

Pandemic Workplace Response: Now What?

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Topics for Discussion

- Legislation, Orders, and Guidance affecting your workplace
- Teleworking and related privacy concerns
- What has changed and what stays the same in the “alphabet soup” of employment laws
- Business interruption issues
- Your questions

LEGISLATION, ORDERS, AND GUIDANCE

H.R. 6201, FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

As of March 17, 2020 the House has passed the FFCRA, but the Senate has not yet voted on it.

Key Provisions

- Federal Emergency Paid Leave
- Paid Sick Days for Public Health Emergencies and Personal and Family Care
- Emergency FMLA Expansion

Proposed Emergency Paid Leave Benefits

- Defines “eligible individual” as someone who had wages or self-employment income during the 30 day period ending on the first “emergency leave day” with respect to such individual.

Proposed Emergency Paid Leave Benefits

“Emergency leave day” is a day in which an individual is unable to work due to one of four qualifying reasons related to COVID-19:

1. Current diagnosis of COVID-19.
2. The worker is quarantined (including self-imposed quarantine) at the instruction of a health care provider, employer, or government official.

Proposed Emergency Paid Leave Benefits

3. The worker is caring for another person who has COVID-19 or who is under a quarantine related to COVID-19.
4. The worker is caring for a child or other individual who is unable to care for themselves due to the COVID-19-related closing of their school, childcare facility, or other care program.

Proposed Emergency Paid Leave Benefits

- Eligible workers will receive a benefit for a month (up to three months) in which they must take 14 or more days of leave from work due to qualifying COVID-19-related reasons
- Days when an individual receives pay from their employer (regular wages, sick pay, other PTO), or unemployment compensation do not count as leave days for purposes of this benefit.

Proposed Emergency Paid Leave Benefits

Benefit amount: Two-thirds of the individuals average monthly earnings (based on the most recent year of wages or self-employment income for which records are readily available) up to a cap of \$4,000.

Proposed Emergency Paid Leave Benefits

- Program and benefit period: leave that occurs from January 19, 2020 (date of 1st U.S. diagnosis) through one year after the bill's enactment.
- Benefits can be paid retroactively
- Applications can be filed up to 6 months after enactment.

Proposed Sick Days Benefit

- Requires all employers to allow employees to gradually accrue 56 hours of sick leave, at the rate of 1 hour of leave for every 30 hours worked, which an employee can use on the 60th day following the commencement of employment;
- Requires all employers to provide an additional 14 days of paid sick leave, available immediately at the beginning of a public health emergency, including the current coronavirus crisis;
- Ensures paid sick leave covers days when your child's school is closed due to a public health emergency, when your employer is closed due to public health emergency, or if you or a family member is quarantined or isolated due to a public health emergency;

Proposed Sick Days Benefit

- Reimburses small businesses—defined as businesses with 50 or fewer employees—for the costs of providing the 14 days of additional paid sick leave used by employees during a public health emergency;
- Enables construction employees to receive sick pay based on hours they work for multiple contractors; and
- Makes the bill effective immediately so that employees in areas covered under a qualifying Public Health Emergency, upon the date of enactment, can take 14 days of paid sick leave in order to address COVID-19.

Emergency FMLA Expansion

- FMLA applies to all private employers with < 500 employees, all public employers.
- Shortens length of time for employees to become eligible (on the job for at least 30 days)

Emergency FMLA Expansion

Allows eligible employees to take 12 weeks of job-protected leave for the following reasons:

- Adhere to a requirement or recommendation to quarantine due to exposure to or symptoms of COVID-19;
- Care for an at-risk family member who is adhering to a requirement or recommendation to quarantine due to exposure or symptoms of COVID-19;
- Care for a child if the child's school or day care has closed, or the child care provider is unavailable, due to COVID-19;
- After two weeks of paid leave, employees will receive a benefit from their employers that will be no less than 2/3 the employee's usual pay.

State Legislative Measures / Directives

Unemployment

- Triggered for layoffs, furloughs, and reductions in force
- Can be triggered by reduction of hours/reduction in wages

Michigan

On March 16, 2020, Governor Whitmer issued Executive Order 2020-10, effective immediately and through April 14, 2020 at 11:59 pm. Employees will be permitted to collect unemployment if:

- They are self-isolating or self-quarantining as a result of COVID-19 “due to being immunocompromised, displaying the symptoms of COVID-19, having contact in the last 14 days with someone with a confirmed diagnosis of COVID-19, the need to care for someone with a confirmed diagnosis of COVID-19, or a family care responsibility as a result of a governmental directive” (i.e. K-12 public school closure); or
- Deemed laid off or unemployed as a result of COVID-19 “because of self-isolation or self-quarantine . . . due to being immunocompromised, displaying the symptoms of COVID-19, having contact in the last 14 days with someone with a confirmed diagnosis of COVID-19, the need to care for someone with a confirmed diagnosis of COVID-19, or a family care responsibility as a result of a governmental directive” (i.e. K-12 public school closure). Unemployment benefits may not issue if an otherwise covered employee is “already on sick leave or receives a disability benefit”

Michigan

- Employees must file claims within 28 days of the last day worked
- Unemployment for affected persons will be available for up to 26 weeks in a benefit year.
- Employers will not be charged for unemployment benefits if their employees become unemployed because of an executive order requiring them to close or limit operations.

Ohio

Governor DeWine issued Executive Order allowing Ohio employees will be permitted to collect unemployment if:

- They are required by a medical professional, local health authority, or employer to be isolated or quarantined as a consequence of COVID-19, even if they are not actually diagnosed with COVID-19.
- The employer lays off the employee due to the loss of production caused by COVID-19.
- The employee is in mandatory quarantine because of suspicion of having COVID-19.
- All other eligibility requirements remain in place, which would include the requirement that the employee work for the relevant time period. Also benefits may not be available if the employee is already on sick leave or receives a disability benefit.

Ohio

Unlike the Michigan law, Ohio's Executive Order does not provide unemployment for those employees who self-isolation or self-quarantine if they are asymptomatic. The reason is because the individual—not the employer—is choosing not to work and, therefore, would not be eligible. However, the facts of each circumstance are important. If the employer allowed this individual to telework, they would not qualify for benefits because they would not be unemployed. If the employer required the individual to stay home but did not offer telework, the individual might be eligible for benefits if they met the monetary and weekly eligibility criteria. In addition, benefits will be available immediately as the normal 1-week waiting period has been waived.

Colorado

- Employers in certain industries must provide up to four days paid sick leave to employees for COVID-19 testing.
- Effective March 11, 2020 – April 10, 2020.
- Industries: leisure and hospitality; food services; child care; education, including transportation, food service, and related work at educational establishments; home health, if working with elderly, disabled, ill, or otherwise high-risk individuals and; nursing homes and community living facilities.

Tennessee

- Governor Lee issued a statement on March 16, 2020 urging schools to close “as quickly as possible” through March 31, 2020.
- Metro Nashville closed bars on Lower Broadway, implemented seating restrictions in restaurants on March 15, 2020.

Pennsylvania

- On March 16, 2020, Governor Wolf “strongly urged” all “non-essential” businesses to close for at least 14 days.
- “Non-essential” businesses include recreation, hospitality, and entertainment facilities.

TELEWORKING AND RELATED PRIVACY CONCERNS

Teleworking Best Practices

Defining responsibilities and expectations

- Agreed-upon hours of work
- How hours will be recorded
- Accessibility
- Safeguarding company equipment and confidential information
- Reimbursable expenses
- Workplace ergonomics

Privacy Concerns with COVID-19

- Due to increased remote work, and less security of networks, higher instances of data breach.
- Cybercriminal use major current events to manipulate and exploit individuals through cyber threats.
- First noted one was dissemination of a real-time information of global infection rates to infect computers with malware.



Teleworking Best Practices ABCs

A is for Access

- Check that home devices have access controls, such as automatic logoff.
- Implement technical policies and procedures that grant access rights to specified workforce members, and that limit access to only those systems and software programs that have been approved by the company.
- Workplace devices should be encrypted and subject to password or MFA authentication.
- Anyone accessing a business network should do so via VPN and access limited to as needed and on authenticated basis.
- Personal emails, SMS's, WhatsApp and other messaging apps outside the business network should be prohibited.

Teleworking Best Practices ABCs

B is for Breach

- Prohibit business discussions on speakerphones.
- When talking, unlink Alexa and similar listening in and analyzing voice technology.
- Require all devices be password protected and that screens lock when not in use.
- Require employees to return paper and electronic files when no longer needed.
- If malware exists on the employees computer then that malware could be recording or forwarding the screen images.
- Remind employees to be careful with the websites they visit, emails they open, attachments they open and links they click on.

Teleworking Best Practices ABCs

C is for Connection

- Ensure employees are only working through a secure connection.
- Prohibit access to business information through unsecured Wi-Fi or networks.
- Businesses subject to HIPAA and GLBA, will have more specific requirements, including documentation.

LEGAL COMPLIANCE

HIPAA

- Protects patient health information from disclosure.
- Exception if necessary to prevent a serious and imminent threat.
- Policies around telehealth have been rapidly evolving.
 - » 1135 Waiver issued for “requirements that physicians or other health care professionals hold licenses in the state in which they provide services if they have an equivalent license from another state.”

ADA

EEOC's Guidance changes once the WHO and the CDC report a pandemic. During a pandemic, employers may subject employees to disability-related inquiry or medical examination if job related and the employee would pose "direct threat," which is a significant risk of harm to the health and safety of that employee or others, which cannot be eliminated or reduced by a reasonable accommodation.

- Can ask if employees if they have COVID-19 like symptoms, including high temperature, dry cough, shortness of breath, and send them home if they do.
- Can ask employees to quarantine, even if they are not experiencing symptoms.
- May take and employee's temperature, which is considered is a medical test.

ADA

- Employers may ask employees to self-quarantine if they have been to countries identified as Level 2 or Level 3 by the CDC. They should not single out individuals based on national origin or race alone, as that will implicate anti-discrimination laws.
- Employers should direct those employees to stay home and continue to avoid office or work site locations. Treat those employees as you would any other on-site employee who is similarly situated.
 - Should not require written proof of COVID-19 illness before allowing time off.
- You can require a doctor's note certifying fitness for duty to return to work, but be mindful of health care providers' ability to provide fitness for duty certification in the coming days and weeks.

ADA

- Employers should adopt a flexible approach to working from home if they intend to keep business up and running. Updates are coming in that some jurisdictions are requiring business closures.
 - » For example, some jurisdictions have closed bars and restaurants, gyms, fitness centers, movie theaters, bowling alleys, etc.
 - » Some jurisdictions have prohibited certain size gatherings.
 - » Absent specific prohibitions, this must be a tailored business decision.

ADA

What if an employee contracts COVID-19 at work, can they sue the employer in tort?

- Likely not. State workers' compensation acts will likely bar those kinds of claims. In most jurisdictions, a claim such as this would require a showing of intent to harm.

FMLA

- Normal rules apply for employee eligibility, covered employer, continuation of group insurance coverage.
- Employee who has COVID-19 or must care for a covered family member with COVID-19 is covered leave.
- An employee who requests time off to prevent potential exposure is not covered by FMLA (at least not until the Senate passes the FFCRA)
- An employer who sends an employee home to prevent exposure is not a covered event. (same caveat above)
- Consider relaxing requirements to require a note to RTW given the anticipated burdens on the health care system.

WAGE/HOUR

If an employees is off because of COVID-19 or suspected COVID-19 are they paid?

Non-Exempt:

- Non-exempt employees are paid for all hours worked.
- If non-exempt employees are not expected to work during a furlough or layoff, make sure they are relived of all duties.
- If employees are working remotely, make sure that all time is captured

WAGE/HOUR

- Exempt employees must be paid for a full week if they perform any work during the week, subject to deductions for full day absences in limited exceptions, which does NOT include an office closure.
- Employers may require exempt employees to take accrued leave on the full days they do not work in the event of an office closure.
- Exempt employees do not have to be paid in workweeks in which they perform no work.

Layoffs, Furloughs, and Shutdowns

- Business Continuity Insurance
- Depending on the policy, business closures might be mitigated by a business interruption provision in a business insurance policy.
- Some states are offering emergency small business loans.

Layoffs, Furloughs, and Shutdowns

WARN

- Only applies to employers with 100 or more employees
- Requires 60 days notice or daily penalties.
- Temporary layoffs of less than six months are not covered by WARN.
- Whether size of layoff triggers WARN notice obligations
- Whether WARN exception for natural disasters will apply to a pandemic, *i.e.*, unforeseeable business circumstances exception.

Layoffs, Furloughs, and Shutdowns

Mini WARN

Some states have mini-warn statutes that provide more protection than the federal WARN statute.

California, Illinois, Maryland, New Jersey, New York, Tennessee, and Wisconsin provide greater protections and apply to workforces under 100.

- California – Employers with 75 – 99 or more full-time employees / 60 days' advanced notice
- Illinois – Employers with 75 – 99 or more full-time employees / 60 days' advanced notice
- Maryland – Employers with 50 or more employees in business for a year / 90 days' advanced notice and continued benefits (encouraged)
- New York – Required 90 days' advanced notice
- Tennessee – Notice required when 50 or more employees affected
- Wisconsin – Employers with 50 or more employees / 60 days' advanced notice

Union Employee Issues

National Labor Relations Act

- Employers with represented employees may have a duty to bargain over new policies developed to respond to COVID-19. For example, if employers develop a policy on whether and how to pay employees who are furloughed or otherwise quarantined as a result of an exposure or potential exposure, that policy likely involves a mandatory subject of bargaining.
- To determine if there is a duty to bargain as these issues arise, review CBA. Potentially relevant provisions include management rights, leaves of absence, paid time off, and health and safety. These provisions may give employers the right to proceed unilaterally, especially under the National Labor Relations Board's (NLRB) new contract coverage standard announced in *MV Transportation, Inc.*

Union Employee Issues

Union Information Requests

- Many unions are seeking sometimes extensive information regarding the employer's response to the COVID-19 outbreak.
- The main topics of these requests relate to real or perceived health and safety concerns, and how absences resulting from the outbreak will be addressed.
- Both involve mandatory subjects of bargaining.
- The duty to respond to requests for information may be covered in a CBA.

Union Employee Issues

If there is a duty to provide the requested information, keep the following general principles in mind:

- The duty is to provide information that already exists. Employers are not required to speculate or create information that they do not have.
- If the request involves specific questions, and a document or policy provides the answers, then providing the document or policy to the union satisfies the employer's duty to respond.
- For information that remains in development, such as a policy relating to whether and/or how the employer plans to pay employees who cannot come to work due to an exposure or other quarantine, there may be a continuing duty to provide the policy to the union when it becomes available.
- Some requests include a very fast turnaround time. There often is a tension between a fast response and a complete response. There are no hard and fast rules on how quickly employers must respond. Consider the reasonableness of any requested timing based on the circumstances, the amount of information requested, and competing responsibilities of those who have to gather the information.
- Employee medical information remains confidential and not subject to disclosure to a union without a release.

Union Employee Issues

- Section 7 of the NLRA protects employees who engage in protected concerted activity (PCA), whether or not they are represented by a union. Specifically, the NLRA protects an employee from retaliation for engaging in “concerted activity” that is taken for “mutual aid or protection.”
- Conduct is for mutual aid or protection when the employees are seeking “to improve terms and conditions of employment or otherwise improve their lot as employees.”
- Thus, a refusal by two or more employees to accept an assignment based on a safety-related fear related to COVID-19 may be PCA.
- Remember though that under the NLRA, the refusal must be reasonable and based on a good faith belief that working conditions are unsafe. Nevertheless, a refusal likely remains protected if the employees are honestly mistaken about the risk.



QUESTIONS?

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Questions?



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