



BELLNUNNALLY

EMPLOYMENT LAW – PANDEMIC STYLE

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COVID-19 ISSUES

World Health Organization

Legal Significance of a Pandemic

PREPARATION AND INVESTMENT



OSHA



OSHA

- General Duty
- Safe working environment
- Recorded illness but relaxed standard for COVID-19

OSHA

- What if an employee appears sick or presents COVID-like symptoms?
- Can we ask an employee who exhibits symptoms to stay home or work from home?
- Can an employee's temperature be taken to determine if he or she has a fever?
- An employee has tested positive. What should we do?

OSHA

- We have a confirmed COVID case. Do we have to report?
- Can we require an employee to disclose a positive test or potential exposure?
- Can an employee refuse to attend work for fear of infection?

HIPAA

- HIPAA applies to “covered entities”
- Generally, employers do not qualify and do not have independent HIPAA obligations – more applicable to medical providers and employer-sponsored health plans
- But always treat medical information in a confidential manner
- Disclosure allowed but must be necessary

ADA

- Although HIPAA does not apply to most employers, the ADA does.
- Is COVID-19 a disability under the ADA? Transitory, but does it substantially limit a major life activity?
- The ADA usually prohibits employers from making disability-related inquiries and requiring medical examinations, with few exceptions.

ADA

- What is a disability-related inquiry?
Anything that is likely to elicit information about a disability. For example, asking whether an employee or applicant has a compromised immunity system.
- What is a “medical examination” under the ADA? Any procedure or test that seeks information about an individual’s physical or mental impairments or health.

ADA

- But what about in a COVID-19 world?
- Can an employer screen applicants for symptoms of COVID-19?
- Can an employer delay the start date of an applicant who has COVID symptoms?
- Can an employer withdraw a job offer from someone who has COVID or symptoms?
- Can an employer postpone the start date or withdraw a job offer because the individual is over 65 or pregnant (high risk categories)?

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

KEY TERMS

- Family First Coronavirus Response Act has two key employee leave provisions:
 - Emergency Paid Sick Leave Act (“EPSLA” or “**2-week Sick Leave**”)
 - Emergency Family and Medical Leave Expansion Act (“EFMLA” or “**10/12 Week Family Leave**”)

WHO IS ELIGIBLE FOR 2-WEEK PAID SICK LEAVE?

- 6 Circumstances:
 1. Employee subject to federal, state, local quarantine order
 2. Employee advised by health care provider to self-quarantine
 3. Employee experiencing symptoms of COVID-19
 4. Employee caring for person subject to #1 or #2
 5. Employee caring for child whose school/daycare closed
 6. Employee experiencing other substantially similar condition specified by Secretary of HHS/DOL

2-WEEK SICK LEAVE BENEFITS

- Two weeks (up to 80 hours) of paid sick leave
 - At regular rate of pay
 - 100% of regular pay for reasons #1, #2, #3
 - 2/3's of regular pay for reasons #4, #5, #6
- Pay calculations:
 - Use regular rate or minimum wage (whichever is higher) based on employee's normal 2-week schedule.
 - Average number of hours for part-time employees

CARING FOR SOMEONE (#4)

- Paid sick leave can be taken for an employee to care for someone they “have a genuine need to care for.”
 - This can include a roommate or live-in partner.
 - FMLA is typically reserved for an immediate family member, but this is to encourage immediate family members not to travel to care for their loved ones.

CAPS ON 2-WEEK PAID SICK LEAVE

- Caps on payments also based on reason for leave:
 - Reason #1, #2, #3: \$511 per day and \$5110 total
 - Reason #4, #6: \$200 per day, \$2000 total
 - Reason #5: \$200 per day, \$12,000 total

WHAT HAPPENS AFTER TWO WEEKS?

- Extended Family and Medical Leave Act provides for 12 weeks of job protected leave for employees who need to care for child under 18 if child's school is closed or child care provider is closed due to Coronavirus public health emergency.
 - The employees must be paid at no less than 2/3 of the employee's regular rate of pay.
 - Total is not to exceed \$200/day or \$10,000 after 10 weeks.
- Employees who have worked for 30 days qualify for this leave for child care reasons.

PROHIBITIONS AND PENALTIES

- Employers may not discharge, discipline or otherwise discriminate against any employee who takes paid sick leave under the FFCRA or files a complaint or institutes a proceeding under or related to FFCRA.
- Penalties of FLSA/FMLA apply (see next slide)
- 30-day nonenforcement period (for good faith noncompliance)

FLSA/FMLA PENALTIES

- Unpaid wages
- Liquidated (double) damages
- Attorney's Fees
- Broad definition of employer under FLSA— means individual managers and owners could be liable.

OTHER EMPLOYER OBLIGATIONS/RIGHTS

- Posting of Notice
 - DOL WH has created a poster:
 - <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- Tax Credits
 - Covered employers receive dollar for dollar reimbursement of wages paid under FFCRA through tax credits and premiums paid to maintain health insurance coverage.

CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES)

CARES ACT OVERVIEW

- **Business loan programs**
- Direct cash payments to citizens
- **Enhanced unemployment benefits**
- Healthcare coverage and medical supplies
- Economic stabilization to severely distressed sectors
- Economic relief to states and tribes

CARES ACT LOANS

1. Paycheck Protection Program Loans
2. SBA Economic Injury Disaster Loans and Grants
3. Debt Relief for New and Existing SBA Loan Borrowers

PPP LOANS – WHO IS ELIGIBLE?

- Small businesses
- Businesses with 500 or fewer employees
- Business with less than the maximum number of employees permitted under SBA employee-based size standards for the industry
- Hotel and food service businesses with 500 or fewer employees per location
- Must have been operational as of 2/15/20

PPP LOANS – WHAT IS MAX LOAN AMOUNT?

The lesser of:

– (i) \$10M or

– (ii)

2.5 x avg. monthly payroll costs

+

Balance on an Economic Injury Disaster
Loan made between 1/31/20 and
4/3/20

PPP LOANS – ALLOWABLE USES

- Payroll costs
 - **At least 75% of PPP loan proceeds must be used for payroll cost.** Borrower must certify this upon application for a PPP loan and upon applying for loan forgiveness.
- Mortgage interest payments (not prepayments or principal payments)
- Rent payments
- Utility payments
- Interest payments on other debt incurred before 2/15/20
- Refinancing an EIDL loan made between 1/31/20 and 4/3/20

PPP LOANS – LOAN FORGIVENESS

- **Amount:** Sum of payroll costs, interest payments on mortgage obligations, payments on covered rent and covered utilities during the eight-week period commencing on the date of the first disbursement of the loan.
- BUT, only 25% of the loan forgiveness amount may be attributable to non-payroll costs.
- PPP loan forgiveness will not constitute cancellation of debt income so the amount of PPP loan forgiveness will not be included in gross income.

PPP LOANS – REDUCTION OF LOAN FORGIVENESS

- The loan forgiveness amount may be reduced by furloughs, layoffs, and wage reductions if employee numbers and wage levels are not restored by June 30, 2020

PPP LOANS – REDUCTION OF LOAN FORGIVENESS

[LOAN] X Avg. FT EEs/ mo during covered period
(8 weeks after loan made)

Avg. FT EEs/ mo 2/15/19 – 6/30/19 OR
Avg. FT EEs/ mo 1/1/20 – 2/29/20
(borrower gets to choose) OR
If seasonal ER, Avg. FT EEs/ mo 2/15/19 –
6/30/19

PPP LOANS – REDUCTION OF LOAN FORGIVENESS

\$\$1M loan 25 ees/mo
 during
 x 8 week period = \$250,000 in
 ----- loan
 100 ees/mo from forgiveness
 2/15/19 –
 6/30/19

PPP LOANS – REDUCTION OF LOAN FORGIVENESS

EXEMPTION: such reduction is eliminated by 6/30/2020 (i.e., furloughed employees are rehired, wages are increased, etc.).

PPP LOANS – TIMING

CARES ACT – ENHANCED UNEMPLOYMENT

- \$600 per week in federal unemployment if the worker receives \$1 or more in state unemployment through July 31, 2020
- Applies to workers receiving both full and partial unemployment benefits
- Extends benefit period for up to 39 weeks (Texas is normally 26 weeks)

ENHANCED UNEMPLOYMENT – ELIGIBILITY

- Employee is willing and able to work but is unable to do so – either totally or partially – because of COVID-19
- Applies equally to salaried and hourly workers
- Applies to all companies, regardless of size
- Broadens scope to include self-employed, people with insufficient work histories, independent contractors, and gig workers

ENHANCED UNEMPLOYMENT – CHARGEBACK PROTECTION

- No charge to employer account for federal unemployment benefits paid
- Possible employer protection from chargeback for state unemployment benefits paid

ENHANCED UNEMPLOYMENT – FAQ

- If an employee declines to return to work based on COVID-19 fear, can the individual continue to collect unemployment benefits, including the enhanced benefits under the CARES Act?

→ No.

ENHANCED UNEMPLOYMENT – FAQ

- If an employee employed by an “essential business” quits work because of fear of COVID-19, can the individual still qualify for unemployment benefits?

→ Probably no.

ENHANCED UNEMPLOYMENT – FAQ

- I need to reduce payroll costs so I want to cut hours. What are my options? Will my workforce qualify for partial unemployment benefits? What about the extra \$600 per week?
 - Furlough
 - Partial unemployment calculation – qualify in TX if they make less than 125% of what the weekly benefit amount would be
 - If they qualify for state partial unemployment, they will qualify for the extra \$600
 - Shared work program

QUESTIONS?



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Alana Ackels advises employers on how to minimize risk, protect their businesses, and navigate the multitude of state and federal laws governing the employer-employee relationship. She prepares employment agreements, confidentiality agreements, non-competition agreements, employee handbooks, and other policies that mitigate risk for employers. She also prepares injury benefit plans for employers who choose to opt out of workers compensation in Texas, and she manages the plan roll-out for companies that go non-subscriber.



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Mark Shoffner represents and counsels clients in employment law and litigation matters. He defends companies against claims under the FLSA, payday laws, and anti-discrimination statutes. Mark has prosecuted cases for clients seeking to protect their trade secrets and enforce non-compete and non-solicitation agreements. He also regularly counsels clients on employment best practices, including regular reviews of employee handbooks and policies.