



In the News

MWM Labor and Employment Client Alert – Coping with COVID-19

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It's not likely that your Standard Operating Procedure manual has a page for pandemics, so let's fill that gap. Here is a checklist approach to what you need to know and do now:

Business Closing Mandates

Check websites for your local (city and county) and state governments to identify which businesses have been told to shut down and whether residents are being told to “shelter in place.” Is it an executive order or mandatory restriction or merely a recommendation? Restaurants and bars have been the focus of mandates so far, with the option to continue to serve via take-out or delivery in most jurisdictions. Some states, like Pennsylvania, draw the line at essential vs nonessential business when proclaiming who must close and who may remain open. Dallas County's order takes effect at 11:59 on March 23 and ends at 11:59 p.m. on April 3, 2020 (subject to possible extension). It requires [1] residents of the county to remain in their homes, except for trips to get groceries or essential medical care; and [2] businesses that are non-essential to shut down. The order is posted at <https://www.dallascounty.org/Assets/uploads/docs/judge-jenkins/covid-19/03232020-AmendedOrder.pdf>. Employers with multiple locations must read and interpret orders for each jurisdiction as the scope of the restrictions and definitions of terms used in the order will vary. One size does not fit all.

Telework

Whether your business is required to close or you are simply wanting to force employees to stay home (or they are asking to stay home), identify which jobs can be done remotely and which cannot. The pay issues are explained below.

Business Travel

Just say no, for now.

WARN and WARN clones

If you are going to furlough workers and/or terminate the employment of workers, you may be required to comply with the federal plant closing and mass layoff law, WARN, and/or State or local laws that are similar to WARN but often have lower thresholds. If you are not familiar with WARN there is a great employers' guide available at:

<https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/EmployerWARN2003.pdf>. WARN contains exceptions which do not excuse the giving of notice but allow giving less than 60 days' notice. The “natural disaster” exception applies to “flood, earthquake, drought, storm, tidal wave or similar effects of nature.” This does not appear to include pandemics. The “unforeseeable business circumstances” exception is when there is a sudden, dramatic and unexpected action or conditions outside the employer's control, like the unexpected cancellation of a major order. At least one state, California, has suspended the notice requirement of their WARN-type state law when the closure is due to the pandemic. Federal WARN does not apply where:

A plant closing or mass layoff results in fewer than 50 people losing their jobs at a single site of employment;

50 to 499 workers lose their jobs and that number is less than 33% of the employer's total active workforce at a single site;

A layoff is for six months or less; or

Work hours are not reduced more than 50% in each month for any six-month period

Furlough or Layoff

These words do not have a single, legal meaning so be clear of your intention when you communicate with employees verbally and in writing. If your employees are employed at-will, announcement of a temporary layoff or furlough should not promise reinstatement. If you have employees with firm contracts of employment (not at-will) then review your obligations before letting them go. If some will stay and some will go, consider running disparate impact analyses to ensure that your selections did not fall more heavily on protected classes. Apply job-related criteria when making these decisions and document your reasoning.

Pay Issues

There are lots of variables here to consider:

Fair Labor Standards Act

This federal law regulates how employers must pay their nonexempt and exempt workers:

Nonexempt

Often referred to as hourly workers, these folks must be paid at least the applicable minimum wage for all hours worked plus overtime. If they are furloughed and perform no work, there is no obligation to pay. If they telecommute and/or work a full or reduced hours schedule, they are paid for all hours worked plus overtime if it is incurred. There is no obligation to offer a telecommute arrangement due to the pandemic but it may make sense for both the employer and the employee, for certain types of jobs.

Exempt

Exemptions relieve the employer of the minimum wage, overtime and record-keeping obligations but they impose new obligations. For most of the "white collar" exemptions to be used, the employer must [1] pay the exempt employee at least the minimum salary rate which went up to \$35,568 on 1-1-20; [2] pay on a "salary basis" which means only certain deductions from pay are allowed; and [3] satisfy the duties test of the exemption being relied upon. Paying on a salary basis means that the exempt worker is paid the same salary amount for each workweek in which any work is performed. There can be no variations based on the quantity or quality of the work. While employers can reduce the salary amount based on a bona fide change to the scope of the job that is expected to be long-term, such as going to four-day workweek instead of five, employers may not reduce the salary in response to a short-term reduction in hours worked such as a furlough (no work done) or a reduced hours schedule (some work done) without nullifying the exemption. Some relief is found in that no salary is required if no work is performed for an entire workweek. Employers who intend to furlough exempts and either can't or do not want to allow telecommuting must make it very clear that no work is to be performed from home.

Both

Employers are mostly free to apply any accrued paid time off during employee absences due to furlough, even if the employee would prefer to keep it saved (but see a change to the rule below under Emergency Family and Medical Leave Expansion Act). For employers who have large individual PTO accrual on their books, this is a great opportunity to bring those balances down while helping your employees.

Emergency Family and Medical Leave Expansion Act (Division C of HR 6201)

The idea here is to expand the FMLA's qualifying reasons for job-protected leave to add an employee who can't work or telework and needs to be home to care for a minor child (under age 18) because the child's school or childcare is closed or the paid childcare provider is unavailable, due to the pandemic. It differs from "regular" FMLA in that the employee need only be employed by the employer for 30 days (instead of one year), there is no minimum number of hours worked for the employer before taking leave and the "50 employees working within 75 miles" of the leave-taking employee's work location requirement is not there. Another difference from "regular" FMLA is that job restoration is n/a if the employer has less than 25 employees and [1] the position the employee held has been eliminated due to the pandemic; [2] the employer tried to reinstate the employee to an equivalent position when leave ended; and [3] the employer contacts the employee if an equivalent position becomes available at any time during a one-year period which begins on the earlier of [a] the date on which the qualifying need (to stay home with the kid) due to the pandemic ends; or [b] 12 weeks after the FMLA leave began. The first ten workdays of the leave are without pay but the employee may elect to use available forms of paid time ("PTO"). Unlike "regular" FMLA there is no language here that allows the employer to force the employee's use of earned PTO during these ten days. The rest of the absence is with pay at a rate of at least 2/3 the employee's regular rate of pay and based on the number of hours the employee would normally work. The law caps the rate of pay at \$200 per day and \$10K in the aggregate but employers are always free to be more generous than what the law requires.

Emergency Paid Sick Leave Act (Division E of HR 6201)

The idea here is to provide two weeks (80 hours) of paid sick time to full-time employees and a pro rata amount to part-time employees who can't work or telework for qualifying reasons. The reasons include [1] employee is subject to a federal, state or local quarantine order; [2] employee has been advised by a health care provider to self-quarantine; [3] employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis; [4] employee is caring for another person who is subject to quarantine under either [1] or [2]; [5] employee is caring for his or her son or daughter whose school or childcare has closed or the regular childcare provider is unavailable due to the pandemic; or [6] the employee is experiencing a substantially similar condition specified by the Secretary of HHS in consultation with the Secretaries of Treasury and Labor. All full-time and part-time employees are immediately eligible for paid sick leave and the employer may not force use of earned PTO before using this paid sick leave. There will be a mandatory poster to be displayed in the workplace available to employers on or before April 9 . . . look for it on the U.S. DOL website at www.dol.gov. The amount of pay is based on the employee's regular rate of pay and usual number of working hours and is capped at \$511 per day and \$5,100 in the aggregate for reasons [1] through [3] above. The amount of pay is 2/3 of the employee's regular rate of pay and usual number of working hours and is capped at \$200 per day and \$2K in the aggregate for reasons [4] through [6].

Health Insurance

Both termination of employment and reduction in hours worked can cause employees to be no longer eligible to participate in their employer's group health plan. That's where federal COBRA and state mini-COBRA laws can help. COBRA laws allow an otherwise ineligible employee to remain on the group health plan for up to 18 months (longer, in certain situations) so long as the premiums are paid. The employer is free to shift the entire cost of the premium to the employee and to add a 2% administrative fee if it wants to. Some employers chose to be more generous and pick up part

of the premium or pay the entire premium. If the employer is doing more than law requires, carefully communicate how long you are willing to pay some or all of the premiums.

Unemployment Compensation

This is available by filing for benefits through the state agency (e.g., Texas Workforce Commission, for employees in Texas) and can often be done on-line. Employees who are discharged or furloughed can apply, as well as some employees whose working hours have been reduced. Division D of HR 6201 pumped additional funds into the system in anticipation of a spike in claims being filed by idled employees.

Ill Workers

This one's easy . . . send them home. In most cases, you should not insist on a doctors' note for several reasons. Some jurisdictions, particularly those with state or local paid sick day mandates, may not allow employers to make that demand. Health care providers may be overwhelmed with cases and not have time for optional paperwork. Firm test results won't be available where COVID-19 testing kits are lacking. Relax a bit from the norm of requiring a doctor's note, for now.

Worried Workers

This one's not so easy since some worries are well-founded and some are not. The lack of COVID-19 testing kits delayed confirmed diagnoses but that should be improving in the coming days and weeks as more become available. Self-quarantine short of confirmed illness is reasonable where the person had recent travel to any of the "hot spots" or came in contact with a confirmed case or is in the "at risk" group of elders with chronic health conditions. There will be additional good reasons to stay home, as community spread upticks. The CDC is mapping known U.S. cases at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

Labor Union?

Be sure to consult your collective bargaining agreement before making any changes that affect your unionized workers.

Communicate

Fear causes anxiety while education and calming communications can bring the fear level down. Tell your employees what you are doing to keep them safe while at work. Encourage and model good hygiene measures that keep everyone safe. If furloughs will be necessary, explain both company-provided resources and government-provided resources that may help. Provide an intranet, hot-line, dial-in number with recorded message, email blasts or other means to keep your team informed as the situation changes.

We are here to help you with your questions, both legal and practical. Feel free to call or send an email at any time and we will reply as soon as possible. Our office phones roll to our cell phones and we are monitoring them during office hours and beyond, to ensure you get what you need:

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