Planning Options and Considerations for Employers Navigating COVID-19 in the Workplace

Presented by:

Members of the Hill Ward Henderson COVID-19 Attorney Response Team

from the

The Employment Law and Employee Benefits and Executive Compensation Practice Groups

This is not legal advice; consult with your attorney.
Agenda

• COVID-19 exposure in the workplace: Gordon Hill
• Top questions regarding the FFCRA answered: Jeff Wilcox
• Cost saving employment options: Gordon Hill
• Effect of these issues on benefits: Kirsten Vignec

This is not legal advice; consult with your attorney.
Steps to Take in the Event of a Positive Test

• Notify the CDC and local health authorities
• Instruct the employee to stay home – at least 14 days
• Require doctor’s note to return to work
• Sick Leave and FMLA (if eligible)
• Ask the employee where he/she has been
  – Follow CDC safety/cleaning guidelines
  – At a minimum – deep clean those areas
  – Better – shut down and hire a specialty cleaning company

S. Gordon Hill

gordon.hill@hwhlaw.com
(813) 222-8506

This is not legal advice; consult with your attorney.
Steps to Take in the Event of a Positive Test cont.

• Employee confidentiality
  – But can ask – who have you been in close contact with?
  – Or get a written waiver of confidentiality

• Notify specific employees
  – Confidentially (unless waiver)
  – Send home for 14 days and recommend testing

• Notify the rest
  – Describe the safety/cleaning steps taken
  – Require immediate notification if even the slightest hint of symptoms

• Notify public?

This is not legal advice; consult with your attorney.
Steps to Take in the Event of a Report of “Close Proximity” or Symptoms

- Instruct the employee to stay home – at least 14 days
- Require test or at least doctor’s note to return to work
- Sick Leave?
- Ask the employee where he/she has been
  - Deep clean those areas
  - Shut down?
- Employee confidentiality – see above
Families First Coronavirus Response Act (FFCRA)

- Requires job protected, mostly paid leave for certain coronavirus-related circumstances
- Applies to all employers with less than 500 employees
- 2 types of leave:
  - Emergency Paid Sick Leave for coronavirus-related quarantines and child care issues – capped at 80 hours
  - Expanded FMLA for coronavirus-related child care issues – up to 12 weeks job-protected leave, with mixture of unpaid and paid
- “Paid for” by employer tax credits – may be able to apply earlier than expected
- Possible individual liability
- DOL says effective April 1st – not retroactive
- Until December 31, 2020

Jeff Wilcox
Jeff.wilcox@hwhlaw.com
(813) 222-8725

This is not legal advice; consult with your attorney.
Counting Employees under FFCRA

• Only applies to employers with less than 500 employees
• Can different entities “aggregate” to exceed threshold?
• Expanded FMLA leave – FMLA tests -“Integrated Enterprise”
  – Interrelation of operations
  – Common management
  – Centralized control of labor relations and personnel
  – Common ownership and financial control
• Emergency Paid Sick Leave – new law - potentially FLSA “joint employer”
  – Hires or fires employee
  – Supervises and controls the employee’s work schedule or conditions of employment to a substantial degree
  – Determines the employee’s rate and method of payment
  – Maintains the employee’s employment records

This is not legal advice; consult with your attorney.
Other Unique Issues under FFCRA

• Other sick leave/PTO provided by employer
  – Can employers require employees to use PTO/sick leave provided by employer?

• Pay calculation
  – Part-time employee paid sick leave calculation

• Furlough or layoff
  – Qualify for paid sick leave even if employee is furloughed or laid off?

• “Health care provider”
  – Along with emergency responders, can be exempted from expanded FMLA leave and paid sick leave

This is not legal advice; consult with your attorney.
Relief for Small Businesses under FFCRA

- Employers with fewer than 50 employees
  - Potential hardship waiver “when imposition of such requirements would jeopardize the viability of the business as a going concern”
  - Exempt from FMLA lawsuits by employees
    - But DOL can still bring enforcement actions
- Employers with fewer than 25 employees - exception from FMLA job restoration when:
  - Position no longer exists due to economic conditions or caused by COVID-19;
  - Employer makes reasonable efforts to restore to equivalent position;
  - If no equivalent position, employer makes efforts over next year to contact employee if equivalent position becomes available

This is not legal advice; consult with your attorney.
Labor Cost Savings Measures - Options

• Cutting Pay / Hours

• Furloughs / Temporary Lay Offs

• Reduction in Force (RIF) a/k/a “Lay Offs”

Note – “Phase 3” economic relief may deny certain relief to employers if they lay off or furlough employees

S. Gordon Hill

gordon.hill@hwhlaw.com

(813) 222-8506
Labor Cost Saving Measures
Considerations when Cutting Pay / Hours

• **Contract Constraints** – employment agreement or offer letter

• **Wage & Hour:**
  – **Exempt employees:**
    • Make it temporary – in whole workweek increments, but not week-to-week
    • New salary threshold – $684 per week / $35,568 annual
  – **Non-exempt employees** – minimum wage – federal, state or local law

• **The Selection Process** – consider protected employees:
  – Discrimination
  – Whistleblower retaliation
  – Employees on FMLA, military, or other leave

This is not legal advice; consult with your attorney.
Labor Cost Saving Measures
Furloughs

• **Pros:**
  - Unemployment Compensation
  - Retain workforce → ramp back up more quickly

• **Contract Constraints** -- required pay or benefits?

• **Wage & Hour** -- paying salary to exempt employees

This is not legal advice; consult with your attorney.
Labor Cost Saving Measures

Furloughs cont.

• Sick Leave Laws
  – Federal – FFCRA
  – State & Local – e.g., AZ, CA, MA, MI, NY, Chicago, Dallas, D.C., Philadelphia, NYC

• Gratuitous Pay
  – Full or partial compensation
  – Benefits
  – Vacation/PTO considerations

This is not legal advice; consult with your attorney.
Labor Cost Saving Measures
Reductions in Force (RIF)

• Unemployment Compensation
• **Contract Constraints** – terminable “at will” vs. “Cause”
• **Sick Leave Laws** (see above)
• **Vacation/PTO** – must pay upon termination?
• **Severance** – pay and/or continuing benefits
  – Severance plans
  – Releases

This is not legal advice; consult with your attorney.
Employee Benefits: Health and Welfare Benefit Considerations

- Benefits eligibility/loss of coverage
  - Plan provisions
  - Application of COBRA
  - PPACA considerations
  - Conversion rights

Kirsten L. Vignec
kirsten.vignec@hwhlaw.com
(813) 227-8731

This is not legal advice; consult with your attorney.
Employee Benefits:
Health and Welfare Benefit Considerations cont.

• Health and welfare premiums during leave/furlough

• Section 125 mid-year election changes
  – Dependent care
  – Changes in spouse’s plan

This is not legal advice; consult with your attorney.
Employee Benefits:
Health and Welfare Benefit Considerations cont.

- Medical Benefits
  - Cost sharing and COVID-19
  - Telehealth services
  - High deductible health plans/HSA

This is not legal advice; consult with your attorney.
Employee Benefits:
Retirement Plan Considerations

• Plan contributions while on leave/furlough
  – Plan definition of compensation
  – Employee contributions
  – Employer contributions

• Severance from employment
Employee Benefits: Retirement Plan Considerations cont.

- Years of service/hours of service
- In-service distributions
- Plan loan options
Employee Benefits: Retirement Plan Considerations cont.

- Reduction in employer contributions
- Partial plan termination
- Defined benefit plans -- funding

This is not legal advice; consult with your attorney.
Employee Benefits: Pending Issues

- HIPAA Privacy
- Pending (or passed) legislation
Thank you for joining us!

Visit our webpage https://www.hwhlaw.com/practice-areas/COVID19-Response-Team for more resources.

A copy of today’s recording will be posted there along with the presentation slides.