

COVID-19: Legal Issues and Updates for Employers



Vermont Businesses for Social Responsibility Webinar
April 10, 2020

Jon Rose and Liz Kleinberg

**The information provided here does not constitute legal advice. You should consult with legal counsel about your particular situation before taking business and employment actions.*

Question

How many of you work at places still operating primarily on an “in-person” basis?



Best Safety Practices

- Telework is the best policy, and is required by Governor's executive order.
- If you can't implement telework policy, there are some things you can do to help keep employees safe.



Remote Work Issues

- EEO Laws
- Monitoring Productivity/Communications
- Hours/Overtime/Leave Issues
- Equipment/Resources
- Disability Accommodation
- OSHA/Workers' Comp/Insurance



On-Site Work Safety Guidance

- Employers with on-site employees should be looking at/following:
 - CDC: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
 - OSHA: <https://www.osha.gov/Publications/OSHA3990.pdf>
 - EEOC:
 - What you should know about the ADA, the Rehabilitation Act, and COVID-19
(https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
 - Pandemic Preparedness in the Workplace and the ADA
(https://www.eeoc.gov/facts/pandemic_flu.html)



EEOC Guidance

- Can require employees to report symptoms.
- Require employees with COVID-19 like symptoms to go home.
- Take body temperature to test for fever.
- Require applicants to submit to post-offer symptom screenings.
- Require those out with symptoms to get doctor's note certifying fitness to return.
- But, be practical, don't discriminate, and always consider medical privacy issues.



Infection Control Policies

- Review CDC/OSHA guidance.
- Proper hygiene.
- Social distancing.
- Workplace sanitation.
- Telework where possible.
- Staying home when ill.
- Requests for medical information/document (see EEOC guidance)
- Confidentiality of medical information.



Leave Considerations

- Employers should consider liberal application of leave policies for workplace safety.
- FMLA/PFLA: Application depends on # of employees.
- ADA Accommodation
- Vermont Paid Sick Leave
- Families First Act
 - Emergency Paid Sick Leave
 - Emergency Paid FMLA Leave
 - (More on this later)
- Individual CTO Banks/Leave Policies



Layoff/Furlough Considerations



Question: How many work at places that have laid off/furloughed employees or are considering layoffs/furloughs?



Layoff vs. Furlough

- Layoff is generally separating employees from payroll on a temporary or permanent basis.
 - Employees completely off the books.
 - No leave accrual, no participation in benefits plans (but maybe COBRA)
- Furlough: keep employees on the books but cut/reduce hours.
 - Look at employment policies for leave/benefits issues.
 - Can lower hours/reduce pay, but consider FLSA issues.
- Big considerations: employee retention and unemployment benefits



A Note About the WARN Act

- Worker Adjustment and Retaining and Notification Act
- Similar Vermont statute applies to smaller employers/layoffs (50 or more employees).
- Requires advance notice of certain larger layoffs.
- Vermont DOL has said it will not enforce state law for COVID-related layoffs.
- Larger employers with large layoffs need to consider whether federal WARN Act applies.



Selecting Employees for Layoff

- Big concern is EEO laws – can't be discriminatory.
- Have to ensure selection based on objective, legitimate business considerations.
- Watch for disproportionate impacts.
 - If protected groups seem to be disproportionately impacted, have to consider whether selection criteria can be modified to limited impacts while still meeting business needs.



Pay/Benefits

- Part-time instead of layoffs?
- Pay bonuses to help make up for reductions?
- Interaction with unemployment?
 - More on this later.
- Reduced hours employees still entitled to benefits under plan docs?
- COBRA payments?



FLSA & Wage/Hour Issues

- Non-exempt employees:
 - careful about tracking hours while working remotely.
- Exempt employees:
 - Furloughs must be for entire workweek – ensure no work performed in week.
 - Salary reductions should be made prospectively, and should not depend on hours worked.
- VT Law: timely payment of wages owed (72 hrs), and vacation payout if required by policy
- More on FLSA issues:
<https://www.dol.gov/agencies/whd/flsa/pandemic>



Severance Pay/Releases

- Concept: offer of additional pay in exchange for release of claims.
- Does severance count against unemployment benefits?
- Keep in mind OWBPA requirements for mass layoffs.
 - Generally, need to provide workers with demographic information on layoffs to assess possible age discrimination claims.



Unemployment Benefits Issues

- Laid off employees generally eligible.
- Furloughed employees may be eligible for partial benefits (based on hours)
- Work search requirements have been temporarily suspended.
- Usually employees are not eligible for benefits if they voluntarily leave, **but . . .**



H.742 – “An act relating to Vermont’s response to COVID-19”

- Expanded eligibility:
 - Temporary layoffs due to COVID-19 closures or for employees’ COVID-related isolation/quarantine
 - Employees leaves voluntarily due to:
 - Own sickness or isolation related to COVID-19
 - Unreasonable risk of exposure at workplace
 - Caring for family member who is sick or isolated or faces unreasonable risk of exposure at work
 - Need to care for child who has had their school or childcare center closed
- Employer experience ratings will not be charged for temporary unemployment in above circumstances.
 - In some circumstances chargeability depends on re-hire.



Federal CARES Act

- Unemployment for self-employed and independent contractors.
- Benefit increase of \$600 per week (Vt. max currently \$513 before the increase)
- Extended benefits of 13 weeks.

Families First Coronavirus Response Act (FFCRA)



FFCRA

- Effective April 1, 2020
- Expires December 31, 2020
- Emergency Paid Sick Leave Act (EPSLA)
- Emergency Family and Medical Leave Expansion Act (EFMLA)



General FFCRA Requirements

- Notice posting requirement
 - Must post notice of FFCRA requirements in conspicuous place on premises
 - Also may email or direct mail notice to employees or post on employee information internal or external website
 - Available at: www.dol.gov/agencies/whd



QUESTION: How many of you have fewer than 500 employees at your business?



General FFCRA Requirements

- Covered Employers:
 - Employers of fewer than 500 employees (private sector)
 - Employee count on the day employee leave is initiated
 - Employers need to maintain “live” headcounts



General FFCRA Requirements

- “Employees” includes:
 - Employees in the US (including DC and Territories)
 - Full-time and Part-time
 - Day laborers supplied by temp agencies
 - All employees of a corporation
 - Employees of 2 joint employers
- Does not include:
 - Employees outside US
 - Independent contractors



Emergency Paid Sick Leave Act (EPSLA)

- Covered Employers
- Employees with Qualifying Reasons for Leave
- 2-week period of paid leave



QUESTION: Did your business provide COVID-19 related leave to any employees prior to April 1, 2020?



EPSLA

- Does not apply:
 - To leave prior to April 1, 2020
 - If an employer closes its business
 - Employees could be eligible for unemployment benefits



EPSLA

Qualifying Reasons: Employee is entitled to take leave if employee is unable to work or telework for any of the following 6 reasons:

1. is subject to federal, state, or local quarantine or isolation order related to COVID-19
2. has been advised by health care provider to self quarantine related to COVID-19
3. is experiencing COVID-19 symptoms and is seeking medical diagnosis
4. is caring for individual subject to federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by health care provider to self quarantine related to COVID-19
5. is caring for their child whose school or place of care is closed (or childcare provider unavailable) due to COVID-19 related reasons
6. is experiencing any other substantially similar condition specified by the US Dept of Health and Human Services



EPSLA

- 2-week period of paid leave
 - This is a new leave requirement effective April 1, 2020.
 - Employees may take EPSLA leave before other leave (employers cannot require employees to use other leave before EPSLA)
 - EPSLA is in addition to other time



EPSLA

- 2-week period of paid leave
 - FTE: up to 80 hours
 - PTE: number of hours equal to number of hours worked on average over 2-week period
 - Overtime is considered

EPSLA

- Pay Rate: highest applicable rate
 - Employee's regular rate of pay, OR
 - FLSA min wage, OR
 - Highest applicable state or local min wage



EPSLA

- Pay Calculation
 - 100% Pay Rate
 - If employee takes leave for Qualifying Reasons 1-3
 - Cap: \$511/day or \$5110 total
 - 2/3 Pay Rate
 - If employee takes leave for Qualifying Reasons 4-6
 - Cap: \$200/day or \$2000 total



Emergency Family Medical Leave Expansion Act (EFMLA)

- Covered Employer
- Employee must have Qualifying Reason:
 - Only one: to care for child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons
- Employee must have been employed by employer for at least 30 calendar days
 - Also includes employee laid off or terminated on or after March 1, 2020 who worked for employer for at least 30 days if rehired by same employer



EFMLA

- Up to 12 weeks job-protected leave with continuation of health insurance
 - Initial 2 weeks are unpaid
 - Employee may choose to use EPSL
 - Employee may choose to use accrued paid time under employer benefits package
 - Remaining 10 weeks are paid at 2/3 employee's regular pay rate
 - Cap: \$200/day or \$10,000 total



EFMLA

- Limitations:
 - It does not add time to the 12-week period under FMLA
 - If an employee has exhausted 12 weeks under FMLA, no more available under EFMLA
 - Might be eligible for EPSL



QUESTION: Does your business have fewer than 50 employees?



FFCRA Small Business Exemption

- If employer has fewer than 50 employees, could be exempted from providing certain leave under EPSLA and EFMLA
 - Employee leave request is because child's school or place of care is closed (or child care provider unavailable)



FFCRA Small Business Exemption

- Authorized officer must determine that at least 1 of the following is met:
 - Providing leave would result in employer's expenses and financial obligations exceeding available revenues and cause business to cease operating at minimal capacity, OR
 - Absence of employee requesting leave would entail substantial risk to financial health or operational capabilities of business because of employee's specialized skill, knowledge of business, or responsibilities, OR
 - Lack of sufficient workers able, willing, and qualified, and who will be available at time and place needed, to perform labor/services provided by requesting employee, and labor/services needed for business to operate at minimal capacity



FFCRA Small Business Exemption

- No application process
 - Must document determination



FFCRA Documentation

- Employers must require documentation from employees to support:
 - Qualifying reason for leave
 - Employee's inability to work or telework
 - Dates of requested leave
- Examples:
 - Quarantine or isolation order
 - Name of health care provider
 - Health care provider documents advising self quarantine
 - School closure notices
- Keep documentation for 4 years, whether leave granted or denied



FFCRA Payroll Tax Credit

- Private sector employers
- Provide paid EPSLA and EFMLA leave
- Eligible for reimbursement of costs of leave through refundable tax credits



FFCRA Payroll Tax Credit

- Eligible for reimbursement of costs of leave through refundable tax credits
 - EPSL: tax credit covers 100% of up to 10 days of EPSL wages
 - EFMLA: tax credit covers 100% of up to 10 weeks of EFMLA
 - Plus amount of employer's share of Medicare taxes imposed on those wages
- Retain appropriate documentation



FFCRA Enforcement

- DOL will begin enforcing FFCRA after April 17, 2020
- Enforcement retroactive to Effective Date (April 1, 2020)
 - For any violations not remedied by April 17



Coronavirus Aid, Relief, and Economic Security (CARES) Act

- Paycheck Protection Act (PPP)
 - Provide loans to help small businesses
 - Retain workers and maintain payroll
 - Make mortgage payments, lease payments, and utility payments
 - Small businesses
 - Fewer than 500 employees
 - Includes FTEs, PTEs, seasonal employees
 - Sole proprietors, Independent Contractors, Self-Employed Individuals



CARES Act

- Loan funds can be used for payroll costs:
 - Compensation (salary, wage, commission, or similar compensation, payment of cash tip or equivalent)
 - Payment for vacation, parental, family, medical, or sick leave
 - Allowance for dismissal or separation
 - Payment required for provision of group health care benefits, including insurance premiums
 - Payment of retirement benefits
 - Payment of state or local tax assessed on compensation of employees



CARES Act

- Payroll costs do not include:
 - Compensation over \$100,000
 - Certain taxes
 - Compensation of employees residing outside of the U.S.
 - Qualified EPSLA and EFMLA for which credit is allowed under FFCRA



CARES Act

- Loan Forgiveness
 - Loan fully forgiven only for funds used for payroll costs, interest on mortgages, rent, and utilities
 - At least 75% of the forgiven amount must have been used for payroll costs
 - Forgiveness based on employer maintaining (or quickly rehiring) employees AND maintaining salary levels
 - If employer reduced FTE headcount or salary between February 15, 2020 and April 30, 2020, amount of forgiveness will not be reduced if reductions eliminated by June 30, 2020
 - Forgiveness will be reduced if FTE headcount declines OR salaries or wages decrease



Questions?



**Thank you
and
stay safe**



Jon Rose

Liz Kleinberg

www.dunkielsaunders.com