

# COVID-19 and the Workplace

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How to Comply  
with Rapidly Changing Legislation

April 2020



# Today's Agenda

- Review employer-related provisions of the Families First Coronavirus Response Act (FFCRA)
- Review employer-related provisions of the Coronavirus Aid, Relief and Economic Security (CARES) Act
- Best practices when considering a reduction in force (RIF)
- Tips from our legal team for managing temporary remote workers
- Why and how to comply with mandatory employee posting regulations during this time

# Understanding the Families First Coronavirus Response Act (FFCRA)

# Introducing the FFCRA

- Signed into law March 18; effective April 1
- Temporary measure — 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
- **Bottom line: Certain employers must provide employees with *paid leave* for specific, COVID-19 reasons**

# Which Employers Are Affected?

- Private employers with <500 employees
  - Employers with <50 employees may qualify for exemption
  - If seeking exemption, document how complying with the law would “jeopardize the viability” of the business
  - Law makes exception for certain healthcare workers and emergency responders (but this is being challenged)
- Almost all public employers

# Which Employees Qualify?

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)

# Which Employees Qualify? (cont.)

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 their 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

# FFCRA vs. FMLA

- FFCRA is paid leave vs. unpaid leave for FMLA
- FFCRA generally has no requirements for length of service or hours worked
  - ... with one exception*
- FFCRA takes precedence for specific COVID-related situation outlined in the law
  - Otherwise, unpaid leave under FMLA applies for other family & medical leave



# Amount of Paid Leave Varies

## *Scenario 1:*

Employee is quarantined by government order or advice of healthcare provider, and/or is experiencing COVID-19 symptoms and seeking diagnosis

- Up to two weeks (or 80 hours) of paid leave at employee's *regular pay rate*
- Capped at \$511/day and \$5,110 total

# Amount of Paid Leave Varies

## *Scenario 2:*

Employee is caring for an individual subject to quarantine OR experiencing a substantially similar condition

- Up to two weeks (or 80 hours) of paid leave at ***two-thirds*** of employee's regular pay rate
- Capped at \$200/day and \$2,000 total

# Amount of Paid Leave Varies

## *Scenario 3:*

Employee is caring for a child whose school is closed or childcare provider is unavailable due to COVID-19

- Up to two weeks (or 80 hours) of paid leave at ***two-thirds*** of employee's regular pay rate
- AND, if employed 30+ days prior to leave, up to 10 additional weeks of paid leave at same rate
- Capped at \$200/day and \$12,000 total

Important: Emergency paid leave under FFCRA is *in addition to* any existing sick leave and/or paid time off already offered by employer.

# Relief for Employers

- Employers are not expected to cover the cost of emergency paid leave under FFCRA
- 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
- Consult a tax advisor

# Recommended Documentation

- Keep proper documentation for COVID-related leave
  - Use written leave request form
  - 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

# Understanding the Coronavirus Aid, Relief and Economic Security Act (CARES Act)

# Introducing the CARES Act

- Signed into law March 27
- \$2 trillion+ stimulus package to reduce economic impact of COVID-19
- Goal is to maintain income for workers through:
  - Business loans (to maintain payroll & benefits)
  - Direct financial assistance to workers who lose their jobs



# Paycheck Protection Loans

- Small employers (generally up to 500 employees)
- Incentive to keep employees on payroll
- Max loan amount = average monthly payroll during prior year X 2.5 (max of \$10 million)
- 2-year term @ 1%; payments deferred 6 months
- Can be used for payroll, healthcare benefits, rent, mortgage interest, utilities and other essential expenses
- *NOT* to be used for FFCRA paid leave

# Paycheck Protection Loans (cont.)

- Available through SBA-approved lenders until June 30
- Standard fees waived
- No guarantee required from borrower
- *Partially or fully forgivable under certain conditions*
  - Proceeds used for qualified expenses
  - At least 75% spent on payroll
  - All employees kept on full payroll for eight weeks

# Loans for Larger Businesses

- Businesses with 500-10,000 employees
- Must restore at least 90% of employees within 4 months after 'end' of federal COVID-19 emergency
- No outsourcing of jobs during loan term and for two years after loan repayment
- Additional requirements related to union activity

# Employee Retention Tax Credit

- For employers affected by COVID-19 due to:
  - Suspension of operations under COVID-19 shutdown order
  - Revenue decline of 50% or more compared to same quarter in previous year
- Tax credit against wages paid from 3/13/20-12/31/20
- 50% of qualified wages, including healthcare coverage, up to \$5,000 per employee
- Not available to employers receiving Paycheck Protection loans or government employers

# Extension of Payroll Tax Deadline

- To help with cash flow
- Employer portion of 2020 Social Security taxes can be deferred
- Half to be paid by 12/31/21
- Remainder to be paid by 12/31/22

# Assistance for Displaced Workers

- Expands and supplements state unemployment benefits
  - Adds \$600 per week to state benefits
    - Must first qualify for state benefit
  - Extends eligibility for up to 13 additional weeks
    - Through July 31
  - Expands coverage to independent contractors, gig workers & self-employed
    - Must be “forced to suspend operations”

# Additional Benefits for Workers

- Penalty-free retirement account withdrawals
  - Up to \$100,000 from 401(k)/defined contribution plan
  - No 10% penalty, but income tax will still be owed
  - Can replace amount withdrawn over next three years (not subject to annual contribution limits)
- Available only to employees directly affected by COVID-19:
  - Employee, spouse or dependent diagnosed w/COVID-19
  - Employee experiences 'adverse financial consequences'

# Additional Benefits for Workers

- Maximum retirement account loan amounts doubled
  - Can borrow up to \$100,000 from 401(k) or other defined contribution plan (or up to full balance if below 100k)
- Same requirements as penalty-free 401(k) withdrawal:
  - Employee diagnosed with COVID-19
  - Employee's spouse or dependent diagnosed with COVID-19
  - Employee suffered 'adverse financial consequences' due to COVID-19



# Best Practices when Considering a Reduction in Force (RIF)

# Crunch the Numbers

- Estimate impact on revenue over next 6-12 months
- Tighten up non-payroll expenses first
- Assess payroll expense last
- Weigh all options under FFCRA and CARES Act
- Consider alternatives to involuntary layoffs
  - Reduced hours/salaries
  - Temporary furloughs/leaves of absence
  - Voluntary leaves/layoffs

# Use Objective Criteria

- Which *functions* are essential to maintain operations?
- *How many* are needed to perform each function?
  - Minimize 'rounds' of cuts
- What *objective criteria* can be used for selection?
  - Tenure
  - Seniority
  - Productivity
  - Worker category
  - Specific skill sets/knowledge

# Avoid Potential Discrimination

- Consider adverse impact on protected classes under federal laws...
  - Race, color, ethnicity, national origin, religion, gender, age (40 or over), disability, veteran status, genetic information
- ... and state and local laws
  - Sexual orientation, marital status, smokers, etc.

Pointer: When all else is equal, "last hired" is often the fairest approach for individuals in similar positions.

# Consider Employee Notification Laws

- Federal Worker Adjustment Retraining and Notification Act (WARN Act)
  - Employers with 100+ full-time employees must give 60 days' written notice of plant closing or mass layoff
  - Typically doesn't apply to temporary closings/layoffs (<6 months)
  - Exceptions for natural disasters or 'unforeseeable business circumstances'
  - Still must provide notice as soon as practicable, with explanation for reduced notice period (e.g., pandemic)

# Consider Employee Notification Laws

- Also check state laws
  - Some states have separate legal requirements related to mass layoffs and plant closings
  - Some requirements may apply to current situation
- Additional notices are required for individual layoffs/terminations under state and local laws

# Determine Severance Benefits

- Not required by federal law, but often include:
  - Severance pay (typically varies by length of service)
  - Employer-paid benefits and COBRA premiums
  - Letters of recommendation
  - Outplacement services
  - Access to internal job postings
  - Waiver of non-compete restrictions
  - Other employee assistance programs



Pointer: Have employees sign a severance agreement releasing employer from liability and protecting against legal claims.

*Note: Consult an attorney to ensure agreement complies with all federal, state and local laws.*

# Communicate Decisions Clearly

- Prepare a script
- Keep to the point and be consistent
- Be clear on whether the layoff is temporary or permanent
- Explain final paychecks
- Provide written details regarding severance benefits, health insurance continuation options and outplacement services
- Describe how recalls/rehires will be handled
  - Temporary: Will job be held or will it depend on business need?
  - Permanent: Will they be considered ahead of new applicants?

# Compliance Tips for Managing Remote Workers

# Update Remote Work Policies

- Critical policies include:
  - Employer control of remote work decisions
  - Use of company equipment
  - Work schedules & expected availability
  - Overtime restrictions and approval processes
  - Data security and confidentiality
- Remind employees that all current policies still apply

# Establish Clear Boundaries for Non-Exempt Employees

- Be clear about 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

# Watch How You Manage Exempt Employees

- Do not track work hours for pay purposes
- Do not establish a fixed work schedule (unless necessitated by role)
- You *can* set expectations for when exempt employees must be available for meetings and collaboration
- Otherwise, manage to goals and deliverables, not hours worked

# Provide Access to Mandatory Postings and Notifications

- Communicating employee rights is more important than ever
  - New laws expand employee rights – federal, state, local
  - New laws mean new postings requirements
  - Employee litigation risk expected to increase due to hard times & increasing legal complexity
- Posting requirements apply to remote workers (can be electronic)
- Mandatory employee handouts are also changing
  - Often triggered by leave requests and unemployment claims

# New & Updated Solutions to Address COVID-19

- Mandatory FFCRA Poster — laminated, bilingual
- 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.*