

Coronavirus and Employment Law: What Small Business Owners Need to Know

Mountain BizWorks
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Outline for the Day

- FLSA and Wage and Hour Act Issues
- Unemployment
 - Furlough vs. Layoff
 - Executive Order No. 118
- H.R. 6201: Families First Coronavirus Response Act
- H.R. 748: Coronavirus Aid, Relief, and Economic Security Act
- Disclaimer:
 - Law is both constantly changing and unclear
 - No legal advice; educational purposes only

FLSA: Wage Reductions (Non-Exempt)

- If going to reduce wages, must provide employee with 24 hours' written notice
- Even if reducing, must still:
 - Be paid at least minimum wage (\$7.25 per hour)
 - Be paid 1.5 times their regular rate for overtime

FLSA: Wage Reduction (Exempt)

- Must also provide 24 hours' written notice
- Exempt employee's reduced salary cannot fall below the salary threshold (\$684.00/week or \$35,568.00/year)
- Can convert exempt employee to hourly employee based on business needs
 - Employee must keep time records
 - Do not have exempt and non-exempt employees in same position

Unemployment: Layoffs vs. Furlough

- Layoff = termination of employment due to COVID-19
 - No definite return date
 - Maximum weekly unemployment benefit is \$350
- Furlough = temporarily laid off for period of time
 - Return date is provided (for example, 30 days)
 - No expectation that employee search for work during layoff
 - Employee remains “attached” to your payroll

Unemployment: Layoff vs. Furlough

- Furlough will result in an attached unemployment claim
- Cannot be filed unless employer's unemployment insurance account is positive
 - If filing attached claim, will need to bring account positive
- Employer must pay full cost of unemployment benefits payable to employee before claim is filed
- Benefits cannot exceed 6 weeks

Layoffs and Executive Order No. 118

- Executive Order changes unemployment for terminated employees
 - No one-week waiting period for benefits
 - Not required to search for work
 - Not required to be able to work
 - Will not be charged to employers' accounts
 - State will seek reimbursement from federal government
- Employees must select COVID-19 as the reason for termination

Layoffs: Practical Guidance

- When laying off employees due to COVID-19, consider:
 - Objective criteria for selection (years of service; part-time versus full-time; department; cross-training)
 - Protected categories and protected activity
 - PTO forfeiture vs. payout
 - Health insurance and COBRA
- Do not give definite re-hire date
- Laying off the poor performer due to COVID-19



H.R. 6201: Families First Coronavirus Response Act

- Signed into law March 18, 2020
- Creates emergency paid sick leave
- Expands Family and Medical Leave Act
 - More employers covered
 - More employees covered
 - Leave must be paid
- Effective date: April 1, 2020

HR 6201: Families First Coronavirus Response Act

- Fewer than 500 employees
- Not retroactive
- No regulations until April 2020
 - Fact sheets for employers and employees
 - Questions and Answers
- “Grace period” of enforcement
 - Ends April 17, 2020
 - Reasonable, good faith effort to comply
- DOL poster released

HR 6201: Families First Coronavirus Response Act: Small Businesses

- Exemption for less than 50 employees if providing childcare related paid sick leave and expanded family and medical leave would jeopardize viability of business
- Authorized officer of business determines:
 - Provision of paid leave would result in business' expenses and financial obligations exceeding available revenues + cause business to cease operating at minimal capacity; or
 - Absence of employee(s) requesting leave would cause substantial risk to financial health or operational capabilities of small business because their specialized skill, knowledge of business, or responsibilities; or
 - Not sufficient workers able, willing, or qualified and who will be available at time and place needed to perform labor/services of employee(s) requesting paid leave, and these labor/services are needed for business to operate at minimal capacity
- Must document but do **not** send to Department of Labor

Emergency Paid Sick Leave

- Must provide paid sick time if employee is unable to work (or telework) due to a need for leave because:
 - Employee is subject to federal, state, or local quarantine or isolation related to COVID-19
 - Employee has been advised by healthcare provider to self-quarantine due to COVID-19
 - Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis
 - Employee is caring for an individual who is subject to a quarantine or has been advised to self-quarantine
 - Employee is caring for son or daughter if school or place of care has been closed, or childcare provider is unavailable

Emergency Paid Sick Leave

- Paid sick leave is at the employee's regular rate of pay
- Capped at \$511 per day (\$5,110 in aggregate) if:
 - Employee subject to federal, state, local quarantine or isolation
 - Employee advised by healthcare provider to self-quarantine
 - Employee experiencing symptoms and seeking diagnosis
- Capped at \$200 per day (\$2,000 in aggregate) if:
 - Caring for individual subject to quarantine or advised to self-quarantine
 - Caring for son/daughter if school or place of care closed, or childcare unavailable



Emergency Paid Sick Leave

- Employee is entitled to following amounts of paid sick leave:
 - Full-time employees: 80 hours
 - Part-time employees: number of hours equal that the employee works on average during a 2-week period
- Available to all employees regardless of length of service
- Cannot require employee:
 - To use other paid leave prior to taking sick leave
 - To assist in finding replacement employee to cover
- Cannot be carried over into next year
- Can only be taken intermittently in certain circumstances and if employer agrees

Emergency Paid Sick Leave

- Must continue health coverage while on leave
- Cannot retaliate against any employee who:
 - Uses emergency paid sick leave
 - Files a complaint or institutes a proceeding for enforcement
- Violation is considered a minimum wage violation
 - Liquidated damages
 - Attorneys' fees

Emergency Family and Medical Leave Expansion

- Adds additional qualifying reason for FMLA Leave
- May take FMLA Leave if the employee is unable to work or telework due to need to care for son or daughter under 18 if child's school or place of care has been closed, or if child care provider is unavailable due to COVID-19
- Employees are eligible after 30 days of employment
- Employee provides as much notice as is practicable

Emergency Family and Medical Leave Expansion

- First 10 days of leave may be unpaid
 - Employee may substitute other available paid leave
- Remaining leave must be paid, up to 12 weeks
 - Not less than 2/3 of employee's regular rate, multiplied by number of hours employee would normally be scheduled to work
 - Overtime hours included
 - Capped at \$200/day or \$10,000 in aggregate
- If employee works variable hours, average number of hours worked in 6-month period ending on date leave begins
- Intermittent leave available only if employer agrees

Emergency Family and Medical Leave Expansion

- May request documentation
 - Example: notice posted on government, school, daycare website; published in newspaper; or email from school official
 - Employer should retain for tax credit
- Can agree to let employee work outside of normal hours (early in AM, late in PM) to care for child
 - Will not qualify for leave
- If allow to telework but cannot do so for qualifying reason, will qualify for the leave
- Must continue health coverage on same terms
- Employer may agree to allow employee to supplement leave with other paid leaves offered by employer (but employer cannot force)
 - No tax credit for supplemental amounts

Emergency Family and Medical Leave Expansion

- Do not have to restore to same position or position with equivalent benefits, pay, and other terms and conditions after leave if:
 - Less than 25 employees
 - Leave is under new qualifying reason (public health emergency)
 - Position does not exist due to economic conditions or other changes in operating conditions of the employer
 - That affect employment
 - Are caused by a public health emergency
 - Employer makes reasonable efforts to restore the employee to an equivalent position
 - If those efforts fail, employer makes reasonable efforts to contact the employee if a position becomes available

HR 6201: Families First Coronavirus Response Act: Poster

- DOL created poster for paid emergency sick leave and expanded family and medical leave
- All covered employers must post
 - If under 50? Guidance suggests most post
- Post on premises
 - Where employees will see it
 - Conspicuously
 - Email if employees working remotely

HR 6201: Families First Coronavirus Response Act: Tax Credit Basics

- Employers receive payroll tax credit for 100% of emergency paid sick leave and expanded family medical leave wages paid
 - Each calendar quarter
 - Includes health insurance costs allocable to paid leave wages
- If paid leave wages exceed payroll taxes, will be able to request accelerated payment from IRS
- Tax credits also apply to self-employed individuals

H.R. 748: Coronavirus Aid, Relief, and Economic Security Act

- Signed by President on March 27, 2020
- Provides assistance for employers affected by COVID-10
- Still a lot of unknowns
- Increases unemployment benefits by \$600
 - For claims filed until December 31, 2020

H.R. 748: Coronavirus Aid, Relief, and Economic Security Act

- Paycheck Protection Program Loans
- Maximum amount: 2 and ½ times average monthly payroll costs in 2019 or \$10,000,000, whichever is less
- 500 or fewer employees
- Forgiveness for amounts used to pay (during first 8 weeks of loan):
 - Payroll costs
 - Utilities
 - Mortgage interest
 - Rent
- May qualify for loan forgiveness:
 - Cannot reduce number of employees
 - Cannot reduce wages by more than 25%
- Loan forgiveness is reduced for each employee terminated and for each percentage point wages are reduced over 25%

H.R. 748: Coronavirus Aid, Relief, and Economic Security Act

- Payroll tax credit
 - Fewer than 100 employees: credit for payroll taxes owed on first \$10,000 in wages and benefits paid by employer to employee
- Not eligible if receive Paycheck Protection Program Loan
- Eligibility requirements:
 - Fully or partially suspended operations due to government order limiting commerce, travel, or group meetings, or
 - Revenues have decreased by more than 50%
- Payroll tax deferral
 - First 50% deferred until December 31, 2021
 - Second 50% deferred until December 31, 2022

Employees With COVID-19 Symptoms

- Can ask employee about symptoms and send home
 - Exempt employees must be paid if performed work in that workweek, but can deduct from accrued paid leave bank
 - Non-exempt employees do not have to be paid, but must let use accrued paid leave
- Do not return to work until 24 hours fever-free or tested
- Temperature checks permitted if related to “business necessity”
- Generally cannot ask about employee’s family member’s symptoms—but consider risks



Questions?

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