Idaho State Dental Association

CORONAVIRUS ISSUES MARCH 2020
Pam Howland
hey.
Hang On, We’ve Got a Lot to Cover!

- Overview of Families First Coronavirus Response Act
- Considerations related to lay-offs, furloughs, or reduced schedules
- Broad overview of CARES Act
New laws in place for COVID-19
Unchartered territory

- New law – no regulations or case law interpreting the law
- That leaves us to rely on legal commentators and a small amount of Department of Labor guidance
- Highly unusual – not the way laws typically go into effect
- Many unanswered questions
- No answers to exactly how this will work when it is put in place
- Do the best you can in good faith and you should be ok
- Watch for updates – you may have to change strategy or procedure at some point
Families First Coronavirus Response Act (‘‘FFCRA’’)

- Goes into effect April 1, 2020 (per DOL)
- Applies to employers with fewer than 500 employees
- Possible small business carve-outs - but no details yet
- Requires employers to pay 80 hours of paid sick leave and up to 12 weeks of emergency family care leave (10 weeks at 2/3 pay)
My interpretation of the Act boiled down

- Two types of coverage
- Both relate to COVID-19 illness
- Illness of an employee or of an employee’s family member triggers
- Key language – coverage is triggered by an employee’s inability to work caused by COVID-19
- If the employee’s inability to work is caused by a lack of work (or a lay-off or furlough), Act likely does not apply
1\textsuperscript{st} category: Coverage under the Act for paid \textbf{emergency family care leave}.

- Employee is 1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services
Eligible employees

- Employee must have worked for you for 30 days.
Payments for emergency family care/school closure (this one is a little tricky)

- For 10 weeks, it is $2/3$ of:
  - their regular rate of pay,
  - the federal minimum wage in effect under the FLSA, or
  - the applicable State or local minimum wage.
- HOWEVER, the employee can call the first 80 hours “sick pay” and receive full pay
- This can stretch payments out to 12 weeks
Maximum payments for emergency family care leave

- Under these circumstances, employees are subject to a maximum of $200 per day, or $2,000 over the entire two week period. The first 80 hours is “sick leave” and is at full pay.

- Employee can then take expanded family and medical leave and may take paid sick leave for the first ten days of that leave period, or may substitute any accrued vacation leave, personal leave, or medical or sick leave under your employer’s policy. For the following ten weeks, ee will be paid for leave at an amount no less than 2/3 of your regular rate of pay for the hours they would normally be scheduled to work.
Category #2: Coverage for **paid sick leave**

- Employee is unable to work or telework due to a need for leave because they (1) are subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, you will receive for each applicable hour the greater of:
  - their **regular rate of pay**,
  - the federal minimum wage in effect under the FLSA, or
  - the applicable State or local minimum wage.
Maximum amount of paid sick leave

- In these circumstances, employees are entitled to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.
Paid sick leave

- Employees need not have been employed for 30 days
- This distinguishes this provision from the paid emergency family leave provision
Small business carve-out for employers with fewer than 50 employees

- An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing paid sick leave and expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:
Small business exemption #1

- The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.
Carve-out only applies to school closure/childcare unavailability!

- There currently do not appear to be exemptions for the paid sick leave triggered by an employee’s illness caused by COVID-19, or requirement to care for others who are ill from COVID-19
You are required to post a notice to employees

- Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.
If you have more than 50 employees, regular FMLA protocols may also apply

- All existing certification requirements under the FMLA remain in effect if an employee is taking leave for one of the existing qualifying reasons under the FMLA. For example, if an employee is taking leave beyond the two weeks of emergency paid sick leave because their medical condition for COVID-19-related reasons rises to the level of a serious health condition, employer must continue to provide medical certifications under the FMLA.
What if your business closes prior to April 1, 2020 or if employees are laid off prior?

- Department of Labor specifically says that if this happens, employees will not be entitled to paid sick leave or emergency care leave.
Some good news for employers

- DOL says they will not penalize for mistakes within first 30 days – 30 day non-enforcement policy
- Law is only in effect until December 30, 2020
Lots of nuanced questions and issues

- How to compute compensation
- Intermittent leave
- Compensation for employees who don’t work the same hours every week
- DOL website/guidance is a good resource
What are your paid leave obligations if you place employees on furlough after April 1, 2020?

- If employer is open, but furloughs on or after April 1, 2020 (the effective date of the FFCRA), the employee, generally speaking will not receive paid leave so long as employer furloughs because it does not have enough work or business. However, employee may be eligible for unemployment insurance benefits.

- A separate question would be what happens if employee becomes unable to work due to COVID-19 before the furlough takes place. Then they might qualify for paid leave.
How will employers get compensated for making leave payments under FFCRA?

- Covered employers will qualify for a dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Employers may also take a tax credit for the amount of the employers’ qualified health plan expenses that may be properly allocated to employees’ COVID-19-related leaves.
Employer tax credits

- In its recently-issued guidance, the Division noted that “every dollar of expanded family and medical leave (plus the cost of the employer’s health insurance premiums during leave) will be 100% covered by a dollar-for-dollar refundable tax credit available to the employer.”
Department of the Treasury
Department of Treasury guidance on tax credits

- When employers pay their employees, they are required to withhold from their employees’ paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.
Tax credits for FFCRA

- Under guidance that will be released next week, eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.

- The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.
Tax credits and relief from FFCRA

- If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.
Check out Department of Treasury website for updates

- Home.treasury.gov
Emergency closure options
What if you need to take action now to close operations on a temporary basis?

- Several options are available including:
  - Lay-offs
  - Furlough
  - Reduced Hours
What is a lay-off?

- Involves terminating employees.
- Employees should qualify for unemployment.
- Employees are off your books & benefits end.
- Would need to on-board employees when they come back.
Lay-off considerations

- Not a bad option if you don’t know whether you will be able to re-open at same staffing levels and if you want to cease all benefits and other obligations to cut costs.
Timing and other considerations

- If you lay-off employees before April 1, 2020, you will not have to make paid leave payments under the FFCRA.
- Can’t lay off employees to avoid obligations, though!
- But can lay-off employees in accordance with justifiable business reasons/economic concerns.
Furlough traditionally contemplates a temporary closure for less than 6 months.

Employees remain on your books and benefits continue.

If employees are placed on furlough prior to April 1, 2020, no obligation to pay sick leave or emergency family care leave (but, again, you cannot place employees on furlough to avoid obligations!)

Employees should qualify for unemployment benefits.
Furlough

- Works well if employer contemplates a situation where employees will receive announcement to return to work and wants workforce ready, willing & able to return.
- From unemployment perspective, so long as employee is given a date to return within 16 weeks, they will not be required to search for other jobs.
How will healthcare benefits work?

- Contact your plan administrator.
- Local healthcare plans are enacting emergency measures to enable employers to continue provide coverage.
Watch out for wage and hour issues with exempt vs. non-exempt.

- Exempt employees (your salaried individuals who meet an overtime exemption – likely managers) are entitled to pay for an entire week if they work any time in one week.
- Be careful to ensure they aren’t checking emails from home or making calls checking on employees. Any work triggers payment for entire week.
Exempt employees on furlough

- Consider taking devices away.
- Need strong message instructing not to work.
- Or consider furlough for weekly increments for exempt employees.
Reduced hours and reduced schedules

- Employees should still be able to qualify for unemployment.
- Should be ok for non-exempt hourly employees.
- Tough to implement with exempt, salaried employees.
- Most exempt employees have to maintain a certain salary in order to keep exemption.
Salary reductions for exempt employees

- If the employee is converted to hourly, or if the new salary falls below the minimum required for the federal FLSA exemptions ($684/week for executive, administrative, or professional; $107,432 per year for high salary exemption), that employee is then non-exempt (regardless of his/her duties), and the employer must keep time records and pay overtime if the employee works more than 40 hours in one week.

- Can later move back to exempt if they meet requirements.
Other employment law considerations

- WARN (Worker Adjustment and Retraining Notification Act) considerations could trigger advance notice (employers with 100 or more employees) for lay-offs.

- Laying off employees over 40 – Older Workers Benefits Protection Act – (applies to employers with more than 20 employees) – need to provide additional information with lay-off if release/severance offered.
Other Employment Law Considerations

- If you have an employee who works pursuant to an employment agreement, these rules don’t apply. You still have to follow your contract!
More considerations for any type of action

- If you are only going to lay-off some employees, important selection criteria and written justification should be done on the front end.
- Don’t arbitrarily pick employees or you set yourself up for discrimination claims.
The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") Is Enacted Into Law
Giant, new law, with little information available yet on practical launch
CARES

- Tax and economic provisions to help businesses (of all sizes) and individuals

- Creates a $349 billion loan program for small businesses, including 501(c)(3) non-profits and physician practices. These loans can be forgiven through a process that incentivizes companies to retain employees.

- Expands eligibility for unemployment insurance and provides people with an additional $600 per week on top of the unemployment amount determined by each state.
Paycheck Protection Program

- The Paycheck Protection Loan Program, at a price tag of $349 billion, covers the period February 15, 2020 through June 30, 2020 and greatly expands SBA loan eligibility. The loan program will allow businesses suffering due to the coronavirus outbreak to borrow money for a variety of qualified costs related to employee compensation and benefits, including (i) payroll costs, (ii) continuation of health care benefits, (iii) employee compensation (of those making less than $100K), (iv) mortgage interest obligations, (v) rent, (vi) utilities and (vii) interest on debt incurred before the covered period.
Paycheck Protection Program

- The legislation greatly expands the number of businesses (including non-profits) that are eligible for SBA loans and raises the maximum amount for such a loan by 2.5 x the average total monthly payroll costs, or up to $10 million. The interest rate may not exceed 4%.

- Companies that employ no more than 500 employees are (or a greater number based on the size standard applicable to the industry) may be eligible. Certain companies in the Accommodation and Food Services Industry (NAICS Code 72) may be eligible if they have no more than 500 employees per physical location. In most cases, the number of employees is counted together with all affiliates.
Paycheck Protection Program

- Waives the credit available elsewhere, personal guaranty and collateral requirements.

- For eligibility purposes, requires lenders to determine whether a business was operational on February 15, 2020, and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor. (This is likely to be interpreted to replace the determination of repayment ability which is not possible during the crisis.)

- All or a portion of the loan may be forgivable and debt service payments may be deferred for up to 1 year.
CARES ACT

- Loan Forgiveness
- Emergency Economic Injury Disaster Loans
- Hundreds of billions of dollars available to small businesses.
Employee Retention Tax Credit

- Refundable payroll tax credit against the employer’s share of Social Security taxes equal to 50% of wages paid from March 13, 2020 to December 31, 2020.
- Qualifying wages are paid by businesses during a shut down order or during a period of significantly declined gross receipts.
Payroll Tax Payment Deferrals

- The CARES Act defers payment of the employer share of social security taxes.
How to apply for loans under the CARES Act

- Some information indicates you apply through the SBA.
- Other information indicates you apply through your bank.
- [https://www.sba.gov/funding-programs/disaster-assistance](https://www.sba.gov/funding-programs/disaster-assistance)
- Idaho Trust: The SBA is requiring that small businesses exhaust all of their resources prior to being approved for the loan (ex: their cash reserves, their lines of credit, etc.).
- Call your banker to see if they have information.
- If tax questions, call your accountant.
Mobilize your team

1. Check in with your banker and let them know what’s going on. Are they on-board to help you obtain SBA loans? If not, who do they recommend that can help you?

2. Check in with healthcare administrator to discuss nuances of healthcare insurance in context of lay-offs, furlough, reduced hours.

3. Check in with 401k administrator. Can you suspend match during time of furlough?

4. Check in with your accountant – what are implications of tax credits, loans, etc.?

5. Do you use a payroll administrator? Do they have input on payroll tax credit?
Don’t forget about soft skills/other HR issues.

- Communication with employees is now more important than ever, in these times of uncertainty. Employees need to hear from their leadership. Consider messaging. What is mechanism for updates?
- Do you have the right policies in place for work at home, telecommuting, and other new issues?
- How will you address coronavirus in the workplace – do you have an infectious disease policy?
- Do your supervisors need guidance as they maneuver through the issues we’ve discussed?
- If you will be subject to Families First Act, consider forms you will need to get paid leave going.
- Don’t forget notice on the Families First Act.
Conclusion
Thank You!

Pam Howland
Idaho Employment Lawyers
(208) 342-0662
Phowland@idemploymentlawyers.com
Upcoming events

- May 27 – Supervisor training
- August 11 – ADA
- October 6 – Workplace investigations
- December 8 – Creating an Anti-harassment culture