

COVID-19/CORONAVIRUS – EMPLOYER GUIDANCE

As employers attempt to operate under the restrictions imposed in response to the COVID-19 pandemic, numerous employment law concerns and questions arise. Rajkowski Hansmeier Ltd. is here to provide employers with an overview of the legal landscape employers must navigate in these stressful times. Furthermore, we will provide guidance regarding the impact that new and future legislation will have regarding an employer's continued obligations to their employees for the duration of the government-imposed restrictions and beyond.

CONSIDERATIONS REGARDING THE “FFCRA” (Families First Coronavirus Response Act).

This bill imposes many changes to increase public health measures as well as provisions that require most U.S. private employers to provide paid leave to employees under certain circumstances. While employers are responsible for funding the paid leave, employers would be able to take tax credits for the paid leave provided to employees under the FFCRA. The FFCRA applies to all business with 500 or fewer employees.

As of March 18, the FFCRA has passed the House, Senate, and has been signed into law by the President. It will become effective in 15 days from the date of signing.

The FFCRA provides for two types of paid leave:

12 Weeks (10 Paid) of Public Health Emergency Leave—The FFCRA would amend the Family and Medical Leave Act (“FMLA”) to provide employees with 12 weeks of Public Health Emergency Leave for employees who need to be absent because to care for their child (under age 18) if their child's school or place of care has been closed, or their child care provider is unavailable, due to a public health emergency. While the first ten days of leave are unpaid, the remaining 10 weeks of leave would be paid by the employer at two-thirds of the employee's “regular rate.” The weekly compensation owed to the employee would be paid based on “the number of hours the employee would otherwise be normally scheduled to work.”

80 Hours of Emergency PSL (Paid Sick Leave)—The FFCRA also requires employers to provide a bank of 80 hours of Emergency PSL for full-time employees to use as a result of absences related to COVID-19. Part-time employees would receive an amount prorated to their regular work schedule.

Employers **must** provide each employee with PSL to the extent that the employee is unable to work due to a need for leave because:

1. The employee is subject to a quarantine or isolation order related to COVID-19 (coronavirus);
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

4. The employee is caring for an individual who is subject to a COVID-19 quarantine or isolation order or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
5. The employee is caring for their own child if the school or place of care of the child has been closed or is unavailable due to the COVID-19 precautions.

This leave is also paid at the employee's regular rate of pay if they are on leave for item 1, 2 or 3 above, but their compensation is capped at \$511 per day and \$5,110 in the aggregate. For leave taken for items, 4, 5 and 6, the compensation is two-thirds of the employee's regular wage, capped at \$200 per day and \$2,000 in the aggregate.

Covered employers will be required to post and keep posted, in conspicuous places, a notice regarding emergency paid sick leave that the Department of Labor must issue no later than March 25, 2020. The DOL is also due to issue additional guidance to help employers comply with these new requirements.

FFCRA CONSIDERATIONS REGARDING CHILDCARE AND SCHOOLCLOSURES

The FFCRA allows employees to take Emergency PSL and/or Public Health Emergency Leave if their child's school is closed. Leave is available for employees who need to be absent from work in order "[t]o 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." Leave is also available for employees who need time off "[t]o care for the child of such employee if the school or place of care has been closed, or the childcare provider of such child is unavailable, due to coronavirus."

Under the bill, the first ten days of such FMLA may be unpaid. An employee may choose to substitute accrued vacation leave, personal leave, or other medical or sick leave during this period, but an employer may not require an employee to do so. After the ten days of unpaid leave, employers must provide up to 10 weeks of paid FMLA leave at a rate of no less than two-thirds of the employee's regular rate of pay.

LAYOFFS

As always, it is best to consult your company handbook before taking action. Many employers have policies and procedures that guide their organization's actions in times where employees are subjected to potential layoffs. Employers should be careful to continually adhere to their previously established policies while simultaneously adapting to the rapidly changing situation.

Normally, employers would be required to provide 60 days' notice to affected employees regarding a mass layoff. However, the WARN Act permits shortened notice for "unforeseen business circumstances." Furthermore, given the circumstances it is highly unlikely that the coronavirus pandemic would not constitute an "unforeseen business circumstance."

FFRCA CONSIDERATIONS REGARDING LAYOFFS AND LEAVE BENEFITS

Employees who are laid off before the FFCRA becomes effective would not be entitled to Paid Sick Leave or Public Health Emergency Leave under the bill.

There remains a question of whether an employee who requested Public Health Emergency Leave could be eligible for leave after the employee's jobsite is closed. Based on the current iteration of the bill, an employee whose position is eliminated while on leave is not entitled to continue the leave or be reinstated to their position.

It is uncertain from the current iteration of the bill whether the current FMLA standard regarding layoffs would also apply to employees taking Public Health Emergency Leave. Additional guidance from the Department of Labor regarding this issue is expected in the coming days.

As with traditional FMLA leave, an employer must offer the employee the same or equivalent position upon their return to work. The current iteration of the bill provides a possible exception to this requirement for employers with fewer than 25 employees if the employee's position does not exist after FMLA leave due to an economic downturn or other operating conditions that affect employment caused by a public health emergency during the period of leave. Certain conditions, including reasonable attempts to return the employee to an equivalent position, and required efforts to contact a displaced employee for up to a year after they are displaced, are required.

UNEMPLOYMENT BENEFITS

An employee who is furloughed without pay is traditionally eligible for unemployment benefits. Those eligible for benefits must wait one week ("waiting week") before they can receive benefits. However, On March 16, 2020, Governor Walz signed Executive Order 20-05 that permits workers to qualify for unemployment benefits who are "not able to work directly or indirectly as a result of COVID-19." The Executive Order waives the usual waiting period, so temporarily laid off or furloughed employees can apply online.

https://mn.gov/governor/assets/EO%2020-05%20%28Gov%20Signed%29_tcm1055-423379.pdf.

Employees are not eligible for unemployment benefits if they are receiving pay, including Paid Time Off (PTO), or if they choose not to work while work is available. If an employee has been laid off temporarily, they can meet work search requirements by staying in contact with their current employer.

The executive order also provides that an employee may apply for unemployment benefits if they have received notification from a school district, daycare, or other childcare provider that either classes are canceled or the applicant's ordinary childcare is unavailable, provided that the applicant made reasonable effort to obtain other childcare and requested time off or other accommodation from the employer and no reasonable accommodation was available.

Additional updates to Minnesota’s Unemployment Insurance Policies can be found at this website.

<https://www.uimn.org/applicants/needtoknow/news-updates/covid-19.jsp>

REDUCTION OF HOURS QUESTIONS AND CONCERNS

Non-exempt (“hourly”) Employees—Non-exempt employees need to be paid only for the hours that they work. Employers don’t need to pay them if they’re not working. Employers may allow them to use PTO or vacation during this time.

Exempt Employees—Exempt employees must be paid their full salary for any week in which they perform any work. If your business is closed for an entire week and the exempt employee performs no work, then you don’t need to pay the salary for that week. For partial weeks, employers can reduce sick leave or vacation time for the days that no work was performed.

When employees are furloughed, an employer should set the expectation that they will not work. This includes checking email and voicemail. A written notice or letter that clearly establishes this expectation is highly suggested. However, it may be a best practice to communicate to employees in your written notice that employees may still routinely check email or voicemail solely for updates.

REMOTE WORK QUESTIONS AND CONSIDERATIONS

There is no express provision requiring that an employer offer flex time or accommodate a “work from home” policy. However, based on Governor Walz’s Executive Order 20-05 that permits workers who are “not able to work directly or indirectly as a result of COVID-19”, it may be in the best interest of an employer to accommodate these requests when it doesn’t impose a significant burden or cost.

PTO USAGE DURING A PERIOD OF MANDATORY CLOSURE OR FURLOUGH.

Employers may require their employees to use their PTO during periods of mandatory closure or furlough, but the answer is going to depend on the terms of your PTO policy. Most fail to address this issue, but should the issue be formally addressed in your policy you should adhere to your formalized procedures. If your PTO policy is silent on this issue and an employee formally complains, it is highly recommended that you seek further legal guidance.

Employers are not be allowed to change their existing paid leave policies, like vacation or PTO, under the FFCRA. The paid leave provided by the FFRCA would be provided in addition to the paid leave provided by employers as of the day before enactment of the bill.

Employees do not have a right to use sick leave or PTO for absences unless they have a scheduled shift. However, subject to the terms of your written policies and procedures, employees may argue that they have a contractual right to use their paid time off. A dispute over PTO usage would create additional employee conflicts that are unnecessary in a time of national crisis. Therefore, it is not recommended to prohibit your employees from utilizing their PTO during mandatory furlough or closure.

ADDITIONAL GUIDANCE AND CONCERNS

We recommend continued monitoring of credible information sources such as the:

Centers for Disease Control

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Minnesota Department of Health

<https://www.health.state.mn.us/diseases/coronavirus/index.html>

If you have any employment or other questions related to the ongoing COVID-19 pandemic, and the legal challenges it poses, please do not hesitate to contact our team at Rajkowski Hansmeier Ltd.

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