

# COVID-19: Legal Issues and Updates for Employers



Vermont Businesses for Social Responsibility Webinar  
April 10, 2020

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*\*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](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](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](http://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**



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