

EMPLOYMENT LAW ISSUES IN A COVID-19 REMOTE WORLD

HUMAN RESOURCES ROUNDTABLE

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MARCH 30, 2020

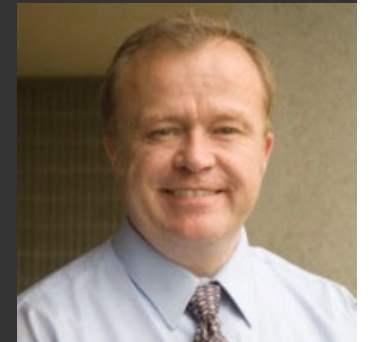


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BOWDITCH & DEWEY, LLP | MARCH 30, 2020

EMPLOYMENT LAW ISSUES IN A COVID-19 REMOTE WORLD

ROBERT G. YOUNG

WORK FROM HOME POLICIES

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- Can we require it?
- If an employee cannot work remotely, but refuses to come in, what then?
- Who provides the tools for remote work?
- Cyber-security issues

WORK FROM HOME POLICIES (CONT'D)

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- DHS recently announced relaxed tax rules
- If employer is operating entirely remotely, do not need to inspect I-9 documentation in person within three days of hire
 - Does **not** apply to employers who have employees present at a work location
- Can review remotely – video, email, etc.
- In-person inspection must occur once normal business operations resume
- Relaxed guidance in effect for 60 days (or 3 business days after National Emergency terminates)

HALLMARKS OF A WORK FROM HOME POLICY

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EXPECTATION SETTING

- Regular workload, or something else?
- Who decides when WFH starts and ends?
- Continued protection of confidential information (electronic and hardcopy)

HALLMARKS OF A WORK FROM HOME POLICY (CONT'D) BOWDITCH

INSTRUCTIONS ON SETTING UP A WORK AREA

- OSHA/Workers Comp concerns
- Establish appropriate, safe work environment at home
- Report (and investigate) all claimed injuries promptly

EMPLOYEE LEAVES OF ABSENCE, SICK TIME AND PAID MEDICAL LEAVE

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LAYOFF

- Ending of the employment relationship, with no guarantee of re-hire
- Final wage payment (including vacation) due on last day
- Benefits cease, subject to COBRA rights
- Eligible for unemployment benefits

EMPLOYEE LEAVES OF ABSENCE, SICK TIME AND PAID MEDICAL LEAVE (CONT'D)

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FURLOUGH

- Temporary, but mandatory, leave of absence; employment relationship does **not** end
 - Generally short-term, defined length (weeks, not months)
 - Can be unpaid, or allow employees to use accrued time off
 - Benefits eligibility remains, subject to terms of the plan
 - COBRA or Massachusetts Health Connector if employee loses coverage
 - Relaxed rules on Massachusetts Connector if lose coverage
 - Possibly eligible for unemployment benefits

EMPLOYEE LEAVES OF ABSENCE, SICK TIME AND PAID MEDICAL LEAVE (CONT'D)

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LAYOFFS & FURLOUGHS

- Decisions on who is selected must be based on legitimate business reasons
 - Always be able to answer “Why?”
 - Potential for discrimination/retaliation/interference claims (even under FFCRA)
 - Mirror test

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

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BECOMES EFFECTIVE APRIL 1, APPLIES TO LEAVES TAKEN BETWEEN
APRIL 1 AND DECEMBER 31

- What about employees who already have been laid off or furloughed?

APPLIES TO EMPLOYERS WITH FEWER THAN 500 EMPLOYEES

BUSINESSES WITH FEWER THAN 50 EMPLOYEES MAY APPLY FOR
HARDSHIP EXEMPTION

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) (CONT'D)

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ELIGIBLE EMPLOYEES – ALL ARE ELIGIBLE FOR PAID SICK LEAVE; ALL WHO HAVE COMPLETED 30 DAYS OF SERVICE ARE ELIGIBLE FOR EXTENDED FMLA

- Special rules for Health Care Providers and Emergency Responders
- Certain **employees** not entitled to leave
 - Does **not** apply to employer as a whole
- “Emergency Responder” not defined
- Regulations likely forthcoming

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) (CONT'D)

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PAID SICK LEAVE

- 80 hours (pro-rated for part-time based on average worked in 2-week period)
 - At ***regular rate of pay*** where employee is unable to work because:
 - Quarantined under federal, state, or local order or advice of health care provider
 - Experiencing COVID-19 symptoms and seeking medical diagnosis
 - “Regular Rate” caps at \$511/day and \$5,110 aggregate

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) (CONT'D)

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PAID SICK LEAVE (CONT'D)

- At **2/3 regular rate of pay** where employee is unable to work because:
 - Need to care for individual subject to quarantine
 - School or child care provider is closed due to COVID-19
 - Employee experiencing a “substantially similar” condition as specified by HHS (in consult with Treasury and DOL) – to be determined
- “Regular Rate” includes scheduled overtime, but caps at \$200/day and \$2,000 aggregate

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) (CONT'D)

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EXPANDED FMLA LEAVE

- Opens FMLA eligibility where employee cannot work due to school/child care provider closing due to COVID-19
- Paid leave starts Day 11 (days 1-10 covered by Paid Sick Leave)
 - 2/3 regular rate, up to \$200/day and \$10,000 aggregate

UNEMPLOYMENT BENEFITS

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MASSACHUSETTS HAS WAIVED THE WAITING PERIOD

BENEFIT RATE – 50% OF BASE WAGE, UP TO A MAXIMUM OF \$823/WEEK

- Federal stimulus bill – additional \$600/week for up to 4 months

BUT DO NOT GUARANTEE AN EMPLOYEE THEY WILL RECEIVE BENEFITS

- DUA determines eligibility, not the employer

UNEMPLOYMENT BENEFITS (CONT'D)

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WORKSHARE

- Allows employer to reduce hours for whole company (or unit/department/shift/job category) and employees to receive unemployment benefits
- At least 2 employees must be listed on a WorkShare plan
 - Each must have the same reduction, between 10% - 60%
 - Can include a shutdown for up to 2 weeks
 - Voluntary – employee may decline to participate
- Can have more than one plan, but an employee can only be on one plan
- Plan valid for up to 52 weeks, but can cancel anytime

WAGE AND HOUR ISSUES

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FOR-PROFIT BUSINESS CANNOT ACCEPT VOLUNTEER LABOR

- Cash flow – have to make payroll each week
 - Employee cannot agree to forego paycheck
- Wage Act – 3x damages, attorney fees, individual liability

EXEMPT VS. NON-EXEMPT IN FURLOUGHS

- Non-exempt – pay for time actually worked
- Exempt – pay full salary for any week in which **any** work is performed
 - Example: If furlough starts on Wednesday, exempt employee receives full salary for that week, even if not working Wednesday-Friday
 - Need to be strict about no work performed
 - Remove access to email/voicemail
 - Can still deduct from accrued paid time off (but can't deduct from salary if accrued time is exhausted)

BUSINESS CRISIS COMMUNICATION PLANS

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OPPORTUNITY TO DEMONSTRATE VALUES

AUTHENTIC

IDENTIFY CORE INTERNAL GROUP FOR QUESTIONS/FEEDBACK

ADDRESS ALL STAKEHOLDERS

- Employees
- Customers
- Suppliers
- Investors



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