

COVID-19 Employment Issues: FAQs & Answers

April 1, 2020

Goulston & Storrs is providing all interested people with periodic legal updates related to the rapidly evolving COVID-19 pandemic. In this update, we are summarizing answers to some of the questions posed by more than 100 business owners, human resource professionals and others who attended a recent webinar hosted by our firm. The subject of the webinar was the Families First Coronavirus Response Act (the "Act") H.R. 6201, and how to handle a host of related employment issues emerging from the pandemic.

Readers should note that the Act goes into effect on April 2, 2020, applies only to employers with fewer than 500 employees, and sunsets on Dec. 31, 2020. Benefits that employers must confer on employees related to family medical leave and emergency sick leave under the Act are reimbursable under certain federal tax credits (which are not covered in this employment law update).

Expanded Family Medical Leave

Q: What kind of family medical leave do employers have to grant now?

A. The Act expands the FMLA to provide up to 12 weeks of paid leave for employees who have been on the job for at least 30 days and are unable to work or telework due to a need to care for the employee's child under 18 years of age, provided that the child's school or place of care is closed or the childcare provider is unavailable due to COVID-19. Under this provision, the first 10 days of leave are unpaid, but an employee may elect to use any accrued paid leave during that period, including Emergency Sick Leave [as defined in next question/answer below]. The final 10 weeks must be paid at two-thirds of the employee's regular rate, up to \$200 per day, and \$10,000 in the aggregate. Also, to qualify for this COVID-related family medical leave, the employee must have been on your books for 30 days.

It's important to note that under the Act, employees also retain FMLA job restoration rights, unless the employer has 25 or fewer employees and the employee's position no longer exists due to an economic downturn or other circumstances caused by COVID-19. However, the small employer must make reasonable attempts to contact the employee and restore the employee to an equivalent position for up to a year following the employee's leave. Employers of health care providers and emergency responders are not bound by these provisions.

Emergency Sick Leave

Q. What kind of sick leave do employers have to grant now?

A. The Act immediately provides 80 hours of emergency sick leave to six categories of full-time workers:

- (i) employees who are quarantined due to COVID-19,
- (ii) employees who are in self-quarantine due to COVID-19,
- (iii) employees who are symptomatic and seeking diagnosis of COVID-19,
- (iv) employees who are caring for someone (not limited to family members) in the first two categories,
- (v) employees caring for their child if the child's school or place of care is closed or the child's care provider is unavailable due to COVID-19, or

- (vi) employees experiencing any other substantially similar condition (to be specified by the Secretary of Health and Human Services).

Employees in the first three categories are entitled to full pay at their regular rate, up to \$511 per day and \$5,110 in the aggregate. Employees in the last three categories are entitled to pay at two-thirds of their regular rate, up to \$200 per day and \$2,000 in the aggregate. Employers cannot require workers to find replacements to cover their hours or discriminate against workers who request sick leave. In addition, employers of health care providers and emergency responders may exclude their employees from these emergency sick leave provisions.

Also, for the sick leave, there's no service requirement, no hours requirement of any kind; and part-time employees are entitled to leave equivalent to their average hours worked per two-week period.

Workforce Reductions

Furloughs & Layoffs

Q. What are the issues we need to think about in doing workforce reductions?

A. One of the hardest decisions for employers is whether to terminate workers through mass layoffs or to furlough them. As with other difficult decisions, there's never one answer that fits for everybody. Many clients favor a furlough because they know that they will need critical employees on board immediately when this COVID pandemic and outbreak subsides. A furlough is a great option for not terminating an employee – they are technically still employed but they are not working, they're not coming into the workplace, and they can continue to receive their benefits and also file for unemployment. This provides some measure of relief to employees that otherwise might be out of work.

Furthermore, furloughs and layoffs do not have to be company-wide. There may be departments or divisions or locations where either a furlough or a termination may be appropriate, and that is largely a business decision.

There is a caveat here. Furloughed employees cannot be working at all. They should not be on email or logging in remotely. If they're on furlough, they can't do any of that, because if they do that's considered work, and it raises various wage-and-hour obligations regardless of whether the employees are exempt or hourly.

Vacation Time

Q. Can employers permit employees to use accrued vacation time or paid time off instead of filing for unemployment benefits right away?

A. That's an opportunity that employers can offer, and it will usually provide a greater benefit than what unemployment benefits will provide. Again, like anything else, it's fact-based. It depends on your business and the challenges that this COVID outbreak is causing.

WARN Act

Q. Do employers have WARN (Worker Adjustment and Retraining Notification Act) obligations associated with layoffs due to COVID-19?

A. WARN is a federal law that requires businesses with more than 100 employees to provide 60 days' notice before a mass layoff or plant closure that will last for over six months. So, depending on the layoff and the plan for the business, you might have WARN Act obligations, but that is a very fact-specific determination. Employers should know that many states also layer on additional notice requirements through their own statutes. California, New York, and Massachusetts, for example, all have additional obligations that are significant.

On the other hand, clearly nobody had 60 days' notice of this COVID event, and there are exceptions under the law that relate to "unforeseen circumstances." Unfortunately, nobody knows how this pandemic will fit into the standard of "unforeseen circumstances." This has happened so quickly, but the longer we're having to live with coronavirus, the less unforeseen future layoffs may be. So, there could be situations where it is prudent to craft some kind of notice to prevent WARN Act claims, but this decision is very dependent on the facts of each employer's individual circumstances, which should be discussed with legal counsel.

Other Impacts on Existing Laws

Anti-Discrimination

Q. What kinds of discrimination issues do we need to consider that relate to the coronavirus?

A. Anti-discrimination laws apply to the current situation just as they do under ordinary circumstances. So, for instance, it would be unlawful to terminate or release only employees that have the greatest risk from COVID-19, whether due to a medical issue or age or some other condition. There's a lot of concern, especially with COVID, about decisions that appear to be based on national origin because of where the disease appears to have originated. Clearly there are multiple state and federal protections, and these should be assessed with your legal counsel to determine how they apply to particular employment law decisions affecting specific employees.

OSHA Considerations

Q. Are there any unique workplace safety considerations that you are seeing with this pandemic?

A. For employers who operate essential businesses that are still open, depending on your jurisdiction, there are federal OSHA and state regulations relevant to safety. There are also considerations affecting workers, customers and others entering your premises. We are seeing headlines now about some employees demanding more protections in the form of hand sanitizers, gloves, masks or other supplies that are hard to procure right now. There are some really helpful [guidelines for COVID published by OSHA](#), and they deal with personal protective equipment, best practices in terms of cleaning and sanitation, and other issues.

Worker's Compensation

Q. How do COVID exposures implicate worker's comp decisions?

A. Many people are asking if we will see a rash of worker's comp claims related to coronavirus. We don't know yet how this will play out, but we know what factors might be considered under a traditional legal analysis, which would examine how a sickness was contracted and the nature of the employer's business. Generally, a temporary communicable disease is not covered by worker's compensation, but this might be different. Certainly, there will be issues of evidence, such as how you prove that an employee actually contracted COVID in the workplace and not somewhere else. For those jobs that have particularly high exposures to the disease, there may be a rash of worker's compensation claims, but we don't know yet. We might see different standards coming for health care workers, first responders and others. Keep checking our web content for topic specific advisories and "additional resources," including links to government guidance and other independent analyses.

What's Ahead?

Notes on Upcoming Legislation and Regulations

Q. What other legislative and regulatory changes are coming?

A. We're waiting for regulations related to the Act that will help to clarify some of the many questions that employers have right now. We're also looking at legislative and regulatory changes created by the very recent Coronavirus Aid, Relief, and Economic Security Act ("CARES") and we will be tracking those for you and publishing further explanations on our website. We have already posted some materials related to employment law and coronavirus (see links below) and we have more information for you that will be coming out of our content pipeline.

[Workforce Reduction & Employee Rights](#)

[Summary of CARES Act](#)

[Expanded FMLA & Emergency Sick Leave](#)

[FFCRA Leave Entitlements](#)

More Granular Fact-Specific Questions

Q. What laws have been enacted for commercial enterprises with more than 500 employees?

A. Just to reiterate, the family medical leave expansion and the emergency sick leave under the Act apply only to employers with less than 500 employees, so this is going to capture a lot of employers who are new to family medical leave altogether. If you have more than 500 people, you're not obligated to offer this. We have had a couple of larger employers ask if they could voluntarily mimic these provisions in the form of a paid leave, and that is indeed permissible but not required. We're actively studying other legislation impacting larger employers and will be publishing advisories on that as well.

Q. If an employee has been told by their doctor to stay at home due to underlying medical issues, do they qualify for leave?

A. Such an employee appears to qualify for the 80 hours of emergency sick leave if they have been told to self-quarantine by a doctor. Again, we're waiting on regulations to clarify some of the specific circumstances that will arise. It is probably a "no" for family medical leave, unless the employee would qualify for that leave under a traditional analysis. But as far as the emergency sick leave, that would appear to be available to them.

Beyond what is legally mandated, employers should also consider what is prudent from a business point of view. It may be wise to encourage and incentivize staying at home in cases of doubt because of the pernicious way this disease spreads and the damage it causes. We're in an unprecedented situation where encouraging employees to take leave, even if there is a suspicion that they may not have been exposed to COVID, could be wise because once there is one questionable contact there could be a forced two-week quarantine for numerous other critical employees. Employers should probably consider each work unit, the risks of contagion, and the risks associated with losing a worker or multiple workers.

Q. Can we ask potential customers questions about their health prior to in-person meetings?

A. Ordinarily, you would not ask, but these are unusual times. The World Health Organization has designated COVID-19 as the source of a worldwide pandemic, the federal government issued a state of emergency, and various state governments have issued a plethora of related health and safety orders. In these circumstances, I think it is entirely appropriate to ask customers health questions related to COVID. You might ask whether they've been exposed, whether they're exhibiting any symptoms, and whether they have traveled to so-called pandemic hot zones before allowing in-person appointments. Not only is that legally okay to do, but it is advisable in order to protect your fellow employees. This may be an exceptionally important consideration pertinent to traveling salesmen or consultants, as well as others who are at higher risk of contracting the virus.

Q. Can we give employees who are about to go on furlough some kind of spot bonus or payment to help them through this crisis?

A. Yes. You could also help employees on furlough pay for medical coverage. Some employers have opted to pick up the cost of health coverage for employees with an option to recoup that cost when the employees return to work.

Q. Can an employee who is reduced to a one-day workweek also apply for unemployment?

A. Reducing the hours of a salaried employee gets very complicated, because it can impact their exempt status. But if an employer has an hourly employee who is working just one day or eight hours per week, there is an option available to do this in Massachusetts and some other states. In Massachusetts, it's called [WorkShare](#), and it enables the Department of Unemployment to pay some unemployment compensation to an employee that is still partially employed. You can click on the highlighted link in this answer for more details.

Q. Will furloughing employees reduce an employer's chances of getting any SBA loan provided for by CARES?

A. We will be publishing more guidance on questions such as this when we look at the forthcoming regulations that will be associated with this legislation. One thing we do want to caution people about is the existence of some SBA requirements associated with utilizing other lines of credit before seeking a subsidized loan. If you have more SBA loan questions, we're happy to connect you with a specialist in that area.

Q. If a company does lay off employees and can provide them with severance, is it better to do lump-sum payments to facilitate qualification for unemployment assistance?

A. This is another area that will require further clarification, but there are important business considerations that may over-ride any legal issues. For instance, there are cash-on-hand requirements associated with paying lump-sum severance checks and medical insurance costs while normal revenues are depleted or non-existent. Employers' covenants with their lenders in various credit facilities could also come into play, unless there is some kind of hardship agreement with the lender.

Q. If an employee lives in a state that has shelter-in-place orders in effect, but our business is outside of that jurisdiction, do we have to pay them if they fail to show up for work as required?

A. This is another of the big gaps in the emergency sick leave that need to be filled by clarifying regulations. We don't know if a shelter-in-place is going to count as part of the 80 hours of emergency sick leave. But certainly, if they're in a shelter-in-place jurisdiction, they can't be required to come to work if their state prohibits that travel, unless they're covered by the essential-business exceptions that a lot of jurisdictions have in place. There may be some unresolved legal issues where the two states in question have different "essential business" definitions too.

Q. If you have an employee with a confirmed case of COVID-19, how do you maintain their privacy? And how do you inform staff without revealing their identity? Are HIPAA laws suspended for this scenario?

A. If you're in the health care field or if you're a so-called "covered entity" under HIPAA, there's a complex regulatory framework that applies, which is outside the scope of this discussion. If you're not a covered entity under HIPAA, then HIPAA laws won't apply to you. But in any case, it's important to maintain employee privacy for other legal reasons. It is always best to avoid using specific names or identifying information. So, if you have an employee that has a confirmed case and you have staff or customers that may have been in contact with that employee, you should inform those people who may have potentially been exposed. But there is no need to mention the person's name. When you disclose a potential contamination, you also have an opportunity to highlight the importance of cleaning, sanitation, social distancing and other measures of containing the virus.

Q. For the new paid FMLA, once it kicks in, does it have to be used in full eight-hour blocks, or can an employee choose to use blocks of four hours per day, for example?

A. The short answer is, we don't know yet. Regular family medical leave, as you know, can be used intermittently. We don't know how this is going to apply to COVID-19. For example, we don't know if family medical leave will apply to an employee who has childcare support only one day a week now because of COVID. We don't know if it applies where an employee can only work six hours a day instead of eight because of childcare issues caused by COVID. But again, we will be publishing answers to these questions on our website as we review forthcoming regulations. Employers probably should be careful for now about denying intermittent leave requests associated with the virus.

Q. What are the insurance implications of paid benefits during work furloughs?

A. First, employers should check the wording on their insurance policies now. There may be provisions defining "leave of absence" or "furlough." Disability policies, on the other hand, may not recognize a furloughed employee as an employee at all, and may discontinue coverage. You might want to get answers and guidance in writing from your relevant insurers.

Q. What do we tell employees who just don't want to come to work over general concerns about the risk of exposure even though they are not required to self-quarantine?

A. For employees who are just generally afraid, you might try appealing to their sense of duty and teamwork. They should know that your essential business cannot survive or perform its vital role in this crisis without their help. But for employees who are in an enhanced risk category, you might need to make some sort of legal accommodation under the ADA. So, talk about it, be open, be empathetic, and be flexible right now, because this is new for all of us, and every person's limits are being tested.

Goulston & Storrs is actively assisting individual, commercial, governmental and institutional clients who are dealing with a variety of impacts caused by the COVID-19 pandemic, helping them formulate plans for preparedness, response and downside contingencies. Please visit our [COVID-19 Knowledge Resources](#) page on our website for more information.

We expect to see regulations for the Act in the immediate future, as well as further economic stimulus measures, and will post updates on our website regularly. As you all know, this crisis is evolving daily, and the changes will lead to new or revised laws concerning employment. For now, you can check out our links to additional resources (below). In the

meantime, if you have specific questions about your workforce plans or about the Act, please contact your Goulston & Storrs attorney or any member of the COVID-19 Task Force.

Goulston & Storrs Resources on this Topic:

[Workforce Reduction & Employee Rights](#)

[Summary of CARES Act](#)

[Expanded FMLA & Emergency Sick Leave](#)

[FFCRA Leave Entitlements](#)

Additional Independent Resources:

[Massachusetts WorkShare Program](#)

[Department of Labor Notice](#) (Must be posted/emailed by April 1, 2020)

[FAQ re: Department of Labor Notice](#)