COVID-19 Employer FAQs

The COVID-19 crisis has impacted the world in so many profound ways, one of which includes how businesses manage their relationships with their employees. The following FAQ addresses several questions businesses are raising in regard to employment-related issues created by the unprecedented COVID-19 situation such as leave, safety, wages, benefits, taxes, and possible insurance coverage. The COVID-19 crisis, and the governmental and societal response to it, has meant that addressing COVID-19 in the employment context has been somewhat of a moving target. In other words, although this FAQ may be current as of the date it is published, it may not still be current the day you read it. It is advisable to consult with counsel prior to altering or taking any employment actions.

New Federal Paid Sick Leave Entitlement

Q: Must I pay my employees their full pay under the new federal sick leave law?

A: Maybe. Generally, the new federal paid sick leave entitlement created by the Families First Coronavirus Response Act, allows employees, working for employers with less than 500 employees, to take up to 80 hours of paid sick leave for various reasons.

If your employee takes paid sick leave because (1) she is subject to government quarantine or isolation order; (2) has been advised by a health care provider to self-quarantine; or (3) has symptoms of COVID-19, then you must pay her regular rate of pay, up to $511/day, but no more than $5110 total.

However, if your employee is taking paid sick leave because she is caring for a person who is subject to quarantine under one of the above scenarios or because her child's school is closed, then you pay 2/3 the regular rate of pay, up to $200/day, but no more than $2000 total.

Q: Can I require my employees to use their vacation time if they are staying home due to the State's stay-at-home order for COVID-19, even if they are not sick?

A: No. Under both California's Paid Sick Leave law and the newly enacted Families First Coronavirus Response Act, which created a temporary federal paid sick leave entitlement (explained above), an employee may use the paid sick leave if they have been advised to self-quarantine or are subject to a governmental directive to do so. However, employers may not require that employees use other leave benefits first, including vacation.

New Partially-Paid Family and Medical Leave

Q: I have less than 50 employees, so I am not a "FMLA" employer. I don't need to worry about this new paid FMLA, right?

A: Wrong. All employers of less than 500 employees are subject to the emergency FMLA expansion.

Q: Does the emergency FMLA expansion mean all FMLA is now paid?

A: No. The Family and Medical Leave Act ("FMLA") is a federal law that allows certain eligible employees to take up to 12 weeks of unpaid, job-protected leave, in a designated 12-month leave year for certain family and medical reasons. This law generally applies to employers with more than 50 employees in a 75-mile radius, and employees were

only eligible to take the leave if they worked at least 1250 hours in the previous 12 months.

The Families First Coronavirus Response Act added an emergency amendment to FMLA requiring employers with less than 500 employees to provide partially-paid FMLA leave to employees who have been employed at least 30 calendar days, and who need leave to care for their children whose school or daycare is closed.

For these employees, the FMLA leave will be unpaid for the first ten days. Employees have the option to substitute other paid leave available to them during this time. After the first ten days, the remainder of the FMLA leave (still up to 12 weeks) will be paid at 2/3 of the employee's regular rate. Benefits are capped at $200 per day or $10,000 total.

Q: I run a small business and cannot afford to pay my employees for their FMLA leave under the new law. Is there any exception for small businesses?

A: Possibly. Businesses with less than 50 employees may be exempt from the requirement to provide partially-paid FMLA leave for caring for children whose school or daycare is closed. The exemption applies if providing the paid leave would jeopardize the viability of the business. The Secretary of Labor is to issue regulations regarding the application of the exemption soon.

Q: Do I have to reinstate my employees to their prior position once their partially-paid FMLA leave ends?

A: Generally, yes. Employers are required to reinstate employees taking FMLA under the new law to the same position or an equivalent position. However, employers with less than 25 employees may be excused from this requirement if the employee's position no longer exists due to business operations changes caused by the crisis. However, the employer must make reasonable efforts to provide the employee with a position or an equivalent position for 1 year.

Employer Tax Credits for Providing New Paid Leave Entitlements

Q: Will I be reimbursed for providing either the paid sick leave or partially-paid FMLA leave under the Families First Coronavirus Response Act?

A: Yes, in the form of tax credits. Under guidance that will be released the week of March 23, 2020, eligible employers who pay qualifying federal sick or FMLA child care leave under the new law will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and/or FMLA child care leave that they paid, rather than deposit those taxes with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the share of Social Security and Medicare taxes of the employee receiving the paid leave, and the employer share of Social Security and Medicare taxes with respect to all employees.

If there are not sufficient payroll taxes to cover the cost of qualified sick and FMLA child care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less.

Equal Employment Obligations in Light of COVID-19

Q: Can I send my employees home if they are exhibiting symptoms of COVID-19?

A: Yes. The EEOC, which is the federal agency that administers the Americans With Disabilities Act, follows the CDC's recommendation that employees who have symptoms of COVID-19, should leave work.

Q: Can I require a "fit for duty" note before employees return to work after exhibiting symptoms of COVID-19?

A: Yes. However, health care professionals and the EEOC are requesting that employers be flexible in the form and formality of such notes due to the fact that health care system is overburdened at present.

Q: Do I have to accommodate a disabled employee if they are working remotely instead of at the workplace?

A: Yes. The law requires most employers to provide reasonable accommodations to a disabled employee, unless that accommodation would cause an undue burden. If you were providing accommodations at work, and that employee needs the same accommodation if now working at a remote location like home, that accommodation must be provided unless it will create an undue hardship. If the accommodation does create an undue hardship, you must engage and interact with the employee to see if there is another reasonable accommodation available.

Further information about the ADA and COVID-19 can be found at the EEOC's website: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

Health and Safety Obligations for COVID-19

Q: Do any Cal/OSHA regulations dictate how we should keep our employees safe from COVID-19?

A: There are no safety regulations yet that address COVID-19 directly. But several regulations are potentially relevant, like the Injury and Illness Prevention Plan regulation, the requirement that employers provide washing facilities, requirements for personal protective equipment if a workplace hazard exists, and the Cal/OSHA requirement that employers control harmful exposure caused by inhalation.

Cal/OSHA has developed a website explaining what regulations may be implicated by COVID-19, in addition to guidance employers can take to keep employees safe like allowing flexible work arrangements, minimizing exposure between employees and the public, in addition to postponing/canceling work-related meetings and events. That guidance is found at: https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html

Wage Replacement Plans Offered by EDD

Q: Are there any benefits that employees might qualify for if I need to lay them off or reduce their hours?

A: Yes, the Employment Development Department ("EDD") offers a variety of wage replacement programs. Employees who are laid off or have reduced hours can file for unemployment insurance benefits, which can range from $40-$450 per week. The Governor recently waived the one-week waiting period for unemployment, meaning employees can start the process of receiving benefits in the week the lay off or reduced hours occurs. Unemployment is also potentially available for employees who miss work because their child's school or daycare is closed.

EDD also offers disability insurance to employees who cannot work because they have, or have been exposed to, COVID-19. In addition, employees who need to care for a family member ill or quarantined with COVID-19 can apply for Paid Family Leave with EDD. Weekly benefits for both disability and paid family leave range from $50-$1300.

Further information about EDD's programs can be found at: https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

Layoffs

Q: What payment obligations do I have, if I need to lay off an employee?

A: An employee who is laid off, fired, or discharged, must be paid all of their wages, including accrued and unused vacation, immediately at the time of separation. Employers in this situation cannot wait to pay employees their final wages at the next scheduled payday.

In addition, final wages need to be paid to the terminated employee at the place where the termination occurs. If the employee previously authorized direct deposit prior to the termination,

that authorization is immediately void upon termination. Direct deposit of final wages is allowed only if the employee voluntarily authorizes the direct deposit of final wages; although, the deposit must still be immediate with the termination.

Q: I have to lay off a large group of employees. Do I need to give the 60 days' notice under the WARN Act?

A: The federal Worker Adjustment and Retraining Notification Act ("WARN") requires certain employers to give 60 days' notice to the affected employees and certain government officials prior to a plant closing or mass layoff. The Cal WARN Act provides a similar notice requirement, but the scenarios governed by the two acts are somewhat different. Both laws apply to only certain types of layoffs and closings, generally depending on the number of employees involved.

The Governor recently suspended the bulk of the Cal WARN Act's requirements for layoffs caused by COVID-19 as "business circumstances that were not reasonably foreseeable as of the time the notice would have been required." The federal WARN Act includes an exception for similar business circumstances. Nonetheless, employers must give as much notice as reasonably practical. Employers planning a plant closure or mass layoff should consult with counsel regarding their notice obligations.

Further information about federal WARN and Cal WARN can be found at the EDD website: https://www.edd.ca.gov/Jobs_and_Training/Layoff_Services_WARN.htm

Employee Benefits and COVID-19

Q: What happens to my employees' health coverage if they get laid-off due to COVID-19?

A: Generally, if an employee loses employer provided group health coverage due to termination or a reduction in hours, the employee will be eligible for continuation coverage under federal or California law. Federal law applies to employers with 20 or more employees and California law applies to those with 2-19 employees.

In these circumstances, the employer must provide a notice to the employee of their eligibility for continuation coverage along with an enrollment form. Continuation coverage can last up to 36 months but ends when the employee is eligible under another group health plan. Continuation coverage is the same coverage as when they were employed, but the employer can require the employee to pay the entire premium cost for the coverage. However, if the layoff or reduction in hours is expected to be temporary until business improves, the employer might consider paying the cost for the employee.

As an alternative to continuation coverage, an employee can enroll in his or her spouse's employer's group health plan, or obtain individual coverage under Covered California.

Q: Can employees take hardship distributions from their 401(k) plan because of COVID-19?

A: A bill pending in the Senate would allow penalty free withdrawals from 401(k) plans of up to $100,000 due to COVID-19. However, COVID-19 is not currently a reason for a distribution from a 401(k) plan. If the plan permits hardship distributions, the financial hardship created by the COVID -19 outbreak may qualify as a reason for a hardship withdrawal.

If a plan permits hardship withdrawals, the employee must demonstrate that the withdrawal is needed to satisfy an immediate and heavy financial need and the amount of the withdrawal is limited to enough to satisfy such need and no more. Most 401(k) plans have adopted a safe harbor whereby certain events are considered to be heavy financial needs such as medical expenses; educational expenses; rent; mortgage payments and other expenses to prevent eviction from a primary residence; expenses to repair a principal residence; expenses for purchasing a principal residence; funeral expenses; expenses and losses such as loss of income as a result of a federally declared disaster if the employee's principal residence

or place of employment are within the disaster area. A 401(k) plan can allow withdrawals for some or all of the above or outside the safe harbor any demonstrated immediate and heavy financial need.

On March 13, the President declared the coronavirus pandemic a national emergency but not a disaster. However, on March 22, the President did declare California a federal disaster area. This declaration should permit hardship distributions from plans due to losses for employees who live or work in California if the plan provides for safe harbor hardship distributions. Additionally, if an employee has had hours cut due to the employer's business closing or operating under limited hours during the pandemic, but has not been terminated, the employee will likely qualify for one of the other safe harbor events, such as preventing eviction or foreclosure, or medical expenses, if evidence of the expenses is provided to the plan administrator. Hardship distributions are taxable, and if the employee is younger than age 59½, the distribution is subject to the additional 10% penalty for early withdrawal.

Finally, an employee must take any distributions available under the plan and other plans of the employer to try to relieve the hardship prior to applying for the hardship withdrawal. For this reason, if the employee has actually incurred a termination of employment, a hardship withdrawal is likely not available, because at that point the entire account balance is available for distribution.

Insurance Coverage

Q: Will any insurance cover my business losses caused by COVID-19?

A: Business Interruption Insurance will generally cover lost profits arising from, and unavoidable fixed costs continuing during, a mandated closure or partial shutdown. Some such policies will cover additional expenses such as temporary locations and excess hiring and training. It may be a stand-alone policy, or an add-on to a policy covering property losses, but is generally elective coverage. Your business might also carry Key Man Insurance that would provide compensation if one of the covered employees is unavailable for an extended period of time due to illness. You should check with your insurance agent about coverage, and if you may have coverage, retain detailed records of extra costs and other losses.

MurphyAustin
ATTORNEYS

MURPHY AUSTIN ADAMS SCHOENFELD LLP

Please contact one of our team members if we can be of assistance.

Aaron B. Silva, Labor and Employment Law
Partner
916.446.2300, Ext. 3027
asilva@murphyaustin.com

Shawn M. Joost, Labor and Employment Law
Associate
916.446.2300, Ext. 3010
sjoost@murphyaustin.com

Dennis R. Murphy, Labor and Employment Law
Partner
916.446.2300, Ext. 3072
dmurphy@murphyaustin.com

Scott E. Galbreath, Employee Benefits and Executive Compensation Law
Practice Team Leader, Of Counsel
916.446.2300, Ext. 3059
sgalbreath@murphyaustin.com

Jeffrey W. Curcio, Tax Law
Partner
jcurcio@murphyaustin.com

B.J. Susich, Corporate, Business and Tax Law
Partner
916.446.2300, Ext. 3002
bjsusich@murphyaustin.com