



Members Helping Members

COVID-19

ICMAD Members Helping Members Webinar Series:

Employment and Employee Benefits: COVID-19 and Beyond

April 30, 2020

ICMAD

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Members Helping Members

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Employment and Employee Benefits - COVID-19 and Beyond

ICMAD Webinar
April 30, 2020

Ballard Spahr LLP

Shannon D. Farmer

Brian M. Pinheiro

Agenda

- Furloughs and Layoffs
- Leave Laws
- CARES Act Stimulus Programs
- Employee Benefits Considerations

Furloughs and Layoffs



Furlough vs. Layoff: Differences?

- Layoffs
 - Severed from employment
 - All benefits cease (subject to COBRA/conversion)
 - May be permanent or temporary (recall rights)
- Furloughs
 - Still employed, but inactive
 - Temporary cessation of work (recall rights)
 - Could be reduction in hours or schedule

Weighing the Options

Layoffs	Furloughs
No longer employed – feels permanent	Workforce more “tethered” - job security
All or nothing approach	More flexibility: reduced pay, schedules
Reduced benefits costs	May continue to incur benefits costs
Incur recruiting and onboarding costs	More nimble: recall can happen quickly
May trigger legal notifications (e.g., WARN)	Fewer notice obligations
Payout PTO (if required)	Preserve or use PTO
No leave entitlement	Leave eligibility (FFCRA, FMLA, STD/LTD)
Group termination program	Not a group termination program

Notice Obligations

- Worker Adjustment and Retraining Notification Act (WARN)
 - Mass layoff
 - Plant closings
 - Hours reductions of more than 50%
 - Possible exceptions
- Notice required for salary reductions

Wage and Hour Considerations

- FLSA
 - Exempt v. Non-Exempt
 - Salary basis for exempt employees
 - Pay docking rules
 - Salary reductions
- Other sources of limitations
 - Collective bargaining agreements
 - Policies

Unemployment Compensation

- Layoffs and some furloughs
- Benefits for hours reductions
- Salary reductions may not qualify
- State work share programs
- CARES Act expansion
 - Additional \$600
 - Additional weeks
 - Additional eligibility
 - Independent contractors

FAMILIES FIRST CORONAVIRUS
RESPONSE ACT LEAVE BENEFITS
AND STATE AND LOCAL LEAVE LAWS

EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

FFCRA Leave

- Two forms of federal leave for COVID-19 events
 - Emergency Paid Sick Leave (EPSL): 80 hours
 - FMLA-Public Health Emergency (PHE) Leave: 12 workweeks of FMLA leave (including EPSL)
- Both paid leaves subject to maximum dollar caps
- Available for different, but overlapping reasons

Covered Employers

- Both forms of leave are mandated for:
 - Private employers <500 employees
 - Most public sector employers
- Employee headcount determined on date leave to be taken (all W2 employees)
- Multiple entities are combined if:
 - Joint employers (DOL FLSA rule), or
 - Integrated employers (FMLA rule)

Employer Exemptions

- Employer has discretion to exclude:
 - Health Care Provider employees
 - Emergency Responder employees
- Small business exemption
 - <50 employees
 - Authorized officer determines leave would jeopardize viability of business as going concern
 - Must be documented with reason(s)
 - Can be done on an employee by employee basis

Eligible Employees

- EPSL: All employees
- FMLA-PHE Leave:
 - Employees employed for at least 30 days
 - Employees laid off after March 1, 2020, and rehired, provided they worked at least 30 days in 60-day period prior to layoff [CARES Act Amendment]

EPSL: Amount of Leave

- 80 hours of paid sick leave for full-time employees (one time use)
 - Full-time = 40 hours or more
- Part-timers are pro-rated based on “normal” schedule” over two weeks
 - If employee’s schedule varies, use average over six-month period to determine daily rate
- EPSL can be used for overtime, but is not paid at premium rate

EPSL: Reasons for Leave Usage

1. **Quarantine/Isolation Order:** Comply with a federal, state, or local quarantine or isolation order related to COVID-19;
2. **Self-Quarantine:** Employee has been advised by health care provider to self-quarantine due to concerns related to COVID-19;
3. **Symptoms:** Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis;
4. **Care for Individual:** Subject to an order as described in (1) above or has been advised as described in (2) above;
5. **School Closures:** Care for son or daughter if school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions;
or
6. **Catch-All:** Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services

Work must be available, and employee must be unable to perform work or telework.

FMLA-PHE Leave

- 12 workweeks – taking into account balance available under FMLA “leave year”
- First two weeks are unpaid, unless employee opts to use EPSL or other paid leave
- Only reason for leave usage: Reason 5
 - Care for employee’s son or daughter if school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions

Pay Rates

- Paid at employee's "regular rate of pay" using FLSA principles
 - Reasons 1, 2, 3: Paid at 100%, up to maximum of \$511/day
 - Reasons 4, 5, 6: Paid at 2/3, up to maximum of \$200/day
- Must determine six-month average rate prior to date of leave
- Includes commissions, tips, piece rates



Existing Employer Policies

- DOL Regulations incorporate existing “concurrent usage” rule under FMLA
- *For FMLA-PHE Leave only*: employee may elect, or employer may require, employee to use available leave under existing policies (e.g., personal, vacation, PTO)
 - If used, leave runs concurrently with FMLA-PHE Leave
 - Employee gets “full pay” (not more)

Intermittent Leave

- No right to use leave intermittently or on reduced work schedule basis
 - Unless employer and employee agree otherwise, including increment
 - EPSL *cannot* be used intermittently when reporting to worksite, except for Reason 5 (school closures)
- Employee could use leave in two “continuous” blocks for separate reasons

Recordkeeping

- Oral statements by employee – must be documented by employer
- Retain all documentation substantiating need for leave
- Record retention period: 4 years
- DOL “advises” to retain all records needed for payroll tax credits

Payroll Tax Credits

- FFCRA provides for payroll tax credits for:
 1. Leave benefits paid by employers under Act; and
 2. Health care premiums paid during leave (employer portion)
- Allowable against employer's share of Social Security and Medicare
- Treated as “wages” to employee – subject to withholding
- **IMPORTANT:** These rules only apply to leave sanctioned by FFCRA – not supplements and not for non-covered employers/employees

State and Local Leave Laws

- FFCRA does not preempt or supersede other laws
- Some states and locales have enacted or amended leave laws to cover COVID-19 situations
- Others already apply leave to certain public health emergencies impacting work or school

Examples

- Many states and locales have enacted paid sick leave laws – e.g., DC, MD, NJ, Philadelphia, Pittsburgh, LA
- Interaction with FFCRA? -- e.g., NJ Earned Sick Leave may be counted toward leave entitlement under federal law
- Other states cover public health emergency leave -- e.g., MD, NJ, NY, Pittsburgh
- Some states also provide for job security rights following quarantine periods

CARES Act Programs

CARES Act Stimulus Programs

- Paycheck Protection Program (PPP)
- SBA Economic Injury Disaster Loan (EIDL)
- Employee Retention Credit for Employers Subject to Closure Due to COVID-19 (Payroll Tax Credit)
- Main Street Lending Program (MSLP)

PPP

- Companies with less than 500 employees or qualified under SBA rules
- 2.5x payroll costs loan amount
- Used for payroll and benefits and rent, mortgage interest and utilities over 8 week period
- 75% must be spent on payroll costs
- Loan is forgivable if thresholds retaining employees and pay are met
- 2 year term if not forgiven

EIDL

- Up to \$2 million for small businesses
- Up to \$10,000 immediate advance that does not have to be repaid
- Can get PPP and EIDL but cannot be used for the same costs
- 30 year term

Payroll Tax Credit

- Not available if get PPP loan
- Available for certain businesses if retain employees even though fully or partially suspended operations or decline in revenue for any calendar quarter of 2020 of 50% or more compared to the same 2019 quarter
- Payroll tax credit equal to 50% of qualifying wages, depending on size of employer

Main Street Lending Program

- Businesses with up to 10,000 employees or up to \$2.5 billion in 2019 annual revenues
- Loan amounts depend on program
- Must use the proceeds to make reasonable efforts to maintain its payroll and retain its employees during the term
- Commitments include retention of at least 90% of employees through certain dates and neutrality in union organizing

COVID-19 and Employee Benefits



Health and Welfare Benefits

- Paid FMLA Leave
 - Health benefits remain in place with no changes
 - Medical, dental, vision, hearing, Rx, health FSA
 - COBRA provided if individual does not return
 - Other welfare benefits may change
 - Disability insurance
 - Life insurance
 - Other benefits

Health and Welfare Benefits

- Unpaid FMLA Leave
 - Health benefits remain in place
 - How will employees pay for coverage?
 - Employer covers 100%
 - Employees pay while on leave
 - Employees make up missed payments upon return
 - COBRA provided if individual does not return
- Other welfare benefits may change
 - How will employees pay for coverage?

Health and Welfare Benefits

- Furloughs / Reductions in Hours
 - Health plan coverage typically will not terminate
 - BUT, confirm with insurer / plan documents
 - If health coverage continues, consider how employees will pay for coverage
 - Other welfare benefits
 - May terminate upon a furlough or reduction in hours
 - Confirm with insurer / plan documents
- Layoff / Termination of Employment
 - Coverage typically terminates
 - COBRA election for health benefits

Health and Welfare Benefits

- Legislative changes affecting health plans
 - Coverage required for COVID-19 diagnostic expenses and vaccines
 - High deductible health plans (HDHPs) may cover COVID-19 expenses
 - Telehealth rules relaxed and expanded
 - Over-the-counter (OTC) medicine expenses may be covered without prescription (again)

Health and Welfare Benefits

- Mid-year changes in participant elections
 - Tax rules prevent mid-year changes in elections unless there is a qualifying event
 - As long as coverage continues during leave or furlough, typically no qualifying event
 - Open question as to whether a pay cut is enough to constitute a qualifying event
 - For dependent care FSAs, qualifying events have occurred
 - Closing/opening day care; kids stuck at home, etc.

Retirement Plans

- Furloughs / Reductions in Hours
 - Employee contributions to 401(k) and 403(b) plans continue so long as employees are paid
 - If leave is unpaid, no employee or employer contributions
 - No service credit for vesting during unpaid leave
 - No distributions because no severance from employment
 - Subject to CARES Act exception
- Layoff / Termination of Employment
 - Triggers a distribution event

Retirement Plans

- Reducing / suspending employer contributions to 401(k) and 403(b) plans
 - Requires a Plan amendment (usually)
 - Requires advance notice to employees
 - Safe harbor 401(k) and 403(b) plans are subject to additional requirements
 - Check safe harbor notice to see if mid-year change is permitted
 - If not, must show that employer is operating at an economic loss
 - 30-day advance notice requirement

Retirement Plans

- CARES Act
 - Coronavirus-related distributions (CRDs) for qualified individuals who self-certify
 - Loans for qualified individuals who self-certify
 - Higher limit (\$100,000 / 100% of account balance)
 - One-year deferment on repayment (with interest)
 - “Qualified individuals” – individual who is:
 - Diagnosed with COVID-19
 - Has a spouse or dependent diagnosed with COVID-19
 - Has adverse financial consequences from quarantine, furlough, layoff, reduced hours, inability to work due to lack of child care, or closing / reduced hours of a business that he or she owns or operates

Retirement Plans

- CARES Act (cont.)
 - Notice requirements for CRD and loan changes
 - Special rules for safe harbor plans
 - Required minimum distributions from defined contribution plans suspended for 2020
 - Funding relief for defined benefit pension plans
 - Minimum funding contributions due in 2020 are delayed (with interest) to January 1, 2021
 - Use of 2019 AFTAP to avoid funding-based benefit restrictions in 2020

Employer Liability & Post-Covid 19 Considerations

QUESTIONS



PRESENTERS

Aliza R. Karetnick

Ballard Spahr LLP

Karetnicka@ballardspahr.com

215.864.8367

Brian M. Pinheiro

Ballard Spahr LLP

Pinheiro@ballardspahr.com

215.864.8511

Shannon D. Farmer

Ballard Spahr LLP

Farmers@ballardspahr.com

215.864.8221



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QUESTIONS? COMMENTS? CONCERNS?

Contact Information:

ICMAD: info@icmad.org

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