

MEMORANDUM

DATE: March 19, 2020

RE: Update for Employers regarding Coronavirus (COVID-19)

Greetings:

A lot has changed since Monday. While some businesses are plugging along, others are considering or actively engaged in furloughs and layoffs. This email contains an update on the federal Families First Coronavirus Response Act that was signed into law on March 18 (**it has materially changed since our last email**), information about a recent change to the Oregon Family Leave Act, and new information regarding layoff considerations and resources. We will keep you posted as new events occur.

Families First Coronavirus Response Act

Yesterday the U.S. Senate passed a revised version of the Families First Coronavirus Response Act (HR 6201), and President Trump signed it into law last night. The law will apparently become effective on April 2, 2020.

The enacted law is different than the original bill in several important ways, and contains the following provisions relevant to employers and employees:

- **Testing:** The law requires private health plans to provide coverage for COVID-19 diagnostic testing, including the cost of provider, urgent care center and emergency room visits to receive testing. Coverage must be provided at no cost to the consumer.
- **Emergency Family and Medical Leave Expansion Act:** Employers with fewer than 500 employees must provide up to 12 weeks of family leave to any employee who has worked for the employer for at least 30 days if the employee has a need for leave to care for the employee's minor son or daughter because the child's school or place of care has been closed or the child's regular paid care provider is unavailable due to a "public health emergency," which is defined as "an emergency with respect to COVID-19 declared by a Federal, State or local authority."

Employers with 50 or fewer employees may seek a hardship exemption from the Secretary of Labor if the imposition of this leave requirement on the employer "would jeopardize the viability of the business as a going concern." Further, the law appears to exempt employers with fewer than 50 employees within a 75-mile radius from civil damages in a FMLA lawsuit

(although a non-complying employer would still be liable for damages to the Department of Labor).

The leave eligibility period begins on the effective date of the law (which appears to be April 2) and ends on December 31, 2020.

Special Note to Health Care Employers: The law allows employers of “health care providers” and “emergency responders” to exclude those types of employees from receiving leave under this section. However, the terms “health care provider” and “emergency responder” are not yet defined, and presumably will be construed narrowly. (The Secretary of Labor is authorized to adopt rules further defining this exclusion, but it is unclear whether health care employers must wait for those regulations before exempting health care workers.)

The first 10 days of family leave under this provision is unpaid, although an employee may elect to use any available paid leave (the employer may not require an employee to use paid leave, however). After that 10-day period the employer must provide paid leave for the duration of the leave period (i.e., up to ten additional weeks) at a rate not less than two-thirds the employee’s regular rate of pay (per-employee pay may not exceed \$200 per day and \$10,000 in the aggregate). Employers will be eligible for tax credits for wages they pay under this law. Paid leave under this provision is in addition to the paid sick leave discussed in the bullet point directly below.

Although employees on other forms of FMLA leave have a right to be restored to their prior position, employers with fewer than 25 employees are not required to restore an employee who takes leave under this emergency law to the employee’s prior position if: (i) that position has been abolished as a result of the public health emergency; and (ii) the employer makes reasonable efforts to re-employ the employee in a comparable position for one year after the employee started the leave.

- **Emergency Paid Sick Leave Act:** This portion of the law requires employers with fewer than 500 employees to immediately provide paid sick leave to employees for any of the following uses:
 - a) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - b) The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
 - c) The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19;
 - d) The employee is caring for an individual who (i) is subject to a Federal, State or local quarantine or isolation order related to COVID-19; or (ii) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

- e) The employee is caring for a son or daughter if the child's school or place of care has been closed, or the child's child-care provider is unavailable, due to COVID-19 precautions.
- f) The employee is experiencing any other substantially similar condition specified by the HHS Secretary, Secretary of the Treasury and Secretary of Labor.

Employers with fewer than 50 employees can request that the Secretary of Labor grant the employer a hardship exemption from the requirements of this portion of the law.

Special Note to Health Care Employers: As with the family leave provisions, employers of "health care providers" and "emergency responders" may elect to exclude those employees from receiving this paid benefit. However, it is unclear whether health care employers can make that election before the Secretary of Labor issues regulations governing that exclusion.

Under this law, full-time employees are entitled to 80 hours of paid sick leave, and part-time employees are entitled to the average number of hours that they work in a two-week period. For leave associated with reasons (a) through (c) above, sick leave is paid at the employee's regular rate and may not exceed \$511 per day and \$5,110 in the aggregate. For leaves associated with reasons (d) through (f) above, sick leave is paid at two-thirds of the employee's regular rate and may not exceed \$200 per day and \$2,000 in the aggregate. Paid sick leave under this law takes priority over any other available paid leave, and tax credits are available to employers for sick leave wages paid to their employees.

The leave eligibility period begins on the effective date of the law (which appears to be April 2) and ends on December 31, 2020.

Employers must post a notice created by the Department of Labor notifying employees of their right to paid sick leave under this law.

- **Tax Credits and Refunds.** The law provides a refundable tax credit (against the employer portion of Social Security taxes) equal to 100% of family leave and sick leave wages paid to employees. The credit is capped at \$511 per day for sick leave wages paid to employees, and \$200 per day for family leave wages and for sick leave wages paid to an employee caring for a family member. If the tax credit is not sufficient to reimburse the employer, the employer will receive a tax refund for the balance.

Expansion of Oregon Family Leave Act (OFLA)

From March 18 through September 13, 2020, OFLA has been expanded to cover absences from work in order to care for an employee's child whose school or place of care has been closed due to a statewide public health emergency (it is an additional form of "sick child" leave). This leave would run concurrent with the federal paid leaves discussed above.

Layoff Considerations for Employers

Many employers face the prospect of laying off employees. On the other hand, those who choose to keep their staff employed may face the costs of providing additional paid family and/or sick leave under the new federal legislation that goes into effect in two weeks. When deciding whether to retain or lay off your employees, consider the following:

- If you employ health care providers, you may decide to exempt those particular employees from the new legislation, which would make them ineligible for the expanded FMLA paid leave described above, possibly reducing your labor costs. Use caution though; it is unclear whether you can make that decision before the Secretary of Labor adopts applicable regulations.
- Generally speaking a “layoff” is treated as a termination, meaning your obligation to pay out accrued leave kicks in (assuming your policies require it). For that reason, and especially if you are confident the employees will be back to work soon, you might consider a “furlough” instead. A furlough is essentially an unpaid leave of absence, with the employees remaining on your payroll (as opposed to being terminated). Most employers permit their furloughed workers to use accrued paid leave. However, furloughed employees will likely be eligible for the paid leaves described above so this option could increase your labor costs.
- Unemployment benefits may be available to laid off employees. If you anticipate closing your business only temporarily, the Employment Department has waived the requirement that laid off employees actively seek other work, and only requires the employees to maintain some contact with their employers during their layoff.
- Laid off and furloughed employees may be able to stay on your group health plan without triggering COBRA (check with your insurer).
- Employees who are so sick that they are unable to work (including while quarantined) are generally not eligible for unemployment compensation (although they will qualify for paid leave under state and federal law). That may change given the circumstances.
- Employees who receive compensation (e.g., severance pay, stand-by pay, vacation benefits, sick leave benefits) while not working may not be eligible for unemployment benefits, or those benefits could be delayed.
- Self-employed individuals who do not pay unemployment insurance taxes are usually not eligible for unemployment compensation benefits.

- Workshare Oregon enables employers to subsidize the wages of employees whose hours are reduced through unemployment insurance. This program is intended as an alternative to layoffs, and more information can be found here: <https://www.oregon.gov/EMPLOY/Businesses/WorkShare/Pages/Work%20Share%20Home%20Page.aspx>

The WARN Act

Employers who decide to at least temporarily shut down their operations or conduct massive layoffs may be subject to the federal WARN Act and its state law equivalent. The WARN Act applies to any employer who has either (a) at least 100 full time employees (including temporary employees) or (b) at least 100 employees who work a total of at least 4000 hours per week. For purposes of this law, an employee is not “full time” if the employee averaged less than 20 hours per week or worked less than six months in the past year.

In simple terms, a subject employer must provide a WARN Act notice if the employer takes any of the following actions that results in loss of employment for at least six months: (a) closes a plant or facility that results in at least 50 employees losing work for at least six months; or (b) conducts a mass layoff (i) of at least 33% of the workforce where at least 50 employees are affected, or (ii) that affects at least 500 employees. For employers with multiple locations or those who reduce employees’ hours rather than conduct a layoff, there are additional factors to consider.

There is no required form of WARN Act notice, but the must include at least the following information (keep in mind that all WARN Act notices are public records and are published on the State’s website):

- Company name and address;
- Company official who can provide more information;
- Whether you intend for the layoffs/plant closure to be permanent or temporary;
- Dates of closure/layoffs – when effective. If you do a staggered layoff/closure, state the different dates if known;
- State that the reason for the layoff/plant closure is “because of a natural disaster and/or unforeseeable business circumstances;”
- State that there are no bumping rights (this is required because some employers have unions); and
- For notices to State and local officials, the job titles and names of affected employees.

For Oregon employers, the notice will need to go to **all** impacted employees as well as the following:

1. Oregon Dislocated Worker Unit
Oregon HECC – Office of Workforce Investments
875 Union St. NE
Salem, OR 97311

2. The chief elected official of the unit of government where the closure/layoff will occur.

For Lane County:
Joe Berney
Lane County Commissioners
125 E. 8th Ave.
Eugene, OR 97401

For Eugene:
Mike Clark
Eugene City Council
125 E. 8th Ave.
Eugene, OR 97401

For Springfield:
Christine Lundberg
Mayor
225 Fifth St.
Springfield, OR 97477

A Reminder About What Employers Can Require and Ask about an Employee's Health

- You can (and should) require employees to stay home if they are sick or have been in contact with someone who exhibits coronavirus symptoms.
- While the ADA limits certain disability-related inquiries and medical examinations, if an employee shows visible symptoms of the flu you can ask the employee if he or she is feeling well.
- If you reasonably believe an employee is sick, you can and should send the employee home. Be consistent: treat employees who exhibit the same symptoms the same.
- If an employee indicates that he or she has flu-like symptoms, you may ask if the employee has been diagnosed with COVID-19 or exposed to someone who has been diagnosed with that condition.
- You may require a 14-day absence for employees who have coronavirus symptoms or have been in contact with someone with symptoms.
- You may require an employee who exhibits coronavirus symptoms to confirm their "fitness for duty," and may require that employees who have been absent obtain a doctor's note before returning to work. NOTE: Under Oregon's Sick Leave Law, employers may not require medical verification in advance of sick time that is expected to last fewer than three

consecutive scheduled workdays; and employers must pay any associated costs for providing medical verification or certification.

Additional Resources

- Financial Resources for Businesses: <http://www.oregon4biz.com/Coronavirus-Information/COVID19-Resources.php>
- EEOC Guidance on COVID-19: <https://content.govdelivery.com/accounts/USEEOC/bulletins/281e1ee>
- WHO Information on Coronavirus: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
- CDC Information on Coronavirus: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>
- https://www.eeoc.gov/facts/pandemic_flu.html
- Wage and Hour Issues: <https://www.dol.gov/agencies/whd/flsa/pandemic>
- OSHA Guidance on COVID-19: <https://www.osha.gov/Publications/OSHA3990.pdf>

For more information, please contact our Labor and Employment attorneys, Amanda Walkup, Andy Lewis and Mario Conte.

This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.