

**COVID-19:  
Managing the Workforce  
Response**

# Agenda

- Today's presentation is divided into four principal segments:
  - Pay and Benefits Issues;
  - ADA and OSHA Concerns;
  - FMLA and Leaves of Absence; and
  - Unemployment Comp and Workers Comp

# Federal Coronavirus Response Act

- We will address the Families First Coronavirus Response Act (“CV Act”) throughout this presentation, explaining its key provisions and explaining how it relates to existing laws.
- The hottest issues for employers in this current health, social and economic environment are:
  - Emergency Paid Sick Leave;
  - Emergency FMLA Expansion;
  - Payroll Tax Credit; and
  - Emergency UC Benefits.

# Pay and Benefits Issues

# Reduced Work Schedules:

- Non-Exempt (Hourly):
  - Hourly EEs are paid for hours actually worked.
  - Hourly EEs may use their earned, accrued vacation / personal / sick time to make up the difference in pay.
- Exempt (Salaried):
  - By law, salaried EEs must be paid the same amount each week “regardless of quality or quantity of work”.

# Options for Exempt Employees:

- Exempt EEs do not have to be paid in weeks in which they perform *no work at all*.
  - “Work” of course includes *remote* work.
- PAY CUTS: Employers can mandate pay cuts for all (or set groups or classes) of salaried EEs:
  - I.e., all salaried EEs (or ALL Management EEs with annual salaries in excess of \$XX K) will have their salaries reduced by 10% from Y date to Z date.
  - The salary must remain fixed – no week-to-week fluctuation – over a set, specified period that begins and ends within the ER’s regular pay periods.

# Health Insurance For Reduced Schedules:

- ALWAYS check Plan documents and follow their requirements. NEVER put yourself in a position where Carrier can deny coverage or EE claims due to *your* error. There may be additional implications.
- ER *can* waive EE premium contributions.
- ER *can* pay the EE premium contributions – or hold them in abeyance until the EEs return to their regular schedule.

# Health Insurance For Layoffs / Furloughs:

- Depending on the ER's Plan documents, EEs normally must receive a letter (separate from the layoff letter) advising of their COBRA rights:
  - Immediately;
  - On the 15<sup>th</sup> day of the month in which the layoff takes place; or
  - On the last day of the month in which the layoff takes place.
- Some ER plans provide flexibility for ER to choose a different, later date.



# COBRA

- **COBRA: Applies to ERs with 20 or more EEs:**
  - EE has 60 days to elect coverage; coverage runs up to 18 months.
  - Special circumstances may allow for a longer time.
  - May not apply if Company goes out of business.
- **PA Mini-COBRA: For PA ERs w/ 2 to 19 EEs:**
  - 60 days to elect coverage; coverage up to 9 months.

# ADA Concerns

# Uniqueness of “Pandemic”!

- We cannot emphasize this enough: Because the World Health Organization declared that COVID-19 constituted a pandemic on March 11, 2020, SOME SPECIAL RULES APPLY:
  - Some instructions being provided here apply ONLY to COVID-19-related EE health symptoms and not to any other EE health conditions; and
  - These instructions and answers may change when the pandemic declaration related to COVID-19 is rescinded.

# What Can I Ask When Employees Call off Sick?

- You may ask EEs claiming illness if they have certain specific symptoms which could implicate COVID-19. Per EEOC guidance, these are:
  - Fever;
  - Chills;
  - Cough;
  - Shortness of breath; and/or
  - Sore throat.
- ADA Compliance: Must maintain all information so received as a ***confidential medical record***.
  - *This means it cannot be shared with other employees.*

# May I Send Employees with COVID-19 Symptoms Home?

- Yes you can.
- Why?
  - (i) WHO has declared a pandemic; and
  - (ii) the Centers for Disease Control (CDC) have stated that EEs who have COVID-19 symptoms should leave the workplace.

# Can I Require a Doctor's Note Before Employees Return?

- Yes, *but* ....
- Our health care system is extremely challenged now. Health care professionals may be unable, through this pandemic outbreak, to provide fitness-for-duty documentation in normal time and fashion.
- Consider accepting alternatives, such as relying on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have COVID-19.

# May I Screen Job Applicants for Symptoms of COVID-19?

- Yes, but only after a conditional offer of employment is made. (Normal ADA-based rule still applies.)
- If an ER chooses to screen an applicant, it must do so for all entering employees in the same job or type of job.
  - *ERs cannot pick and choose who to screen.*

# Other Questions Related to Applicants:

- **May I *Delay the Start Date* of an Applicant with COVID-19 Symptoms?**
  - Yes. Current CDC guidance is that an individual with COVID-19 or associated symptoms should not be in the workplace.
- **May I withdraw an offer when I need the applicant to start *immediately*, but the applicant has COVID-19 or associated symptoms?**
  - Yes. Again, this answer is based on current CDC guidance that it is not safe to have such an individual in the workplace.



# OSHA Standards

- Some basic measures all employers can take to comply with the General Duty Clause:
  - Send sick employees home, and encourage sick employees to stay home;
  - Explore remote work arrangements, when possible;
  - Ensure appropriate cleaning measures, and make cleaning supplies available to employees;
  - Put up signage regarding social distancing and workplace etiquette for coughing/sneezing;
  - Require regular hand washing;

See OSHA's [Guidance on Preparing Workplaces for COVID-19](#) for additional information.

# **FMLA and Leaves of Absence**

# Leave Agenda:

- Current FMLA Leave Statute;
- Emergency Family and Medical Leave Expansion Act;
- Emergency Paid Sick Leave Act; and
- Discretionary Leave.

# Current FMLA: Eligibility

- Applies to ERs with 50 or more employees working within a 75-mile radius.
- To be eligible for FMLA leave, an EE must have worked for the ER for at least one (1) year and have worked at least 1,250 hours in the immediately preceding 12-month period.

# Current FMLA: Leave Benefit

FMLA leave may be taken for any of the following circumstances – *most* to a maximum of 12 weeks:

- The birth or placement of a child with the employee through adoption or foster care;
- To care for an immediate family member (*i.e.*, spouse, child or parent) with a "serious health condition";
- Due to the employee's own serious health condition which renders the employee unable to perform an essential function of his/her job;
- Military Exigency Leave (for exigencies related to active duty military service); or
- Military Caregiver Leave (to care for injured service member in immediate family (26 week leave entitlement)).

# Current FMLA: “Serious Health Condition”

- **An illness, injury or impairment that results in:**
  - **Inpatient Care** (meaning an overnight stay in a hospital, hospice, or residential medical care facility or any subsequent treatment in connection with such inpatient care); **or**
  - **Continuing Treatment by a healthcare provider:**
    - In-person treatment 2 or more times within 30 days of first day of incapacity;
    - Treatment by healthcare provider on at least 1 occasion that results in a continuing course of treatment; or
    - For chronic conditions which require 2 or more in-person visits per year, continue over an extended period, and may cause episodic flare-ups.

# CORONAVIRUS ACT FMLA: Eligibility

- This Act is different from the (regular) FMLA!
- This Act Applies to any ER with less than 500 EEs.
- Any EE who has been employed by the ER for at least 30 calendar days is eligible.

# CORONAVIRUS ACT FMLA: **Leave Benefit**

- 12 week leave benefit to care for children due to school or childcare closures related to coronavirus.
- First 10 days of leave are unpaid.
- For subsequent days, an employee must be paid at 2/3 of the employee's regular rate, for the number of hours the employee would normally be scheduled to work.
- Pay is capped at \$200 per day, and an aggregate of \$10,000.



# CORONAVIRUS Paid Sick Leave Act

- Applies to private employers with fewer than 500 EEs, and public employees with 1 or more employees.
- What is the leave benefit entitlement under this Act?
  - Full Time: 80 hours of leave.
  - Part Time: Average number of hours worked over a two-week period.

# First 3 Reasons for CORONAVIRUS Paid Sick Leave:

1. Employee is subject to a gov't quarantine or isolation order due to COVID-19.
2. Employee is ordered to self-quarantine by health care provider due to COVID-19.
3. Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis.

These three types are paid at the greater of the regular rate or minimum wage, not to exceed \$511 per day and \$5,110 in the aggregate.

## Last 3 Reasons for Paid Sick Leave:

1. Employee is caring for someone subject to a quarantine, isolation, or self-quarantine order.
2. Employee is caring for his-her child due to COVID-19-related closure of the child's school or childcare facility.
3. Employee is experiencing any other substantially similar condition specified by Federal authorities.

These three categories are paid at the greater of 2/3 the regular rate or minimum wage, not to exceed \$200 per day and \$2,000 in the aggregate.

# Payroll Tax Credit

On March 20th, the IRS announced that tax credits were available, on a dollar-for-dollar basis, for:

- ER's Payments for Emergency Paid Sick Leave;
- ER's Payments for Emergency FMLA Leave;  
and
- ER's cost incurred to maintain EEs health insurance while on leave.

## Examples From the IRS:

- If an ER pays \$5,000 in sick leave and is required to deposit \$8,000 in payroll taxes, including taxes withheld from all its EEs, it can use up to \$5,000 of the \$8,000 in taxes due to make qualified leave payments (depositing the remaining \$3,000 on its next regular deposit date).
- If the ER paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, it can use the entire \$8,000 to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

# Unemployment Comp -and- Workers Comp

# Workers Comp

- If an employee can show that he/she contracted COVID-19 through work-related exposure, the employee may have a claim that COVID-19 is an occupational illness / injury:
  - *Occupational exposure could be work-related travel, or documented exposure in a health care facility.*
- As COVID-19 has now spread widely through the bulk of the country, it is becoming harder to show that an employee contracted the disease through occupational exposure.
- Causation remains a key issue on these matters.

# Unemployment Comp Basics:

- The UC Law recognizes two types of claims:
  - *Termination:*
    - Claimant presumed eligible; employer bears the burden of proving that the claimant was terminated for “willful misconduct.”
  - *Voluntary Quit:*
    - The claimant is presumed ineligible; claimant bears burden of proving claimant’s resignation was due to “necessitous and compelling cause.”
- Under both prongs, claimant must be “able and available to work.”



## UC and COVID-19:

- If your workplace closes, or you furlough employees, there is little doubt they will be eligible for UC benefits.
- Also should be eligible if:
  - A doctor orders the employee to self-quarantine; and/or
  - A public health authority orders an employee to self-quarantine or isolate.
  - Hours are reduced due to COVID-19.

# Employer Questionnaire

- To help employees who lose employment due to COVID-19, we recommend filling out the reason for separation on the Unemployment Paperwork as follows:

*“Employee [laid off / had hours reduced] due to coronavirus [shutdown / loss of business]. Employer is not contesting this application for unemployment.”*

# Federal Emergency UC Benefits

- The Families First Coronavirus Relief Act also provides federal funding for state UC funds, and an additional 26 weeks of federally-funded emergency UC benefits for states that meet certain requirements related to COVID-19, including:
  - Waiving work search requirements; and
  - Waiving the waiting week.
- PA has taken both of these steps.

# Questions?

If you want to receive follow-up materials on this topic or future **U&A Client Alerts** on labor and employment issues, just send us an e-mail.

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