

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

MARCH 20, 2020

Coronavirus: Where are We Now?

Last week, our firm [issued guidance](#) to employers planning for the spread of COVID-19 (commonly known as the Coronavirus). The impact of the Coronavirus is rapidly evolving, and employers must be aware of key issues to make informed decisions in the coming days and weeks.

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The federal government passed the Families First Coronavirus Response Act (FFCRA) on March 18. For more information on this new federal law, which for most employers with fewer than 500 employees institutes mandatory emergency paid leave and expands FMLA leave, please [click here](#) for our recent article.

SAFETY ISSUES

On March 17, 2020, Governor Evers ordered the Wisconsin Department of Health services (DHS) to prohibit all gatherings of 10 people or more to slow the spread of the Coronavirus. [This order](#) contains a number of exceptions relevant to employers:

- Office spaces are exempt from the order, but offices are instructed to implement social distancing measures, including teleworking, as much as practicable.
- Gas stations, grocery stores, and healthcare facilities are exempt from the order.
- Manufacturing, processing, distribution, and production facilities are exempt from the order, as are utility facilities.
- Food establishments may only remain open for take-out or delivery—indoor seating is prohibited.

As a result of this order and the declared pandemic, organizations are making changes to how they operate. These changes include implementing policies permitting remote work, creating new paid leaves, expanding existing paid leaves, placing employees on unpaid leave/temporary layoff (or merely not scheduling employees to work), and making changes to business practices to increase safety. Organizations need to continue monitoring guidance from DHS, the Centers for Disease Control (CDC), and county health departments as the guidance changes every day. Employers should coordinate their immediate response with the upcoming requirements of the FFCRA..

MANAGING EMPLOYEES WHO MIGHT BE SICK

Employers may send employees home if they display symptoms of the Coronavirus. The CDC states that symptoms of the Coronavirus include fever, a dry cough, and shortness of breath. The symptoms may appear between 2 and 14 days after exposure. The long period of time between exposure and symptoms is one reason the virus is spreading so rapidly. As a result, employers are responding to the pandemic cautiously even when they do not have any employees currently experiencing symptoms.

Employers should consider the following:

- Tell employees who are sick not to come into work.
- Ask employees not to come into work if the employee has a reasonable belief that they have been exposed to the Coronavirus (such as learning that they recently, within 14 days, had close contact, less than six feet apart, with someone who was diagnosed with the Coronavirus).
- Require the reporting of confirmed Coronavirus cases for those who have been on premises.
- Ask employees who have traveled to a geographic location that is experiencing an outbreak of the Coronavirus not to come in to work. However, the list of locations experiencing outbreaks is rapidly increasing, making it hard for employers and employees to keep track of which locations are at higher risk of exposing people to the Coronavirus.

Employers should also consider asking employees who are sick or might have been exposed to the Coronavirus to self-quarantine for at least 14 days or until cleared by a healthcare professional to return to work. However, given that healthcare providers are experiencing strong demand and given the lack of available testing for the Coronavirus, it might be more practical for employers to simply require such employees to self-quarantine for 14 days and/or to only return to work after they have been symptom-free for a period of time.

For further information on employee and job applicant rights under the Americans with Disabilities Act, please see [this link](#) for guidance from the EEOC, which was updated on March 19, 2020.

WAGE AND HOUR ISSUES

Employees Who Are Non-Exempt from Overtime Pay under the FLSA

Non-exempt employees are those who are generally paid on an hourly basis and who are entitled to overtime pay for hours worked in excess of 40 in a workweek. For non-exempt employees (setting aside the requirements of the FFCRA):

- Employers do not have to pay these employees if they are not working and have no applicable paid leave available (either because they do not qualify for or have run out of applicable leave).
- If an employer shuts down operations, the employer does not have to pay these employees if they are not performing services during the shut down.
- Employers can generally reduce these employees' hourly rates of pay going forward due to anticipated downturns in business.

Employees Who Are Exempt from Overtime Pay under the FLSA

Exempt employees are generally those who are higher level employees who are paid a set salary, regardless of the quantity or quality of work they provide in any given week, and who are not entitled to overtime pay. For exempt employees (again, setting aside the requirements of the FFCRA):

- If they have no paid leave available (either because they do not qualify for or have run out of applicable leave), employers can only deduct from these employees' salaries on a full-day basis if they perform no services for an entire workday due to sickness or personal reasons.
- If an employer shuts down operations for an entire day or more, the employer cannot deduct from these employees' salaries unless the employer shuts down for a full FLSA workweek and these employees perform no services for the employer during that entire week.
- Employers can generally reduce these employees' salaries going forward due to anticipated downturns in business (so long as they do not reduce them below \$684 per week). However, an employer that reduces an exempt employee's salary on a short term basis due to the employee working less than full-time hours risks jeopardizing that employee's exempt status. A Department of Labor Fact Sheet on paying employees during financially distressed times is [found here](#).

TEMPORARY LAYOFFS OR REDUCTIONS IN FORCE

Employers may be forced to consider temporary reductions in hours, layoffs, or reductions in force that result in involuntary terminations. These decisions require employers to decide on issues such as:

- How long will the reduction in hours/temporary layoff last? (Do not make promises as things are shifting rapidly.)
- How do the employer's paid leave policies apply (including any leave required under the FFCRA)?
- Will the employer provide any additional paid leave?
- What happens to the employee's health benefits?
- What are your criteria for selecting those to be laid off? Job skills? Seniority? (Using objective criteria will help ward off claims of discrimination)

Employers considering layoffs might want consider the Work-Share Program administered by the Department of Workforce Development. Information on that program is available online at <https://dwd.wisconsin.gov/uitax/workshare.htm>.

UNEMPLOYMENT BENEFITS

Employers who shut down operations should consider the ramifications of not paying employees during a period of full or partial shut down. Following the mandatory one week waiting period,¹ employees who are not being paid by employers are likely eligible for unemployment benefits. It generally does not matter what employers call the period of full or partial shut down ("layoff," "furlough," or "unpaid leave of absence"), employees that are out of work due to the shut down will likely be eligible for unemployment benefits. On March 20, Governor Evers issued an [emergency order](#) stating that unemployment claimants shall be deemed available for suitable work during the period of public health emergency if:

- The claimant is perceived by an employer to exhibit COVID-19 symptoms which is preventing the employee from returning to work, or
- The claimant is quarantined by a medical professional or under local, state, or federal government direction or guidance.

Provided that one of the following applies:

- The employer has instructed the claimant to return to work after a set period of time or after the claimant is no longer exhibiting symptoms,
- The employer has not provided clear instruction for the claimant to return to work, or
- The claimant would be available for work with another employer but for the employer's perception that the claimant is exhibiting coronavirus symptoms.

Additionally, retroactive to March 12, 2020, employees do not have to meet the normally required work search requirements each week in order to receive benefits.

HEALTH INSURANCE BENEFITS

Employers should consult with their health insurance carriers regarding their employees' continued eligibility for group health insurance benefits while the employees are off work during a layoff or shut down. Employers should clearly communicate to employees the status of their health insurance benefits and any obligation the employees have to continue paying the applicable portion of their health insurance premiums, including situations where the employee will be receiving no wages and will be required to remit premium payments to the employer. If employees are no longer eligible for group health insurance benefits, they will generally be eligible for COBRA continuation coverage once their group health insurance coverage ends.

WARN ACT ISSUES

Private employers with 100 or more employees are covered by the federal WARN Act. Private employers with 50 or more employees in the state of Wisconsin are covered by the state WARN Act. Employers covered by both laws must generally comply with the law that provides the most protection to employees.

These laws generally require that in the event of a mass layoff or plant/business closing (all defined in detail in the statutes) the employer must provide 60 days' notice to employees, to the state, and to the chief elected official of the local government of the municipality where the closing or mass layoff occurs. If an employer fails to give required WARN Act notice, it could be held liable for up to 60 days' wages and benefits for each affected employee. There is an exception to the 60 days' notice requirement for "unforeseeable business circumstances." There is a very strong argument that the Coronavirus pandemic qualifies for this exception. However, even if the "unforeseeable business circumstances" exception applies, employers must still give as much notice of a closing or mass layoff as possible, including a statement of the basis for reducing the notice period.

TALKING TO EMPLOYEES ABOUT CORONAVIRUS

Employers must be careful with their messaging about all things related to the Coronavirus. The primary concerns are:

- The individual privacy of each employee. Employers must not share the identity of any employee that has been tested for the Coronavirus or medical details about that employee’s condition or underlying medical health. Employers should inform their workforce if an employee is suspected to have the virus or has a positive diagnosis, but that messaging should not refer to personally identifying information (even if the identity of the employee will be obvious to others).
- When communicating to employees, employers should be supportive of the problems their employees are facing due to the Coronavirus. However, employers should carefully assess messaging around promises to their employees of “permanent” paid leave during the pandemic or promises that no one will lose their job due to the pandemic. Simply put, things are changing too fast, and employers that are forced to backtrack on such promises will face significant morale issues and potential threats of legal claims.

The unprecedented Coronavirus pandemic has raised numerous complex legal issues for employers. The Boardman Clark Labor & Employment team is here to assist you navigate through this incredibly difficult time.

¹Governor Evers has asked the Wisconsin legislature to pass a law removing the one week waiting period, but no such law has been passed yet.

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