wiley

Consumer Technology Association™

Employment and Labor Guidance Related to Coronavirus (COVID-19) Prepared For:

Consumer Technology Association (CTA) Members

March 27, 2020

Wiley Employment and Labor Team

Wiley's employment and labor team can be contacted at:

Todd A. Bromberg
Chair, Employment and Labor Practice
tbromberg@wiley.law
202.719.7357

Christine E. Connelly
Partner
cconnelly@wiley.law
202.719.7372

Olaoluwaposi (Posi) O. Oshinowo
Special Counsel
ooshinowo@wiley.law
202.719.4275

Martha G. Vázquez
Associate
mvázquez@wiley.law
202.719.4496

Table of Contents

The Families First Coronavirus Response Act

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA or the Act) into law. The Act goes into effect April 2, 2020, but employers are able to start providing sick or medical leave under its provisions immediately. Employers will have to ensure they are able to comply and are complying with its provisions by the effective date. All employers must post a notice advising employees of their rights under the new law. Wiley advises also providing that notice electronically, given that many employees are currently working remotely.

This legislation was created and passed very quickly, leaving a large number of questions unanswered, including how the number of employees will be determined in calculating whether an employer is subject to the 500-employee cap and how the small-business exemptions will be administered.

OVERVIEW OF PROVISIONS: The Act impacts all employers with fewer than 500 employees primarily in two ways; through extension of the Family and Medical Leave Act (FMLA) and a mandate to provide sick leave under certain circumstances. The Act also includes tax credit provisions to help employers who are now required to provide paid leave, as well as some carve-outs for small businesses. The major provisions are summarized below.

Emergency Paid Sick Leave:

- Covered Employers: Applies to all private sector employees with fewer than 500 employees. Secretary of Labor is authorized to issue regulations to exempt employers with under 50 employees for good cause.
- Eligible Employees: All employees are immediately eligible.
- Duration of Leave: Employer must provide 80 hours of paid sick leave for full-time covered employees and the number of hours equal to an average of two weeks of work for part-time employees.
- Qualifying Reasons for Leave:
    1. Employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
    2. Employee has been advised by a health care provider to self-quarantine;
    3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
    4. Employee is caring for an individual who is subject to quarantine pursuant to numbers 1 and 2 above;
    5. Employee is caring for a child or children whose school or care provider is unavailable to due to COVID-19;
    6. Employee is experiencing a “similar condition,” as specified by the U.S. Department of Health and Human Services, Labor, or Treasury.
- Required Wage: In the case of Reasons numbers 1-3 above, the employer must pay the employee’s regular rate of pay with a daily cap of $511. For Reasons numbers 4-6 above, the employer must pay two-thirds (2/3) of the employee’s regular rate of pay with a daily cap of $200.
- Tax Credits: Private sector employers with fewer than 500 employees may receive a tax credit for 100% of the required paid sick leave wages, plus certain health care expenses. This amount is also refundable if the tax liabilities are less than the required paid sick leave wages.

Emergency Family and Medical Leave:

- Covered Employers: Applies to all private sector employers with fewer than 500 employees. Secretary of Labor is authorized to issue regulations to exempt employers with under 50 employees for good cause.
- Eligible Employees: Employees who have been employed with the employer for at least thirty (30) days.
- Duration of Leave: The first ten (10) days for which an employee takes the "emergency" FMLA leave may consist of unpaid leave, but an employee may choose to use any accrued regular leave during that time or the newly mandated emergency sick leave (described below). The employer must then provide paid leave for remainder of the emergency FMLA leave (up to ten (10) weeks), with a cap of $200 per day.
- Qualifying Reasons for Leave: Employee is unable to work or telework as a result of caring for a son or daughter under 18 years of age if the school or place of care has been closed, or the childcare provider is unavailable, due to a public health emergency.
- Required Wage: The employer must provide two-thirds (2/3) the employee's regular rate of pay, based on the number of hours the employee typically works with a daily cap of $200.
- Tax Credits: Private sector employers with fewer than 500 employees may receive a tax credit for 100% of the required paid medical and family leave wages, plus certain health care expenses. This amount is also refundable if the tax liabilities are lesser that the required paid sick leave wages.

FREQUENTLY ASKED QUESTIONS

- How does a business determine whether they have less than 500 employees?

There is no guidance in the Act itself on how to determine whether an employer will be subject to the provisions by virtue of having fewer than 500 employees. This will be a significant issue that courts and agencies will have to grapple with.

That said, there are two parts to the Act; 1) a temporary expansion of FMLA coverage, and 2) a new law that mandates sick leave coverage. Thinking of it this way helps to anticipate how the threshold question of who must comply will be determined.

With regard to the emergency FMLA, because it is an expansion of the existing law, all of the rules and regulations around FMLA apply to the temporary expansion. Therefore, with regard to determining whether an employer has 500 employees, it is the FMLA integrated employer test that will apply here. Under the integrated employer test, entities are considered a single employer for the purposes of FMLA coverage if they share common management, interrelation between operations, centralized control of labor relations, and a degree of common ownership.

With regard to the new law mandating emergency sick leave, we anticipate that courts and agencies will turn to the test that is typically used to determine whether two entities will be considered one enterprise under the Fair Labor Standards Act (FLSA). Under the FLSA, two or more businesses are considered to be one enterprise, and therefore their employee counts must be aggregated, if they involve related activities, unified operations, common control, and a common business purpose. While this portion of the Act is not technically an extension of FLSA, but rather a new law entirely, it does reference FLSA in several places (including on a determination of penalties) and we anticipate that courts and agencies will turn to the law surrounding FLSA for answers in this area.

- What documentation should employers require before granting emergency sick leave or emergency FMLA leave?

Employers may request that employees who are refusing to come to work provide documentation that is consistent with the documentation they would typically seek with respect to enforcement of their attendance policies.

* * * * * *

wiley Consumer Technology Association™

Coronavirus Aid, Relief, and Economic Security Act (CARES Act): What Employers Need to Know

On Friday, March 27, after days of intense negotiations, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law. This sweeping $2.2 trillion emergency stimulus package was passed on a bipartisan basis to help abate the massive economic disruption caused by the coronavirus (COVID-19) pandemic.

Many of the provisions of the Act will aid businesses in making difficult decisions about their workforce as the nation comes to a standstill due to the need for social distancing. In particular, employers that maintain their payroll will be eligible for forgivable loans to blunt the impact of the virus. Below is an overview of the key provisions that employers should be aware of as they continue to find a path through the COVID-19 crisis

Small Business Employers

The CARES Act gives the U.S. Small Business Administration (SBA) authority to make loans under what is being called the Paycheck Protection Program. Eligible borrowers will have to make a good faith certification they have been impacted by COVID-19, will use the funds to retain workers and maintain payroll and other debt obligations, and are not receiving duplicative funds for the same purposes from another SBA program.

The stimulus loans can be used for payroll support, such as employee salaries, to cover sick or medical leave, retirement contributions, insurance premiums, mortgage payments, and any other debt obligations. If the employer maintains its payroll, then the portion of the loan used to cover payroll costs, interest on mortgages, rent, and utilities for the eight weeks following the origination date of the loan would be forgiven. This is retroactive to February 15, 2020, so any employees who have already been laid off may be brought back onto the payroll and the employer will be able to have those payroll amounts forgiven.

Expansion of Unemployment Insurance Coverage

In addition to providing for stimulus loans directly to employers, the stimulus package provides for an expansion of unemployment insurance to help workers who have lost their jobs or have been furloughed directly. This section of the Act is known as the Relief for Workers Affected by Coronavirus Act.

The stimulus plan creates a temporary Pandemic Unemployment Assistance program through December 31, 2020, to provide payment to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others) who are unable to work as a direct result of the COVID-19 public health emergency.

Employers should be especially aware that the Act also provides funding to support “short-time compensation” programs, where employers reduce employee’s hours instead of laying off workers and the employees with reduced hours receive a pro-rated unemployment benefit. This provision would pay 100 percent of the costs the employer incurs in providing short-time compensation through December 31, 2020.

* * * * * *

Where Do We Go From Here: An Employer's Guide to Options for Weathering the Storm

Where do we go from here? That question is on the mind of nearly every American and it is a critical question for business leaders, as more than 80 million Americans are being asked to stay at home to help curb the spread of the novel coronavirus (COVID-19). We have compiled several options business leaders may consider when resolving that question, particularly with regard to their efforts to balance the long-term health of their company versus their immediate commitment to their employees.

Option: Mandatory Accrued PTO or Vacation Use

Employers may require employees to use their accrued paid time off (PTO) or vacation time to ensure they are paid at a full rate. This option is minimally disruptive to the employer-employee relationship, but it comes with a definite expiration date (*i.e.,* the employee will eventually run out of accrued PTO).

Practical Considerations:

Employers must be mindful of the differences between nonexempt and exempt employees. For hourly employees who are entitled to overtime (nonexempt employees), except as limited by state or local law, employers may force employees to exhaust their accrued PTO and vacation. Additionally, employers may restrict employees' ability to accrue PTO or vacation going forward.

For employees who are not subject to overtime pay requirements (exempt employees), employers can take the same action as with nonexempt employees, with one notable caveat: exempt employees are entitled to their full salary for completing any work during a workweek, regardless of the number of hours or days of work they completed. In practical terms, that means an exempt employee who exhausts her vacation or PTO time with three days remaining in a week must be paid her full salary.

Importantly, an exempt or nonexempt employee's exhaustion of employer-provided paid leave will not affect their rights to receive paid sick leave or Family Medical Leave Act (FMLA) leave under pre-existing state laws or the Families First Coronavirus Response Act (FFCRA).

Option: Voluntary Unpaid Leave of Absence

Employers may ask employees to partner with them to ensure the long-term viability of the company by voluntarily taking unpaid time-off.

Practical Considerations:

Employers are free to request that both exempt and nonexempt employees take voluntary unpaid leave that would not otherwise be protected by the FMLA or a state or local equivalent. However, exempt employees *must* take unpaid leave in full-day increments. Additionally, employers should be mindful of the caveat discussed above concerning the requirement that exempt employees be paid their full weekly wage for any week in which they complete work. Employers may temporarily modify their unpaid leave policies to accomplish this goal.

Asking employees to take a voluntary unpaid leave of absence may affect the employer's ability to have loans taken pursuant to the coronavirus stimulus package forgiven. These loans require payroll maintenance to be forgivable. See Section 2 for more information.

Option: Temporary Reduction in Hours or Pay

This option allows employers to keep employees working, albeit with a reduction in pay or hours that allows employers to reduce payroll costs.

Practical Considerations:

Employers must be mindful of the differences between nonexempt and exempt employees. For nonexempt employees, employers are permitted to enact prospective wage and hour reductions so long as the reductions do not bring the employees' wages below the applicable minimum wage requirements. Employers who chose this option should be mindful of state and local laws that might require an advance notice period before a wage or hour reduction can become effective and should include a notice period as a practical employee relations matter.

For exempt employees, things can be a bit more complicated because employers must balance the need to reduce wages and hours with the goal of maintaining the employees' exempt status. The Fair Labor Standards Act (FLSA) requires employers to pay exempt employees the same weekly salary for any workweek during which they perform work without regard to the number of hours worked. Put into practice, this means an employer owes an exempt employee wages for an entire workweek even if the employee only worked three out of five days during the week due to a pandemic-related office closure. Employers who violate that requirement risk loss of an employee's exempt status and liability for retroactive and prospective overtime pay.

There is a narrow exemption that applies to prospective reductions in wages and hours that are occasional and related to long-term business needs so long as the employee receives the minimum exempt weekly salary required to maintain exempt status (currently $684). However, neither the FLSA nor the U.S. Department of Labor's guidance concerning the statute defines "long-term" in this context, so it is very important to consult with an attorney before reducing an exempt employee's wages. Employers may also simply choose to have exempt employees alternate workweeks given that the FLSA does not require employers to compensate exempt employees for weeks during which they complete no work.

Option: Furlough

Furloughs are typically short-term forced or voluntary unpaid leaves where employees remain employed but complete no work. Employees typically maintain benefit eligibility during furloughs. Employers should refer to the details of their employee health plan(s) and benefit policies to determine employee benefit eligibility during a furlough.

Furloughs help employers reduce payroll expenses while allowing employees to keep their jobs and potentially remain eligible for benefits.

Practical Considerations:

Employers may furlough nonexempt employees for hours, days, or weeks. Exempt employees must be furloughed for an entire workweek (and furloughs should not begin in the middle of a workweek), in order to maintain their exempt status.

Furloughs may trigger certain notice obligations under the federal Worker Adjustment and Retraining Notification Act (WARN) or a state equivalent. Under the federal law, furloughs that last for a more than six months are considered an "employment loss" that could trigger compliance with the law. Accordingly, employers must plan carefully and consult with counsel to ensure WARN compliance.

Option: Layoff or Reduction in Force

As discussed above a furlough is a temporary reduction in hours that is not accompanied by a loss of employment. A layoff, by contrast, typically describes an actual employment termination with the possibility of re-hire at some point in the future. A reduction in force is similar to a layoff except that there are no plans to re-hire the employee at a future date.

Layoffs and reductions in force help employers reduce payroll and benefit costs during times of economic of business difficulty.

Practical Considerations:

Layoffs or reductions in force can be complicated and can have unintended consequences if they are not well thought out and executed. Proposed layoffs or reductions in force must always be analyzed to determine whether the federal

WARN Act or a state equivalent requires certain advance notices to employees. The company will also want to attempt to frame the employment action in a manner that will allow it to argue that no notice was required under WARN's unforeseeable business circumstances exception.

Layoffs and reductions in force also trigger employer obligations under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA), or state equivalents, because they typically result in a loss of benefits. Layoffs and reductions in force may also trigger vesting requirements for qualified defined contribution retirement plans (*e.g.,* 401(k)s or Employee Stock Option Plans).

Layoffs or reductions in force may also trigger employer obligations to structure severance agreements and materials to be compliant with the Older Workers Benefit Protection Act (OWBPA), which imposes certain requirements concerning employees who are 40 years of age or older. A valid release of age claims under the OWBPA also contains numerous other requirements when two or more employees are laid off such as an additional review period (45 days) and an attachment setting forth such information as the unit or ages of the employees considered for the layoff.

Like a voluntary unpaid leave of absence, laying off employees may affect the employer's ability to have loans taken pursuant to the coronavirus stimulus package forgiven. See Section 2 for more information.

Other Things to Think About

Disparate Treatment and Impact Concerns: Employers should carefully analyze their potential liability for discrimination under federal, state, or local antidiscrimination laws with the assistance of counsel before implementing any of the foregoing options. A plan that disproportionately impacts members of a protected class (*e.g.,* women, workers over 40, people with disabilities, racial or ethnic minorities) creates potential exposure for employers. Employers should carefully document their analysis and the business need for their decisions with respect to the application of the options discussed in this guide.

Unemployment Eligibility: Employees who are underemployed (*i.e.,* employees whose hours and wages have been reduced without a corresponding loss in employment) are typically not eligible to receive unemployment benefits. Both the states and the federal government have acted to expand unemployment benefits to those who would have previously been unqualified and the extend the length of the benefits. As a practical employee relations matter, employers should consult counsel to determine what kind of unemployment benefits might be available to employees whose hours and wages have been reduced.

Contractual Obligations: Employers should review employee personnel files to determine what, if any, obligations they have to employees based on employment or other contractual agreements. Employers may have obligations concerning notice, severance, and guaranteed pay that could be violated by implementing an across-the-board measure. Employers always have the option to renegotiate such agreements, but it is essential that any such amendments be properly negotiated and documented in order to ensure that they are enforceable.

State and Local Law: Employers should always consider the impact of various state and local laws before implementing any of the options discussed in this guide. In the District of Columbia, for example, employers who involuntarily terminate an employee are required to pay the employee's final wages within one working day of the termination. If the employer's PTO or vacation policy provides for the payment of accrued leave upon termination, the employer would also need to include that amount as wages paid on the employee's final paycheck. As a practical matter, that means an employer who anticipates a temporary downturn in business and who wants to hold as strong a cash position as possible may be in a better position to rebuild the company if they force employees to use accrued PTO (thereby stretching out payments over the course of days, weeks, or months) than if they lay off employees (thereby giving rise to liability for a lumpsum payment the next working day).

Considerations for Service Members: The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects job rights and benefits for veterans and members of Reserve components who are employees or prospective employees in the civilian space. USERRA is an important consideration for employers of impacted service members and reservists in light of the activation of the National Guard. As COVID-19 continues to spread across the country, we can likely anticipate more activations of reservists and Guardsmen, which would implicate employer obligations under USERRA.

Shared Work Programs: Some states offer and encourage the use of shared work programs that allow employers to reduce an employee's normal weekly hours by a given percentage while permitting eligible employees to supplement the lost income with "Shared Work Unemployment Benefits." Texas, for example, has such a program and recently encouraged employers to consider the program in place of layoffs.

* * * * * *

wiley Consumer Technology Association™

Cheat Sheet for Managers Answering Questions from Employees

Emergency Paid Sick Leave

- Who is eligible for emergency paid sick leave?
  - Employee is subject to a Federal, state, or local quarantine or isolation order related to COVID-19;
    - This may include employees that are subject to a shelter in place order.
  - Employee has been advised by a health care provider to self-quarantine;
  - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  - Employee is caring for an individual who is subject to quarantine pursuant to bullets 1 and 2 above;
  - Employee is caring for a child or children whose school or care provider is unavailable due to COVID-19;
  - Employee is experiencing a "similar condition," as specified by the U.S. Department of Health and Human Services, Labor, or Treasury.

- How do I get the emergency paid sick leave?
  - Employees may immediately take advantage of this paid sick leave if they are experiencing one of the above conditions.
  - We recommend that employers instruct employees to request to use the emergency sick leave using the company's regular procedure for using sick leave or PTO.
  - Because this emergency sick leave will be reimbursed to the company through tax credits, we recommend having a dedicated charge code or otherwise tracking the total amount the company pays to each employee.

- How much pay am I eligible for if I take emergency paid sick leave?
  - The normal rate of pay in these circumstances is up to $511/day:
    - Employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
    - Employee has been advised by a health care provider to self-quarantine; or
    - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  - Two-thirds (2/3) of the normal rate of pay in these circumstances $200/day:
    - Employee is caring for an individual who is subject to quarantine;
    - Employee is caring for a child or children whose school or care provider is unavailable due to COVID-19;
    - Employee is experiencing a "similar condition," as specified by the U.S. Department of Health and Human Services, Labor, or Treasury.

- How many hours can I use?
  - If they are a full-time employee, 80 hours.
  - If they are a part-time employee, the employer must determine the available hours based on how many hours you typically work over a two-week period.

- Can I use the sick leave to make up for working reduced hours?
    - No. Underemployment is not a qualifying reason to use sick pay.

- Am I eligible for unemployment to make up for my reduced hours?
    - The employee is likely eligible for unemployment, but the amount of unemployment or whether they qualify depends on which state they live in. The federal government has also expanded access to unemployment for those who were previously ineligible, as well as extending the unemployment benefits period. For specifics about eligibility, the employee will have to contact their state unemployment office.

- If I use the emergency sick leave, will I lose my ability to use my PTO or other leave guaranteed by existing, non-emergency state law?
    - No. This leave is in addition to that leave and is only available until December 31, 2020.

- If I do not use the emergency sick leave, can I be paid out the amount at the end of the year or roll it over to next year?
    - No.

Emergency Family and Medical Leave

- Who is eligible for the emergency family and medical leave?
    - An employee is eligible for the emergency family and medical leave if they are unable to work or telework because they must care for a dependent whose school or place of care is closed due to COVID-19.
    - The employee must have worked with the company for at least a month at the time they request this leave in order to be eligible.

- How do I get the emergency family and medical leave?
    - We recommend that employers maintain their normal processes for processing and approving FMLA requests, with the caveat that it should be considered and approved with some urgency.

- How many weeks of leave can I take? How many of those weeks will be paid?
    - The employee can take twelve (12) weeks of leave, ten (10) of which must be paid by the employer pursuant to the legislation.
    - If the employee wishes to use existing paid leave that is either guaranteed by company policy or by state law during the first ten (10) days of their emergency leave, they may do so. They may also use the emergency sick leave to cover those ten (10) days.

- How much will I get paid?
    - The employee will get paid two-thirds (2/3) of their normal rate of pay with a limit of $200 per day.

- I saw my state just passed an emergency sick leave law, as well. Can I use that time in addition to the federal emergency sick leave?
    - This depends on the state, but generally the state mandated leave runs concurrently (not in addition to) the federally mandated leave.

* * * * * *

CTA’s Employment and Labor Team

Contact information for members of CTA’s Employment and Labor team is outlined below. Please contact us with any questions or concerns.

Todd A. Bromberg

Chair, Employment and Labor Practice
tbromberg@wiley.law
202.719.7357

Christine E. Connelly

Partner
cconnelly@wiley.law
202.719.7372

Olaoluwaposi (Posi) O. Oshinowo

Special Counsel
ooshinowo@wiley.law
202.719.4275

Martha G. Vázquez

Associate
mvázquez@wiley.law
202.719.4496