

L&E Live

Employment Law in the Time of COVID

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Family First Coronavirus Response Act: Paid Sick Leave

FFCRA – Paid Leave Provisions

- Covered Employers: Fewer than 500 employees
- Effective April 1, 2020 through December 31, 2020
- Posters are here:
 - <https://www.dol.gov/general/topics/posters>

Paid Sick Leave

Qualifying Reasons

Unable to work or telework due to a need for leave because:

1. Subject to a federal, state, or local quarantine or isolation order related to COVID-19
2. Advised by a health care provider to self-quarantine due to COVID-19 concerns
3. Experiencing symptoms of COVID-19 and seeking medical diagnosis
4. Caring for an individual subject to an order described in (1) or (2)
5. Caring for a child if the school or care center has closed, or a child care provider is unavailable, due to COVID-19 precautions
6. Experiencing any other substantially similar condition specified by Secretary of Health and Human Services

Paid Sick Leave

Qualifying Reasons

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1. Subject to a federal, state, or local quarantine or isolation order related to COVID-19
2. Advised by a health care provider to self-quarantine due to COVID-19 concerns
3. Experiencing symptoms of COVID-19 and seeking medical diagnosis

Payment Cap

- Greater of: Regular Rate or Minimum Wage
- Maximum of \$511/day or \$5,110 in the aggregate

Paid Sick Leave

Qualifying Reasons

Unable to work or telework due to a need for leave because:

4. Caring for an individual subject to an order described in (1) or (2)
5. Caring for a child if the school or care center has closed, or a child care provider is unavailable, due to COVID-19 precautions
6. Experiencing any other substantially similar condition specified by certain government officials

Payment Cap

- 2/3 of Regular Rate or Minimum Wage
- Maximum of \$200/day or \$2,000 in the aggregate

Paid Sick Leave



No minimum duration of employment



Maximum leave:
Equivalent of 2 weeks
or 80 hours



Cannot first require
use of other,
employer-provided
paid leave



Separate from other
paid sick leave

COVID-19 and the Americans with Disabilities Act

ADA Basics

- Coverage: 15 or more employees
- Applies to applicants and employees, not independent contractors
- Prohibits discrimination against qualified individuals with disabilities
- Reasonable accommodation

ADA Basics

- What is a disability?
 - Physical or mental impairment that substantially limits one or more major life activities.
 - Record or history of such impairment, or regarded as having such impairment
- Is COVID-19 a disability?

Inquiries and Medical Exams

- The ADA restricts when and how much medical information employers may obtain from employees and applicants
- What screening can you do for COVID-19?
 - What questions can you ask employees?
 - Can you take employees' temperatures?
 - Can you administer COVID-19 tests?
 - What if an employee refuses to be screened?

Hiring and Onboarding

- The ADA limits when an employer can subject applicants to medical exams and inquiries.
- Can you screen applicants for COVID-19 symptoms, and if so, when?
- Can you delay the start date of an applicant with COVID-19 symptoms?
- Can you withdraw a job offer?

Inquiries and Medical Exams



Can you require employees with symptoms to stay home?



Can you require employees with symptoms to have a doctor's note to return to work?



What information should be kept confidential?

Reasonable Accommodations

- What's a "Reasonable" Accommodation?
 - Leave of absence?
 - Job restructuring?
 - Modify workplace policies?
 - Job reassignment?
 - Modify equipment, work station or work location?
 - Work from home?

Reasonable Accommodations

- Some disabilities may put workers at greater risk from COVID-19 and require reasonable accommodations
- Must you accommodate workers with stress or anxiety about returning to work?
- Must you accommodate workers with vulnerable family members?
- What kinds of undue hardship considerations can you consider?

At-Risk Workers

- Older workers, pregnant employees, and individuals with underlying medical conditions
- The “direct threat” issue
 - High standard to meet
 - Individualized determinations are required
 - Can the threat be eliminated or reduced with reasonable accommodations?

Family First Coronavirus Response Act: Expanded FMLA

Expanded FMLA



Eligibility

- Employees: After 30 calendar days of employment

Qualifying Reason

Unable to work or telework due to the need to care for a minor child because of:

- School closure or unavailable child care due to a COVID-19 emergency declared by a federal, state, or local authority

Expanded FMLA

Payment

- First 10 days unpaid unless employee elects to substitute paid leave
- Remaining 10 weeks:
 - 2/3 regular rate or minimum wage
 - Maximum of \$200/day or \$10,000 in the aggregate
- Weekly payments based on hours normally worked

Exemptions

- Small business (fewer than 50 employees) exemption
 - Child care-related paid sick leave and expanded FMLA
- Leave provisions do not apply to furloughed employees
- Employers *may* exclude health care providers

Exemptions

- Small business (fewer than 50 employees) exemption
 - Expenses and financial obligations would exceed available business revenues and cause the business to cease operating at a minimal capacity; or
 - Employee absence would entail a substantial risk to the financial health or operational capabilities of the business because of specialized skills, knowledge, or responsibilities; or
 - Insufficient 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 employees or employees requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Additional Thoughts

- Retain documentation for tax credits and refunds
 - Updated DOL Guidance
 - Additional DOL Regulations

Layoffs and Furloughs During the Pandemic

Layoffs



Advance notice to employees may be required



Does the WARN Act apply?

- Applies to certain plant closings and mass layoffs
- Applies to certain “employment losses” exceeding six months, which creates a potential pitfall for employers



Other considerations

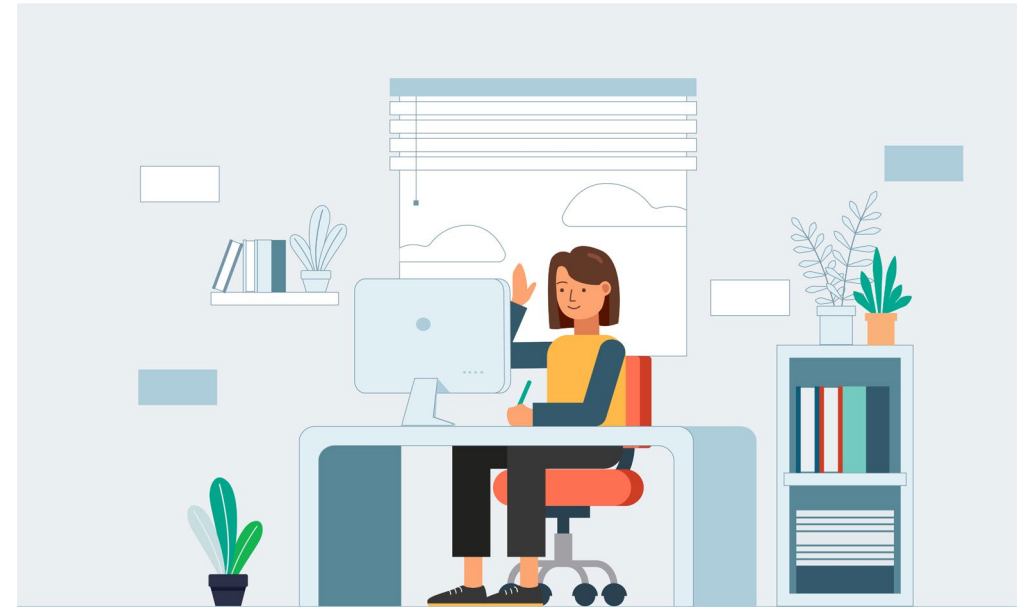
Furloughs

- What is a furlough? Is it different from a layoff?
- Issues under the FLSA and state wage laws
- Health insurance issues
- Unemployment issues

Family First Coronavirus Response Act: Telecommuting

Telecommuting

- Temporary policy can be stand-alone (encourage or require)
- Tools at home (cyber and physical security)
- Workers comp
- FLSA – payment of employees
 - Exempt vs. non-exempt



Questions?

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