



# COVID-19

WHAT EMPLOYERS NEED TO KNOW

# QUARANTINED EMPLOYEES

- You can require an employee to self-quarantine for fourteen (14) days if:
  - 1) they have traveled,
  - 2) been in contact with someone who has tested positive,
  - 3) tested positive themselves, or
  - 4) show signs of the illness.
- Under the ADA, employers are allowed to exclude employees from work if they believe they are a “direct threat” to employees. This applies to any illness, including COVID-19
- Under OSHA, employers have a duty to mitigate the spread of an infectious disease. This allows employers to prohibit employees from coming to work if they show symptoms.

# INFECTED EMPLOYEES

- If you have an employee who informs you that they have tested positive for COVID-19 you need to:
  - 1) Tell them to quarantine for fourteen (14) days;
  - 2) Ask them who they have had contact with (within six feet for more than 10 minutes);
  - 3) Inform those employees who have been contacted, quarantine them for fourteen (14) days;
  - 4) Inform the general group of employees that an employee has tested positive for COVID-19 (do not give the name) and that the people affected have been contacted.

# INFECTED EMPLOYEES

- You can require an employee to provide a negative COVID-19 test or a fitness for duty from a healthcare provider upon return to work.
- While hospitals and emergency rooms have been overloaded, several health centers have been forced to close or lay off due to less traffic. Therefore, they can receive a doctor's note from their primary care provider stating they are clear to return to work.
- Consider the availability of testing in your respective state – as long as the employee has been quarantined for 14 days, the virus has left them.

# TESTING EMPLOYEES

- Since this has been considered a pandemic, employers are permitted under the EEOC to take employee's temperature prior to work.
  - They can send people home who have a fever that qualifies as a symptom under COVID-19 or those who refuse to test.
  - This is best for those who work in healthcare settings.

# DISCRIMINATION ISSUES

- Employers CANNOT unilaterally tell all employees over a certain age or all disabled employees to self-quarantine. This would be impermissible age and disability discrimination. You cannot limit their work or reduce their hours.
- However, an employee who is at risk can request an accommodation to self-quarantine. You can follow the normal ADA procedure for this 1) engage in the interactive process and receive documentation from the healthcare provider, 2) determine a reasonable accommodation, and 3) determine if there is undue hardship.
- You do not have to go through the entire process to provide the accommodation. You can allow it once the employee has requested it.

# CARING FOR A FAMILY MEMBER OR CHILD OUT OF SCHOOL

- Coronavirus is not considered a “serious health condition” under the FMLA. Therefore, this leave would not be available to employees.
- The CDC has requested employers to be liberal with their attendance policies. If the employee can work from home then this should be an option. If they cannot, it should be an excused absence.
- Based on the new law going into effect in a couple of weeks, employees will be entitled to paid leave for these reasons under the Emergency Family Medical Leave and Emergency Paid Sick Leave. We will go into detail later in the presentation about this legislation.

# PAYMENT

- Under the FLSA, you are not required to pay employees for hours they did not work.
  - Hourly, non-exempt employees do not need to be paid for hours they did not work.
  - Salary, exempt employees need to be paid their full week's pay for any week in which they worked (could be only one hour). Employers can deduct from their PTO/Sick time accrual to cover absences. Salary employees do not need to be paid for any weeks they do not work.
- Short-term Disability – most insurance companies will not cover Coronavirus because it is not considered a disability.
- Unemployment – unemployment is only available if the company closes or reduces an employee's hours, not if the employee has to be quarantined. Employees need to be available to work in order to be eligible.
- PTO/Sick – you can allow employees to use their PTO and earned sick time to cover them while they are out for quarantine.

# EARNED SICK TIME

- Since a state of emergency has been declared in Massachusetts, employers can request documentation the first day of using earned sick time.
- Employees can use earned sick time if they have tested positive for COVID-19 or are caring for someone who has tested positive for COVID-19.
- Again, per the CDC, it is better to be forthcoming and generous with your sick time policy and absences.

# NEW FEDERAL LEAVE REQUIREMENTS

- Effective April 2, 2020:
  - Emergency Paid Sick Leave and
  - Emergency Family and Medical Leave

# EMERGENCY PAID SICK LEAVE

- All public employers and any private employers with less than 500 employees.
  - Employers under 50 can be exempted if they can show providing leave would jeopardize the viability of their business.
- Eligible to all employees currently working (no days requirement) that cannot work or work remotely.
  - Health care or emergency responder employees can be excluded.
- Two weeks paid leave, 80 hours or whatever the average hours are for that employee (i.e., full time is 75 hours or part time employee 60 hours). They have not defined a measure period but the best method would be rolling 12 months from the date of leave.

# EMERGENCY PAID SICK LEAVE

- Qualifying Reasons:
  - The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.;
  - To self-isolate as ordered by a healthcare provider because the employee is diagnosed with COVID-19 or to concerns related to COVID-19;
  - To obtain a medical diagnosis or care if the employee is experiencing the symptoms of COVID-19;
  - To care for the employee's family member who is subject to a federal, state or local quarantine or isolation order related to COVID-19 or has been advised to self-quarantine by a healthcare provider for concerns related to COVID-19;
  - The 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; and
  - To care for the child of such employee if the school or childcare has been closed due to COVID-19, or the childcare provider of such son or daughter is unavailable.

# EMERGENCY PAID SICK LEAVE

- For the employees own illness – regular rate of pay
  - No more than \$511 per day (\$2,555 per week) or \$5,110 in total.
- For any other reason – 2/3 pay
  - No more than \$200 per day (\$1,000 per week) or \$2,000 in total

# EMERGENCY PAID SICK LEAVE

- Employee may chose to use this leave in place of an existing employer leave or policy.
  - This means the employee does not have to use their own PTO or sick time given by the employer.
- Does not diminish the rights to use the existing state or company sick leave policy.
  - Can run concurrently with Emergency Family and Medical Leave.
- No retaliation, employee needs to be given the same or equitable position prior to leave.
- Can require documentation after the first day of leave.
- No notice needs to be given to the employer to use this leave.
- Entitled to health insurance benefits.

# EMERGENCY FAMILY AND MEDICAL LEAVE

- Applies to employees who have worked for 30 days.
- Applies to employers with less than 500 employees.
  - Employers under 50 can be exempted if they can show providing leave would jeopardize the viability of their business.
- Employees can take up to 12 weeks paid leave to care for a child (under 18 years of age) of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable due to a coronavirus.
  - Only if they are unable to work their shift or work remotely. If employees can do either, then they do not qualify for this benefit.

# EMERGENCY FAMILY AND MEDICAL LEAVE

- First 10 days are unpaid.
  - This can run concurrently with Emergency Paid Leave (two weeks paid leave).
  - Employees can use PTO and sick but cannot be required to do so.
- Rest of the leave is paid at 2/3 of the employee's weekly salary.
  - Capped at \$200 per day (\$1,000 per week) and \$10,000 total.
- Can use PTO or state earned sick time to supplement the additional 1/3.
- Notice: As soon as practicable.
- No retaliation, need to restore the employee to the same or equitable job prior to the leave. Similar to FMLA.
- Entitled to health insurance benefits.

# REIMBURSEMENT

- Unfortunately not a lot of information has been provided on this topic, more will likely be given once the regulations are drafted.
- Employers will receive a 100% tax credit for payment of leave under the Emergency Family and Medical Leave and Emergency Paid Sick Leave through the Employer Social Security Contribution Tax (section 311(a) of IRC) or the Excise Tax (3221(a) of IRC). If the employer has over paid they will receive reimbursement for their taxes.
- The Treasury has stated they would advance funds to businesses so they could meet the sick leave requirements for those businesses who do not have enough tax to draw from.
- Unemployment: The government will remove the timing restriction to give access to these funds and give grants to states to supplement their trusts.

# REDUCTION IN FORCE

- Reducing Hours:
  - If reduced in hours or pay more than 30%, employees are eligible for unemployment
  - If reduced below 30 hours per week they are eligible for COBRA.
  - Consider attempting to maintain benefits if feasible.
- Furlough:
  - Temporary lay off with the assumption that employees can return once work picks up.
  - Need to pay them their full pay on their last day but do not need to pay them accrued PTO/vacation time.
  - Eligible for both unemployment and COBRA.
  - Under the ACA, depending on the underlying plan documents – you may still need to keep them on plan until their average hours are below 30 per week.
- Lay off:
  - Actual termination with no return date.
  - Need to pay them their full pay on their last day and any accrued PTO/vacation time.
  - Need to send them both unemployment notice and COBRA notice.
  - If you do have a severance agreement, for employees over 40 you need to provide a chart of employees laid off with their ages and insert the Age discrimination language in their severance agreement.

# REDUCTION IN FORCE

- Remember: there is flexibility and reduction can be done in multiple phases.
- You can select certain departments for hour reduction, furlough, and lay off.
- You can do several phases of reduction in force as well.
- Furlough is likely the best option because it maintains the workforce and does not have a budget impact on paying out sick and vacation time.
- WARN is not needed if the reduction was caused by COVID-19

# FAQS

- What does the ban on gatherings more than 25 people apply to? (MA specific)
  - This only applies to gatherings for entertainment, faith based gatherings, etc. It does not apply to businesses. The only businesses that are closed down are restaurants and bars.
- Do we need to post a notice for the new FFCRA?
  - Yes, the government does require employers to post a notice about this, they have not yet drafted the notice. Foley & Foley has a compliance kit with FFCRA for a flat fee which includes a notice to employees. Feel free to reach out.
- Should we be closing?
  - No, you do not need to close. Unless you have an employee who has contracted COVID-19 and has had prolonged contact with other employees, there is no reason to close. However, you will want to assess incoming revenue and projected costs. You can go on a temporary furlough until work picks up again.
- How should we handle our own emergency program along with the various state initiatives?
  - This is certainly complicated because the advice does change frequently. It would be best to continually review the CDC and state DPH websites for any updates. Again, Foley & Foley has a compliance toolkit with the emergency program just for COVID-19 for a flat fee.

# FAQS

- Does the 90 day deferral to file taxes apply to all businesses?
  - This applies to C-Corporations. Partnerships and S-Corporations do not file directly as a business, when those profits are distributed to the managers, then they would be eligible for their own personal taxes.
- What is the appropriate distance for social distancing?
  - Six feet has been the standard.
- How do you handle clients who appear sick and don't want to put employees at risk?
  - This is up to your discretion. Legally, you have the ability to limit or refuse service to anyone – especially those who you believe to have an infectious disease. If you are truly concerned you can let clients know by signage that if they are feeling ill to please refrain from entering the facility.
- How do we handle insurance?
  - For employees who are taking extended leave under the FFCRA they are still entitled to stay on benefits during their entire leave and need to cover their portion of premiums. For those employees who are furloughed or laid off, they need to be given COBRA notice and are likely eligible for MassHealth.

# FAQS

- If an employee takes leave under the FFCRA, can they still qualify for unemployment?
  - No, they need to be available to work in order to qualify. If they are out on this type of leave, they are not available to work.
- Can I reduce a salaried person's hours and pay?
  - Yes, if there was a need for hours reduction, you could have the employee come in four days a week and reduce their salary by 20%. However, this would need to be for the weeks going forward. For any hours worked in the weeks prior to the reduction they need to be paid their full week's pay.
  - You should do so with as much notice as possible.
- If we offer a different payment of leave during a furlough would they still be eligible for the benefit?
  - Likely, yes. If the employee needed the leave for the qualifying reasons, they would be eligible for the FFCRA in lieu of a company program.

# COVID-19 RESPONSE TOOLKIT

- A comprehensive outline for creating a dynamic and responsive Sick Leave Strategy for your organization;
- A sample Notice from leadership that sets forth your organization's commitment to stop the spread of infectious disease in the workplace that can be modified to meet your specific needs;
- A written COVID-19 Plan outlining what employees can expect and company procedures;
- Guidance on recommendations to slow the spread of disease and maintain workflow productivity;
- Recommended posters and infographics to communicate good hygiene and other risks in the workplace;
- A sample medical certification proving an employee's Fitness for Duty from their healthcare provider;
- Frequently Asked Questions (FAQs); and
- Remote Working Survey on evaluating remote capabilities for job positions and Remote Working Expectations Agreement.

# FFCRA COMPLIANCE PACKAGE

- A written Emergency Family Leave Policy;
- A written Paid Sick Leave Policy;
- A sample Notice from leadership that includes a notification on the entitlement to these new leaves;  
and
- Paid Sick Leave Act Poster for compliance with posting requirements.

# Q&A

The background is a dark blue gradient with a subtle pattern of white stars and faint technical diagrams. On the right side, there are several circular diagrams resembling gauges or dials with numerical scales (e.g., 100, 110, 120, 130, 140, 150, 160, 170, 180, 190, 200, 210) and arrows. There are also dashed lines and other geometric shapes scattered across the scene.