



LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • BENEFITS

QUESTIONS AND ANSWERS REGARDING COVID-19 EMPLOYMENT REQUIREMENTS

March 24, 2020

A. FAMILIES FIRST CORONAVIRUS RESPONSE ACT

1. How do I get reimbursed for the cost of paid leave?

You are required to withhold from employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes and to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941) with the IRS. Under guidance that will be released next week, eligible employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes 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 childcare leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.

2. What about the cost of health care coverage during the leave?

As part of the tax credit, you can recover the cost of health care coverage while the employee is on leave.

3. Do I have any tax liability for the leave paid under the Act?

Employers face no payroll tax liability for the required leave.

4. What are the group health insurance implications for employees impacted by a temporary separation?

Some employers are paying the employee's share of insurance premiums, as it's still less than pay continuation. Other employers are requiring employees to pay their share of the premium to keep coverage. Again, employers should evaluate the employee

relations/reputational implications of how allocation of premium payments is handled in conjunction with the organization's financial vitality. Additionally, if insurance coverage continuation is not handled under COBRA, the insurance plan's eligibility standards may be implicated and should be reviewed as part of the decision-making process.

5. We will provide the FFCRA's emergency sick pay benefits to employees effective immediately instead of waiting for the Act's effective date. Any issues?

You will not get to "count" any of this time towards the Emergency Paid Leave or Expanded FMLA entitlements, nor is there any provision for an employer to be able to get the offsetting tax credits for leave provided in advance of the Act's effective date, which is presumed to be April 2, 2020 (see next question).

6. Can employers charge leave given before April 2 as leave under either the Emergency Sick Leave or Expanded FMLA provision and get the tax credit?

No, although the effective date is not entirely clear ("not later than 15 days after the date of enactment" is the language used in the FFCRA).

7. What are the insurance implications for a temporary separation?

Some employers are paying the employee's share, as it's still less than pay continuation. Otherwise, an employer may require employees to pay their share to keep coverage. Again, evaluate the employee relations/reputational implications of how this is handled in conjunction with the organization's financial vitality. Additionally, if this is not done under COBRA, the insurance plan's eligibility standards may be implicated.

8. If we start paying a supplement to employees who are not working, can we stop paying it when economic conditions require?

Absolutely, and it's not a precedent for any future layoff or furlough.

9. If we close for lack of work or send employees home for that reason, does it trigger Families' First obligations?

No, not at all.

10. If an employer is required to close after April 2, does that trigger quarantine language regarding sick leave?

Thus far there is a lack of clarity about this. The trigger is the instruction to the employee, either from a health care provider (specific to the employee) or from a governmental body with the authority to issue quarantine or isolation orders affecting the employee. We hope the Department of Labor will clarify when an employee is

subject to a Federal, State, or local quarantine or isolation order related to COVID–19, as it applies to the availability of Emergency Paid Sick Leave.

11. Is it better to terminate/furlough or pay a supplement?

This involves employee relations considerations in addition to financial ones. For example, would short term employees be on furlough/terminated prior to April 1 but not long-term ones, even if they have the same childcare issue? It may be appropriate to furlough/terminate short term employees now, particularly if they won't be needed even if they secure childcare coverage.

12. What is the difference between termination and furlough?

Furlough anticipates recall and is usually of a potentially shorter duration than layoff.

B. DOCUMENTATION

1. May an employer require documentation of the need for sick leave?

Although the FFCRA is silent on this, we think that you may, but be sensitive to the strains on the medical field in your community.

2. What about return-to-work clearance?

Yes, we think that documentation may be required.

3. Are there posting requirements?

A sick leave poster will be forthcoming from the Department of Labor.

C. WORKPLACE ISSUES

1. Several employees have complained about a co-worker's cough. What can I do?

You can assess for yourself...is the cough dry? You may ask the employee (privately) about symptoms consistent with COVID-19. Right now, these include dry cough, fever, chills, and shortness of breath. We recommend employers review the CDC and OSHA guidance prior to this as it will provide symptoms and risk assessment guide. You may ask the employee if he/she has been exposed to COVID-19 or someone known to be diagnosed with COVID-19. You may choose to require the employee to telework or remove them from the workplace. After April 2, this would arguably qualify for prong #3 (employee needs leave because they are experiencing symptoms and seeking treatment) of the Emergency Sick Leave Act if you appropriately guide the conversation to the employee needing to seek treatment and/or clearance from having COVID-19 .

- 2. Several employees have complained about a co-worker's sneezing. The sneezing employee has been here for several years and in my personal experience she normally has these allergy symptoms on a seasonal basis. She is also asthmatic. She actually had her annual check-in with her allergist and the allergist provided her with a handout about distinguishing between allergies and COVID-19.**

You can assess for yourself...is there a cough as well? You may ask the employee (privately) about symptoms consistent with COVID-19. Right now, these include dry cough, fever, chills, and shortness of breath. We recommend employers review the CDC and OSHA guidance to stay up to date. You may ask the employee if he/she has been exposed to COVID-19 or someone known to be diagnosed with COVID-19. You should NOT tell other employees that the sneezing employee is an asthmatic. This would be a non-essential disclosure of an employee's disability. The sneezing employee is free to tell others of their condition. You may tell employees that you will be vigilant in assessing risks but will not exclude employees with symptoms that do not correspond to COVID-19.

3. May I place a pregnant employee on leave at her request?

At this point—and the situation could change in an instant—COVID-19 is not known to pose an additional exceptional risk to pregnant women or their unborn children. Thus, in the absence of an underlying complication, there is no ADA or Pregnancy Discrimination Act obligation to provide an accommodation. Additionally, any leave provided would not exhaust a pregnant employee's FMLA allotment since it would not correspond to an existing serious health condition. Do not single pregnant employees out for forced leave, light duty, or sequestration where they have not requested it.

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