

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (AND OTHER EMPLOYMENT-RELATED MATTERS RELATED TO COVID-19)



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March 25, 2020

LATEST "GUIDANCE"

- ➔ Joint Press Release – DOL/IRS/Treasury (3/20)
- ➔ DOL Press Release late 3/24
- ➔ DOL Documents (3/24)
 - ➔ Fact Sheet for Employees
 - ➔ Fact Sheet for Employers
 - ➔ Questions and Answers
- ➔ Expect poster today (3/25)
- ➔ Additional fact sheets and Q&As this week
- ➔ Regulations

WHAT DOES THE LAW DO?

- ➔ Expansion of FMLA – Public Health Emergency Leave
 - ➔ All private employers with fewer than 500 employees
 - ➔ Public agencies
 - ➔ All employees who have worked for 30 days are eligible (some exclusions permitted for health care and emergency responders)

WHAT DOES THE LAW DO?

- ➔ Public Health Emergency Leave (cont'd.)
 - ➔ Employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency with respect to COVID-19.
 - ➔ "Child care provider" means a provider who receives compensation for providing child care services on a regular basis
 - ➔ "School" means an elementary or secondary school.

WHAT DOES THE LAW DO?

- ➔ Public Health Emergency Leave (cont'd.)
 - ➔ 10 days unpaid
 - ➔ Remainder paid at 2/3 of regular rate, capped at \$200 per day/\$10,000 in aggregate
 - ➔ If variable work week, 6 month averaging (or reasonable expectation)
 - ➔ Notice required by employee "as soon as practicable" if leave is foreseeable

WHAT DOES THE LAW DO?

- ➔ Public Health Emergency Leave (cont'd.)
 - ➔ Small employers
 - ➔ Fewer than 50 employees - exempt if would jeopardize the viability of business as a going concern
 - ➔ Fewer than 25 – no obligation to restore if –
 - ➔ Position no longer exists due to economic conditions or other changes in operating conditions that affect employment caused by a public health crisis
 - ➔ Make reasonable efforts to restore to an equivalent position; and
 - ➔ If reasonable efforts fail, make reasonable efforts for 1 year (beginning either date of need due to the public health emergency end or a date 12 weeks after employee's leave commenced, whichever is earlier) to contact employee if equivalent position becomes available

WHAT DOES THE LAW DO?

➔ Emergency Paid Sick Leave

- ➔ Private employers with fewer than 500 employees, almost all public employers
 - ➔ DOL can exclude certain health care providers and emergency responders or exempt small businesses with fewer than 50 employees when the imposition of the requirement would jeopardize the viability of the business as an ongoing concern. **NO APPLICATION** to DOL
- ➔ All employees (no service requirement), for immediate use
 - ➔ Employers can exempt health care providers or emergency responders

WHAT DOES THE LAW DO?

➔ Emergency Paid Sick Leave (cont'd)

➔ Employee's Circumstances

- ➔ An absence because the employee is experiencing the symptoms of COVID-19 and seeking a medical diagnosis.
- ➔ An absence because the employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19
 - ➔ Shelter in Place/Stay at Home??
- ➔ An absence because a health care provider has advised the employee to self-quarantine due to concerns related to COVID-19

WHAT DOES THE LAW DO?

- ➔ Emergency Paid Sick Leave (cont'd)
 - ➔ Caregiver/Other circumstances
 - ➔ An absence for the purpose of caring for an individual who is subject to a Federal, State or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
 - ➔ An absence for the purpose of caring for a child if the child's school or place of care has been closed or is unavailable due to COVID-19 precautions.
 - ➔ An absence because the employee is experiencing a "substantially similar condition" – determined by Health and Human Services

WHAT DOES THE LAW DO?

- ➔ Emergency Paid Sick Leave (cont'd)
 - ➔ Reasonable notice requirements after 1st day
 - ➔ Documentation?
 - ➔ How much pay?
 - ➔ Employee's own circumstances - what the employee would otherwise be paid, capped at \$511 per day, \$5,110 in the aggregate
 - ➔ Caregiver/Other - 2/3 of pay, capped at \$200 per day and \$2,000 in the aggregate
 - ➔ 80 hours for full-time; or, if part-time, the amount the employee would work, on average, in a two week period
 - ➔ Variable hours calculation same as FMLA amendment

WHAT DOES THE LAW DO?

- ➔ Emergency Paid Sick Leave (cont'd)
 - ➔ Cannot require that employees find a replacement
 - ➔ Employers cannot force employee to use other paid time off first
 - ➔ Employees may chose to use emergency paid sick leave first
 - ➔ No carry over; no pay upon separation
 - ➔ Model notice from DOL
 - ➔ No interference, discrimination or retaliation – FLSA violation

WHAT DOES THE LAW DO?

➔ Tax Credits

- ➔ Private employers will be allowed a credit against the employer portion of social security taxes/Medicare tax paid on wages
- ➔ Equal to what paid under the FMLA amendment or the Emergency Paid Sick Leave Act; also credit for certain qualified health plan expenses.
- ➔ Under Emergency Paid Sick Leave Act - capped at \$511 per day for full pay; \$200 per day for 2/3 pay (also limited to 10 more days than what took credit for in prior quarters - unclear)
- ➔ Credit under the amendments to the FMLA, cannot exceed \$200 per day with an aggregate cap of \$10,000 in a calendar quarter
- ➔ Credit cannot exceed the applicable payroll taxes; excess treated as overpayment subject to refund
- ➔ Income to employer
- ➔ Will need regulations/guidelines

➔ WHEN IS IT EFFECTIVE?

- ➔ No later than 15 days after enactment
- ➔ DOL says April 1
- ➔ Not retroactive
- ➔ Through December 31, 2020

➔ WHAT SHOULD I BE DOING NOW?

- ➔ Policies/Communications
- ➔ Pay codes
- ➔ Look at state laws
- ➔ Consider impact on business
- ➔ Talk to counsel

OPTIONS FOR AVOIDING SPREAD OF VIRUS

- ➔ Hygiene Precautions/Cleaning
- ➔ Social Distancing/Shift Staggering
- ➔ Remote work
- ➔ Certifications
- ➔ Taking Temperature
 - ➔ Creating medical record
 - ➔ Confidentiality
 - ➔ Accuracy
 - ➔ Middle-of-the-road readings

WHAT IF SOMEONE IN YOUR WORKFORCE HAS OR MIGHT HAVE THE CORONAVIRUS

- ➔ Ask about symptoms/diagnosis
 - ➔ Medical inquiry - must be job related and consistent with business necessity – ADA (EEOC Guidelines)
 - ➔ Confidentiality
 - ➔ What about household member (GINA) or other exposure?
- ➔ Send home employees (OSHA General Duties Clause)
- ➔ Sanitize
- ➔ Notification of rest of (or part of) workforce?
 - ➔ Safety
 - ➔ Privacy and Confidentiality
 - ➔ Rely upon local health department, if possible

WILL EMPLOYEES BE PAID?

- ➔ Requirements to pay under FLSA or state law (non-exempt vs. exempt)
- ➔ New laws
- ➔ Already existing policies/short term disability
- ➔ State paid sick or family leave laws
- ➔ Unemployment – FAQ from IN DWD/EO 20-05
- ➔ Worker's Compensation?

Tax Free Employee Assistance Options

- ➔ Charity Sponsored Employee Relief Funds
 - ➔ Charitable foundations under Section 501(c)(3)
 - ➔ If "public charity" (funded through employee contributions), and granted for financial or personal hardship, tax free to employees, not reported by employer – employee must show financial need
 - ➔ If "private foundation," because of national emergency declaration, can operate relief funds without approval from IRS

Tax Free Employee Assistance Options

- ➔ Qualified Disaster Relief Payments
 - ➔ Made directly to employees impacted by the virus.
 - ➔ Reimburse or pay for reasonable and necessary personal, family, living or funeral expenses incurred
 - ➔ Cannot be made if otherwise covered by insurance.
 - ➔ Ordinary business expenses for business, not gross income of the employees.
- ➔ MORE on [https://www.icemiller.com/landing-pages/coronavirus-\(covid-19\)-resource-center/](https://www.icemiller.com/landing-pages/coronavirus-(covid-19)-resource-center/)

REDUCTION OF HOURS/TEMPORARY FURLOUGHS

- ➔ Salaried, Exempt Employees
 - ➔ Can prospectively reduce predetermined salary during a business or economic slowdown
 - ➔ Change must be bona fide; not to evade the salary basis
 - ➔ If not related to the quantity or quality of work performed, will not cause loss of exemption, as long as required salary level met (\$684)
 - ➔ Deductions made by day-to-day or week- to-week are impermissible and could cause a loss of exempt status
- ➔ LOOK AT STATE LAW ALSO

WHAT IF WE NEED TO LAYOFF/CLOSE?

- ➔ WARN Act
 - ➔ Employers with 100 or more employees
 - ➔ 60-days' notice in advance of either a “plant closing” or “mass layoff”
 - ➔ At least 50 employees (excluding part-time) must be affected at a single site
 - ➔ Must be an “employment loss”

WHAT IF WE NEED TO LAYOFF/CLOSE?

- ➔ WARN Act (cont'd.)
 - ➔ “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 of employment
 - ➔ “Mass layoff” = reduction in force which is not the result of a plant closing and results in an employment loss at the single site of at least 33 % of employees (excluding any part-time employees); and at least 50 employees (excluding any part-time employees); or at least 500 employees (excluding any part-time employees).

WHAT IF WE NEED TO LAYOFF/CLOSE?

- ➔ WARN Act (cont'd)
 - ➔ “Employment loss”
 - ➔ Termination, other than a discharge for cause, voluntary departure, or retirement
 - ➔ A layoff exceeding 6 months
 - ➔ Reduction in hours of work of more than 50 percent during each month of any 6-month period

WHAT IF WE NEED TO LAYOFF/CLOSE?

- ➔ WARN Act (cont'd)
 - ➔ Exception to 60 day notice
 - ➔ “Unforeseeable business circumstances”
 - ➔ Must be the result of “sudden, dramatic and unexpected action or conditions outside of the employer’s control”
 - ➔ Focus on whether reasonably foreseeable
 - ➔ Important to act as a reasonable employer would
 - ➔ Must still provide notice as soon as it is practicable, and must provide a statement of the reason for reducing the notice period
 - ➔ State Mini-WARN laws

WHAT IF WE NEED TO LAYOFF/CLOSE?

- ➔ Bargaining with union
- ➔ "Final" pay?
- ➔ Impact of paid sick leave laws

ICE MILLER's COVID-19 Resource Center and Task Force

- ➔ COVID-19 Resource Page

- ➔ [https://www.icemiller.com/landing-pages/coronavirus-\(covid-19\)-resource-center/](https://www.icemiller.com/landing-pages/coronavirus-(covid-19)-resource-center/)

- ➔ Task Force

- ➔ Primary Contacts

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THANK YOU

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