

# Managing Your Workforce in the # SaferAtHome Era

Hosted by:

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# Today's Presenters



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Laurie combines her experience in human resources management with over 20 years of employment law practice to provide creative, strategic counsel and defense to employers of every size on a full range of employment issues. This depth of experience allows her to provide legal assistance to employers in ways that minimize risk and avoid litigation and support long-term business goals. Laurie takes a practical approach to solving employment problems for her clients and achieving their goals in a cost-effective way.



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Tony proactively and reactively assists employers in wading through the various HR-related issues that arise in today's employment world. Proactively, Tony helps with issues such as hiring/firing, noncompetition agreements and other restrictive covenants, disability and ADA issues, FMLA and other leave matters, employee handbook review and revision, sensitive personnel matters and investigations, OSHA compliance, wage and hour issues, and labor negotiations.



Laurie Meyer



Tony Steffek

## Discussion Agenda

- Telework, Furloughs, and Layoffs
- Families First Coronavirus Response Act (FFCRA)
  - Paid Sick Leave
  - Expanded Family and Medical Leave
- What Can Employers Ask Their Employees Related to Illness?



# Considerations for Telework, Furlough, and Layoffs

# Telework

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- If an employee can telework—whether that employee is exempt or nonexempt—he or she must be compensated.
- State law requires that non-exempt employees precisely track their work start and end times, as well as meal and other unpaid breaks, just as if they were at work.
- Non-exempt employees must be paid overtime for hours worked over 40 in a workweek, so employers must be explicit in their instructions to such workers about when they are and are not expected to work.

# Furloughs

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- Includes sending employees home or reducing their hours.
- Non-exempt employees are usually paid by the hour. Generally speaking, such employees must only be paid for time worked. Employers can simply schedule such employees for fewer days or hours without wage-and-hour liability concerns.
- Exempt employees who work any portion of a day must be paid for that entire workweek, absent certain exceptions.

# Layoffs

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- If a layoff of workers or a large reduction in hours is predicted to be of short-term duration, significant advance notice is likely not required.
- However, if an employer finds that a longer-term mass layoff or a plant or work location closing is necessary, it should ensure that it complies with both the federal WARN Act and the Wis-WARN law, as well as any other states' "mini-WARN" laws.

# Families First Coronavirus Response Act (FFCRA)

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- Does the FFCRA Apply to Your Business?
- Paid Sick Leave Obligations
- Expanded FMLA Obligations

# Does the FFCRA apply to my business?

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- Applies to businesses with fewer than 500 employees within the United States (not those overseas).
- Includes:
  - Full-time and part-time employees;
  - Employees on leave;
  - Employees who are jointly employed by you and another employer; a
  - Day laborers supplied by a temporary agency.
- Does NOT include independent contractors.

# Small Business Exemption

- The exemption applies to:
  - Businesses with **less than 50 employees**
  - If providing **child care-related** paid sick leave and expanded FMLA would jeopardize the viability of the business as a going concern.
  - Exemption only applies to providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded FMLA due to school or place of care closures or child care provider unavailability for COVID-19 related reasons.

# How To Claim the Small Business Exemption:

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- New DOL Guidance!
- Three Ways to Claim Exemption:
- An authorized officer of the business has determined that:
  1. The provision of paid sick leave or expanded FMLA would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

# How To Claim the Small Business Exemption: (cont.)

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- An authorized officer of the business has determined that:
  2. The absence of the employee or employees requesting paid sick leave or expanded FMLA would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities;

or

# How To Claim the Small Business Exemption: (cont.)

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- An authorized officer of the business has determined that:
  3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded FMLA, and these labor or services are needed for the small business to operate at a minimal capacity.

# Covered employers must provide to all employees:

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- Two weeks (up to 80 hours) of paid sick leave at the **employee's regular rate of pay** where the employee is unable to work or telework because the employee:
  - Is subject to a Federal, State, or local quarantine or isolation related to COVID-19;
  - Has been advised by a health care provider to self-quarantine related to COVID-19;
  - And/or is experiencing COVID-19 symptoms and seeking a medical diagnosis.

# Covered employers must provide to all employees:

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- Two weeks (up to 80 hours) of paid sick leave at **two-thirds the employee's regular rate** of pay because the employee is unable to work or telework because the employee:
  - Is caring for an individual subject to a Federal, State, or local government quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine;
  - Is caring for a child whose school or place of care is closed for reasons related to COVID-19;
  - Or is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services.

# What is “Quarantine” or “Isolation”?

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- Under the FFCRA, “quarantine” or “isolation” means that the specific individual is compelled by a government entity to remain at home either because they are known to be sick or suspected to be sick.
- This is different from a “shelter-in-place” or “safer-at-home” mandate, which is typically prophylactic and general in nature.

# Pay for Part-Time Employees

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- A part-time employee is entitled to leave for his or her average number of work hours in a two-week period.
  - Use the number of hours the employee is normally scheduled to work;
  - Or if the employee's schedule varies, use a six-month average to calculate the average daily hours.

# Expanded Family and Medical Leave

- An employee who cannot work because the employee is caring for a child whose school or place of care is closed or child care provider is unavailable may be entitled to up to twelve weeks of paid leave. This includes:
  - Initial 2 weeks of paid leave provided under the Emergency Paid Sick Leave Act;
  - And an additional 10 weeks under the Emergency and Family Medical Leave Expansion Act at two-thirds of the employee's regular rate of pay.



# FFCRA FAQs

# What qualifies as telework?

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- An employee may telework when an employer permits or allows an employee to perform work from home or at a location other than the normal workplace.
- Normal wages must be paid for telework.
- Telework is not compensated under the paid leave provisions of the FFCRA.

If an employer has furloughed workers before April 1, 2020, are those employees eligible to get paid sick leave and/or expanded FMLA?

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- No. If prior to the effective date of the FFCRA, the employer has furloughed workers because it doesn't have enough work for them to do or due to a temporary closure order, those employees are not eligible for paid sick leave or expanded FMLA.
- However, they may be eligible for unemployment insurance benefits.

If an employer closes a worksite on or after April 1, 2020, but before the employee goes on leave, is the employee eligible to get paid sick leave and/or expanded FMLA?

- No, in this scenario, an employee is not eligible for paid sick leave or expanded family and medical leave.
- However, the employee may be eligible for unemployment insurance benefits.

What happens if an employer closes a worksite while an employee is on paid sick leave or expanded FMLA?

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- The employer must pay for any paid sick leave or expanded FMLA that the employee used before the employer closed.
- As of the date the employer closes a worksite, the employee is no longer entitled to paid sick leave or expanded FMLA.
- The employee may be eligible for unemployment insurance benefits.

# Reduction in hours?

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- If an employer reduces an employee's scheduled work hours, the employee may not use paid sick leave or expanded family and medical leave for the hours that they are no longer scheduled to work.
- Even if the reduction in hours was somehow related to COVID-19, this is not a situation where the employee was prevented from working those hours due to a COVID-19 qualifying reason.
- Employees may, however, use paid sick leave or expanded FMLA if a COVID-19 qualifying reason prevents him or her from working his/her full schedule.

What about an employee who does not want to come in to work out of concern for contracting COVID-19?

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- This is not an absence requiring emergency paid sick leave.
- However, an employer may decide to allow the employee access to other leave provided by the employer.
- Employers should be cautious that in some instances, an employee with an underlying mental health condition or anxiety may be entitled to leave under the traditional FMLA if the concern exacerbates the condition.

# EEOC Guidance

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What can an employer ask of its employees related to illness?

## May an employer send home an employee who has symptoms of COVID-19?

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- Yes
- This is not a disability-related action and is permitted under the Americans with Disabilities Act.
- The CDC also advises that employees with acute respiratory illness and a fever (greater than 100.4 degrees Fahrenheit) should stay home.
- Employers should apply a policy related to COVID-19 symptoms uniformly.

## May an employer require an employee to work from home when that person has been in close contact with someone with COVID-19?

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- Yes
- This is appropriate even if the employee is asymptomatic.
- The CDC advises that employees who are asymptomatic may be excluded from the workplace, if they:
  - Have close contact with,
  - Sat on an aircraft within 6 feet of,
  - Or live in the same household as, are an intimate partner of, or are caring for at home for
  - A symptomatic individual with laboratory-confirmed COVID-19.

May an employer take its employees' temperatures to determine whether they have a fever?

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- Yes
- However, employers should be aware that some people with COVID-19 do not have a fever.
- As with all medical information, the fact that an employee had a fever or other symptoms is subject to ADA confidentiality requirements.

How much information may an employer request from an employee who calls in sick, in order to protect other employees?

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- During the COVID-19 pandemic, employers may ask employees if they are experiencing symptoms of the virus.
- Employers must maintain all information about employee illness as a confidential medical record under the ADA.

## If an employee tests positive for COVID-19, what are some next steps for the employer?

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- Advise the employee to self-quarantine for 14 days.
- Ask the employee to identify all coworkers that he/she came in contact with for at least the 14 days prior.
- Contact those employees identified by the infected employee.
- Inform your workforce that an employee has been diagnosed with COVID-19.
- Consider closing the office for an OSHA approved cleaning process.
- Reassess risk to other employees and allow employees to work remotely, if possible.

For an employee that is diagnosed with actual or probable COVID-19, may the employer disclose the diagnosis to others?

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- Yes
- The CDC advises that employers should inform fellow employees of their potential workplace exposure.
- Employers should maintain confidentiality under the ADA by not sharing the infected individual's name unless otherwise directed by the CDC or other public health authority.

# When is it safe for an employee to return to work after having COVID-19?

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- CDC guidance provides that a person with COVID-19 can stop home isolation when:
  - The employee has had no fever for 72 hours (3 full days of no fever without the use of medicine that reduces fevers)
  - And other symptoms have improved
  - And at least 7 days have passed since the employee's symptoms first appeared.

When an employee returns to work, does the ADA allow employers to require doctors' notes certifying the employee's fitness for duty?

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- Yes
- However, due to the current stress on the health care system, doctors and health care professionals may be too busy during and immediately following the pandemic to provide such documentation.

# Questions/ Comments?

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