

# Avoid These 5 Legal Landmines

---

When Managing Remote  
Employees During COVID-19

May 2020



# Today's Agenda

## 5 Legal Landmines

- #1: Remote Work Policies
- #2: Managing Nonexempt Workers
- #3: Managing Exempt Workers Remotely
- #4: COVID-Related Leave Requests
- #5: Mandatory Postings and Notifications

# **Legal Landmine #1**

## **Neglecting to Update Employee Policies for Remote Work**

# Why Remote Work Policies Matter

- Policies need to reflect the shifts occurring in the workplace
- Remote work creates unique situations that must be addressed directly
- Can help set clear boundaries, prevent misunderstandings and protect your business

# 5 Remote Work Policy Updates to Consider

## 1. Employer control of remote work decisions

- Define criteria for what jobs qualify for remote work
- Reserve the right to end remote work arrangements whenever the business decides it's no longer needed
- Review rules for access to business locations or facilities

# 5 Remote Work Policy Updates to Consider (cont.)

## 2. Use of company equipment

- How should the equipment be used?
- How should the employee care for the equipment?
- What steps should the employee take if the equipment is damaged or lost?

# 5 Remote Work Policy Updates to Consider (cont.)

## 3. Work schedule and availability

- Specify the hours employees are expected to work/be available for work
- Are schedule modifications allowed? Under what conditions?
- Expected responsiveness with coworker requests and exchanges

# 5 Remote Work Policy Updates to Consider (cont.)

## 4. Overtime restrictions and approval process

- Review existing overtime guidelines
- Provide specific guidance regarding emergency remote work
- Temporary “no overtime, no exceptions” policy



# 5 Remote Work Policy Updates to Consider (cont.)

## 5. Technology, data security and confidentiality

- Establish minimum requirements (virus protection, phone/internet service)
- Address how employees should handle sensitive information at home
- Protect confidential company information

*Remind employees that all current policies still apply*

# **Legal Landmine #2**

## **Time and Pay Compliance Oversights for Nonexempt Workers**

# Time and Pay Basics for Nonexempt Employees

- All nonexempt employees must be paid at least the minimum wage for all hours worked and 1.5 times their regular rate for hours over 40
- All employees are considered nonexempt unless they meet strict legal tests for exempt status under the FLSA
  - Exemptions are based on job duties and minimum salary amount
- Fluctuating workweek option (salary plus overtime)
  - Must pay an agreed fixed salary for any workweek in which employees perform, plus overtime using a reduced calculation method
- Keep accurate records of all hours worked

# Time and Pay Basics for Nonexempt Employees (cont.)

- Change in rate of pay
  - Allowed if meets minimum wage requirements (consider highest applicable rate for state, county or city)
  - Review Contractual/union obligations and discrimination laws
  - Must comply with state and local notification rules
- Change in scheduled hours
  - Change or reduction allowed due to temporary closures or reduced demand
  - Must comply with predictive scheduling laws

# Remote Workers and Predictive Scheduling Laws

- Provide employees with advance notice of their schedule
- In some instances, compensate employees for last-minute changes
- Applies in Oregon, San Francisco, Emeryville, New York City, Philadelphia , Seattle and Chicago\*
- Failure to comply may result in fines of \$500 per employee PLUS legal damages

**\*Takes effect July 1, 2020**

# Considerations for Managing Remote Nonexempt Workers

- Risk of off-the-clock work and unpaid overtime with nonexempt employees working remotely
- Brush up on traditional rules regarding “hours worked” (e.g., training, seminars, meetings, on-call time, time waiting when systems are down)
- Off-the-clock time (e.g., meals and breaks) must not be interrupted
- Must adhere to state/local mandatory break rules
- Avoid automatic deductions for meals/breaks

# Best Practices for Managing Nonexempt Employees Remotely

- Clarify expected work hours
  - Can vary by role/department
  - Can allow some flexibility based on role
- Use electronic system for clocking in/out, if possible
- Otherwise, require weekly time sheets
- Emphasize that “off the clock” work is strictly prohibited
- Require overtime approval
- Reinforce written wage and hour policies

# Legal Landmine #3

## Putting Exempt Status at Risk



# What Is Exempt Status?

- Only employees who qualify as exempt under the FLSA may receive a fixed salary for all hours worked (without overtime)
  - To be exempt, an employee must meet minimum requirement (currently \$684/week) and specific “job duties” test
- Salary amount cannot fluctuate
  - Employees must receive full salary for any workweek in which they perform, regardless of quality or quantity of work (limited exceptions apply)
  - PTO bank deductions are permitted; salary/pay deductions is not
- Exempt employees are paid for their results — not hours worked
- Not required to keep time records of hours worked

# Reducing Pay for Exempt Employees

- Salary reductions are allowed by law
- However, it cannot fluctuate week to week based on revenue or business needs
- Still must meet minimum salary amount and job duties test

# Watch How You Manage Exempt Employees

- Risk of destroying exempt status by over-managing work hours
  - Do not track work hours for pay purposes
  - Do not establish a fixed work schedule (unless necessitated by role)
  - You can specify when exempt employees must be available for meetings and collaboration
  - Manage goals and deliverables, not hours worked
- Make sure employee's role does not shift to predominantly nonexempt duties
- Option to revert an employee to nonexempt status (hourly + overtime)

# Develop Proper Communication Channels

- No “one size fits all” approach since every company operates differently
- Reliable connectivity between employees and managers (regardless of location, time differences and other factors)
- Company email, calling and instant messaging for regular exchanges
- PLUS, audio and videoconferencing platforms for flexible collaboration

# **Legal Landmine #4**

## **Mishandling Paid Sick Leave Requests**

# Understanding the Families First Coronavirus Response Act (FFCRA)

- Signed into law March 18; effective April 1
- Temporary emergency measure that expires December 31, 2020
- Extensive legislation covering many aspects of federal COVID-19 response
- Two key parts affecting employers
  - Emergency Paid Sick Leave Act
  - Emergency Family and Medical Leave Expansion Act

# Emergency Paid Sick Leave Act

- Affects all private employers with fewer than 500 employees, as well as most public employers
- Provides up to 80 hours of paid leave for eligible employees who cannot work (even remotely) because they:
  - Are experiencing COVID-19 symptoms and seeking diagnosis
  - Have been advised by healthcare provider to self-quarantine due to COVID-19
  - Are subject to mandatory federal, state or local government quarantine order related to COVID-19
  - Are experiencing any other “substantially similar condition” to COVID-19 (per Secretary of Health and Human Services)

# Emergency Paid Sick Leave Act (cont.)

- Additionally, the law provides leave for employees who cannot work (even remotely) because they:
  - Are caring for an individual who is subject to a mandatory government quarantine order or was advised by healthcare provider to self quarantine
  - Are caring for a child whose school is closed because of the COVID-19 emergency
  - Are caring for their child whose usual caregiver is unavailable because of the COVID-19 emergency



# Emergency Family and Medical Leave Expansion Act

- Amendment to the Family and Medical Leave Act (FMLA)
- Affects private employers with fewer than 500 employees and certain public employers
- Provides extended paid family leave and job protection to employees who are caring for a child whose school or place of care closed during the COVID-19 crisis
- Unlike FMLA:
  - Does not require minimum of 50 employees within a 75-mile radius
  - Requires only 30 days of employment to qualify (vs. 12 months/1,250 hours for regular FMLA leave)

# FCCRA Is Supplemental Employer Leave

- Emergency paid sick leave under the FFCRA is in addition to any existing sick leave and/or paid time off already offered by the employer
- Federal government will reimburse the cost of qualified COVID-related leave
  - Financial relief will come as tax credits
  - Keep proper documentation to prove leave meets FFCRA criteria

# Recommended Documentation for COVID-Related Leave

- Use written leave request
- Documentation should include:
  - Employee's name
  - Qualifying reason for requesting COVID-related leave
  - Date(s) for which leave is requested
  - If due to quarantine, include details about quarantine order from government agency or healthcare provider
  - If due to childcare, include details about school or daycare closure

# Paid Sick Leave — State and Local Laws

- Many states, counties and cities have their own paid sick leave laws
- Some laws are specifically related to COVID-19, and may apply to larger employers than the FFCRA (including 500+)
- Other laws apply to all sick-related absences (employee illness and/or to care for sick family members)
- Remote workers may need time off if they are unable to work due to an illness or to care for a sick family member

# Paid Sick Leave — State and Local Laws (cont.)

- Follow state/local rules permitting job-protected leaves of absence and paid sick days, where applicable
- Thirteen states and the District of Columbia currently have paid sick leave laws:
  - Arizona
  - California
  - Connecticut
  - District of Columbia
  - Maryland
  - Massachusetts
  - Michigan
  - New York
  - New Jersey
  - Nevada
  - Oregon
  - Rhode Island
  - Vermont
  - Washington

# Paid Sick Leave — State and Local Laws (cont.)

- More than 15 cities and counties have paid sick leave requirements
  - CA: Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, Santa Monica
  - IL: Chicago, Cook County
  - MD: Montgomery County
  - MN: Duluth, Minnesota, St. Paul
  - NY: New York City, Westchester County
  - PA: Philadelphia, Pittsburgh
  - WA: Seattle, Tacoma
- State and local laws are changing rapidly — be sure to check!

# **Legal Landmine #5**

## **Ignoring Posting Compliance for Remote Workers**

# Posting and Notification Requirements for Remote Workers

- For employees who report to your facility (with physical wall posters) fewer than 3-4 times per month, you must provide the postings in another format
  - Can be electronic
- Communicating employee rights is more important than ever
  - New laws mean new posting requirements
  - Employee litigation risk expected to increase due to hard times and increasing legal complexity



# Posting and Notification Requirements for Remote Workers (cont.)

- Mandatory employee handouts are also changing
- Legal notifications that must be personally distributed to employees in addition to labor law postings
- Range of topics and reasons for providing, depending on state
- More than 400 different federal, state and local notification requirements
  - More than 130 changes in the last 12 months
  - Approximately 40 changes related to COVID-19

# Posting and Notification Requirements for Remote Workers (cont.)

- In addition to the new FFCRA handout for new hires, other COVID-related examples include:
  - District of Columbia: Notice on Family and Medical Leave Act During COVID-19; Notice to Employees — Information on Paid Family Leave
  - Michigan: Unemployment Insurance Notice
  - Minnesota: COVID-19 Preparedness Plan Notice; Unemployment Insurance Notice
  - New Jersey: Earned Sick Leave Notice
  - Ohio: Mass Layoff Instruction Sheet
  - San Francisco, California: Public Health Emergency Leave Notice
  - Tennessee: Separation Notice

# Solutions to Protect Your Business

- Remote Worker Compliance Essentials Kit
- FFCRA Compliance Essentials
- Intranet Licensing Service for Electronic Posters (6 or 12 months)
- Smart Apps — Company Policies
- Mandatory Employee Handout Service

Learn more at: [Hrdirect.com/COVID-19](https://hrdirect.com/COVID-19)

# Questions



*Reminder: All attendees will receive a link to the presentation and slides in a follow-up email.*