CRA VIRTUAL TOWN HALL MEETING 3/20/20

LAYOFFS VS. FURLoughs AND OTHER LABOR LAW CONSIDERATIONS – WHAT YOU NEED TO KNOW

INSURANCE CONSIDERATIONS AND MYTHS

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Layoff vs. Furloughs - Todd Fredrickson, Attorney, Fisher & Phillips

a. **Furlough**, generally speaking, is a short/set period where employees are put on unpaid leave. Typically this leave is for 2-3 weeks, but many in the restaurant industry are stretching that time. The longer the suggested furlough period, the closer it gets to a layoff. Furloughs may allow for, but do not require continuation of employee benefits, such as health insurance, and allow you to avoid paying accrued but unused PTO/vacation time because you and your employees carry that banked time over to when they return. Most furloughs can last as long as the closures, but they may be extended.

b. **Layoffs** are a termination. Terminations trigger the requirement that you must pay all outstanding wages and PTO/vacation at the time of layoff. If you have not paid these out, you need to do so ASAP. There is a grace period built into the Colorado Wage Claim Act, that if employees are not paid out of their PTO/vacation time, they can send you a demand for these wages/benefits after 14 days. After the demand, you must pay them out. Even if you have fallen behind or missed these deadlines, you have this 14-day window, but you must make the best effort to issue these payments before you receive employee demands.

c. If you begin the closure process putting your employees on furlough, you can lay them off later depending on how the situation unfolds.

d. There can be an impact on insurance benefits. Many are deciding on furloughs because their employees may still be entitled to health insurance benefits under furloughs. If you lay off employees, they will be entitled to COBRA.
e. Employees are entitled to unemployment benefits under both models. They will just notice that on their unemployment application forms the word “furlough” isn’t used, so they should check the layoff box.

How to file for Unemployment, what makes employees eligible?

a. If you are planning to rehire your employee’s within the next 16 weeks, it is to your employee’s benefit to select “job attached” options on their unemployment applications. They will still have to follow the same check-in requirements outlined by CDLE, but they won’t have to look for additional work during this time. The job attached feature can also impact how much employers will pay in unemployment benefit taxes. If you are hearing from your employees that they are having difficulties applying for or receiving unemployment benefits, please refer them to the Colorado Department of Labor & Employment. CRA does not have any authority over the functions of the online applications, and we cannot expedite any applications.

Leave under Colorado and Federal law - Kristin White, Attorney, Fisher & Phillips

a. Colorado
   i. The state paid leave requirements were passed into law on March 12. Employers have to provide up to 4 days of paid leave to their employees who have flu-like symptoms AND are being tested for COVID-19. If they already have existing PTO, they can use that, but if they do not have any PTO days left, they are entitled to these additional 4 days. You should either pay them the full minimum wage, or you can calculate their average daily wage over the past month if their wages vary.

b. Federal
   i. Emergency paid sick leave
      1. It doesn’t go into effect until April 2.
      2. All private employers with less than 500 employees are required to offer the paid leave
      3. 5 categories would qualify an employee to receive this paid leave:
         a. if they are unable to work or work from home because they have been ordered to quarantine,
         b. a medical professional has advised they need to stay home,
         c. they are experiencing symptoms AND are seeking a medical diagnosis,
         d. they are taking care of someone else that is suffering from COVID-19, or
         e. they are taking care of a child without access to childcare
      4. Full-time employees are entitled to two weeks (80 hours) of pay at their regular rate. If they are part-time, they will either get the higher of their regular rate of pay or the full local minimum wage. If employees are taking leave because they are caring for someone else who is sick, they receive these benefits at 2/3 of the rate listed above. There are caps on
the amount they can collect depending on if they are taking leave because they have been ordered to quarantine or to care for a child.

ii. Emergency FMLA

1. Under this law, employees are entitled to 12 weeks of leave, of which the first two weeks are unpaid. Employees can only take this leave if they need time off to take care of a child without access to childcare or school.

2. There is a proposed exemption for small businesses with fewer than 50 employees who would be jeopardized by providing this paid leave outlined in this bill. There are forthcoming rules from the Department of Labor to see what is needed to apply for this exemption.

3. The cap for this leave is $200 per day/$10,000 in the aggregate per person.

Exposures in the workplace

a. If someone tests positive, or they are exposed to someone who has COVID-19, they are required to be quarantined for 14 days.

b. Employers can take employee body temperatures to determine if they are fit for work. Employers can also order employees to leave work if they are showing symptoms. You can screen potential applicants for symptoms and withdraw a job offer if they test positive for COVID-19.

Insurance concerns - Sean Pechan, President, Crest Restaurant Insurance

- Insurance policies are all different, so your coverage determinations will need to be reviewed case by case.

- Some coverages most policyholders would have:
  - If restaurants were to be accused of spreading COVID-19, their general liability would provide defense coverage.
  - If employees spread the virus to one another in the course of their employment, your worker’s comp insurance would provide coverage.
  - Health insurance coverage should not be impacted; it may even be expanded by regulation during this time.

- Business income/continuity coverage:
  - Intended to cover lost profits and continuing expenses during the time your business is not operating.
  - For coverage to be triggered, there must be direct physical loss or damage to the property.
  - Currently two lawsuits have been filed claiming that the presence of COVID-19 on an insured’s property has damaged the property, thus triggering Business Income coverage. We are waiting on the results.
● It’s ultimately the policyholder’s decision to file a claim, it’s not your agent or broker’s job to discourage you from making a claim. We encourage you to speak to your agent/broker regarding what coverages could be applicable for your loss.

● Most policies will also have a virus/bacterium exclusion that will need to be considered.

● Civil authority coverage is typically triggered when a government authority denies access to the insured property. It is debatable whether current government actions would have triggered civil authority coverage.

● Some additional risk management considerations:

  ● Restaurants who are either delivering or utilizing third party services (i.e. GrubHub, Uber Eats or DoorDash) should purchase hired/non-owned auto coverage.

  ● Consider the employee is on the road for the benefit of the business. A driver’s personal automobile policy will exclude claims arising from commercial use of that vehicle. Thus the injured party will likely look to the employers business policy for coverage.

  ● Read more about insurance considerations for delivery here, and for alcohol delivery here.

  ● If you have decided to start food deliveries whereby you haven’t before, you should let your insurance company know you have added this exposure to your business operations.

  ● Take a look at the projections you have on your other existing policies, premiums are driven by revenue and payroll projections. Consult with your agent/broker if your annual payroll or revenue projections have changed.

  ● If you are not going to sell liquor in any capacity, you could suspend your liquor liability coverage (although you must be diligent in adding this coverage back once you resume operations.)

  ● If you wish to defer a premium payment you should contact your insurance company’s billing department and request a premium deferment.

  ● You should still keep your general liability and property policies active as your lease requires so and now is not the time to not have coverage for a property event (i.e theft, fire, vandalism, etc.)

  ● If your restaurant location will be closed for longer than 30 days, you should confirm with your agent what policy conditions could be applicable if the property is considered vacant. Often the perils of theft or vandalism are not covered if the property is considered vacant.

Lastly, now is the time to act fast, make bold decisions to preserve cash and be prepared for when the restrictions are lifted. There is most likely prosperity awaiting once life returns to normal.

Q&A

For people who are choosing to self-quarantine, either because they have an underlying health condition or are afraid to come to work, do they qualify for paid leave benefits?
If they are just choosing to self-quarantine, and have not received necessary medical advice to do so, then they do not qualify under the federal sick pay provisions. And if they are not caring for a child, they do not qualify under this expansion of FMLA.

**What if the employer requires quarantine? Is the employee then eligible?**

No. Some employers may suggest out of an abundance of caution that their employees stay home. For their employees to receive benefits, they have to be subject to a federal, state, or local quarantine or qualify under one of the other conditions listed above.

But, if the employer thinks an employee is exhibiting symptoms and tells them to seek a medical opinion, then the employee would qualify.

**Clarification around hourly requirements? Do hourly employees qualify for these paid leave benefits?**

Under normal FMLA, employees have to work for a year to qualify. That has been expanded under this law in favor of employees to take FMLA. Any employee that has worked for the employer for 30 days and has a qualifying reason to take their leave is entitled to benefits.

**Can employers expect that their rates will go up because of increasing Unemployment applications?**

We have been actively advocating to keep rates the same because these are unprecedented times. We will know more when the details are outlined in the executive order, but we expect that any unemployment filings contributed to COVID-19 will not impact rates.

**If an employer has fewer than 50 employees or more than 500 employees, are there different requirements for them under these paid leave laws?**

These emergency leave requirements apply to employers with between 1 and 499 employees. The bill directs the federal government to outline new processes and regulations to follow to exempt businesses with fewer than 50 employees. Once these additional rules and regulations are determined, Fisher & Phillips will craft a legal alert to be forwarded to members.

**If an employer has proof that one of their employees has tested positive for COVID-19, what is the best way to handle it? Practical next steps?**

When you receive this notice, you need to ask that employee if they can identify other employees they worked in close proximity with within the last two weeks. Ask them to be specific, otherwise, it may be your entire staff. You must then go to that list of contacted employees and ask that they quarantine for 14 days. When you are going to these contacted employees to notify them, you may not use the name of the employee who has tested positive unless that employee gives you explicit permission to do so.

_It has come to my attention that one of the employees who work here has tested positive for COVID-19. It is our understanding that you have been in close contact with that individual within the last two weeks. Because of that, I am asking that you do not return to work for the next 14 days._

**What are employers allowed to ask if one of their employees tells them they are quarantining? How can they verify?**

You can encourage them to get medical attention and testing, but you cannot require that they do so. If the employee gets tested, then you are within your right to ask what the results of that test were for the
safety of your other employees. Under the Colorado leave law, employees have to be seeking a test, and you cannot refuse to pay them their paid leave if they cannot or do not provide documentation of their testing. You can, however, ask for a doctor’s release for them to return to work. For the federal leave, we have no guidance around this yet. But you can approach this scenario the same way you would an employee that poses a direct threat. That allows you to ask for information, which includes asking directly for a doctor’s note indicating whether or not they impose a direct threat to themselves or other employees.

**Some states are moving to shelter in place. What is the liability for employers if Colorado follows suit?**

Depending on the details of this potential order, it varies. If the government requires everyone to stay home, you can either lay off employees or try to treat it as a furlough. Depending on the order, there may not be a determined length of time. Otherwise, the same wage requirements would apply to you (paying out wages and PTO/vacation time) if you decide to do layoffs. If someone is subject to a local shelter in place order, we think that would likely be one of the qualifiers under the federal leave, and you may be required to pay the paid leave. *It is important to note that the Dept. of Homeland Security is classifying restaurants as “essential” businesses. Other states that have “shelter in place” orders, have also done the same. We will update you should such an order be put in place in Colorado.*

**In regards to unemployment benefits, if an employer can find a few hours for their employees, does that impact the employee’s ability to apply for benefits?**

Certain reductions in hours entitle employees to file for unemployment benefits. It is unclear how many hours have to be cut to entitle them to their benefits, as that is determined by the Department of Labor. The application asks how many hours they are working, and then the Department will determine what the employee benefit is.

**Can employers take an emergency measure to reduce employee salaries or benefits?**

A lot of times this is driven by existing handbook policies. It depends usually on whether the employee is exempt or non-exempt. Exempt employees must receive a threshold salary of at least $35,568. If necessary you can reduce an exempt employee’s salary, but you can’t reduce below the required salary threshold. For any week that an exempt employee does any amount of work, you have to pay them at least the exempt salary. Please note, if employee pay is reduced below the exempt salary threshold, then they would qualify for overtime pay when applicable.

With non-exempt employees (typically hourly) you can modify/reduce wages so long as it is not below the full local minimum wage.

Bonuses and other employee incentives can be changed unless you have an employment contract that determines the length of time the employee will receive their benefits. Otherwise, you can make changes to what their compensation/benefits are going forward.

**For employers that have moved forward with layoffs or furloughs, are they still required to provide the new paid leave?**

There is no clear answer yet. In cases of furlough, employees are still considered actively hired by the company, and therefore would qualify for benefits. If the employee has been laid off before they
experience a qualifying event under the new laws they are not entitled to benefits. Additional regulations may offer more clarity on these questions.

**Update on state sales tax deferment:**

The state is not delaying the sales tax due today, but some local governments have elected to delay their local sales tax. Contact your local government to understand your requirements.