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COVID-19 Legal Update: Practical Guidance for Employers

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Families First Coronavirus Response Act

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Overview of the Law

- Signed into law on March 18, 2020
- 2 key provisions for employers:
 1. Creates limited paid sick leave
 2. Amends FMLA to expand coverage for COVID-19 childcare-related reasons
- Emergency paid sick leave and expanded FMLA leave provisions are **effective April 2, 2020*** and remain in place until the end of 2020

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Emergency Paid Sick Leave Act

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Key Definitions

- Eligible Employee
 - All employees of a covered employer are eligible for paid sick leave
- Covered Employer
 - A public agency
 - A private entity with fewer than 500 employees
(FYI-some ongoing discussion to apply to all employers)
 - Are employees at subsidiary/related entity included?
 - May utilize FLSA single enterprise test: the entities must engage in related activities, have unified operations or common control, and have a common business purpose*

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Qualifying Reasons for Emergency Paid Sick Leave

1. Employee is subject to a quarantine or isolation order related to COVID-19
2. Employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
4. Employee is caring for an individual who is needs to quarantine, isolate, or self-quarantine under government order or health care advisor advice
5. Employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions
6. Employee 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

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Emergency Paid Sick Leave Entitlement

- Full-time employee
 - 80 hours of paid sick leave
- Part-time employee
 - A number of hours equal to the average number of hours such employee works over a two-week period
- Varying schedule employee
 - Based on average number of hours such employee was scheduled to work per day over the preceding 6 months
 - If not employed during that 6-month period, use reasonable expectation of scheduled hours at time of hire

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Emergency Paid Sick Leave Compensation Amount

- Leave for Employee's own COVID-19 qualifying reason (#1-3):
 - Paid at the employee's regular rate of pay (if regular rate is below applicable minimum wage, then use minimum wage rate)
 - Cap: \$511 per day and \$5,110 in the aggregate
- Leave to care for family member's COVID-19 qualifying reason (#4-6):
 - Paid at 2/3 of employee's regular rate of pay (if regular rate is below applicable minimum wage, then use minimum wage rate)
 - Cap: \$200 per day and \$2,000 in the aggregate

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Additional Important Provisions

- Notice
 - Employer must post notice in conspicuous places where notices are customarily posted (DOL to provide model notice)
 - After the first sick day, employer may require an employee to follow reasonable notice procedures in order to receive paid sick leave
- Prohibitions
 - Cannot require employee to use other paid leave first
 - Cannot require employee to find a replacement employee
 - Cannot discharge, discipline, or discriminate against an employee who takes paid leave (or engages in related protected activity)
- Enforcement consistent with FLSA

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Emergency FMLA Expansion Act

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“Covered Employer”

- Only applies to private employers with **fewer than 500 employees** and certain public employers
- Are employees at subsidiary/related entities included?
 - At this time 500 employee threshold definition is uncertain (pending published regulations)
 - May apply the following:
 - FMLA “integrated employer” test (29 C.F.R. § 825.104(c)(2))
 - 4 Factors: common management; interrelation between operations; centralized control of labor relations; degree of common ownership/financial control
 - **Caution:** consider potential adverse legal implications of claiming that separate entities are an integrated employer

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“Covered Employer”

- Healthcare provider or emergency responder can elect to exclude employees from these provisions
- Potential exemption of businesses with fewer than 50 employees when the provision would **jeopardize the viability of the business as a going concern**
- U.S. Department of Labor to issue regulations on these exemptions

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“Eligible Employee”

- Only eligibility requirement is that employee must have been employed **for at least 30 calendar days**
- Traditional FMLA eligibility requirements are not applicable to added sections (but still apply to other FMLA leaves)
 - Employed for 12 months;
 - Worked for at least 1,250 hours in preceding 12 months; and
 - 50 employees within a 75-mile radius of worksite.

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- Employee is unable to work (or telework) due to a need to care for the employee’s son or daughter under 18 years of age if the child’s elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a public health emergency
- “Public health emergency” is defined as an emergency with respect to COVID-19 declared by a federal, state, or local authority
- **Note:** Employee does not get an additional 12-week FMLA entitlement, simply adds an additional reason for leave

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FMLA Entitlements for Childcare Provision

- 10 workdays of leave unpaid
- Subsequent absences for this reason must be paid at 2/3 the employee’s regular rate of pay
 - A cap of \$200 a day and \$10,000 in aggregate per employee.
 - If the first 10 days are unpaid, an employee may elect to substitute any accrued vacation leave, personal leave, or medical/sick leave for the unpaid leave

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Notice/Job Protection

Notice

- Employee must provide the employer with "such notice of leave as is practicable"

Job Protection

- Normal FMLA rules apply (reinstatement to same or equivalent position)
- Exception for employers with fewer than 25 employees if the employee's position no longer exists due to economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave
 - Must make reasonable efforts to restore employee to the same/equivalent position
 - If reasonable efforts fail, must make efforts to contact and reinstate employee if an equivalent position becomes available within one year

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Who is Paying for This?

- Employers "reimbursed" through payroll tax credits*
- IRS issued initial guidance on Friday (IR-2020-57)
 - Employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS
 - The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees
 - If there are not sufficient payroll taxes to cover the cost of qualifying sick and child care leave paid, employers will be able to file a request for an accelerated payment from the IRS

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Implementing Pay Changes, Furloughs, and Reductions in Force

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Time for Drastic Measures?

Workforce Options

- Reduce wages/salaries
- Reduce hours of work
- Furloughs
 - A/K/A: Temporary layoff, temporary leave, inactive status, "on reserve"
- Terminations
 - A/K/A: Reductions in force or "RIFs", layoffs

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Workforce Options

How Do We Decide What to Do?

- Strategic Plan
- Cash reserves, cash flow, and other operational issues
- Industry factors and outlook
- What kind of message do we want to send employees?
- Legal Factors*
- Government Directives*

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Reduction of Hours and Pay

What Do We Need to Consider?

- FLSA + State Wage-and-Hour Laws
 - Non-Exempt Employees
 - Exempt Employees
- Unemployment Benefits
- Benefit Plans and Policies*
- WARN Notices*

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Furloughs and RIFs

Benefit Plans and Policies

- Don't make assumptions regarding coverage under plans
- Don't promise continued benefits to employees who no longer meet eligibility requirements of benefit plans
- Need to carefully review terms of benefits plans, PTO policies, other employment policies, and any employment contracts to determine impact of furloughs or RIFs

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Furloughs and RIFs

Benefit Plans and Policies

- Reduction in hours or non-active work status "might" trigger loss of coverage and notice requirements under benefit plans
- Group health plans: continuation coverage and COBRA notices may be required
- Severance, accrued PTO, and other benefits may be due at separation*

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Furloughs and RIFs

Federal WARN Act

- "Employer" coverage: any business enterprise that employs 100 or more employees, excluding "part-time employees" OR 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime hours)
- Notice requirements: must issue notices with specific content to employees and various government agencies if employee threshold is triggered by RIF or furlough
- Consequences: severe penalties, class actions

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Furloughs and RIFs

Federal WARN Act

- 60 days' advance notice required
- Exception: Unforeseeable Business Circumstances
 - Must still issue notices "as soon as practicable"

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Furloughs and RIFs

Federal WARN – Threshold for Notice Requirements

- "Plant closing" - the permanent or temporary shutdown of a **single site** of employment, or one or more facilities or operating units within a single site, if the shutdown results in an "employment loss" for **50 or more employees**
- "Mass layoff" means a reduction in force (not a full shut down) that results in an "employment loss" at a **single site** for:
 - **50 or more employees**, and 33 percent or more of the employees; OR
 - at least 500 employees

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Furloughs and RIFs

Federal WARN – Threshold for Notice Requirements

"Employment loss" of 50 or more employees at single site

- Include: terminations, OR reduction of hours by 50% or more
- Include: full-time employees
- Exclude: part-time employees
 - Less than 20 hours/week, OR less than 6 of last 12 months
- Exclude: temporary layoffs or furloughs (less than 6 months)
 - But MUST provide notice as soon as reasonably foreseeable that layoff will be extended beyond 6 months.

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Wage and Hour Issues

- Cannot make deductions from the salary of an exempt employee because did not have enough work for them in a work week.
- Can reduce an exempt employee's salary on an indefinite basis as long as the salary minimum of **\$684 per week** (equivalent to \$35,568 per year) is paid.
- Non-exempt employees who work remotely must be paid for all hours worked. Best Practice is to send a reminder and require accurate timekeeping.

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Health Insurance and COBRA

- If taking traditional or expanded FMLA leave, the employee continues to receive coverage and employer/employee pay the same amounts as before.
- If not FMLA leave, need to check your policy to determine if the leave, reduced hours or a layoff or furlough will affect coverage. If there is a loss of coverage, the employee (and covered spouse and dependents) are entitled to continue coverage under COBRA at their expense.
- Make sure required COBRA notices are timely sent.

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SOUTH DAKOTA

- Governor Noem March 23 Executive Order
- Reemployment Assistance
- SD City Closures
- SBA COVID-19 Economic Assistance for SD small businesses
- COVID-19 Information Resources

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Workplace Considerations in a COVID-19 World

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How much information may you request from an employee who says they're sick?

- ADA generally prohibits "disability-related" inquiries and medical examinations
- ADA contains an exception where there is a "direct threat of harm" to the health and safety of employee or coworkers
 - EEOC has determined that COVID-19 meets definition of a "direct threat"
- EEOC: Not a violation of the ADA to measure body temperatures
 - **Note:** some individuals with COVID-19 do not have a fever
- EEOC: Not a violation of the ADA to require a fit for duty release for an individual who has been away due to concerns of COVID-19

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What can you do if an employee is showing symptoms of COVID-19?

- May ask if they are experiencing influenza-like symptoms, such as fever, chills, cough, or sore throat
- May send employee home if they display influenza-like symptoms
- May encourage employees to telework
- May require infection control practices such as regular hand washing, coughing and sneezing etiquette, etc.
- May require employees to wear personal protective equipment
- Must maintain medical information as confidential
- **Cannot** ask employees to disclose medical condition which CDC says makes the employee vulnerable to COVID-19

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What if an employee or customer/client is confirmed to have COVID-19 after being in your workplace?

- CDC recommends that employees who have been diagnosed with COVID-19 or who have had close contact with individual confirmed to have COVID-19 should notify Human Resources and remain out of the workplace for 14 days
- Employees who live with an individual who is confirmed positive for COVID-19 are considered within the definition of "close contacts"

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What if an employee or customer/client is confirmed to have COVID-19 after being in your workplace?

- Consider communicating with state/local health department ASAP
- Follow directions regarding disinfection
- Work with CDC and state/local health department to identify potential contacts
- Focus on communication but keep in mind confidentiality issues under ADA and FMLA for employees (i.e., you cannot reveal identity of infected employee, unless that employee gives permission)
- Manage public relations issues

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What steps should employers take in order to continue operating in the event of a community outbreak?

- Prepare for increased absences
- Consider available staffing options including remote work, staggered shifts, etc.
- Plan to minimize exposure between employees and the public
- Plan employee communications
- Plan for supply chain disruption if various areas experience widespread COVID-19 spread
- Check your force majeure clauses if you have ongoing contractual commitments

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MORE Q and A
YOUR QUESTIONS!

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Thank You!



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