

AUTUMN OUTLOOK – PLANNING AHEAD AMIDST THE COVID-19 PANDEMIC

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PALEY
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TODAYS AGENDA

- FFCRA Update
- Executive Orders
- Workplace Safety Mandates and Recommendations
- Liability Issues and Waivers
- Policy Updates
- Performance Management and Mental Health
- Future Furloughs and Layoffs



FFCRA UPDATE

- Families First Coronavirus Response Act
 - Emergency Paid Sick Leave Act (EPSLA)
 - Emergency Family Medical Leave Expansion Act (EFMLEA)
- Signed into law on March 18, 2020; Effective April 1, 2020 at the same time the DOL promulgated its Final Rule; First lawsuit file on April 14, 2020
- Act applies until December 31, 2020
- *State of New York v. Dep't of Labor* challenging:
 - Exclusion of leave benefits if work is unavailable
 - Definition of “health care provider”
 - Employer consent for intermittent leave
 - Documentation requirement for leave

FFCRA UPDATE

- Memorandum Opinion – August 3, 2020

Court Ruling	Impact on Employers
“Work Availability” Requirement is Invalid	Under EPSLA/EFMLEA employees may take leave even if work is unavailable
DOL Definition of “Health Care Provider” is Overbroad	Employer’s should be wary of excluding employees who do not actually provide medical services when evaluation FFCRA leave requests
Consent Requirement of Intermittent Leave is Invalid	Employers will have to allow intermittent leave requests on a qualifying employee’s request
Prior Notice Documentation Requirement for Leave is Contrary to the Notice Procedures Set Forth in the FFCRA	Cannot require prior notice before an employee can take leave. Under EPSLA, an employee must give reasonable notice and, under the EFMLEA, an employee need only give notice “as soon as practicable”

FFCRA UPDATE

- Remainder of DOL Final Rule remains intact, including the outright ban on intermittent leave for certain qualifying reasons and most of the documentation requirements
- Unclear whether court's decision applies everyone or just within the Southern District of New York
- Uncertain whether the decision has retroactive application
- Will it be stayed or appealed? Will the DOL take new regulatory action? Will Congress react? Will anything definitive happen prior to December 31?

FFCRA UPDATE

- So, what does this mean for you?
 - Even more uncertainty if you can believe that!
 - Be prepared to deal with the “nightmare” that is intermittent leave
 - Proceed as if the decision applies to you:
 - Allow an employee to take leave even if no work is available (“I know ... this makes no sense.”)
 - Allow intermittent leave
 - Don’t condition leave on prior notice
 - If you are a health care provider, don’t exclude the janitor

FFCRA UPDATE

- Now 97 FAQs on DOL website:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- Top of mind:
 - School Closure Eligibility (EPSLA/EFMLEA)
 - Another “suitable individual” or “usual childcare provider” must be unavailable
 - Physical location where child attends school/daycare must be closed
 - Reduced capacity and hybrid modes could be problematic
 - Plan ahead and communicate with employees!
 - **BE FLEXIBLE AND CREATIVE!**
 - Return to work
 - Return to “same or similar position”
 - Employer can require a negative test
 - Employer can require less interaction/remote work

EXECUTIVE ORDERS

- **Payroll Tax Deferral*** (Memorandum)
- **Unemployment Assistance*** (Memorandum)
- **Moratorium on Evictions**
- **Student Loan Relief** (Memorandum)

EXECUTIVE ORDER – PAYROLL TAX DEFERRAL

- Defers the “withholding, deposit, and payment” of employees’ SS/FICA tax (6.2%) through 12/31/2020.
- Applies to Employees with biweekly gross pay less than \$4,000 (\$104k annually).
- Employer tax already deferred by CARES Act.
- Only a “loan” for now—Forgiveness is possible.
- Treasury, IRS guidance is needed for clarity on implementation
- Employers likely allowed to continue withholding



EXECUTIVE ORDER – UNEMPLOYMENT ASSISTANCE

- Supplemental weekly assistance payments up to \$400
 - Until December 6, 2020, or funding runs out.
- Available to individual receiving at least \$100 per week in unemployment benefits
 - Who self-certify as unemployed due to COVID-19
- Federal government to fund \$300/States to fund \$100
 - State portion is optional
 - Maryland has applied and will fund the \$100
- Federal portion will be available even if states do not fund the \$100, per White House.
- Replaces \$600 assistance payments (FPUC) under CARES Act, which expired on 7/31/2020.

SOURCES OF COVID-19 WORKPLACE SAFETY RULES AND RECOMMENDATIONS

- Occupational Safety and Health Administration (OSHA) Guidance
- Centers for Disease Control and Prevention (CDC) Guidance
- Equal Employment Opportunity Commission (EEOC)
- State workplace safety requirements and guidance
- State and local mask and social distancing orders



FEDERAL GUIDELINES - CDC

- Lawsuits are beginning to emerge
- Protect your business by following CDC and OSHA Guideline – “GO TO” RESOURCES:
 - OSHA’s Guidance on Returning to Work
<https://www.osha.gov/Publications/OSHA3990.pdf>
 - OSHA’s Guidance on Preparing Workplaces for COVID-19
<https://www.osha.gov/Publications/OSHA3990.pdf>
 - CDC Website for Businesses & Workplaces
<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
 - CDC’s General Business Frequently Asked Questions
<https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>
 - CDC’s Interim Guidance for Businesses and Employers
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- **CDC guidance is meant to supplement, not replace, state or local regs**

CDC UPDATED RETURN TO WORK GUIDANCE

- July 20, 2020 – CDC issued Interim Guidance: *Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Setting*
 - Focuses on when individuals diagnosed with COVID-19 may end home isolation and return to work
 - Moves away from “test-based” strategies toward a preference for “symptoms-based” strategies
- Criteria for RTW in Non-Healthcare/Healthcare settings:
 - Remain on home isolation until:
 - **10 days** have passed since onset of symptoms or first positive COVID-19 test; and
 - At least **24 hours** have passed since resolution of the last fever without fever-reducing medications (formerly 72 hours)
 - **Other symptoms** have improved (formerly only respiratory symptoms)

CDC UPDATED RETURN TO WORK GUIDANCE

- Caveats - Severe and Critically Ill, and Immunocompromised
 - This category of individuals may continue to produce replication-competent virus for 10-20 days
 - CDC recommends extending isolation for up to 20 days
- CDC formerly recommended discontinuance of isolation through “test-based” strategy of two consecutive laboratory-confirmed negative viral tests 24 hours apart.
- Now, CDC does NOT recommend test-based strategy, UNLESS:
 - Discontinuing isolation of immunocompromised individuals
 - To discontinue isolation earlier than would occur using “symptom-based” strategies
- Oddly, CDC continues to recommend that individuals who have been exposed but are asymptomatic quarantine for 14 days

EEOC UPDATED GUIDANCE

- June 17, 2020 – Released updates to its document “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws”
- Addresses Return to Work, Age, Caregiver/Family Responsibility and Pregnancy questions:

EEOC UPDATED GUIDANCE

- RTW – As part of RTW plan, EEOC suggests
 - Notifying employees that the company is willing to be flexible, that it will provide accommodations and who to contact; and
 - Accommodating requests for alternative screening
- Age – Reminds employers that they cannot involuntarily exclude older workers only because they are at higher risk but suggests they should voluntarily provide flexibility
- Caregivers/Family Responsibility – Don't make gender-based assumptions of who may have caretaking responsibilities
- Pregnancy – Reminds employers that they cannot exclude an employee from the workplace involuntarily due to pregnancy, that pregnancy-related medical conditions may trigger reasonable accommodation and that employer must offer the same modification to all employees who are similarly situated in their ability to work

VIRGINIA COVID-19 EMERGENCY WORKPLACE SAFETY STANDARDS

- Effective July 27, 2020
- Covers:
 - Exposure assessment, determination and notification
 - Employee return to work post COVID-19 infection
 - Physical distancing and closure of common areas
 - Use of masks and PPE
 - Sanitation and disinfecting
- Special requirements for jobs with medium, high or very high exposure risks
- Infectious disease preparedness and response plan requirement

OTHER DMV REQUIREMENTS AND GUIDANCE

- Mask and social distancing orders:
 - Maryland, District of Columbia and Virginia each have orders governing the use of masks (including in workplace settings) and social distancing
- State and local guidance

LIABILITY ISSUES

- A business has an obligation to protect employees, contractors, and customers.
- In an attempt to reduce liability, businesses are turning to release/waiver agreements.
- A release/waive cannot fully eliminate a business' obligation to protect its employees, contractors, and customers.



WAIVERS/ RELEASES

- **Two Main Components of a COVID-19 Liability Waiver and Release (“COVID Waiver”)**
 - exculpatory clause, and
 - assumption of the risk



WAIVERS: EXCULPATORY CLAUSE

- Definition

Parties agree in advance:

- That the business is not under an obligation to provide specific care or prevent harm to the person.
- That the business is not liable for consequences of conduct which would otherwise be negligent.

WAIVERS: EXCULPATORY CLAUSE

- Are exculpatory clauses enforceable?

In many States, yes (parties are free to enter into a contracts)

Even if generally valid in a particular state, important exceptions exists:

1. Intentional harm or extreme forms of negligence (*i.e.*, gross negligence)
2. Grossly unequal bargaining power
3. Transactions affecting the public interest
4. Patently offensive

WAIVERS: EXCULPATORY CLAUSE

EMPLOYEE WAIVERS

- Disfavored due to unequal bargaining power between the employee and employer
- Workers Compensation coverage (cannot be waived)

WAIVERS: ASSUMPTION OF RISK

Business must prove that:

- Person had knowledge of the risk of danger
- Person appreciated the risk of danger
- Person voluntarily confronted the risk of danger

**COVID-19 Assumption of Risk Language
Should be Specific to Your Industry/Business**

LIABILITY SHIELDS

- GOP Liability Shield (stalled)
 - Proposal: Gross negligence or intentional conduct for liability
- Some State have passed legislation
 - Narrow the liability standards related to and stemming from COVID-19



POLICY UPDATES

- **Don't wait!**
 - Outdated policies pose an increased concern during times like these when there is a heightened risk layoffs or personnel issues
- Key policies to review and update:
 - Attendance and absenteeism policies
 - Leave policies
 - Telecommuting policies

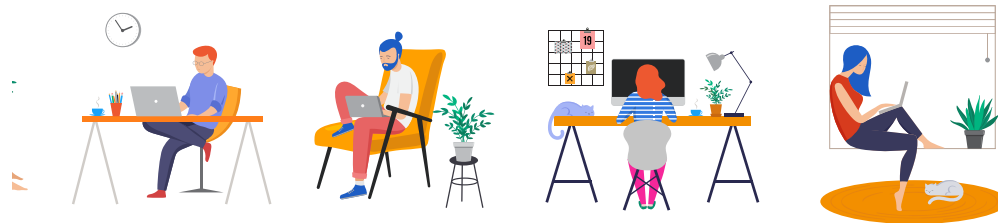


ATTENDANCE AND LEAVE POLICIES

- **Attendance and absenteeism policies**
 - How do these apply if employees are working remote?
 - Does the policy distinguish between protected absences v. unexcused absences that may result in discipline?
- **Leave policies**
 - Is the company complying with all applicable leave laws - including leave under the FFCRA and applicable sick and safe leave laws?
 - For voluntarily provided paid leave (vacation, PTO):
 - Does the company want to change accrual rates or change or add rollover or use caps?
 - Is it clear to employees how and when the leave can/must be used?
 - Does the policy state if leave will be paid out on separation?

TELECOMMUTING POLICIES

- Review and update telecommuting policies and procedures
- Consider requirements for exempt v. non-exempt worker
- Determine whether the company will use any monitoring equipment or applications
- Consider a telecommuting agreement



TELECOMMUTING POLICIES: CONTENTS

A good telecommuting policy should:

- Explain how decisions are made about telecommuting
- Note that not all jobs are suitable for telecommuting
- Address what equipment the company will and will not provide
- Make it clear that telecommuting may be temporary and doesn't set a precedent
- State that employees must continue to abide by all employer policies
- Address job duties and work hours
- Explain that telecommuting is not a substitute for dependent care
- Address safety issues
- Address information technology and confidentiality issues

MENTAL HEALTH: IDENTIFYING & ADDRESSING EMPLOYEE ISSUES

- Each request is different – Leave or Accommodation?
- Be mindful of whether a “disability” is present.
 - Stress, “Zoom fatigue” do not qualify.
- “Disability-related inquiries” prohibited.
 - Symptoms, medication, etc.
- Cannot discriminate based upon perception of disability
- Best Practice is to create opportunities for employees to seek assistance or disclose issues:
 - Make EAPs and other resources available.
 - Make sure employees know to seek “accommodations.”
 - Culture of compassion and receptiveness
 - Ensure managers know to engage HR immediately.



MANAGING EMPLOYEE PERFORMANCE IN A CHANGING ENVIRONMENT

- Make sure expectations are clear (and updated)
 - Work-product
 - Availability/reachability
 - Provide runway for major changes
 - Review Handbooks & written contracts
- Time-tracking
 - Verifiable?
 - Overtime?
- Make outlets for feedback available
 - Opportunities to discuss safety, mistreatment & dissatisfaction
- Encourage regular engagement & (safe) socialization

FURLOUGHS & LAYOFFS

- Assessing Risk
 - Protected class?
 - COVID-19 diagnosis, care of others, childcare under the Family First Coronavirus Response Act.
- WARN Notices for larger employers (over 100 employees) who close a facility with 50 or more employees or a mass layoff.
 - Notice of at least 60 calendar days



FURLOUGHS & LAYOFFS

- Consider Severance Agreements
 - Release in exchange for additional payment
 - Assess PTO liability
 - If layoff covers more than one employee, a release for older employees (over 40) will require additional information regarding those selected for layoff
- COBRA (or mini-Cobra) Notices are required

THANK YOU!

Q+A

If you have any questions, please don't
hesitate to contact us.



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