Draper Richards Kaplan
FOUNDATION

COVID-19: Families First Coronavirus Response Act
Emergency Paid Sick Leave and Expanded FMLA

Updated as of March 27, 2020

Detailed below is a summary of the Act's provisions based on our recent conversation with Insperity. Obviously, this is a rapidly changing environment and each organization should check with their own legal counsel and HR professionals to make sure you understand the particular state and local rules and interpretation of this legislation as it applies specifically to you and your organization. The Families First Coronavirus Response Act takes effect on April 1, 2020 and lasts through December 31, 2020. We also have some guidance on reduced hours, furloughs, and terminations.

1. New Emergency Paid Sick Leave

- *Applies to all U.S. entities with under 500 employees*
- *Applies only to U.S. employees, regardless of how long the employee has been employed by the company*
- *The Secretary of Labor has the authority to exempt small businesses (under 50 employees) if the business can show that providing the leave would jeopardize the viability of the business. We expect more guidance.*
- *You cannot change your sick leave or PTO policy in light of this federal policy*

Emergency paid sick leave may be taken for 5 reasons: (1) if employee is subject to a Federal, State or local quarantine or isolation order related to coronavirus; (2) if the employee is diagnosed with coronavirus or experiencing symptoms and seeking diagnosis; (3) to care for an individual experiencing symptoms or who is quarantined; (4) to provide child care or (5) if the employee is experiencing substantially similar symptoms as specified by the Health and Human Services Department.

A. **If an employee is subject to a federal, state or local quarantine or isolation order, or has coronavirus/symptoms or is quarantined due to coronavirus**, you must provide an additional 80 hours of emergency paid sick leave to full-time employees. Part-time or hourly employees are entitled to the number of hours the employee was scheduled to work for 2 weeks, or the number of hours the employee regularly works in a typical two-week period. Paid sick leave is capped at $511 per day and $5,110 in the aggregate per employee for emergency sick leave used for these reasons.

For the additional 80 hours, employers will receive a tax credit from the federal government by deducting paid sick leave from payroll taxes (any excess amounts will have to be applied for refund by the IRS - we estimate these amounts will be take at least 10 weeks for reimbursement).

Note: employees who can work from home are not considered eligible for this benefit. If they are quarantined due to doctor's prescription or cannot work at home, they may be eligible.

B. **If an employee must care for an individual, provide childcare, or is experiencing similar symptoms as identified by the Health and Human Services Department**, they may be eligible for an additional 80 hours of paid leave at 2/3 of the employee's regular pay rate. The person cared for may include students whose schools have closed, sick family members, or others who your employee is caring for. Paid sick leave is capped at $200 per day and $2,000 in the aggregate per employee for emergency sick leave used for these reasons.

For the additional 80 hours, employers will receive a tax credit from the federal government in the same manner as described above.

Note: employees who are able to work from home and have flexibility to care for children, such as older children who are largely independent, would not be eligible for this benefit.

2. New Expanded Family and Medical Leave Act (FMLA)

- *Applies to all U.S. entities with under 500 employees*
- *Applies only to U.S. employees, who have been employed for 30 days or more*
- *The Secretary of Labor has the authority to exempt small businesses (under 50 employees) if the business can show that providing the leave would jeopardize the viability of the business. We expect more guidance.*

Employees who have been employed for 30 days or more are entitled to up to 12 weeks of job-protected FMLA leave when an employee is unable to work or telework because his or her child's school, day care, or childcare is unavailable.

The first 10 days of the leave may be unpaid and employees may elect to use other paid benefits to cover that time period. After the first 10 days, the remaining up to 10 weeks of leave must be paid at no less than two-thirds of the employee's regular rate of pay. The required pay is capped at $200 per day and $10,000 in total.

3. Reduced hours, Furloughs, and Terminations

- *Applies to all U.S. employees*
- *Note that unemployment practices vary widely state-by-state*
- *In certain circumstances, you may be required to re-employ a terminated employee within 12 months*
- *Furloughed or terminated employees do not qualify for emergency paid sick leave or expanded FMLA*

Unfortunately, the best path for many organizations may include reduced hours, furloughs, or terminations. DRK recommends planning carefully and executing any terminations or furloughs *once*, as repeated terminations will seriously undermine morale and belief in the organization's survival.

A. Reduced Hours

You can reduce the hours of any employee under certain conditions.

- Nonexempt employees' hours may be reduced as needed and we recommend prohibiting overtime without specific permission.
- Generally, to avoid a layoff, exempt employees' hours and salary can be reduced, as well, but you must still pay at least the minimum exempt employee salary (which varies state by state). You can also convert an exempt employee to a nonexempt employee in order to reduce hours below that threshold. If you do that, be sure to then require that the employee record all time worked and require that they take meal and rest breaks as required by various state laws.

Employees whose hours are significantly reduced below average or expected hours may file for unemployment. Some states, such as California and Washington, have created emergency wage replacements. You should review your benefit plans and determine whether that employee's benefits would be impacted by the reduction in hours.

Note that unemployment pay may be backlogged and employees may not receive payment for 10+ weeks.

B. Furloughs

A furlough is a temporary termination for a specified period of time during which employees generally do not receive wages. Employees remain employed by the company with the expectation of re-hiring the employee in the near future. Again, it is important to assess any potential impact on benefits. Certain health plans may allow you to keep furloughed workers on health benefits while collecting unemployment benefits during the furlough. This varies plan to plan, so we recommend that you carefully review your benefit plans and determine whether they are impacted by the decision to furlough.

As of March 25, it appears that there will be a four-month extension of unemployment benefits, which should minimize the harm to employees being furloughed. This suggests that furloughs may be a very good option for some organizations in light of the new federal stimulus package.

C. Terminations

Any terminations to employees must be compliant with all federal and state laws, including obligations to provide final pay at the time of termination in some states. You should also consult with your legal counsel and board to ensure you are employing non-discriminatory practices as you plan your layoff process. Notice is not typically required for companies under 100 people (See the WARN Act). In terms of final payment, employees are due unearned vacation. It is customary to provide one week of pay for each year of service at the discretion organization based upon circumstances. Employees should also be informed of how to access unemployment benefits in your state as well as COBRA healthcare insurance.

A Note on the CARES Act (stimulus package)

At the time of writing, the CARES Act has been signed into law. While details are still becoming clear, there appears to be nothing in the CARES Act that changes the basics of the law outlined above, with the exception that unemployment benefits may be extended four months beyond what the state currently allows:

> *Benefits would be expanded in a bid to replace the average worker's paycheck, explained Andrew Stettner, a senior fellow at the Century Foundation, a public policy research group. The average worker earns about $1,000 a week ($52,000 per year), and unemployment benefits often replace roughly 40 to 45 percent of that. The expansion would pay an extra amount to fill the gap.*
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> *Under the plan, eligible workers would get an extra $600 per week on top of their state benefit. But some states are more generous than others. According to the Century Foundation, the maximum weekly benefit in Alabama is $265, but it´s $450 in California and $681 in New Jersey.*
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> *So let´s say a worker was making $1,100 per week in New York; she´d be eligible for the maximum state unemployment benefit of $435 per week. Under the new program, she gets an additional $600 of federal pandemic unemployment compensation, for a total of $1,035, or nearly all of her original paycheck.*
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> *States have the option of providing the entire amount in one payment or sending the extra portion separately. But it must all be done on the same weekly basis.*