

COVID-19 Issues Affecting Employers

Platinum Group
March 20, 2020

SABRINA PRESNELL ROCKOFF

MURPHY HORNE FLETCHER

(828) 254-8800

SRCKOFF@MWBLAWYERS.COM

MFLETCHER@MWBLAWYERS.COM



McGUIRE WOOD & BISSETTE
LAW FIRM

Outline for the Day

- FLSA and Wage and Hour Act Issues
- Unemployment
 - Furlough vs. Layoff
 - Executive Order No. 118
- H.R. 6201: Families First Coronavirus Response Act
- Employee with COVID-19 Symptoms
- Disclaimer:
 - Law is both constantly changing and unclear
 - No legal advice; educational purposes only

FLSA: Wage Reductions (Non-Exempt)

- If going to reduce wages, must provide employee with 24 hours' written notice
- Even if reducing, must still:
 - Be paid at least minimum wage (\$7.25 per hour)
 - Be paid 1.5 times their regular rate for overtime

FLSA: Wage Reduction (Exempt)

- Must also provide 24 hours' written notice
- Exempt employee's reduced salary cannot fall below the salary threshold (\$684.00/week or \$35,568.00/year)
- Can convert exempt employee to hourly employee based on business needs
 - Employee must keep time records
 - Do not have exempt and non-exempt employees in same position

Unemployment: Layoffs vs. Furlough

- Layoff = termination of employment due to COVID-19
 - No definite return date
 - Maximum weekly unemployment benefit is \$350
- Furlough = temporarily laid off for period of time
 - Return date is provided (for example, 30 days)
 - No expectation that employee search for work during layoff
 - Employee remains “attached” to your payroll

Unemployment: Layoff vs. Furlough

- Furlough will result in an attached unemployment claim
- Cannot be filed unless employer's unemployment insurance account is positive
 - If filing attached claim, will need to bring account positive
- Employer must pay full cost of unemployment benefits payable to employee before claim is filed
- Benefits cannot exceed 6 weeks

Layoffs and Executive Order No. 118

- Executive Order changes unemployment for terminated employees
 - No one-week waiting period for benefits
 - Not required to search for work
 - Not required to be able to work
 - Will not be charged to employers' accounts
 - State will seek reimbursement from federal government
- Employees must select COVID-19 as the reason for termination

Layoffs: Practical Guidance

- When laying off employees due to COVID-19, consider:
 - Objective criteria for selection (years of service; part-time versus full-time; department; cross-training)
 - Protected categories and protected activity
 - PTO forfeiture vs. payout
 - Health insurance and COBRA
- Do not give definite re-hire date
- Laying off the poor performer due to COVID-19



H.R. 6201: Families First Coronavirus Response Act

- Signed into law March 18, 2020
- Creates emergency paid sick leave
- Expands Family and Medical Leave Act
 - More employers covered
 - More employees covered
 - Leave must be paid
- Effective “no later than” 15 days after enactment



Emergency Paid Sick Leave

- Must provide paid sick time if employee is unable to work (or telework) due to a need for leave because:
 - Employee is subject to federal, state, or local quarantine or isolation related to COVID-19
 - Employee has been advised by healthcare provider to self-quarantine due to COVID-19
 - Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis
 - Employee is caring for an individual who is subject to a quarantine or has been advised to self-quarantine
 - Employee is caring for son or daughter if school or place of care has been closed, or childcare provider is unavailable



Emergency Paid Sick Leave

- Employee is entitled to following amounts of paid sick leave:
 - Full-time employees: 80 hours
 - Part-time employees: number of hours equal that the employee works on average during a 2-week period
- Available to all employees regardless of length of service
- Cannot require employee:
 - To use other paid leave prior to taking sick leave
 - To assist in finding replacement employee to cover
- Cannot be carried over into next year

Emergency Paid Sick Leave

- Cannot retaliate against any employee who:
 - Uses emergency paid sick leave
 - Files a complaint or institutes a proceeding for enforcement
- Violation is considered a minimum wage violation
 - Liquidated damages
 - Attorneys' fees

Emergency Family and Medical Leave Expansion

- Adds additional qualifying reason for FMLA Leave
- May take FMLA Leave if the employee is unable to work or telework due to need to care for son or daughter under 18 if child's school or place of care has been closed, or if child care provider is unavailable due to COVID-19
 - School means elementary or high school
- Employees are eligible after 30 days of employment
- Employee provides as much notice as is practicable



Emergency Family and Medical Leave Expansion

- Covers employees with 500 employees or less
- Authorizes Secretary of Labor to issue regulations exempting employers with less than 50 when such requirements “would jeopardize the viability of the business as a going concern”
 - No indication when this will happen or how the process will work

Emergency Family and Medical Leave Expansion

- First 10 days of leave may be unpaid
 - Employee may substitute other available paid leave
- Remaining leave must be paid, up to 12 weeks
 - Not less than 2/3 of employee's regular rate, multiplied by number of hours employee would normally be scheduled to work
 - Capped at \$200/day or \$10,000 in aggregate
- If employee works variable hours, average number of hours worked in 6-month period ending on date leave begins

Emergency Family and Medical Leave Expansion

- Do not have to restore to same position or position with equivalent benefits, pay, and other terms and conditions after leave if:
 - 25 employees or less
 - Leave is under new qualifying reason (public health emergency)
 - Position does not exist due to economic conditions or other changes in operating conditions of the employer
 - That affect employment
 - Are caused by a public health emergency
 - Employer makes reasonable efforts to restore the employee to an equivalent position
 - If those efforts fail, employer makes reasonable efforts to contact the employee if a position becomes available

Employees With COVID-19 Symptoms

- Can ask employee about symptoms and send home
 - Exempt employees must be paid if performed work in that workweek, but can deduct from accrued paid leave bank
 - Non-exempt employees do not have to be paid, but must let use accrued paid leave
- Do not return to work until 24 hours fever-free or tested
- Temperature checks permitted if related to “business necessity”
- Generally cannot ask about employee’s family member’s symptoms—but consider risks



Questions?

Sabrina Presnell Rockoff

Murphy Horne Fletcher

McGuire, Wood & Bisette, P.A.

srockoff@mwblawyers.com

mfletcher@mwblawyers.com

(828) 254-8800

Disclaimer: This presentation is intended and made available to provide information of general interest to the public, and for educational purposes only, and is not intended to offer legal advice about specific situations or problems. No representation is made about the accuracy of the information provided herein.



McGUIRE WOOD & BISSETTE
LAW FIRM