion and final authority for all determinations
 - Workspace and location for at-home work environment
 - Employee schedule
 - Communication expectations
 - Equipment, supplies, technology support, and security expectations
 - Expenses, such as internet, phone, and utilities
- Protection of confidential and trade secret information
 - Trade secrets must be the subject of reasonable secrecy efforts
 - Employer must take measures to guard the secrecy of information, especially when permitting employees to work at a remote site

STATE-BASED STAY AT HOME ORDERS

- Currently implemented in numerous states
 - California, Colorado, Connecticut, Delaware, Hawaii, Idaho
 - Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota
 - New Jersey, New Mexico, New York, Ohio, Oregon, Vermont
 - Washington, West Virginia, Wisconsin
- Essential Businesses and Operations
 - Healthcare / public health operations
 - Essential government functions
 - Grocery stores / pharmacies / hotels and motels
 - Religious institutions / educational institutions
 - Gas stations and transportation companies
- Essential Infrastructure / Critical Trades
- Modified Orders
- How does this work with E-PSL / E-FMLA?

Furloughs and Layoffs

- What's what?
- Time period, notice, and benefits
- Health insurance
 - Catch-up deductions after furlough
 - COBRA
- Unemployment
- Accrued PTO?
 - Potential use before a furlough (subject to unemployment eligibility)
- Discrimination concerns – despite COVID-19

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT ("WARN")

- Prior warnings for mass layoff/furlough
- For employers with 100+ employees (excluding PT employees)
- PT: <20hrs/wk, OR, employed <6 of 12months before WARN
- ONLY for 6month+ layoff – COVID uncertainty?
- Triggers: plant closing or mass layoff
- Plant closing – temporary or permanent shutdown, with 50+ layoffs, in a 90-day period at:
 - Single site of employment; or
 - Facility or operating unit within a single site of employment

WARN

- Mass layoff – within 90-day period
 - 50+ employees laid off at a work site, if the number of employees is 33% or more of total employees at the site
 - 500 employees
- Notice – 60 days in advance
 - To: employees, union reps, local government
 - Form: to employees – layoff date, closings/openings, contact for employer rep

WARN

- Unforeseeable business circumstance exception
 - COVID-19!
 - As much notice as practicable
 - Statement of unforeseeable cause
 - Consider support with internal memoranda
- Damages: back pay, benefits, attorney fees
- For another day: state-specific WARN Acts...

WAGE AND HOUR ISSUES

- Exempt employees
 - Full versus partial week closures
 - Off for the week – don't check email!
- Non-exempt employees
 - Generally, hour/pay reductions OK
- Check your policies – especially notice
- Tracking remote hours worked for non-exempt employees

PPP Loans -Coronavirus Aid, Relief and Economic Security (CARES) Act

- Payroll Protection Loans to Small Businesses
 - Use for payroll support, employee salaries, rent, utilities, and interest payments on mortgages or debt existing on February 15, 2020
 - Available through SBA-certified lenders, including banks, credit unions, and other financial institutions
- Up to 2.5 times average monthly payroll during the trailing 12 months or \$10M
- Potential partial forgiveness – but depends on EE retention; consider re-hiring furloughed EEs
- June 30, 2020 deadline

CARES Act: Payroll Protection Program Loan (Eligibility)

- Affiliates: commonly owned *or* commonly controlled
 - Management agreement allowing capital expenditures, budget, exec. control?
- Small businesses with ≤ 500 FTEs after aggregating affiliates
- Any business concern operating as franchise with franchise identifier code (FIC), as to stores with ≤ 500 FTEs; >500 ineligible despite FIC
 - Waiver of rule that common interest businesses must aggregate FTEs
 - see directory for FIC status: <https://www.sba.gov/sba-franchise-directory>
- Pending FICs – to apply or not to apply?
 - Lenders can't submit to SBA w/o FIC – may reject instead of hold
 - Long line – if submitted *specify* pending status (see next slide)

CARES Act: Payroll Protection Program Loan (Forms)

- **Application.Q.3 – if “yes”, indicate, with addendum re FIC**
 - **modified form of faith-based waiver model answer from interim rule**
 - The Applicant claims an exemption from all SBA affiliation rules applicable to Paycheck Protection Program loan eligibility because the Applicant has made a reasonable, good faith determination that the affiliation rules in section 13 CFR 121.103 are waived as to the Applicant by 15 U.S.C. § 636(a)(36)(D)(iv)(II), as Applicant operates as a franchisee of [OEM], which has [been assigned/applied for] a franchise identifier code [which is reasonably anticipated to be issued], [code#].
- **Form 2462 – addendum to franchise agreement**
 - **Only if indicated in directory**
 - **Still receiving?**
 - Check with OEM re 2464 cert due Apr. 30
 - If cert filed or to be filed – 2462 unneeded for dealer (but inquire re other basis)

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Signed by the President on March 18
 - Effective April 1 through December 31
 - Covered employers must provide emergency paid sick leave (E-PSL) and partially paid expanded FMLA leave (E-FMLA) for certain qualifying reasons related to the Coronavirus emergency
- DOL issued informal guidance on rolling basis starting on March 24
 - <https://www.dol.gov/agencies/whd/pandemic>
- DOL issued Temporary Rule on April 1
 - <https://www.dol.gov/agencies/whd/ffcra>
 - Important clarifications and some changed positions
 - Note “correction” to Temporary Rule issued April 10

FFCRA: Emergency Paid Sick Leave

- Two weeks of paid E-PSL is available for any employee who:
 1. Is subject to a government-mandated quarantine or isolation order
 2. Has been advised by a health care provider to self-quarantine
 3. Is experiencing COVID-19 symptoms and seeking a medical diagnosis
 4. Is caring for an individual covered under reasons 1 or 2 above
 5. Is caring for the employee's son or daughter if the school is closed or the child care provider is unavailable due to COVID-19 precautions (E-FMLA)
 6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

FFCRA: Emergency Paid Sick Leave

- **Fear of contracting COVID-19**
 - Not a covered reason, but doctor's order to self-quarantine due to particular vulnerability to COVID-19 may be reason #2
- **Government mandated quarantine or isolation order**
 - Includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders
 - May be a broad order applicable to categories of citizens (e.g. or certain age ranges or of certain medical conditions)
 - Work must be available for the employee and employee must be able to work but for the order

FFCRA: Emergency Paid Sick Leave

- Two weeks of E-PSL is equal to
 - 80 hours for full time employees
 - the number of hours a part-time employee would normally be scheduled to work in a two week period
- Rate of pay depends on reason for leave
 - Employee's regular rate of pay for first three reasons, up to \$511 per day (\$5,110 in the aggregate)
 - 2/3 employee's regular rate for last three reasons, up to \$200 per day (\$2,000 in the aggregate)

FFCRA: Expanded FMLA Leave

- Up to twelve weeks of E-FMLA leave
 - Available if employee has worked at least 30 days and is unable to work (or telework) due to a need for leave to care for a son or daughter whose school is closed or child care provider is unavailable due to the COVID-19 public health emergency
 - 12-week maximum includes E-FMLA and FMLA
 - Available to rehired employees who were laid off on or after March 1, as long as employee worked 30 of 60 days prior to leave (CARES Act)
- First two weeks are unpaid
 - But employee may receive pay through E-PSL
- Paid after the first two weeks of leave
 - Employee is paid 2/3 of average regular rate for the number of hours the employee would normally be scheduled to work during that time

FFCRA: Job Protection for E-FMLA Leave

- Employers must restore employee to an equivalent position upon conclusion of E-FMLA leave
- Limited exception for small employers with fewer than 25 employees
 - Must make “reasonable efforts” to restore the employee to an equivalent job unless position was eliminated due to economic conditions or other changes in operating conditions caused by COVID-19
 - Still, must make reasonable efforts to contact employee for any equivalent position that becomes available in the year following the first day of employee’s E-FMLA leave or conclusion of COVID-19 emergency (whichever is earlier)

FFCRA: Covered Employers

- E-PSL and E-FMLA must be provided by employers with less than 500 employees
 - Separate corporations may be considered a single employer under the FLSA’s “joint employment” doctrine or the FMLA’s “integrated employer” doctrine
- Potential Exceptions
 - Small employers with fewer than 50 employees if providing leave would jeopardize viability of company
 - E-PSL reason #4 and E-FMLA
 - Employers of health care providers and emergency responders at the employer’s option
 - Broad interpretation includes anyone working for hospitals, etc.
 - All E-PSL reasons and E-FMLA, but DOL says to be “judicious”

FFCRA: Small Business Exemption to E-PSL and E-FMLA for Childcare-related Reason

- Small business must document one of the following applies, as determined by an authorized officer of the company:
 - Leave would cause expenses to and financial obligations to exceed available business revenue and the small business would cease operating at minimal capacity
 - The absence of the employee would pose a substantial risk to the financial health or operational capacity of the small employer because of the employee's specialized skills, knowledge of the business, or responsibilities
 - There are not enough workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee requesting leave and these services are needed to operate at minimal capacity

FFCRA: Enforcement

- **Effective dates**
 - Applies only to qualified leave taken April 1-December 31, 2020, so no credit to employer or deductions from employee's E-PSL and E-FMLA entitlement for leave provided by employer before April 1, 2020
 - Initial 30-day non-enforcement period for employers who have acted reasonably and made good faith attempt for compliance
- **Penalties**
 - Same as FMLA: lost wages and benefits, out of pocket costs, liquidated damages, attorney's fees, reinstatement
 - Same as FLSA: lost wages and benefits, liquidated damages, attorney's fees for failure to provide E-PSL; reinstatement, fines up to \$10,000 and criminal penalties (if prior violation) for intentional violations and unlawful termination

FFCRA: Tax Credits for Paid Leave

- 100% tax credit “reimbursement” for all paid leave plus allocable costs for maintenance of health insurance during leave
 - Maximum credit matches daily and aggregate payment caps
- Credit is applied to employer portion of the 6.2% social security tax
 - Employers may immediately use payroll taxes withheld from employees to pay employees for FFCRA-required leave
 - If payroll taxes are insufficient, employers may request an accelerated payment from the IRS.
 - IRS has provided guidance and claims form
 - <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>
 - <https://www.irs.gov/newsroom/covid-19-related-tax-credits-how-to-claim-the-credits-faqs#40>
- Credits not available to state and local governments and political subdivisions

FFCRA: Notice Obligations

- **Employer**
 - Poster in a conspicuous place where all employees and applicants can see it
 - Can be hung on a wall in break room, posted to a website, mailed to employee
- **Employee**
 - Verbal notice is sufficient
 - Employees may be required to follow reasonable notice procedures as soon as practicable after the first workday or portion of a work day missed (not in advance)
 - Reasonable” is determined based on the circumstances of the particular case
 - If need for E-FMLA is foreseeable, employee must provide notice of the need for leave as soon as practicable
 - Employees must provide enough information to determine the need for leave is covered by E-PSL or E-FMLA
 - If employee does not provide proper notice, employer must notify employee and give the opportunity to provide documentation before denying request for leave
 - May not require information from employee beyond that employer is required to maintain as supporting documentation.

FFCRA: Documentation and Record-keeping

- Employer must maintain documentation received in support of leave for 4 years
- Employee may be required to provide information to support the need for leave that includes all of the following (as applicable):
 - The employee's name, date for which leave is requested, oral or written statement that the employee is unable to work (including work remotely) because of a qualifying reason AND
 - Additional information depending on the reason for leave:
 - For Reason #1: The name of the government entity that issued the quarantine or isolation order
 - For Reason #2: The name of the health care provider who advised the employee to self-quarantine.
 - For Reason #4: The name of the individual being cared for by the employee and the individual's relation to the employee; and either the name of the government entity that issued the quarantine or isolation order application to the individual being cared for or the name of the health care provider who advised the person being cared for to self-quarantine.
 - For Reason #5: The name of the son or daughter being cared for; the name of the school, place of care, or child care provider that has closed or become unavailable; a representation that no other suitable person will be caring for the son or daughter during the period of leave taken by the employee.

FFCRA: Intermittent Use of E-PSL and E-FMLA

- Intermittent use of E-PSL and E-FMLA only if employer allows it
- Even then, DOL has issued guidelines for intermittent use:
 - Employees working remotely may take leave intermittently for any reason permitted by employers
 - Employees working at the worksite may use leave intermittently (less than a full day) only for absences due to childcare
 - Once the employee takes E-PSL for reasons #1-4 and 6, leave must continue until the employee uses the full amount of leave or the employee is no longer has a qualifying need for leave
- Intermittent leave does not impact “exempt” status under the FLSA

FFCRA: Coordination with Other Policies

- Order of Leave
 - Employees cannot be required to take other available leave first
- Supplementing Pay
 - Employers may let employees supplement their pay with available paid leave (e.g. PTO) while on E-PSL
 - Employee must be permitted to supplement or employer can require supplementation with available paid leave (e.g. PTO) in weeks 3-12 of E-FMLA leave
- Group Health Insurance and Other Benefits
 - Must maintain coverage under group health plan on same terms as if the employee was not on leave
 - Employee remains entitled to all other rights or benefits available under other Federal, State, or local law, CBA, or existing employer policy

FFCRA: Retaliation and Interference Prohibited

- Employer must not discriminate, discharge, discipline or take other adverse action because employee took E-PSL or E-FMLA, opposed unlawful practice, or participated in related proceedings
- FFCRA does not prohibit layoffs or other employment actions that would have affected the employee regardless of whether leave was taken

FFCRA: Collective Bargaining Agreements

- Employer in a multi-employer CBA may comply with paid leave provisions by paying into multi-employer fund as long as employees have access to funds for leave
- Employer must still comply with CBA terms and bargaining requirements to avoid unfair labor practice charge under the NLRA
- Pension or health and welfare fund contributions may be required during leave based on hours paid (vs. hours worked) or as continuation of group health insurance or other rights or benefits (as required by FFCRA)

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