

Coronavirus Guidance for Employers: Is Your Workplace Prepared?



FOULSTON
ATTORNEYS AT LAW

Panelists



Tara Eberline

Foulston Siefkin Partner,
Employment and Labor
Law



Jason Lacey

Foulston Siefkin
Partner, Employee
Benefits & ERISA, and
Taxation



**Laurie Hoag-
Winkler**

IMA Executive Vice
President, Employee
Benefits National Practice
Leader



Kristi Gjellum

IMA Executive Vice
President, Employee
Benefits National Client
Experience & Services
Leader



KC Rippstein

IMA Employee
Benefits Compliance
Practice Leader



Craig Truitt

IMA Employee
Benefits Compliance
Attorney



Agenda

- Families First Coronavirus Response Act
 - Phase 3 relief still being negotiated
- Navigating leaves of absence under the FMLA and FLSA
- Protecting your employees/OSHA
- Employee confidentiality and the ADA
- WARN Act
- Employee benefits implications



Families First Coronavirus Response Act

Emergency Paid Sick Leave Act (EPSL) and Emergency Family and Medical Leave Expansion Act (EFML)

	EPSL	EFML
Covered Employers	Employers with fewer than 500 employees, and Public employers of any size	Employers with fewer than 500 employees, and Public employers of any size
Covered Employees	<p>Any employee (no matter how long they have been employed).</p> <p>Employees who are health care providers or emergency responders may be excluded.</p>	<p>Any employee who has been employed at least 30 calendar days.</p> <p>Employees who are health care providers or emergency responders may be excluded.</p>

EPSL and EFML

	EPSL	EFML
Covered Leave Purposes	<ol style="list-style-type: none"> 1. When quarantined or isolated subject to federal, state, or local quarantine/isolation order; 2. When advised by a health care provider to self-quarantine (due to concerns related to COVID-19); 3. When experiencing symptoms of COVID-19 and seeking a medical diagnosis; 4. When caring for an individual doing #1 or #2 (2/3 pay); 5. When caring for a child whose school or place of care is closed due to COVID-19 (2/3 pay); or 6. When the employee is experiencing any other substantially similar condition (2/3 pay). 	<p>To care for a child under 18 of an employee if the child’s school or childcare provider is unavailable due to a public health emergency, defined as an emergency with respect to the coronavirus declared by a federal, state, or local authority.</p> <p><i>(Note the original House bill had extended this partially-paid leave for COVID-19 medical reasons of an employee or family member, but that was stricken, so those would only be considered under normal FMLA, not EFML.)</i></p>

EPSL and EFML

	EPSL	EFML
Leave Duration	<p>Full time employees are entitled to 80 hours of paid sick leave.</p> <p>Part time employees are entitled to sick leave equal to the number of hours worked on average over a typical two-week period.</p>	<p>Up to 12 weeks of job-protected leave. This is not an extra 12 weeks on top of normal FMLA allowances.</p>

EPSL and EFML

	EPSL	EFML
Compensation	<p>Employee's regular rate of pay for leave used for the employee's own illness, quarantine, or care, up to \$511/day and \$5,110 total.</p> <p>Two-thirds of the employee's regular rate if taken to care for a family member, to care for a child whose school or childcare provider is unavailable due to the Coronavirus, or the employee experiencing any other substantially similar condition, up to \$200/day and \$2,000 total.</p>	<p>No pay for first 10 days of leave (employee can, but is not required, to use any other leave available to them, including the emergency sick leave discussed to the left).</p> <p>Employers may not require employees to use paid leave during this period.</p> <p>After 10 days, employers must pay two thirds of the employee's regular rate of pay for the number of hours they would normally be scheduled to work, capped at \$200/day and \$10,000 total.</p>

EPSL and EFML

	EPSL	EFML
Other Notes	<p>Employers will be required to post a notice. A model notice will be provided. Employers cannot require employees to find a replacement employee to cover their missed shifts. Employers cannot require employees use other available paid sick time before this emergency paid leave.</p> <p>The bill reserves the right for the Secretary to exempt small businesses with fewer than 50 employees if business viability was jeopardized as a going concern.</p>	<p>The same reinstatement provisions apply as under traditional FMLA. However, restoration to position does not apply to employers with fewer than 25 employees if certain conditions are met:</p> <ul style="list-style-type: none"> • The job no longer exists because of changes affecting employment caused by an economic downturn or other operating conditions that affect employment caused by a public health emergency, subject to the following conditions: <ul style="list-style-type: none"> • The employer makes reasonable efforts to return the employee to an equivalent position, and • The employer makes efforts to contact a displaced employee if anything comes up within a year of when they would have returned to work.

EPSL and EFML

	EPSL	EFML
Potential Liability	Failure to provide mandatory sick leave is treated as a failure to pay minimum wages under the FLSA. Employers could face civil liability including fines up to \$10,000, back pay, liquidated damages, and attorney fees and costs.	Employers covered here but not by the rest of the FMLA (i.e. those with fewer than 50 employees) are not subject to civil action by employees (only action by the Secretary of Labor).

Do I Need to Pay My Employee Who is Sick or Quarantined at Home?

- General considerations:
 - Is telework an option?
 - Does the employee have paid time off available (federal paid sick leave, employer-provided sick, vacation, or PTO)?
 - Does the employee qualify for FMLA leave (unpaid)?
 - Is the employee salaried & exempt under FLSA?
 - What are the terms of the employment contract?
 - Is there a collective bargaining agreement in place?



Family and Medical Leave Act

- Eligible employee may take up to 12 workweeks of unpaid leave for their own or a family member’s “serious health condition.”
 - Infection with COVID-19
 - Care for an immediate family member with COVID-19
 - Old FMLA eligibility rules apply (employed for 12 months; worked at least 1250 hours in previous 12 months; 50 or more employees)
- For new FMLA Childcare Leave only, eligibility is all employers with 500 or fewer employees; worked for last 30 days.
- An employee who stays home due to self-, or employer-imposed isolation and is not symptomatic or caring for a sick family member is not entitled to FMLA leave.



Fair Labor Standards Act

For non-exempt, hourly employees:

- Pay for actual working time
- Pay overtime if over 40 hours worked
 - Require employees to keep track of and accurately report all teleworking hours



Fair Labor Standards Act

For exempt, salaried employees:

- If employee performed **any** work during that workweek, pay salary for that week, unless deduction is specifically permitted.
- Deductions are permitted for:
 - Full-day absences for personal reasons
 - Full-day absences for illness, if employer provides some paid time off
 - FMLA, including partial-day FMLA absences and new FMLA Childcare Leave (paid at 2/3 after waiting period)
- If employee performed **no** work during entire workweek, then salary need not be paid (unless eligible for Federal Paid Sick Leave or FMLA Childcare Leave)
- No deductions for partial-day absences other than intermittent or reduced-schedule FMLA



Fair Labor Standards Act

Deductions for exempt, salaried employees are permissible when Federal Paid Sick Leave and FMLA Childcare Leave is exhausted and:

- An employee is symptomatic and stays home;
- An employee is subject to a government-ordered quarantine; or
- An employee stays home to care for a child who can't go to school.

These could be fairly viewed as absences for illness or personal reasons.



Fair Labor Standards Act

Deductions are NOT permissible when an employer forces an employee who is not symptomatic to stay home such as if:

- The employer has imposed a quarantine rule; or
- The employer has closed a facility for operational reasons, like supply chain or labor shortages.

These missed days must be paid if the employee has performed any work during the workweek, but if an employee performs no work during a workweek then no salary is required.

If employment terminates, you can pro-rate during the final week.





Protecting Your Employees



FOULSTON
ATTORNEYS AT LAW

Duty to Protect Employees from Workplace Exposure

- Employers have a legal duty to maintain a safe workplace.
 - Take feasible measures to reduce the likelihood that your employees will be exposed to COVID-19.
 - Remember you could be liable for hazards to employees, contractors, and subcontractors.
- Workers' compensation coverage is unlikely, but possible, depending on state law and industry.
- Healthcare organizations: follow CDC guidance for healthcare facilities and check CDC website daily for updates.



Screening Employees for COVID-19

You should:

- Ask employees about exposure to COVID-19, recent travel, and symptoms of the virus;
- Require self-reporting of symptoms;
- Send home employees who report or show signs of illness; and
- Follow CDC guidelines and local government directions for screening employees and return-to-work rules.

If you have an employee who tests positive or is presumed positive:

- Notify coworkers, but do NOT disclose the identity of the infected individual (ADA requires confidentiality of that information).



Employees Discontinuing Isolation

- CDC recommends employees with symptoms who have not been tested remain isolated until:
 - No fever for at least 72 hours without fever-reducing medication;
 - Other symptoms have improved; AND
 - At least seven days have passed since symptoms first appeared.
- Employees who tested positive may discontinue isolation when:
 - No fever without fever-reducing medication;
 - Other symptoms have improved; AND
 - Two negative tests in a row, 24 hours apart.



OSHA Rules for Personal Protective Equipment

- Employers must follow OSHA rules for PPE use:
 - Assess workplace virus hazard
 - Provide PPE at no cost to employees
 - Train employees how to use PPE
- Surgical masks are different from respirators.
 - Surgical masks protect against fluid splatter.
 - Respirators protect against airborne contaminants. Be aware of special “respirator” definition (includes N95 mask).

Americans with Disabilities Act

- Complications from COVID-19 could cause or aggravate a disability covered by the ADA.
- Employee with disability or pregnancy may need reasonable accommodation, if no undue hardship to employer.
 - Telework
 - Temporary removal from work rotation
- Employer can ask about COVID-19 symptoms, but not underlying disability.
- Employer may send home an individual who poses a “direct threat” to workplace (including signs of COVID-19).



Employee Separations

Employee Separations

- Consider shared work programs available through state departments of labor
- Encourage laid off/furloughed employees to request unemployment.
- OWBPA requires specific language to be included in severance agreements to release age discrimination claims.
- Work with counsel on any group separation package (voluntary or involuntary).



Worker Adjustment and Retraining Notification (WARN)

- Federal law that requires employers with 100+ employees company-wide to provide employees with specific written notice at least 60 days prior to an employment loss that is caused by a plant closure or mass layoff.
- Plant closing occurs if a shutdown of a site of employment or a facility or operating unit with an employment site causes employment loss for:
 - At least 50 employees (excluding part-time* employees)
 - Measured over a rolling 90-day period
- Mass layoff occurs if there is not a plant closing and reduction in force that affects (i) at least 1/3 of employees and at least 50 employees (excluding part-time); OR (ii) at least 500 employees (excluding part-time*).



WARN Exception: Unforeseeable Business Circumstances

- An employer may order a plant closing or mass layoff in advance of the usual 60-day notice when the underlying business circumstances were not reasonably foreseeable at the time notice would have been required.
 - This does not make WARN inapplicable; it just reduces the requisite notice period.
- WARN has many technical provisions. If your employment actions may implicate these provisions, contact your employment law counsel to discuss.



Employee Benefits

HDHPs: IRS Notice 2020-15

- HDHPs may provide no-deductible or low-deductible benefits for testing and treatment of COVID-19
- Individuals remain eligible to contribute to an HSA
- Does not otherwise modify previous HDHP guidance
 - Vaccinations continue to be considered preventive care
 - Beware other low-deductible or no-deductible benefits, such as telemedicine
- Not a coverage mandate, so coverage under individual plans may vary
 - But see mandate under the Families First Coronavirus Response Act [next slide]



FFCRA: Mandated Testing Coverage

- Under FFCRA, GHPs must cover approved testing for COVID-19 without cost-sharing or medical management
 - Proposed CARES Act would expand eligible tests and address out-of-network pricing
- Coverage must include related services furnished during urgent care, emergency room, or in-person or telehealth provider visits that result in a covered diagnostic test
- Applies to all fully insured and self-insured GHPs, including grandfathered plans
- Effective from the date of enactment for the duration of the public health emergency



FFCRA: Payroll Tax Credits

- For covered employers (private sector), payroll tax credits are available to offset FFCRA-mandated paid leave
- The tax credit is increased for expenses the employer pays to provide and maintain group health coverage
 - Generally means premiums or the equivalent under a self-insured plan
- Credit is available to the extent the GHP expenses are “allocable” to required leave payments
- Clarifying guidance from the IRS on how to determine the credit amount is expected



Additional GHP Considerations

- Continued GHP eligibility typically requires meeting eligibility criteria (e.g., minimum hours of service)
- A layoff, furlough, reduced work schedule, or non-FMLA leave of absence will often cause an employee to lose GHP eligibility, unless the plan provides otherwise
- COBRA will typically be available in these circumstances
- Coverage should not be voluntarily extended without modifying the plan language and gaining insurer approval (including stop-loss)



Additional GHP Considerations

- Employer health coverage must comply with PHSA mandates, unless the plan is exempt (e.g., retiree-only)
- Some employers have considered extending limited GHP coverage (e.g., COVID-19 testing and treatment) to employees who are not eligible for traditional GHP coverage
- Must be carefully evaluated as it typically will not satisfy all applicable PHSA mandates if offered on a stand-alone basis

Additional GHP Considerations

- Substantiation requirements for HRAs and FSAs continue to apply
- Claims must be substantiated to qualify for reimbursement
- If participants are struggling to obtain needed documents, consider extending claims submission period (runout period)
 - Waiver of substantiation requirements seems unlikely



CARES Act

- If enacted, may provide additional flexibility for HDHPs, HSAs, and account-based plans
 - Telemedicine
 - Won't interfere with HSA eligibility if offered pre-deductible under an HDHP
 - Direct Primary Care
 - A qualifying direct primary care arrangement costing less than \$150 per month (\$300 for a family) could be used in connection with an HDHP
 - Cost of the qualifying direct primary care membership could be paid from an HSA
 - OTC Expenses
 - HSAs, HRAs, and health FSAs could reimburse OTC drugs without a prescription
 - Expenses for menstrual care products are reimbursable

To engage Foulston attorneys to respond to your company or organization's legal questions, please contact:

Traci Anderson, 316-613-6603
tanderson@foulston.com



FOULSTON
ATTORNEYS AT LAW