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# What Employers Need to Know about Rapidly Changing Employment Laws As Employees Return to Work During the COVID-19 Pandemic

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**Editor's Note**: The joint and several liability clause identifies the parties that are jointly and severally liable for obligations under the agreement. The term is also frequently incorporated into other clauses and may appear anywhere in an agreement.

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After shut-downs due to the COVID-19 pandemic, many businesses around the country are now in the process of reopening their doors and requiring that employees return to the physical workplace. Because COVID-19 cases continue to surge in some areas and many schools are starting the year with remote learning, it is critical for employers to understand the maze of federal and state laws that apply to their workforce.

## Families First Coronavirus Response Act

The Families First Coronavirus Response Act was signed into law on March 18, 2020 and will remain in effect until December 31, 2020. The FFCRA applies to employers with less than 500 employees as of the date that any eligible employee requests a leave under the Act. Temporary employees who are jointly employed are included in that number, but independent contractors are not. The FFCRA may apply to 1099 employees in certain situations when there is a joint employer relationship as defined under the law.

The FFCRA includes the Emergency Paid Sick Leave Act, which allows for paid sick leave of two weeks (up to 80 hours) as of the first day of employment for employees who cannot work or telework. EPSLA sick leave may be taken at full pay, up to $511 per day or $5,110 in aggregate if the employee is subject to a federal, state, or local government quarantine or isolation order relating to COVID-19 or is experiencing COVID-19 symptoms and seeking a medical diagnosis. EPSLA sick leave may be taken at 2/3 pay for employees who need to take care of individuals subject to a quarantine or a child whose school is closed or if a child care provider is unavailable.

FFCRA also includes the Emergency Family and Medical Leave Expansion Act for employees who have worked for an employer for at least 30 days. The EFMLEA provides for an additional 10 weeks of paid family leave at 2/3 pay for employees who are unable to work due to a bona fide need to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Employers may receive dollar-for-dollar reimbursement through tax credits for all qualifying wages they pay to employees under the FFCRA and amounts paid or incurred to maintain health insurance coverage for employees on leave.

The Department of Labor issued rules in connection with the FFCRA. On August 3, 2020, the United States District Court for the Southern District of New York struck down four Department of Labor regulations pertaining to the FFCRA, including: (1) the requirement that in order for employees to be eligible for leave, the employer must have work available for them; (2) the broad definition of "health care providers" who may be excluded from the FFCRA; (3) the requirement that employers must approve intermittent leave; and (4) the requirement that employees must provide employers with documentation specifying the reason for the leave and the duration. State of New York v. United States Dept. of Labor, Case No. 20-CV-3020 (S.D.N.Y. Aug. 3, 2020). In reaching its holding, the Court did not specify whether its decision should apply on a nationwide basis. The DOL's next steps will likely clarify the applicability of this ruling.

## EEOC Pandemic Guidelines

In addition to providing FFCRA benefits, if applicable, employers must also follow the newest guidelines put forth by the U.S. Equal Employment Opportunity Commission in connection with the Americans with Disabilities Act.

During the pandemic, employers may send employees home if they display influenza-like symptoms, such as fever, chills, cough, shortness of breath, or a sore throat. Employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19.

Employers may take an employee's temperature to determine whether he or she has a fever but must keep confidential any collected medical information about fevers or other symptoms.

And, employers may ask employees about their exposure to COVID-19 during travel. According to the EEOC guidelines, employers may follow the advice of the CDC and state/local public health authorities about information required to permit their employees' return to the workplace after visiting a specific location, whether for business or personal reasons.

## Furloughs and Temporary Layoffs

During the pandemic, employers have used furloughs and temporary layoffs, mandatory time off from work without pay, as a means to control costs. During a furlough, the employer-employee relationship continues, and employees generally remain on the business' payroll roster and retain their access to benefits. However, employers must inform employees that no work is to be performed during the furlough period, including answering emails or work calls. This is because under state and federal law hourly employees must be paid for hours worked; employees who are exempt from wage and hour laws typically must be paid on a "salary basis," meaning that they must be paid a full salary for any week in which they perform any work. If these employees decide to perform even one minute of work during any week, the employer could be obligated to pay the entire salary of that employee for that week.

A permanent layoff is termination of employment, without specific right to be recalled by the employer. In this scenario, employee benefits end, and the termination usually triggers payout requirements under state wage laws.

## WARN Act

Employers considering downsizing during the pandemic need to have an understanding of the federal Worker Adjustment and Retraining Notification Act. The Act, which was enacted in 1988, applies to businesses with 100 or more employees. WARN generally requires covered employers to provide 60 days' advance written notice to affected employees of a "plant closing" or "mass layoff."

Mass layoffs are defined under WARN as involving at least 50 employees at a single site during a 90-day period.

Several states, including California, Illinois, and New York, have instituted their own "mini-WARN" acts, which specify their own notice periods. Employers in states with "mini-WARN" acts must comply with both the federal and state acts.

## Reduction in Hours/Compensation

Employers generally can change the work hours and schedules of hourly, nonexempt employee hours worked as needed during the pandemic. However, some state and local "show up to work" and/or predictive scheduling laws might apply limitations to what can be changed or require a certain amount of notice to be given. State and local laws also might require notice for changes in hourly compensation for exempt workers and/or the salaried compensation of exempt employees.

## Sick Leave Provided Under State or Local Law

Paid sick leave policies vary by state and, sometimes, even by cities or counties within states. In Illinois, for example, the Chicago Paid Sick Leave Ordinance and the Cook County Earned Sick Leave Ordinance require employers in those localities to provide eligible employees with at least one hour of paid sick leave for every 40 hours worked, subject to other requirements.

In general, in places where paid sick leave is mandated, employees may use paid sick leave for their own illnesses as well as those suffered by a qualifying family member.

Various states and localities have provided additional sick leave in response to COVID-19 so that employees may use paid sick leave if their workplace is closed by "order of a public official due to a public health emergency," or if they are caretakers for a child whose school or place of care has been closed by such an order.

Employers should be aware of these new laws if they operate in states including Arizona, Colorado (note amendments to HELP Act), Connecticut, Maryland, as well as cities like Los Angeles, Seattle, and Washington, D.C.

## Best Practices for Employers

Human resources leaders and employers around the country face new and complex state and federal employment laws. Sound legal counsel and proactive updates to policies and procedures will help ensure compliance with these laws as employees return to work during the pendency of the COVID-19 pandemic.