

MEMORANDUM

DATE: March 23, 2020

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

Greetings:

Things continue to change significantly and at a rapid pace for employers. This email contains updates regarding Governor Brown's "Stay Home, Save Lives" Order, how employers will be reimbursed for the new federal paid leave programs, and COBRA continuation coverage and notices. We will keep you posted as new events occur.

Governor Brown's Stay-At-Home Order

On March 23, 2020, Oregon Governor Kate Brown issued Executive Order No. 20-12 requiring all Oregon residents to stay at home "to the maximum extent possible" due to the current public health crisis caused by COVID-19.

• **Closure of Certain Businesses**

Effective at 12:01 a.m. on March 24, the Order explicitly requires the closure of the following businesses:

- Amusement parks;
- Aquariums;
- Arcades;
- Art galleries (to the extent that they are open without appointment);
- Barber shops and hair salons;
- Bowling alleys;
- Cosmetic stores;
- Dance studios;
- Esthetician practices;
- Fraternal organization facilities;
- Furniture stores;
- Gyms and fitness studios (including climbing gyms);
- Hookah bars;
- Indoor and outdoor malls (i.e., all portions of a retail complex containing stores and restaurants in a single area) (NOTE: such businesses are not prohibited from operating to provide food, grocery, health care, medical, pharmacy or pet store services);

- Indoor party places (including jumping gyms and laser tag)
- Jewelry shops and boutiques (unless they provide goods exclusively through pick-up or delivery service);
- Medical spas, facial spas, day spas, and non-medical massage therapy services;
- Museums;
- Nail and tanning salons;
- Non-tribal card rooms;
- Skating rinks;
- Senior activity centers;
- Ski resorts;
- Social and private clubs;
- Tattoo/piercing parlors;
- Tennis clubs;
- Theaters;
- Yoga studios; and
- Youth clubs.

Subject to approval by the Governor, the Oregon Health Authority can determine if additional business closures are necessary to slow the spread of COVID-19.

The Order does not apply to restaurants, bars, cafes and similar establishments that offer food or drink, which remain subject to Governor Brown's Executive Order No. 20-07 (prohibiting on-premises consumption of food or drink, but allowing take-out or delivery service).

- **Social Distancing Required for Other Retail Businesses**

The Order prohibits the operation of any other retail business not listed above, unless the business designates an employee or officer to establish, implement, and enforce social distancing policies, consistent with guidance from the Oregon Health Authority.

The social distancing requirements do not apply to grocery, health care, medical or pharmacy services, which are nevertheless encouraged to comply with social distancing guidelines.

Retail businesses that fail to comply with requirements will be closed until they demonstrate compliance.

The order does not define "retail business," but the list of closed businesses is a strong indicator of the class of businesses considered "retail." For example, it is hard to see how construction or manufacturing firms would fall under the definition. Hopefully there will be further guidance from the Governor's office or other state agencies for those businesses that do not clearly fall outside the definition. But even for those that do not meet the definition, encouraging and enforcing social distancing to the greatest extent possible is wise for both business and health reasons.

- **Workspace Restrictions**

Aside from the closure of certain businesses, the most consequential component of the order is that, effective Wednesday, March 25, 2020, all businesses and nonprofit entities with offices in Oregon must facilitate telework and work-from-home by employees, to the maximum extent possible.

Work in offices is prohibited whenever telework and work-at-home options are available, in light of position duties, availability of teleworking equipment, and network adequacy. That most likely means employees working in any office environment—be it at a manufacturing facility or a law office—must work from home if the technical capabilities exist and their job duties allow for it.

When telework and work-from-home options are not available, businesses and non-profits must designate an employee or officer to establish, implement, and enforce social distancing policies, consistent with guidance from the Oregon Health Authority. Such policies also must address how the business or non-profit will maintain social distancing protocols for business-critical visitors.

Businesses and non-profits that fail to comply with these workspace restrictions will be closed until they demonstrate compliance.

- **Enforcement**

The Order prohibits individuals from patronizing businesses that are supposed to be closed. Violating any of the governor's orders is a class C misdemeanor (punishable by up to 30 days in jail and/or a \$1,250 fine).

Updated Information from the IRS on How Employers Will Be Reimbursed for Wages Paid Pursuant to the FFCRA Paid Leave Programs

As you know, the protected absence required by the Families First Coronavirus Response Act (FFCRA) are initially paid by the employers, who are then reimbursed by the federal government through tax credits and refunds. We recently received guidance from the IRS regarding how the tax credit program will work. Employers will first need to calculate the actual tax credit they are entitled to receive. This amount is the total amount of wages the employer was required to pay under the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act, along with the health insurance costs paid for those affected employees during their FFCRA-paid leaves. Keep in mind that there are caps on the wages employers are required to pay under the two paid leave programs, so employers can only get a tax credit for those wages that were required to be paid. Employers who elect to pay more than what is required under the FFCRA will not be entitled to recoup those additional amounts paid from the federal government.

Effective immediately, the tax credit program will allow employers with tax credits to retain and access the federal taxes that would typically be deposited with the IRS (the withheld federal income taxes and the employer and employee share of Social Security and Medicare taxes for all employees) up to the amount of the employer's tax credits. If those amounts are not sufficient to

cover the employer's tax credits, the IRS is creating an expedited process to seek a refund for the balance. Currently, the IRS is hoping to respond to refund requests within two weeks. That process will be announced sometime this week. We will update our clients with this information when it becomes available.

There are equivalent credits available to self-employed individuals based on similar circumstances.

Here is the example provided by the IRS:

If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.

If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Equivalent child care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

COBRA Continuation Coverage

In most cases an employee's eligibility for group health plan benefits is based on whether the employee is (a) actively working; and (b) meeting the minimum hour requirements under the employer's plan. If the employee is terminated/laid off, or if the employee's hours drop below the eligibility threshold (for reasons other than the use of protected leave), the employee may be eligible for continuation coverage under COBRA (for employers with 20 or more employees) or under Oregon's continuation program (for employers with less than 20 employees).

Several employers have expressed concerns about their laid off employees' ability to afford COBRA premiums, and whether there are any alternatives to placing employees on COBRA. According to Eugene-based employee benefits broker J.L. Jones and Associates:

- Whether alternatives to COBRA exist will depend on the terms of your health plan and applicable law (including self-insured plans);
- At least one insurer's plan has a layoff provision that permits employers to continue to pay the health care premium for 90 days without triggering COBRA;
- Other carriers are awaiting input from the State regarding the extent to which they can delay COBRA eligibility;
- Insurers are generally not permitting mid-year modifications to plans to lower the "hours worked" eligibility threshold; and

- Employers who are interested in sharing the costs of COBRA premiums that laid off employees would otherwise have to bear should work with their benefits broker to explore alternatives.

In addition, it appears that an employer with a fully insured plan can pay all or a portion of the employee's COBRA premium costs without violating ERISA's anti-discrimination rules, and those payments would not constitute taxable compensation to the employee. A self-insured employer has less flexibility in that regard. In any case, employers considering this option should consult with their employee benefits attorney.

COBRA Notices

As a reminder, when COBRA or state continuation coverage is triggered, both the employer and employee face deadlines regarding the issuance of notices and election(s) of coverage. You should contact your carrier or third-party administrator as soon as possible to coordinate compliance with those obligations.

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.