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Coronavirus Update: Worker Safety, Paid Leave, and Other Employment Law Issues

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PPSA/TAPPI Webinar
March 30, 2020



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Employers & Lawyers. Working Together

Agenda

- Workplace Safety & Health (OSHA)
 - OSHA and CDC Guidance
- Paid Leave Requirements
 - New Law: Families First Coronavirus Response Act (effective 4/1/20)
 - Current Laws (FMLA, ADA) and Company Policies
- Minimizing Workforce and Payroll Expenses
 - Pay issues regarding exempt (salaried) and non-exempt (hourly) positions
 - Layoffs
- Helpful resources

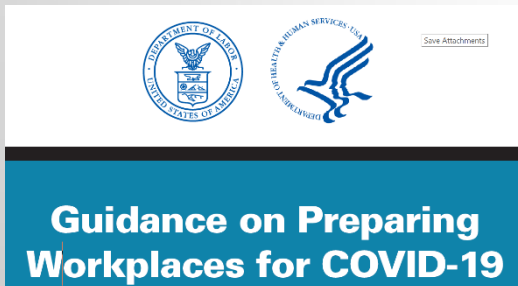
Introductory Remarks

- Focus first on safety and health of your employees and their families and your community
- Focus on your business – survival of your business matters
- Employment and labor laws and systems don't fully contemplate this unprecedented situation
 - Be careful about absolutes in advice and opinions
 - Get advice from reliable sources
 - General materials are not legal advice for specific situations
- Be safe, kind, and patient with each other

Unprecedented Challenges for Employers

- Government ordering businesses to shut down
- Significant loss of business
- Economic recession
- Wage reductions, shift changes, furloughs, voluntary separation programs, reductions-in-force
- Stay-at-Home or Shelter-in-Place Orders

Workplace Safety and Health



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Safety First – A New Way to Work ... For Now?

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Emergency Remote Work Arrangements

- Voluntary or mandatory
- Equipment and services necessary to work from home (and properly handling expense reimbursements with regard to working from home)
- Appropriate physical security and cyber-security precautions to safeguard confidential information
- Appropriate timekeeping controls for non-exempt employees;
- The benefits of establishing an interim or emergency policy establishing the controls around remote work while making clear such arrangements are not intended to set future precedent.

Social Distancing – on the Job?

- For those who cannot work from home
- CDC recommends groups of no more than 10
- Workflow issues in the work area
- Digital meetings or conference calls
- Conferences and conventions on hold

OSHA Guidance: Steps All Employers Can Take to Reduce Risk of Exposure

1. Develop an Infectious Disease Preparedness and Response Plan
 - Specific to your workplace threat level
 - Follow federal and state, local, tribal, and/or territorial (SLTT) recommendations regarding development of contingency plans for situations that may arise as a result of outbreaks, a reduced workforce, including cross-training workers across different jobs in order to continue operations or deliver surge services.

OSHA Guidance: Steps All Employers Can Take to Reduce Risk of Exposure

2. Prepare to Implement Basic Infection Prevention Measures
3. Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate
4. Develop, Implement, and Communicate about Workplace Flexibilities and Protections
5. Implement Workplace Controls

OSHA Guidance: Steps All Employers Can Take to Reduce Risk of Exposure

6. Follow Existing OSHA Standards

- PPE (29 CFR 1910 Subpart I)
 - Specific requirements for respirators whether voluntary or mandatory
- Bloodborne Pathogens (29 CFR 1910.1030)
- General Duty Clause...see following slide

OSHA / CDC Guidance – Mandatory?

- CDC guidance is just that – guidance, consisting of recommended best practices
- The same can be said of OSHA's Guidance on Preparing Workplaces for COVID-19
- But, these are the type of publications OSHA will rely on if it issues general duty clause citations

Most Significant Workplace Safety and Health Issues

- Temperature checks
- OSHA recording/reporting
- CDC Guidance – Is it mandatory?
- Working from home
- Fatigue – Is it a safety issue?
- Can employees refuse to work?

Temperature Checks

- EEOC – temperature checks are permissible under the ADA
 - Generally, taking a person's body temperature would be a medical examination
 - Because the CDC has acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure workers' body temperature
 - CDC recommends for public health workers taking temperatures hand washing and/or sanitizing before and after and for the temperature taker to wear full PPE

Temperature Checks

- Employers should consult medical expert
 - Don't play doctor!
 - Who should take readings
 - Protocols
 - Thermometer/PPE

Temperature Checks

- Anecdotally – clients in the following industries are considering or performing temperature checks
 - Manufacturing
 - “Essential” infrastructure – defense, utilities, grocery/food supply, and some construction
 - “Essential” retail/restaurant

Temperature Checks

- What are employers looking for?
 - Temperature below 100.4 F
 - CDC/Public Health Authorities: Employees with higher temperatures should be sent home, told to call a physician, and not return to work until they are free of fever for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines

Temperature Checks

- What are best practices? How do you protect the person taking the temperature?
 - No official guidance unless healthcare or public health practitioner
 - Rely on your consulting health care provider
 - If backed against a wall, consider having employees take their own temperatures at home/in parking lot before coming into work and self-reporting elevated temperatures

OSHA Recording/Reporting

- “COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties.”
- When is a COVID-19 case work-related?
 - Healthcare: Treating patients who tested positive
 - Working with general public: Employee contracts it and has no family/foreign travel factors? Maybe...
 - Sam is diagnosed with COVID-19 – first person in the workplace -- Sally works closely with Sam and is diagnosed – no family/travel history -- Sally’s case is probably work-related

OSHA Recording

- Recording
 - Employee confirmed with work-related case
 - One of recording criteria is met
 - Days away from work – this will likely always be met because employee will be quarantined once diagnosed
 - Date of incident (for 300 Log) – “date of onset”
- “Unofficial” word from OSHA – “we are not really concerned about recording outside of healthcare” (DO NOT rely on this...)

OSHA Reporting

- Employee hospitalized for in-patient treatment or employee dies as result of work-related infection
- Same timing rules apply to reporting as usual: If a fatality occurs within 30 days of the work-related incident, or if an in-patient hospitalization, amputation, or loss of an eye occurs within 24 hours of the work-related incident, then you must report the event to OSHA
 - Example: Employee is confirmed with a work-related case and goes home to recuperate. Two weeks later, the employee is hospitalized. The employer is NOT required to report this hospitalization because it occurred more than 24 hours after the event

OSHA Complaints

- All being triaged in national office
- OSHA's national leadership recognizes these are extraordinary circumstances
- BUT...
 - Why not more acknowledgement of respirator shortage?
 - Why can't OSHA simply say when they will consider a general duty clause violation?
 - Couldn't OSHA issue specific guidance about what to do when an employee gets sick or comes back from international travel?

General Duty Clause

- CDC cleaning guidance – are employers required to follow it? NO
 - BUT what will you say in response to an OSHA complaint?
 - Cleaning protocols are most important in doctor's office, manufacturing, and any business where employees work close together

General Duty Clause

- What should employer do when an employee has symptoms?
 - Send employee home and tell him or her to get medical treatment
 - What if employer does not do this?
 - General Duty Clause violation is possible, BUT OSHA has to prove actual hazard
- What if employee is coming back from Italy, China, or other travel?

General Duty Clause – State Closure Orders

Example: Indiana

- Allow as many employees as possible to work from home
- Actively encourage sick employees to stay home
- Do not require healthcare provider's note to validate the illness or return to work of employees sick with acute respiratory illness to reduce workload on healthcare provider offices and medical facilities
- Ensure sick leave policies are up to date, flexible and non-punitive
- Frequently perform enhanced environmental cleaning of commonly-touched work surfaces; provide wipes

General Duty Clause – State Closure Orders

Example: Indiana -- Scenario

- Employee calls Indiana OSHA: “We are an essential business and working. My co-worker Sally was told she needed a note from her doctor to miss work. She couldn’t get one so she came to work sick, and now I am going to get sick. Also, we don’t have any wipes.”
- IOSHA investigates and issues a citation alleging a GDC violation

General Duty Clause – State Closure Orders

Example: Indiana -- Scenario

- Is it a violation? Maybe
 - IOSHA has to prove actual health hazard existed, e.g. someone had it
 - IOSHA has to prove employer knowledge
 - Fact that policy was bad is not enough
- BUT – this will cost time and money to fight

Working from Home

- Voluntary or mandatory
- Equipment and services necessary to work from home (and properly handling expense reimbursements with regard to working from home)
- Physical security and cyber-security precautions to safeguard confidential information
- Timekeeping controls for non-exempt employees
- Supervising telecommuting employees
- Workers' compensation considerations

Working from Home

- With so many employees working from home, will OSHA start inspecting home offices?
- No. Longstanding OSHA policy endorses telecommuting and provides :
 - OSHA will not conduct inspections of employees' home offices
 - OSHA will not hold employers liable for employees' home offices, and does not expect employers to inspect employees' home offices
 - If OSHA receives a complaint about a home office, complainant will be advised of OSHA's policy. If employee makes a specific request, OSHA may informally let employer know of complaint about home office conditions, but will not follow-up with employer or employee

Employee Fatigue – Is It a Safety Issue?

- Yes -- research estimates 13% of workplace injuries can be attributed to fatigue, and 43% of Americans admit they may be too tired to function safely at work

Employee Fatigue – Is It a Safety Issue?

- Employers can:
 - Avoid assigning permanent night-shift schedules (if possible)
 - Provide adequate time to recover between shifts
 - Provide frequent breaks within shifts
 - Nap time! Sleeping on the job is typically frowned upon, but if you encourage your employees to rest when safe and feasible, it could prevent an injury or mistake. Many employees are fatigued, but a short nap could give them the energy and focus they need to be safe and productive at work.

Employee Fatigue

- OSHA has not yet established standards applicable to fatigue, but it has published Guidance
- Guidance recommends some of options in the previous slide and other good ideas that are not necessarily practical right now (such as avoiding long shifts and scheduling many long shifts in a row)

Employee Fatigue

- Consider hiring temp workers to help, but remember OSHA is hyper-focused on anything involving temporary employees
- If you need to bring in temp workers:
 - Joint responsibility – sort out responsibilities in writing
 - Train, train, train!
 - Treat temporary employees just as you would any of your other employees when it comes to health and safety

Can Employees Refuse to Work?

- May employee refuse to come to work based on general fear of becoming infected with COVID-19?
 - No -- but refusal based on a specific safety hazard may be the basis for an 11(c) retaliation claim under the OSHAct or potentially an unfair labor practice charge if employees are engaged in protected concerted activity under the National Labor Relations Act

EEOC Guidance on COVID-19



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How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

- EEOC: During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- OSHA: See General Duty clause

■ When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?

EEOC: Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?

- EEOC: Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
- OSHA: See General Duty Clause

When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?

- EEOC: Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

May an employer require an employee who is not exhibiting COVID-19 symptoms but who has been in contact with an individual with COVID-19 or is in a potential incubation period (e.g., after returning from travel to an area of risk, as noted by the CDC) stay away from work?

- Yes, and see the paid leave provisions below [in the Guidance].

Safety & Health – Travel Issues

- Can employers forbid business-related travel to affected areas? **Yes.**
- Can employers require employees to go on business trips to affected areas, despite employees expressing concern over contracting the virus? **Not a good idea.**
- Can an employer ask employees about their personal travel or future travel plans? **Yes.**
- Can employers ban employees from personal travel to affected areas? **Yes by using leverage.**

“Families First Coronavirus Response Act”

Signed by President Trump: March 18, 2020

Effective Date: **April 1, 2020 (not retroactive)**

Two New Paid Leave Requirements

DOL's Informal Guidance posted 3/24 and updated since then
(awaiting regulations)

FFCRA - Coverage

Employers with fewer than 500 employees, counted at the time of the leave request, including:

- FT and PT employees anywhere in US;
- Employees on leave;
- Temporary employees who are jointly employed with another employer (regardless of whose payroll they are on);
- Day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship); and
- Employees of other entities if joint employer or integrated enterprise tests are met.

Very Small Business Exemption (DOL)

- Criteria set out in DOL FAQ updated Friday, 3/27:
 - Only covers leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons;
 - Providing leave would jeopardize the viability of the small business as a going concern.

Very Small Business Exemption (DOL)

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient 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 or employees requesting paid sick leave or expanded family and medical leave, and these labor or
- Services are needed for the small business to operate at a minimal capacity.

Very Small Business Exemption (DOL)

- This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:
 - employer employs fewer than 50 employees;
 - leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
 - an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.
- “You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.”

Emergency Paid FMLA Leave (EFMLEA)

- 12 weeks of job-protected FMLA leave for employees to care for children if schools/ daycares closed because of a public health emergency and they are unable to work or telework
- Who is eligible? Employees working for at least 30 calendar days
- Rate of Pay / Caps
 - First 10 days are unpaid
 - Employees may use accrued paid personal or sick leave during the first 10 days, but employers may not require them to do so
 - After 10 days, employees are paid at 2/3 of their regular rate
 - Capped at \$200 per day and \$10,000 in the aggregate

Emergency Paid Sick Leave (EPSLA)

Requires employers to provide paid sick time to the extent the employee is unable to work (or telework) only if s/he has need for leave because:

1. Employee is under government-ordered quarantine or isolation
2. Employee's "Health Care Provider" advises self-quarantine (HCP is same as FMLA definition and includes nurse practitioners and others)
3. Employee is experiencing COVID-19 symptoms and seeking medical diagnosis
4. *Employee is caring for an individual subject to quarantine order or self-quarantine HCP advice (1 or 2, above)*
5. ***Employee is caring for own child if the school or place of care of the child has been closed or the child care provider is unavailable***
6. *Employee is experiencing substantially similar conditions as specified by the Secretaries of Health and Human Services, Treasury, and Labor*

Emergency Paid Sick Leave (EPSLA)

- Eligibility. All employees, regardless of length of employment
- Amount of Paid Sick Time
 - Full-time Employees = 80 hours
 - Part-time Employees = equal to the number of hours that such employee works, on average, over a 2-week period
- Rates of Pay / Caps
 - a. For reasons 1-3 on prior slide (employee's condition)
 - The higher of the employee's regular rate or applicable minimum wage
 - Capped at \$511 per day and \$5,110 in the aggregate
 - b. For reasons 4-6 (employee caring for another)
 - 2/3 of regular rate or applicable minimum wage
 - Capped at \$200 per day and \$2,000 in the aggregate

Rates of Pay Explained by DOL

- The average regular rate over a period of up to six months prior to the date on which the employee takes leave.
- Includes commissions, tips, or piece rates.
- Includes overtime if regularly earned (see below)
- You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

Emergency Paid Sick Leave (EPSLA)

- Employers with Existing Leave Policies. This paid sick time is in addition to whatever sick leave is already offered by the employer (including state or local requirements).
 - Employers may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick time under the Act
 - But nothing prohibits employers from changing their leave programs after the bill is enacted
 - Can allow employees to supplement with PTO

Applicable to Both

■ Exemptions

- Employers of employees who are health care providers or emergency responders may elect to exclude such employees from the paid leave (DOL FAQs define these terms broadly).

Applicable to Both

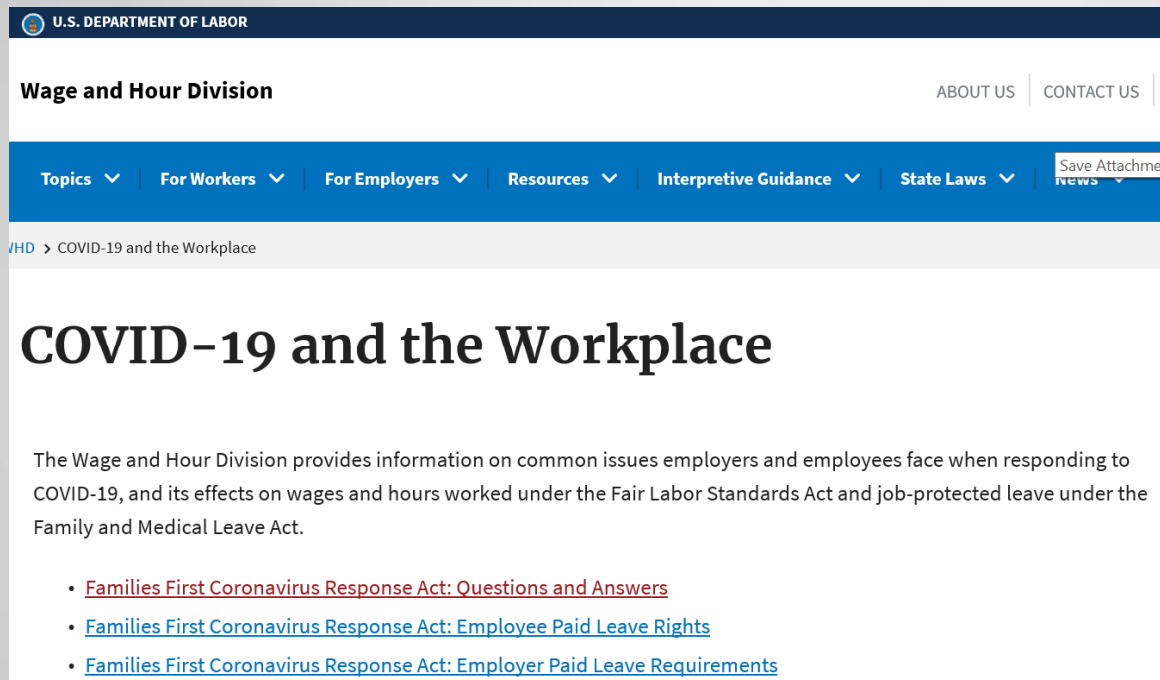
■ Notice Posting

- FFCRA Poster from the DOL: For private employers:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

U.S. Department of Labor

- Wage & Hour Division has issued guidance this week and will be issuing regulations that hopefully will address many unanswered issues.
- Expect them to resolve doubts in favor of paid leave coverage and request issues

DOL's COVID-19 Guidance – For Now



The screenshot shows the official website of the U.S. Department of Labor, Wage and Hour Division. The header includes the DOL logo and navigation links for 'ABOUT US' and 'CONTACT US'. A blue navigation bar contains dropdown menus for 'Topics', 'For Workers', 'For Employers', 'Resources', 'Interpretive Guidance', and 'State Laws'. A 'Save Attachments' button is visible on the right. The breadcrumb trail indicates the path: 'WHD > COVID-19 and the Workplace'. The main heading is 'COVID-19 and the Workplace'. The introductory text states: 'The Wage and Hour Division provides information on common issues employers and employees face when responding to COVID-19, and its effects on wages and hours worked under the Fair Labor Standards Act and job-protected leave under the Family and Medical Leave Act.' Below this, there are three bullet points with links to specific guidance documents.

U.S. DEPARTMENT OF LABOR

Wage and Hour Division

ABOUT US | CONTACT US

Topics ▾ | For Workers ▾ | For Employers ▾ | Resources ▾ | Interpretive Guidance ▾ | State Laws ▾ | Save Attachments

WHD > COVID-19 and the Workplace

COVID-19 and the Workplace

The Wage and Hour Division provides information on common issues employers and employees face when responding to COVID-19, and its effects on wages and hours worked under the Fair Labor Standards Act and job-protected leave under the Family and Medical Leave Act.

- [Families First Coronavirus Response Act: Questions and Answers](#)
- [Families First Coronavirus Response Act: Employee Paid Leave Rights](#)
- [Families First Coronavirus Response Act: Employer Paid Leave Requirements](#)

Can employees use both leave types?

- **Yes.** Employees may be eligible for both leaves to care for their children if school or daycare is closed (or child care provider is unavailable) due to COVID-19 related reasons.
- **But,** only for a total of 12 weeks of paid leave. The paid sick leave would cover the first 10 workdays at regular rate of pay. Afterward employees will receive 2/3 of regular rate of pay.

What's Next from Congress?

■ CARES Act (a/k/a Phase 3)

- Signed by President: March 27, 2020
- Very long, very complicated
- Provides for enhanced UI benefits
 - Through December 31, 2020 (12 more weeks)
 - \$600 more per week for up to four months
 - Funds week one of unemployment if states provide for payment
 - Funds “short-time compensation” claims (where reduced hours)

What's Next from Congress?

- Forgivable loans to pay payroll, mortgage/lease, utilities
- Payroll tax credit: up to 50% up to \$10K per employee
 - Funds “short-time compensation” claims (where reduced hours)
- Phase 4? In the works

Leave Law Questions

- Does the FFCRA prevent layoffs before the law's effective date? **No.**
- What about after the effective date?
 - **No**, but beware of private lawsuits and government enforcement claiming interference or retaliation

Leave Law Questions

- Does the EFMLA leave cover an employee who is unable to work due to a need to care for an adult child or other family member?
 - **Yes**, if the adult child has a disability
 - **No** coverage for other family members

Leave Law Questions

- Does the FMLA leave apply if an employee's nanny or other child care provider is unavailable?
 - **Yes.** It applies when a “child care provider” is unavailable and defines that term as “a provider who receives compensation for providing child care services on a regular basis.” There is no indication this is limited to just child care facilities.

FAQ's on the New Paid Leave Law

- Can employees sue for alleged violations?
 - Yes.
- What are the remedies available?
 - EFMLEA Coronavirus Leave: same as FMLA remedies
 - EPSLA Paid Sick Leave: FLSA remedies

Paid Leave Law Sunset

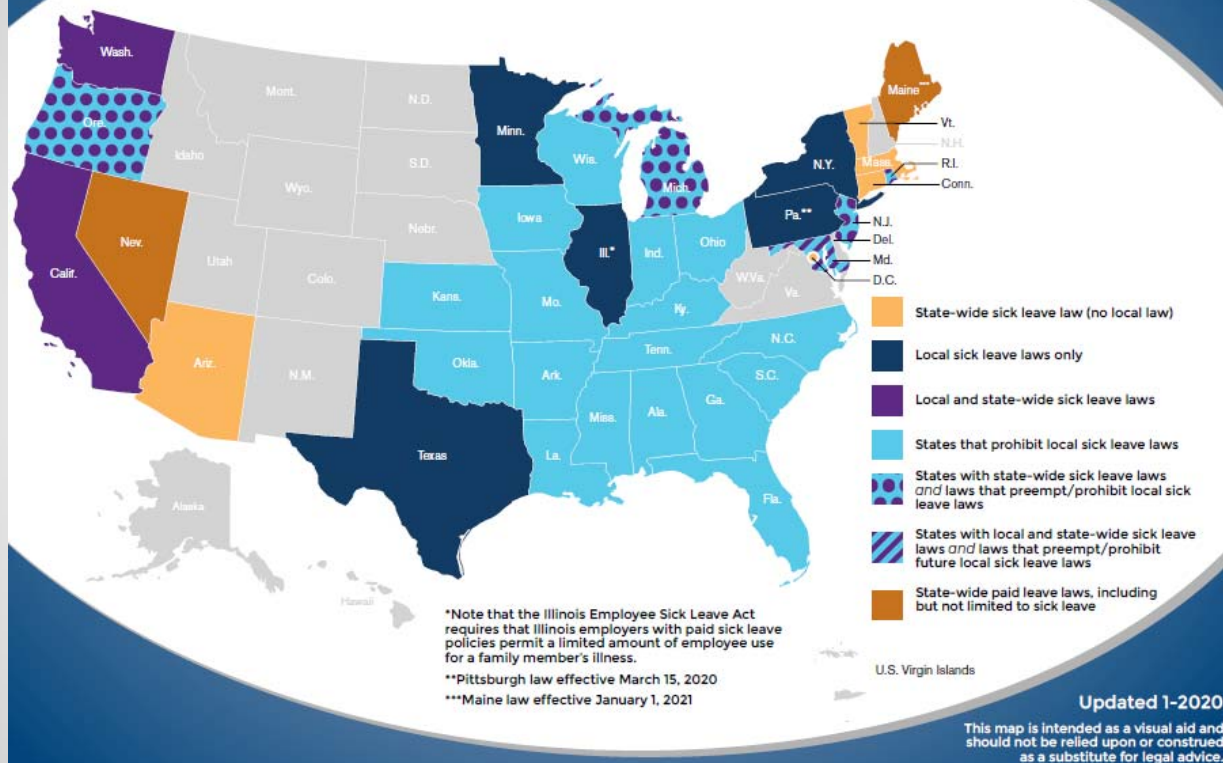
- Are these two new paid leave requirements permanent?
 - **No.** Both expire on December 31, 2020, unless renewed by a new law.

Other Leave Issues



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State and Local Sick Leave Laws



What are your normal policies?

- Follow policies; if deviate, make sure it's for a legitimate business reason
- Be mindful of state and local laws
- Follow policy of call-in procedures
- Continue to require doctor notes?
- Consider creating temporary pandemic policies.

What are your normal policies?

■ For example:

- An employer may advance vacation time and/or paid time off to employees to cover COVID-19 absences
- An employer may set up a plan to excuse or otherwise not count absences related to COVID-19, whether for an actual illness or a quarantine period

Other Current Laws that May Apply

- FMLA: 12 weeks of unpaid leave (same bucket as EFMLA)
 - Own serious health condition
 - Dependent serious health condition
- ADAAA: leave as possible reasonable accommodation
- Worker's compensation
- Retaliation under all three of the above

Minimizing Your Workforce and Payroll - Time to Get Lean?



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Options to Consider

- Step 1 (now): Separate all employees with performance, conduct, or attendance issues
- Step 2: Require telework when possible (possibly reduce hours or overall pay; convert salary to hourly)
- Step 3: Process voluntary separations for early retirements or for others (involves severance pay and agreement)

Options to Consider

- Step 4: Implement pay reductions (hourly and salary strategies)
- Step 5: Execute temporary layoffs (furloughs) – no pay

*These steps are not necessarily in the order that works for your business.
Consider following a different order.*

Voluntary Separation Programs

- If providing severance pay, get agreements releasing all claims in exchange
- If age claims are to be released, all employees 40 and over must sign a different agreement with additional terms including a waiting period and signature revocation period

Voluntary Separation Programs

- If group layoff and age claims are to be released, every agreement must disclose positions considered and chosen and age data (OWBPA)
- Beware of WARN considerations

Strategies to Reduce Payroll

Fair Labor Standards Act (FLSA)

- Requires minimum wage and overtime for non-exempt and for certain exemptions requires minimum salary basis compensation and primary duties.
- Classification: exempt or non-exempt
- Method of compensation: salary or hourly
- Workweek – defined

But, Does the FLSA apply?

- If employees are not working because they cannot physically report to work or telework, **no**.
- Employers can provide some “pay” (better term, “furlough benefit”) without regard to minimum wage or salary basis minimum

Non-Exempt Employees

- Federal law requires pay for all hours **worked**
 - Regardless of reason that a non-exempt employee does not work, federal law does not require pay for time not worked
 - Non-exempt includes all hourly-paid employees and salaried employees who do not perform exempt work

Non-Exempt Employees

- Strategies for consideration in coronavirus crisis
 - Substitution of paid PTO/vacation/sick leave for missed work
 - Compensating employees at reduced rates for not working
 - Beware of implications of reducing workforce or hours under CARES Act

Exempt Employees: Salary Basis Test

- Exempt employee must receive guaranteed salary of at least \$684 per week (payment need not be made weekly)
- Employee must receive salary for any workweek in which any work is performed subject to seven exceptions
- If no work is performed in a workweek, employer does not have to pay salary
- Deductions from salary for absences of less than a week or changed business operations required by employer are not allowed

Exempt Employee: Salary Basis Test

- Seven exceptions include:
 - Full-day absences for personal reasons other than sickness and disability
 - Full day absences for sickness or disability under bona fide plan, policy, or practice of employer to provide compensation for pay loss due to sickness or disability
 - Absence for FMLA leave (partial or full days – employer must pay for time worked)
 - Unpaid suspensions of less than a week for violations of major workplace safety rules
 - Unpaid disciplinary suspensions in full-day increments for violating workplace conduct rules where suspensions are imposed in good faith and pursuant to written policy
 - Paid jury duty or military leave time

Exempt Employee: Exempt Work Test

- Salary basis/amount not enough
- Exempt work includes *only*:
 - Executive
 - Administrative
 - Learned or creative professional
 - Computer programming
 - Outside sales
- Certain highly compensated employees also included

Exempt Employee Strategies

- If still working (or teleworking), consider:
 - Reduction in salary (to not less than \$684 per week)
 - Conversion to hourly and payment for time worked
- If not working (or teleworking), consider non-wage payment (amount can be below \$684)
- Remember, however: Exemption measured by week, but flip-flopping categorization/treatment suspect and can result in loss of exemption

Furloughs or Temporary Layoffs



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If Not Covered by WARN Act

- WARN Act = Worker Adjustment and Retraining Notification Act
- Temporary layoff or reduction of hours is a “furlough”
- See above for non-exempt and exempt positions
- Check benefit plans for coverage issues
- Don’t create expectation or guarantee of if or when there will be return to work full-time

If WARN Act Applies - Issues

- Is organization a covered employer?
- Is this a covered employment action?
- Does an exception apply?
- Does a state or local WARN law apply?
- What are potential consequences for non-compliance with one, other or both?

WARN Act - Notice

- WARN Act requires qualifying employers to provide 60 days' advance notice of "plant closing" or "mass layoff"
- A qualifying employer under WARN Act is business enterprise that employs either:
 1. 100 or more employees, excluding part-time employees or
 2. 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime

WARN Act – Notice

- Plant closing is defined as:
 - Plant closing Permanent or temporary shutdown of a "single site of employment"; or
 - One or more "facilities or operating units" within a single site of employment, if shutdown results in an "employment loss" during any 30-day period at the single site of employment for 50 or more full-time employees

WARN Act – Notice

- Mass layoff is defined as:
 - A reduction in force that:
 - Is not the result of a plant closing; and
 - Results in an employment loss at the single site of employment during any 30-day period for
 - At least 33 percent of the active full-time employees; and
 - At least 50 full-time employees
- Where 500 or more full-time employees are affected, 33 percent requirement does not apply, and notice is required if other criteria are met

WARN Act- Exceptions to Notice

- Faltering Company Exception
- Natural disaster
- Unforeseeable business circumstances
- Practicable Notice

WARN Act - Compliance

- Compliance is very **inexpensive**
 - Provide notice 60 days ahead of covered event
 - Cost is limited to letters prepared/mailed
- But non-compliance is very **expensive**
 - Provide lost pay and benefits to each employee who should have received notice
 - For full period that notice should have been provided but wasn't, up to 60 days

Recommendations

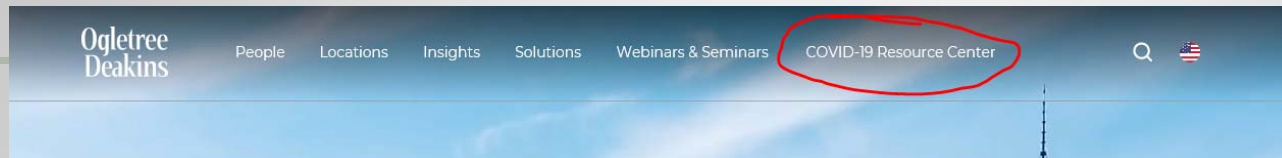
- Monitor the latest guidance and developments.
- Communicate regularly with your employees.
- Be flexible, but consistent.
- Communicate and analyze individual issues with HR and Legal.

Resources

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Coronavirus Resource Center



Ogletree Deakins | **CORONAVIRUS** (COVID-19) Resource Center

Coronavirus (COVID-19) Resource Center for Employers.

The Ogletree Deakins Coronavirus (COVID-19) Resource Center delivers the information and resources that employers need to minimize risk and remain informed about the many workplace issues related to the virus. During the outbreak—and the international response to it—employers must make critical decisions to ensure the safety and well-being of their workforces while accomplishing their goals.

<https://ogletree.com/solutions/coronavirus-covid-19-resource-center/>

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Coronavirus Daily Update E-mail



SIGN UP FOR DAILY UPDATES

Please provide your contact information if you wish to receive daily COVID-19 updates.

First Name *

Last Name *

Company *

Job Title

Business Email *



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Client Resources



Client Resources

www.ogletree.com

Current Information You Should Know

The firm's Coronavirus Rapid Response Team has developed numerous resources to assist employers in responding to the COVID-19 pandemic. For additional information, please reach out to the Ogletree attorney with whom you work.

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Client Resources

Complimentary:

- [Coronavirus Resource Center](#) (includes numerous blog posts, podcasts, etc.)
- Detailed [FAQs](#) on federal labor and employment laws implicated by COVID-19
- [On Demand Webinar Recording: Coronavirus \(COVID-19\) Update for Employers: Planning for the Potential Impact on Your Workplace](#)
- [Your Daily COVID-19 Update](#) email (attorney-client privileged communication featuring the latest developments and recommendations). **Available only to Ogletree Deakins clients.**
- Chart of Closure Orders for All States and Major Municipalities in the United States

Client Resources

- Template Documents (\$250 each or \$1,750 for all)
 - ✓ Pandemic Response Plan for Employers
 - ✓ Manager Communication Guide
 - ✓ Sample Employee and Manager Communications Addressing Common Situations
 - ✓ Questionnaire/Disclosure Form for Employees
 - ✓ Questionnaire/Disclosure Form for Visitors to a Company's Facility
 - ✓ Travel Risk Acknowledgment
 - ✓ Samples of Temporary Emergency Policies for Pay Continuation or Enhanced PTO
 - ✓ COVID-19 Remote Work Policy
 - ✓ Sample Remote I-9 Guidelines
- Legal Research Surveys (\$750 each or \$1,750 for all)
 - ✓ 50-State Survey of Notice Requirements for Changing Pay or Hours
 - ✓ 50-State Survey of Predictive Scheduling Laws
 - ✓ 50-State Survey of Mini-WARN Acts
- Legal Review and/or Customization of Client's Documents (hourly)
- Advice and Consultation (hourly)

Thank You

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