

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



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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



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HENDERSON
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S. Gordon Hill
gordon.hill@hwhlaw.com

(813) 222-8506



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?



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



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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



HILL WARD
HENDERSON
ATTORNEYS AT LAW

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



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



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



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



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



HILL WARD
HENDERSON
ATTORNEYS AT LAW

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



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



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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



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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



Employee Benefits: Health and Welfare Benefit Considerations

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



HILL WARD
HENDERSON
ATTORNEYS AT LAW

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



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



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Employee Benefits: Health and Welfare Benefit Considerations *cont.*

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



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Employee Benefits: Retirement Plan Considerations

- Plan contributions while on leave/furlough
 - Plan definition of compensation
 - Employee contributions
 - Employer contributions
- Severance from employment



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Employee Benefits: Retirement Plan Considerations *cont.*

- Years of service/hours of service
- In-service distributions
- Plan loan options



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Employee Benefits: Retirement Plan Considerations *cont.*

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



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Employee Benefits: Pending Issues

- HIPAA Privacy
- Pending (or passed) legislation



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Thank you for joining us!

Visit our webpage

<https://www.hwlaw.com/practice-areas/COVID19-Response-Team>
for more resources.

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



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