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Important News: Employment Law Issues Arising from COVID-19

Layoffs and furloughs. Many employers have been forced to lay off employees or implement temporary furloughs.

- Generally, layoffs confer no right of later reinstatement (absent commitments to the contrary), and furloughs are intended to be temporary, typically having defined start and end dates.
- Laid off employees must be paid their accrued vacation (or PTO) pay and given an EDD Notice to Employees form and COBRA notice.
- Furloughed employees may also be entitled to unemployment insurance benefits and also should be given the EDD Notice to Employees form. Employees whose furlough extends beyond the end of the current month may be deemed ineligible for continued health coverage under the employer's plan except through COBRA. (Health plans may differ on this issue.) Furloughed employees who are ineligible should also be given COBRA notices.
- Governor Newsom has waived the one-week unpaid waiting period for employees to file for unemployment insurance benefits. *https://www.gov.ca.gov/2020/03/12/governor-newsom-issues-new-executive-order-further-enhancing-state-and-local-governments-ability-to-respond-to-covid-19-pandemic/*
- Furloughed employees should be given the option of using accrued time off benefits, and they may qualify for paid sick time or paid family leave under The Families First Response Coronavirus Act (below).
- Normally, layoffs or furloughs of more than 50 employees in a single work site, or any plant closure, triggers an employer's obligation to provide 60 days' notice under California's WARN Act. Governor Newsom has suspended most of those notice requirements for layoffs and closures resulting from the COVID-19 emergency. *https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-EO-motor.pdf* Abbreviated notice as soon as possible may still be required, however.

Work reductions. Employers facing challenges during this period may also consider reducing the workloads and compensation of their employees.

- EDD provides for approved work sharing programs under employees can receive unemployment insurance benefits to offset reductions in their earnings as a result of work reduction. https://www.edd.ca.gov/unemployment/Work_Sharing_Program.htm At this point, EDD has not announced any relaxation of the application requirements.
- Reductions in pay of nonexempt and exempt employees are permissible so long as done in a non-discriminatory manner like for example, through an across the board percentage pay reduction. For employees, you could also choose to reduce workdays for those essential ones able to work on site or those approved to work remotely, such as by reducing the number of workdays from 5 to 4, with a commensurate reduction in pay. Keep in mind that to be exempt, no matter the reduction, exempt employees must still meet the exempt salary standard which cannot be prorated. These, and other

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options, should be explored with your employment counsel.

- Employers under a CBA or other work agreement will need to consider and address any obligations thereunder.

Remote working arrangements. To the extent feasible, many employers are permitting employees to work remotely from their homes.

- Employees who purchase or use their own equipment and services (cell phones, computers, internet service, computer/video software) will be entitled to reimbursement of the portion of those costs attributable to work performed for their employer. Employers may ask employees to submit requests for reimbursement or establish a stipend that is reasonably calculated to cover the employees' business related costs. (If a stipend, employees should be provided the express opportunity to seek additional reimbursement subject to proof).
- It is ideal to have an agreement with employees covering the basics of the arrangement and any expectations. Keep in mind during this time that flexibility is needed.

New Federal Paid Sick Time and Paid Family Leave. The Families First Response Coronavirus Act has been enacted and will take effect on April 2, 2020. The bill includes multiple provisions, but of most interest to employers are those that provide for paid family leave and pad sick time.

- **Employers Affected.** The new FMLA and paid sick leave requirements apply to most employers with fewer than 500 employees. The Department of Labor is authorized to issue regulations to exempt small businesses with fewer than 50 employees "when the imposition of such requirements would jeopardize the viability of the business as a going concern." This has not yet happened.
- **Expansion of Family and Medical Leave Act.** The new FMLA provisions require affected employers to provide an additional type of leave to any employee who has been employed for 30 days, with part of the leave paid.
- Employers must provide up to 12 weeks of FMLA leave to covered employees who are unable to work or telework due to the need to care for a minor child because the child's school or place of care has been closed, or if that child's childcare provider is unavailable, due to a public health emergency. COVID-19 is a public health emergency.
- The first 10 days of this leave are unpaid. However, the employee could use the new paid sick leave (as explained below) or could choose to use any other already-accrued paid leave (e.g., sick, vacation, PTO) to receive pay during that time.
- The remainder of this leave may be partially paid by the employer at two-thirds of the employee's regular pay, based on the number of hours the employee is normally scheduled to work. If an employee's schedule is varied, then the "normal hours" are based on the average of the hours worked during the last six months.
- The pay is capped at $200 per day or $10,000 in the aggregate per employee.
- There is no certification required.
- The employee should provide notice of the need for this leave as soon as possible.
- There is no retaliation allowed for using this leave.
- All other FMLA leave provisions continue to apply as before and are not affected by this new law.

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- **Mandatory Paid Sick Leave.** The new federal paid sick leave law is specific to the coronavirus emergency.

Eligibility: The new law provides paid sick leave, as further defined below, to employees for the following reasons:

1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to a federal, state or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine, all related to COVID-19;
5. The employee is caring for their own minor child because the child's school or place of care has been closed, or their childcare provider is unavailable, due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

- **Two weeks of leave:** Full-time employees are to receive 80 hours of paid sick leave. Part-time employees are to receive paid sick leave equal to their average hours worked over a two-week period.
- **Rate of pay:** The rate of pay is the full amount of the employee's regular rate of pay if the reason for leave falls under numbers 1, 2 or 3 above. The rate of pay is two-thirds of the employee's regular rate of pay if the reason for leave falls under numbers 4, 5 or 6 above.
  For leave under reasons 1, 2 or 3 above, pay is capped at $511 per day or $5,110 in the aggregate, per employee.

  For reasons 4, 5 or 6 above, pay is capped at $200 per day or $2,000 in the aggregate, per employee.
- **No carryover:** There is no carryover of this leave to the next year. The leave ends on December 31, 2020.
- **Employer prohibitions related to this leave:** Employers cannot require an employee to exhaust other leave first, to find a replacement to use this leave, or retaliate against an employee for using this leave.
- **Posting requirements:** Prior to April 2, 2020 the Department of Labor will provide a notice about this leave which must be posted by employers.
- **Employee responsibilities:** Employees are to provide reasonable notice of the need for this leave and follow any established reasonable notice procedures during the leave.
- **Impact on other sick leave laws:** California's paid sick leave laws, as well as any local sick leave ordinances, continue to apply and are not affected by this new law.
- **Employers will be given tax credits for these benefits.** To help employers pay for these requirements, the law provides a refundable payroll tax credit for 100% of qualified paid sick leave wages and family leave wages paid by the employer under H.R. 6201, to be taken against the employer portion of Social Security taxes. This tax credit only applies to the employers that are required to provide the expanded FMLA and required emergency paid sick leave.

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Employers that voluntarily provide this type of benefit will not be eligible for the tax credit. The Treasury Department will issue further guidance on these tax credits and how exactly they will work.

Reporting Time Pay. California law requires employers to pay up to four hours of reporting time pay to employees who are required to report to work, but are not put to work or are furnished with less than half of their usual or scheduled day's work. The employees must be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at their regular rate of pay.

- Exceptions to the reporting pay requirement exist:
  - When the employer's operations cannot begin or continue due to threats to employees or property, or when civil authorities recommend that work not begin or continue.
  - When public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system.
  - When the interruption of work is caused by an Act of God or other cause not within the employer's control, for example, an earthquake.

Additional EDD guidance can be found at *https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs.htm*

This summary provides an overview of the law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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