HR in the Age of COVID-19

Maine State Library
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Ann M. Freeman, Esq.
How far we have come since March 16, 2020!

- Lockdown
- Layoff/Furlough
- Unemployment
  - Fraud
  - Impact of the $600 Pandemic pay (if any?)
- FFCRA (a/k/a Alphabet Soup)
  - EPSLA
  - EFMLA
- Reopening guidance
- COVID policies
- Restart
- Face mask mandates
- Cleaning protocols
- Travel restrictions
- Sick leave banks
- Zoom overload
- Oh my!
Where we are today....

- FFCRA Revisited
- Unemployment/Furlough
- EEOC
- ADA
- Employees with COVID symptoms/positive test
- Liability
- Common Issues
Families First Coronavirus Response Act:
Emergency Paid Sick Leave Act
• Set to expire December 31, 2020

• Leave is paid out now by employer, recouped in full by tax credits against employer’s portion of social security taxes and/or refunds.

• Employers with less than 500 employees must provide two weeks of paid sick leave to all employees.
  • Full time employees 80 hours, for part-time, the average number of hours for 2 weeks.

• Employees may take Paid Sick Leave if:
  • The employee is subject to a federal, state, or local isolation or quarantine order related to COVID-19 (i.e., shelter in place)
  • A healthcare provider instructs the employee to self-quarantine;
  • Employee has symptoms consistent with COVID-19 and is seeking a medical diagnosis;
  • The employee is caring for an individual who is subject to a federal, state, or local isolation or quarantine order (2/3 regular rate of pay);
  • The employee is caring for a child for whom the school or childcare has been closed or is unavailable due to COVID-19 precautions (2/3 regular rate of pay); or
  • A similar reason to be specified later by the Department of Health and Human Services Secretary (2/3 regular rate of pay).

• Exclusion for healthcare provider employers or emergency responders.
Families First Coronavirus Response Act: Emergency Family & Medical Leave Expansion Act

• Leave is paid out now by employer, recouped in full by tax credits against employer’s portion of social security taxes and/or refunds.

• Employers with less than 500 employees must provide paid leave to employees caring for children under 18 whose school or childcare is closed.
  • Full time employees 80 hours, for part-time, the average number of hours for 2 weeks.

• Healthcare provider and emergency responder employers may elect not to provide this leave.
Supplemental Leave

• For employees who are only entitled to 2/3 their pay under either the Emergency Paid Sick Leave or the Emergency FMLA, you may permit the employee to supplement to in order to make them “whole”

• May utilize existing accruals (PTO/Sick/Vacation/Personal)

• You will not receive the credit for the supplemental amount

• May apply or decide to amend your existing policies regarding use of PTO/Vacation/Sick

• Do not have to permit employees to supplement

• Sick Leave/COVID Leave Bank: Be careful of the tax implications!
Intermittent Leave

- Is permitted if employer and employee agree

- Intermittent telework applies to both Emergency FMLA and Emergency Paid Sick Leave

- Intermittent work at worksite is only permitted due to school or childcare closure due to COVID-19

- If you permit intermittent leave, be sure to apply any policies equitably

- “The Department encourages employers and employees to collaborate to achieve maximum flexibility.”
FFCRA in limbo: Federal Court Litigation

- New York Federal District Court Judge struck down key provisions of the FFCRA

- **Work Availability Requirement**: employee entitled to EPSLA or EFMLA even if there is no work available
  - Directly contrary to the FMLA work requirement; equated leave under FFCRA to a “snow day”
  - Practically speaking: could open up leave requests from employees who are furloughed or temporarily laid off

- **Health Care Provider Exemption Definition**: “vastly overbroad”; narrowed to include the FMLA definition which is limited to specifically identified direct health care professionals or providers

- **Intermittent Leave**: employer consent is not required (goes against FMLA current advise)

- **Scope of decision’s reach unclear**: just the state of New York or Nationwide?

- Seek advice of counsel when interpreting these provisions of the FFCRA
Unemployment

• Unemployment Insurance Changes
  • One week waiting period eliminated.
  • Benefits sought are not charged against the employer’s experience rating during period of emergency.
  • Defined COVID-19-related reasons:
    • He or she is under a temporary medical quarantine or isolation restriction to ensure that the individual has not been affected by COVID-19 and is expected to return to work; or
    • He or she is temporarily laid off due to a partial or full closure of the individual’s place of employment as a result of the state of emergency and is expected to return to work once the emergency closure is lifted.
    • He or she is on a temporary leave of absence continues to remain able and available to work for and maintains contact with the relevant employer due to:
      • medical quarantine or isolation restriction,
      • a demonstrated risk of exposure or infection, or
      • a need to care for a dependent family member as a result of COVID-19
  • Workshare program allows employers to apply on behalf of their company or a unit of the company, but has restrictive rules on the amount of reduction in hours and has separate application process.
    • COVID-19 related closures or reductions may not be so predictable.

• “Supplementing” benefits with additional payments may jeopardize employees’ eligibility.
EEOC Guidance

Can we screen our employees?

- Pre-COVID-19: Generally, no.
- Post-COVID-19: Generally, yes with some clear parameters.
  - Body Temperature
  - Screening questions including fever, cough, sore throat, chills, shortness of breath
  - Information is still confidential pursuant to the ADA (not generally HIPAA)
  - Testing for COVID-19: Job-related and consistent business necessity
    - Be sure tests are accurate and reliable and come from a reputable source.
    - Review US FDA guidance
    - Consider who is administering the test
ADA Implications?

Employee does not want return to work because they have an illness or disease which makes them more at risk if they acquire COVID-19

- Conduct the “interactive process” under the ADA to determine if there are any reasonable accommodations
- Possible reasonable accommodations:
  - Continued telework
  - Staggering work shifts
  - Providing different office environment
  - Additional leave?
Liability for COVID-19 Claims

- **Employee Litigation**
  - Lawsuits in other states, injunctive relief, PPE, remote work, or leave.
    - Breach of Employment Agreement
    - Interference with FFCRA or FMLA, including misclassification
    - Non-compete
    - WARN Act (mass layoffs)
    - Whistleblower (masks, healthcare worker PPE)
    - Retaliation
    - Worker’s Compensation
    - Discrimination
  - 1,038 Complaints as of October 30 (according to one tracker), only 1 in Maine—prisoner seeking unemployment

- Liability to customers (Millinocket wedding venue example—the gift that keeps on giving)
Liability for COVID-19 Claims

Key Takeaways:

- **Follow health and safety guidance and enforce it.**
  - Pandemic Policy
    - Screening
    - Social distancing
    - Masking, PPE
    - Hygiene
    - What will occur in the event of an illness
  - Policies for Families First Coronavirus Response Act Leave (Emergency Paid Sick and Expanded Family & Medical Leave)
  - DECD Checklists, Postings

- **Protect yourself**
  - Liability Waivers
  - Understand your insurance coverage
Common HR Issues of Today

Employee does not want return to work because they are comfortable receiving unemployment

• Refusal to accept work without good cause will likely jeopardize their eligibility to collect unemployment
• Desire to simply not work and collect unemployment is not good cause

Employee does not want to return to work because they are afraid of getting COVID-19

• You do not have to take this at face value
• Ask questions about why they are fearful
• Explain what you are doing to ensure a safe work environment
• Without more, this may not be good cause to refuse work
Common HR Issues of Today

Employee has symptoms of COVID, when can they return to work (i.e. “discontinue home isolation”)?

- CDC guidance prefers the “symptom-based strategy” a/o July 22, 2020
  - At least 24-hours have passed since last fever without the use of fever-reducing mediations
  - Improvement in symptoms
  - For severe cases, 20 days after symptom onset may be warranted
  - For persons who never develop symptoms, isolation and other precautions can be discontinued 10 days after first positive PT-PCR test for SARS-CoV-2 RNA.
- Can require them to work from home if possible (both physically and work-wise)
- EPSLA likely triggered

It’s flu season, and symptoms are the same. What does that mean?

- Follow CDC guidance—you don’t want the flu to wipe out your office anymore than you want COVID in your office.
Common HR Issues of Today

Employee refuses to wear a mask when they are required to wear one while working.

• You can enforce mask requirements
• Make sure there isn’t an underlying medical condition which prohibits them from wearing a mask and consider reasonable accommodations

A member of the public refuses to wear a mask.

• You can enforce mask requirements
• Make sure there isn’t an underlying medical condition which prohibits them from wearing a mask and consider reasonable accommodations
Pay Attention to the Changing Information

• Follow closely CDC’s ever evolving guidance

• Monitor Maine’s Reopening Website frequently (https://www.maine.gov/covid19/restartingmaine)

• Watch Dr. Shah’s bi-weekly press conference

• If you don’t receive Bernstein Shur’s client alerts, let us know! We will put you on the list.

• Other HR/Business publications also issuing update and alerts.
Questions?

Thank you!