

# COVID-19 EMPLOYMENT ISSUES WEBINAR

PRESENTED BY

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## DISCLAIMER

- The information provided in this presentation is for educational and informational purposes only. If you have specific questions about how the laws discussed in this presentation (or any other laws) apply to your situation, please consult an attorney and/or HR professional. The facts of your unique situation may affect how such an attorney or professional would advise you.

## AGENDA

- Families First Coronavirus Response Act (FFCRA)
- Other Employee Issues Related to COVID-19
- Layoffs vs. Furloughs
- WARN Notice Requirements

# FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

- Effective Date – April 1, 2020
- Expiration Date – December 31, 2020
- Leaves:
  - Paid Sick Leave
  - Expanded Family and Medical Leave

# FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

- Covered Employers
  - Fewer than 500 employees.
  - “Small Business” Exemption (Forthcoming Regulation):
    - Fewer than 50 employees; and
    - Providing leave would jeopardize the viability of the business as a going concern.
    - Only for child-care related leave?

## FFCRA – PAID SICK LEAVE

- Applies to all employees of covered employers.
- Leave Entitlement (2 weeks):
  - Full-time employees – up to 80 hours of paid sick time.
  - Part-time employees – number of hours the employee works, on average, over a 2-week period.

## FFCRA – PAID SICK LEAVE

- Qualifying Reasons for Leave – employee cannot work (or telework) due to a need for leave because:
  1. Employee is subject to a quarantine or isolation order related to COVID-19, issued by the government.
  2. Health care provider has advised the employee to self-quarantine due to COVID-19 concerns.
  3. Employee has COVID-19 symptoms and is seeking a medical diagnosis.

## FFCRA – PAID SICK LEAVE

4. Employee is caring for:
  - a. Someone subject to a quarantine or isolation order related to COVID-19, issued by government.
  - b. Someone who has been advised by a health care provider to self-quarantine due to COVID-19 concerns.
5. Employee caring for a child whose school or place of care has closed, or whose child care provider is unavailable, due to COVID-19 precautions.
6. Employee has other conditions specified by the Secretary of Health and Human Services.



## FFCRA – PAID SICK LEAVE

- Paid sick leave is paid as follows:
  - For reasons (1), (2), and (3), the employee is paid his or her regular rate of pay, up to \$511 per day, and \$5,110 total.
  - For reasons (4), (5), and (6), the employee is paid 2/3rds of his or her regular rate of pay, up to \$200 per day or \$2,000 total.

## FFCRA – PAID SICK LEAVE

- Relation to other paid leave (e.g., PTO, sick leave, vacation, etc.)
  - Employee can elect to use paid sick leave before other leaves.
  - Employer cannot force an employee to use other paid sick leaves first.
  - Leave provided before April 1 cannot be credited against paid sick leave.

# FFCRA – EXPANDED FAMILY AND MEDICAL LEAVE

- Applies to all employees who have worked 30 days for a covered employer.
- Leave Entitlement – 12 weeks.

## FFCRA – EXPANDED FAMILY AND MEDICAL LEAVE

- Qualifying Reasons for Leave – employee cannot work (or telework) due to a need to care for a child whose school or place of care has closed, or whose child care provider is unavailable, due to a COVID-19 emergency declared by government.

## FFCRA – EXPANDED FAMILY AND MEDICAL LEAVE

- Expanded family and medical leave:
  - First 2 weeks are unpaid.
    - Employee can use paid sick leave during this period.
    - Employee can use other accrued vacation leave, PTO, or sick leave under employer policies.
  - Next 10 weeks are paid at 2/3rds the employee's regular rate of pay, up to \$200 per day and \$10,000 total.

## FFCRA – EXPANDED FAMILY AND MEDICAL LEAVE

- Employees who take leave to care for children whose school or place of care is closed, or whose child care provider is unavailable:
  - Eligible for both paid sick leave and expanded family and medical leave.
  - Employee can take 2 weeks' paid sick leave, then 10 weeks' expanded family and medical leave.

## FFCRA – EXPANDED FAMILY AND MEDICAL LEAVE

- Employees generally entitled to reinstatement after expanded family and medical leave.
- Exception for employers with fewer than 25 employees, if:
  - I. The employee's position does not exist anymore due to economic conditions or other changes in the employer's operating conditions that affect employment and are caused by a public health emergency during the leave;

## FFCRA – EXPANDED FAMILY AND MEDICAL LEAVE

2. The employer makes reasonable efforts to restore the employee to an equivalent position; and
  3. If the employer’s efforts fail, the employer makes reasonable efforts during the “contact period” to contact the employee if an equivalent position becomes available.
- “Contact period” is 1-year period beginning on earlier of: (a) date the employee needs leave to care for children concludes, or (b) 12 weeks after the employee’s expanded family and medical leave begins.



## FFCRA – EXAMPLES

- Employee is under a shelter-in-place order, but the employee can telework at home.
- Employee is not entitled to paid sick leave or expanded family and medical leave.

## FFCRA – EXAMPLES

- Employee does not have children and can't work because the employee is under a shelter-in-place order and the employer is not an “essential business”:
  - Employee is entitled to 2 weeks of paid sick leave, at full pay, subject to caps.
  - Employee is not entitled to expanded family and medical leave for this reason.

## FFCRA – EXAMPLES

- Employee does not have children and can't work because the employee is caring for someone who has been advised by their doctor to self-quarantine due to COVID-19 concerns:
  - Employee is entitled to 2 weeks of paid sick leave, at 2/3rds pay, subject to caps.
  - Employee is not entitled to expanded family and medical leave for this reason.
  - Employee may be eligible for “regular” FMLA.

## FFCRA – EXAMPLES

- Employee can't work (or telework) because the employee needs to care for children whose school is closed, or whose nanny is unavailable due to COVID-19 concerns:
  - Employee is entitled to 2 weeks of paid sick leave, at 2/3rds pay, subject to caps.
  - Employee is entitled to 10 weeks of expanded family and medical leave, at 2/3rds pay, subject to caps.

## FFCRA – RESOURCES

- DOL Resources:
  - Q&A – <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
  - FFCRA Fact Sheet – <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>
- DOL Posters:
  - FFCRA Poster – [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WHI422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WHI422_Non-Federal.pdf)
  - FFCRA Poster FAQ – <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- RMWBH Article – <https://www.rmwbh.com/families-first-coronavirus-response-act/>

## OTHER EMPLOYEE ISSUES RELATED TO COVID-19

- Temperature Checks
  - EEOC says it's okay: [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
- Privacy Concerns – Infected Employees
  - Informing Contacted Employees
  - ADA confidentiality requirements

## OTHER EMPLOYEE ISSUES RELATED TO COVID-19

- Additional Leaves to Think About:
  - “Regular” FMLA – Unpaid Leave
  - ADA – Unpaid Leave as a Reasonable Accommodation
  - Sick Leave Ordinances (e.g., Dallas)
  - Employer-Provided Leave (e.g., PTO, sick leave, vacation, etc.)

## OTHER EMPLOYEE ISSUES RELATED TO COVID-19

- Reductions in Pay for Exempt Employees – FLSA Issues
  - “White collar” exemptions require pay on a “salary basis”.
  - “Salary basis” means pay is fixed, irrespective of quality or quantity of work.
  - Reductions in pay should not be tied to reduced hours.



# LAYOFFS VS. FURLOUGHS

## Furlough:

- Employees do not have a loss of employment, although a reduction in hours including up to no hours.
- Retain talent
- Wage & Hour – Fair Labor Standards Act (FLSA)
  - ✓ Non-Exempt
  - ✓ Exempt & Salary Basis
    - Full FLSA workweek in which no work is performed.
    - Salary Adjustment - Salary Basis \$684 per week min.

## Layoff:

- Employment Separation Reduction in Workforce

# SELECTION CRITERIA

## Non-Discriminatory

- **LIFO** – Last-in first-out provides the safest selection process from these type of claims, although you may lose top performers.
- **Based on skills** is another method such as with combining job duties; e.g.: We eliminate one position and combine/consolidate those duties under another position. Documentation showing where someone has a skill set another doesn't have is key.
- **Performance based** is used most often in retaining the best talent. With such it is also important to have good documentation such as performance reviews, corrective actions, etc.

# EMPLOYEE BENEFITS

## Benefits/Insurance with Furloughs:

- Be sure to check plan documents as to eligibility; i.e.: Must be scheduled/work an avg. of 30hrs per week to be eligible.
- Some plans may allow for discretion with continuing insurance during a period of eligibility not being met.
- If not, some companies are working with carriers, and/or stop loss carriers (self-insured plans) to amend their plans.
- If no longer eligible, COBRA and/or State Continuation.

# FEDERAL WARN ACT REQUIREMENTS

## **Federal Worker Adjustment and Retraining Act (WARN)**

- Employers with 100 or more employees.
  - Employees who have worked less than 6 months in the last 12 months
  - Employees work fewer than 20 hrs. per week
- Layoff (Employment Loss) impacts 50 or more employees.
- Sixty (60) day written notice.

# FEDERAL WARN ACT REQUIREMENTS

## **The term employment loss means:**

1. An employment termination, other than a discharge for cause, voluntary departure, or retirement;
2. A layoff exceeding six months; or
3. A reduction in an employee's hours of work of more than 50 percent in each month of any six-month period.

# MINI-WARN ACT REQUIREMENTS

**The following states have their own state-specific  
“mini-WARN” laws.**

California

Connecticut

Hawaii

Illinois

Iowa

Maine

Minnesota

New Hampshire

New Jersey

New York

North Dakota

Philadelphia, Pennsylvania has a city law

Puerto Rico

Tennessee

Vermont

Wisconsin



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## UPDATE ON FFCRA (APRIL 2, 2020)

- DOL has updated its Q&A Guidance – <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- New topics addressed include:
  - When to calculate the number of employees for employer coverage.
  - Details on the small business exemption for employers with fewer than 50 employees.
  - Recordkeeping requirements.
  - Intermittent leave under FFCRA.
  - Whether “shelter-in-place” orders count towards a qualifying reason for paid sick leave.
  - Whether an employee can “top off” 2/3rds pay with PTO.
  - Definitions of “full-time employee” and “part-time employee.”
- Updated RMWBH Article – <https://www.rmwbh.com/families-first-coronavirus-response-act/>



# UPDATE ON DALLAS SICK LEAVE ORDINANCE

- After the City of Dallas issued its paid sick leave ordinance, a lawsuit was filed, challenging the ordinance.
- On March 31, 2020, a federal judge issued an order preventing the City of Dallas from enforcing the ordinance during the pendency of the litigation.
- Employers with employees who work in Dallas need to comply with the ordinance until (or unless) the injunction is lifted.