



COVID-19: UPDATES FOR EMPLOYERS

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DISCLAIMER

- This is strictly for informational purposes. The information is intended to be used solely by the subscribers to the Webinar.
- Any answered questions are for hypothetical purposes only. There is no attorney-client privilege information or specific advice.
- If you have specific questions and are a part of Foley & Foley's On-Call Triage Service through Baystate Benefits, then please feel free to reach out to me at wendy@foleylawpractice.com.

FFCRA – DOL UPDATES

- Employers can permit employees to supplement their 2/3 pay with their existing PTO or Sick Time bank but are not required to do so. Employers cannot force the use of PTO or Sick Time to supplement pay.
- Emergency Family and Medical Leave – 12 weeks includes the FMLA allotment. This means that if an employee has already exhausted their FMLA 12 weeks, they are NOT entitled to additional leave. The 12 weeks are apart of FMLA and not in addition to.
- Health Care Provider Exemption – Incredibly broad, applies to ANYONE who works at a health care facility.

FFCRA – DOL UPDATES

- New Regulations:
 - Son/Daughter is defined the same as under the FMLA, meaning if they are over 18 and cannot care for themselves then they qualify for the leave.
 - Quarantine/Isolation orders include orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. This is called the “but for” test. But for the stay at home order, the employee would have work.
 - Furloughed employees do not count towards the 500 employee count.

FFCRA – IMPLEMENTATION

- Get the necessary documentation.
- Create a notice form.
- Track and document the leave for reimbursement.
- You can require a doctor's note and require it to be specific to COVID-19.
- Similar to the FMLA, if you are aware of an employee taking leave for a qualifying reason, you must give them notice of EPSL or EFMLA
- What the IRS needs:
 - Name of the employee;
 - Dates of leave;
 - Reason for taking the leave; and
 - Statement the position cannot work remotely.
- Self-quarantine by a health care provider: Health Care Provider's name.
- Quarantine or Isolation Order: name of Government entity and date of order.
- Care for a child who's school or day care has been closed: name of school and statement from employee that no one else can take care of the child.

FFCRA -IMPLEMENTATION

- What to do when leave is exhausted?
 - FMLA – does it rise to the level of a serious health condition? (not for EFMLA).
 - ADA – Is it a disability?
 - Engage in the interactive process;
 - Determine a reasonable accommodation;
 - Is there undue hardship?
 - Unpaid leave
 - Furlough/Layoff
- **They will likely be eligible for unemployment
- Should we allow intermittent leave?
 - Can the position be worked remotely?
 - How crucial is the position?
 - Can the duties be performed by other employees?
 - How well can you trust your employee base?

FFCRA - IMPLEMENTATION

- If an employee is taking voluntary leave (FMLA, ADA, Paid State Leave) and they qualify for one of the reasons under the EPSL or EFMLA, they can stop their previous leave and use the leaves under the FFCRA.
 - They have to qualify for the leave under the stated reasons
 - If it is a mandatory leave (closure, furlough) then they are not entitled to the leave.
- If you take an employee off of furlough and they state they cannot return due to an EPSL or EFMLA reason, you need to offer them the leave.

CARES ACT - UNEMPLOYMENT

- **Pandemic Unemployment Assistance (PUA)**
 - Unemployment provisions that expand the eligibility for unemployment for COVID-19 reason. This is the normal Weekly Benefit Amount as calculated by the state.
 - Available for 39 weeks
- **Federal Pandemic Unemployment Compensation (FPUC)**
 - The additional \$600 every week until 7/31/20

PUA – PANDEMIC UNEMPLOYMENT ASSISTANCE

- The intent of PUA is to expand unemployment eligibility to two groups – those with COVID-19 related issues and those who have already exhausted their unemployment benefits.
- Expanded to self-employed, partially employed, or those lacking a sufficient work history.
- Employees who are eligible for unemployment under PUA are eligible for a WBA under the states determination for 39 weeks.

PUA – EXPANDED COVID-19 REASONS

- The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- A member of the individual's household has been diagnosed with COVID-19;
- The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;
- A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;

PUA – EXPANDED COVID-19 REASONS

- The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
- The individual has to quit his or her job as a direct result of COVID-19; or
- The individual's place of employment is closed as a direct result of the COVID-19 public health emergency

PUA – ELIGIBILITY WITH SICK LEAVE

- Generally, employees cannot receive sick leave AND unemployment. However, the DOL states that if an employee is not getting their full pay through sick leave (i.e. 2/3 rate) they may still be eligible for PUA depending on their salary.
- Similar reasons to Emergency Paid Sick Leave and Emergency Family and Medical Leave – generally would be after the employee exhausted either or both and still could not work.

UNEMPLOYMENT – FEDERAL PANDEMIC UNEMPLOYMENT COMPENSATION

- FPUC available to four groups of people:
 - Those who are already collecting
 - Those who are eligible for regular unemployment
 - Those who are not normally eligible for unemployment but meet the requirements under PUA for COVID-19 issues.
 - Those who have exhausted their state unemployment benefits but meet the requirements under PUA for COVID-19 issues.

PUA AND FPUC

- 100% Federally funded for both.
- States must enter an agreement with the Secretary of Labor and must follow their regulations and guidance.
- If you receive at least \$1 of unemployment through the other programs, you are eligible for the \$600 under the FPUC.
- Potentially self-insured employers would not need to cover these additional costs – but still unsure.
- Still does not state a limitation on earning same or more than regular wages.
- You can find the guidance here: https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf and here for the FPUC: https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20.pdf.
- New York state created a helpful chart found here: <https://labor.ny.gov/ui/cares-act.shtm>, generally applicable to any state that accepts the funding. Still look to your state websites for updated information.

PPP LOAN – PAYROLL COSTS

- Same for both application and forgiveness
- They include:
 - Net profits on 1040 Schedule C (box 31) capped at \$100k
 - Salaries, wages, commissions, tips (to the best recorded ability) capped at \$100k
 - Vacation, earned time off, paid sick/medical/parental/family leave
 - Severance
 - Benefits (not owners) – health insurance, retirement
 - State and local taxes

PPP LOAN – PAYROLL COSTS

- DO NOT INCLUDE:
 - Non-U.S. residents
 - Salary in excess of \$100k
 - Federal taxes FICA – both employee and employer portion
 - Leave taken under the FFCRA – EPSL and EFMLA
 - You can still offer this leave and you still qualify for forgiveness, the leave just cannot be paid out by the PPP loan money.

PPP LOAN - FORGIVENESS

- You will be forgiven in full if you:
 - 1) Maintain the same head count
 - 2) Maintain compensation above 25% reduction
 - 3) Use the funds for 75% of payroll costs
 - 4) Use the remaining 25% for mortgage interest, rent, utilities, or interest on a debt owed.
 - These costs are the qualifying deductible costs on your 1040 Schedule C

PPP LOAN - FORGIVENESS

- Forgiveness can be reduced two ways – reduction in head count and reduction in compensation.
- If you have a reduction in head count:
 - $(\text{March-June 2020 monthly average FTE headcount} / \text{March - June 2019 monthly average FTE head count}) - 1 =$ Forgiveness reduction.
 - $250 \text{ monthly average} / 300 \text{ monthly average} = .833 - 1 = 16\%$ So your forgiveness for the loan would be reduced by 16%
 - Bring employees back as quickly as possible.
- If you have a reduction in compensation: This is compared to the first quarter of 2020 to the 8 week loan period, if the reduction is above 25%, forgiveness will be reduced by that amount.

PPP LOAN – DOCUMENTS FOR FORGIVENESS

- Form 941
- State quarterly wage unemployment insurance tax reporting or payroll processing forms
- Payment on business rent, mortgage interest, and utility payments.
- Schedule 1040 C

PPP LOAN SUGGESTIONS

- Make sure you have an accurate headcount of employees from March – June 2019
- Document everything you pay with the PPP loan
- Set up a separate bank account for just the PPP loan money to show the appropriate payments were made.
- Bring people back on payroll as soon as you can to get your average monthly headcount up.
- This is based on the CAREs Act and the two regulations issued by the SBA – still more information to come.

PPP LOANS – SBA PUBLIC COMMENT

- Regulations are still open for comment which will be closed by May 15, 2020
- Submit your comments to www.regulations.gov and use SBA-2020-0015 as the regulation number.

BRINGING EMPLOYEES BACK

- Reduction in Hours – provide a letter to the employee, informing them that their hours will be increased at X amount. As much notice as possible. If they are eligible for benefits again, let them know. Clear communication is key with this group especially.
- Furloughs – send a recall letter informing them of their start date, they will be restored to their same position, benefits, tenure, and accruals. Make sure you can really bring back this group before you send out the notice.
- Lay offs – these are actual rehires and you would process their paperwork according to your policy. They would start as brand new employees. Phone call would be the best form of contact for this group.

CAUTION

Who gets rehired? Avoid claims of retaliation and discrimination upon rehire

AFTER A REDUCTION IN FORCE:

- When EMPLOYERS rehire everyone except a few people, questions will be raised.
- Employers need to consider this when THEY rehire.
 - CONSIDER CAREFULLY WHAT YOU TOLD PEOPLE WHEN THEY WERE LET GO.
 - CONSIDER THE CRITERIA USED TO DECIDE WHO WAS LAID OFF.
 - TRY TO BE CONSISTENT WITH THAT MESSAGE.

BEST REHIRING PRACTICES

- An employer is not legally obligated to recall laid off individuals.
- If an employer elects to recall, however, the employer must make thoughtful, defensible decisions about who to rehire and who not to rehire.
- If hiring “the best candidate for the job”, the employer should be able to prove it with objective evidence.
- Employers should document each rehire as if they will have to defend the decision in court, because they may have to.

BEST REHIRING PRACTICES

- One of the best defenses against a discrimination suit is accurate, well-documented evidence that the chosen criteria were objective, and that the employer applied the criteria consistently. Possible criteria include:
 - Experience
 - Seniority
 - Performance review sCORES
 - disciplinary history or lack thereof
 - Education, training, cross-training (helps with flexibility in the event of absences)
 - Performance on skills tests or other objective measures
 - Performance in rehire interviews

BRINGING EMPLOYEES BACK

- OSHA: We have already started to see complaint trickling in for the workplace not abiding by the CDC guidelines.
 - Clean your office according to the CDC guidelines – inform you cleaning company, set up a procedure for your employees to follow to clean their own workspace.
 - Require masks – unless the employee has a disability then provide a reasonable accommodation.
 - Take temperature of employees prior to coming into work – allowable until the pandemic is over, monitor this policy.
 - Move the work space so that employees are six feet a part where possible, if not, give additional PPE and hand cleaning resources.
 - Put up plexiglass for those who have multiple interactions with employees and customers.

BRINGING EMPLOYEES BACK

OSHA Issues Continued:

- Let employees continue to work remotely if possible.
- Keep meetings virtual.
- Any employee who: 1) shows symptoms of COVID-19; 2) has travelled out of state; 3) been in contact with someone who has tested positive; or 4) tested positive – exclude them from work for 14 days. Preclude clients/customers/vendors who show the symptoms.
- CDC is now recommending that the preferred option for health care workers to return to work is a negative COVID-19 test. You can require this, consider availability of testing in your area.

BRINGING EMPLOYEES BACK

- Refusal –
 - If you offer the same job to the employee and they refuse to return, they are essentially resigning from their position UNLESS they have a qualifying reason for leave under the FFCRA (or any other protected leave). Employees cannot refuse to come to work because they are worried.
- FFCRA –
 - If an employee has been on furlough and you want to bring them back to work, but they tell you they have to take care of their child due to school closure from COVID-19 – you then need to offer them leave.
 - Because you are bringing them back, they are technically no longer a furloughed employee.
 - Once you are on notice of the reason for the leave, you need to let them know it is available to them.

BRINGING EMPLOYEES BACK

- Unemployment – when offering a job to return:
 - If it's the same position – they cannot collect.
 - If it's the same position and they cannot return due to a FFCRA qualified reason – they need to be offered leave first, then once the leave is exhausted, they would collect.
 - If it's the same position and they cannot return to work for an additional reason listed under the PUA – then they can collect unemployment.
 - If it is a different position – they might not have to accept and can still collect.

RELIABLE SOURCES

- Department of Labor's – this agency is in charge of promulgating and executing the rules under the FFCRA, if it comes from them, then it is the most accurate/up-to-date information.
- Internal Revenue Service – this agency is in charge of applying tax credits to the FFCRA, they will have the most up to date information.
- Department of Treasury – this is department in charge of the PPP loans, here's their update FAQ to lenders: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.
- Center of Disease Control – In charge of providing evidence-based, scientific information on COVID-19, how to prevent it, how to manage it, and what they symptoms are.
- State or Local Government Orders – each state website has an location where all the executive orders are kept. The order will have the list of essential businesses and the expected enforcement.
- State Department of Health – This will provide the up to date statistics on COVID-19 in your area.
- For SBA loans (PPP) – TALK TO YOUR LENDER, they are the entity taking on the liability of the loan, you want to be sure what they expect from you for forgiveness and implementation of the loan. Link to the interim final rule: https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf and additional guidance: <https://www.sba.gov/sites/default/files/2020-04/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf>

BIO – WENDY HANSEN

- After graduating law school on a merit scholarship, Wendy Hansen organized and created a legal compliance program for a large manufacturer in Massachusetts. Starting from the ground up, Wendy taught legal compliance and leadership training; implemented and produced policies from employee records to employee reviews; drafted and implemented a framework for a new Human Resources department for the company; and conferred with upper management regularly on HR and general business problems. This experience gives Wendy an insider's perspective on the day to day challenges HR and management face.
- As well as her strong human resources background, Wendy worked at an insurance defense litigation firm in Boston. She reviewed and analyzed employment law agency charges, demand letters, and litigation. Wendy worked with employers under their employment practice liability insurance on a variety of claims, including harassment, discrimination, retaliation and wrongful termination.
- Wendy graduated from New England School of Law, cum laude and received the Outstanding Scholastic Achievement Award. She was a Comment and Note Editor for New England Law Review, where her case comment, *Morrow v. Balaski: When Good Intentions Go Bad*, was published. She was a Mock Trial Regional Finalist her second year.
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Q&A

The background features a vertical gradient from dark blue at the bottom to bright red at the top. It is decorated with faint, light-colored circular patterns and lines. On the right side, there is a prominent circular gauge or scale with numerical markings from 0 to 210 and several concentric circles, some with arrows indicating direction.