



2020 RAPID IMPLEMENTATION WEBINAR SERIES

# COVID-19 Employment Law Q&A

In collaboration with The Law Firm of Paley Rothman

Monday, March 23, 2020

# CORONAVIRUS UPDATES FOR MONTGOMERY COUNTY MEDICAL SOCIETY

MARCH 23, 2020

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# NEW CORONAVIRUS-RELATED LEGISLATION IMPACTING DMV EMPLOYERS

- FEDERAL FAMILIES FIRST CORONAVIRUS RESPONSE ACT
- FEDERAL CORONAVIRUS AID, RELIEF & ECONOMIC SECURITY ACT (CARES Act) – Pending
- MARYLAND COVID-19 PUBLIC HEALTH EMERGENCY PROTECTION ACT OF 2020
- D.C. COVID-19 RESPONSE EMERGENCY AMENDMENT ACT OF 2020
- D.C., MARYLAND & VIRGINIA UNEMPLOYMENT AMENDMENTS

# FEDERAL FAMILIES FIRST CORONAVIRUS RESPONSE ACT

**Effective April 2, 2020 through December 31, 2020**

*Addresses leave benefits in two ways:*

1. EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (EFMLEA)
2. NEW FEDERAL PAID SICK LEAVE LAW (PSLL)

# EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (EFMLEA)

- **Covers employers with 500 or fewer employees**
- **Employee must be employed for 30 days to be eligible**
- **Applies when employee needs leave for the following COVID-19 reasons:**
  - ONLY applies to School or child-care closure
- **Employee entitled to 12 weeks of leave**
  - First 10 days may consist of **unpaid** leave (subject to other leave benefits that employee may elect to use)
  - Then employee must be **paid** at 2/3 the employee's regular pay rate up to \$200 per day/per employee (\$10,000 aggregate/per employee)

# EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (EFMLEA) (CONT.)

- **Employers with fewer than 50 employees can apply for an exemption**
  - Standard: Jeopardizes the viability of the business as a going concern
- **Reinstatement exception for employers with fewer than 25 employees**
  - FMLA leave generally requires employers to reinstate employees in the same job or an equivalent position when they return to work, but there is an exception for employers with fewer than 25 employees if the position no longer exists due to economic conditions or operational changes that are made because of the public health emergency

# NEW FEDERAL PAID SICK LEAVE LAW (PSLL)

- **Covers employers with 500 or fewer employees**
- **Employee is covered from the first day of hire**
- **80 hours of paid sick leave for these COVID-19 issues (*pro rata* for part-time employees)**
  - Self-quarantine on advice of healthcare provider (paid at regular rate)
  - Diagnosis of COVID-19 (paid at regular rate)
  - Compliance with an order to stay away from work due to the employee's exposure to COVID-19 or employee's symptoms of COVID-19 (paid at regular rate)
  - Care for family member who is self-isolating or has COVID-19 (paid at 2/3 regular rate)
  - Care for a child whose school or child care has closed (paid at 2/3 regular rate)

# NEW FEDERAL PAID SICK LEAVE (CONT.)

- **Caps on paid leave**
  - For the first three bullets on previous slide
    - \$511 per day/per employee (\$5,110/per employee)
  - For the last two bullets on previous slide
    - \$200 per day/per employee (\$2,000/per employee)
- **Employers with fewer than 50 employees can apply for an exemption**
  - Standard: Jeopardizes the viability of the business as a going concern
- **Notice Requirements:** Employer can require the worker to follow reasonable notice procedures to continue receiving the benefit after the first workday that an employee receives paid sick time under the act

# WORKERS NOT COVERED BY THE FFCRA

- **Healthcare Worker Exclusion:**

Allows the Secretary of Labor to exclude health care providers and emergency responders from the definition of employees who are allowed to take leave

- **Uncovered Workers:**

While not specifically excluded, taken together, the EFMLEA and the PSLL do not cover employees:

- Who refuse to work for fear of exposure
- Who are out of work but who are not exposed, sick, caring for a family member or caring for children
- Who are out of work before April 2, 2020

# FFCRA EMPLOYER TAX CREDITS

- For employers with fewer than 500 employees (includes tax-exempt organizations)
- Applies to “qualified family leave wages” under FFCRA
- Dollar-for-dollar credit: Equal to 100% of those leave wages, subject to the same daily/aggregate limits
- Under both laws, eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for eligible employee during the leave period
- Can be claimed quarterly against employer’s payroll taxes. If allowable credit exceeds payroll tax liability, the difference can be treated as an overpayment.
- Guidance to be release within the next week

# FFCRA EMPLOYER TAX CREDITS (CONT.)

- Employer can retain an amount of payroll taxes equal to the amount of qualifying sick or child care leave instead of deposit them with quarterly payroll tax returns
- Withhold from quarterly payroll taxes when filing Form 941
- Payroll taxes eligible for retention included:
  - Federal income taxes
  - Employee share of Social Security and Medicare taxes
  - Employer share of Social Security and Medicare taxes with respect to all employees
- If there is not sufficient payroll taxes to cover the cost of qualified leave paid, employer can file a request for an accelerated payment form the IRS

# FFCRA EMPLOYER TAX CREDITS (CONT.)

- For each quarter, the employer should:
  - Calculate its payroll tax liability
  - Calculate the aggregate amount of qualified sick leave wages and qualified family leave wages paid to covered employees
  - Calculate the maximum credit allowed for wages paid to all covered employees (while this is a 100 percent credit, it is 100 percent of the maximum benefit amount as set forth in the Act for each type of paid leave)
  - Calculate the aggregate amount of qualified health plan expenses
- The sum of the wages paid amount plus the amount of employer-paid health insurance premiums and expenses is the credit amount for the relevant quarter.
- Employers should apply the credit against its payroll tax liability for that quarter. The excess (if any) will be treated as an overpayment and paid to the employer as a refund.

# FEDERAL CORONAVIRUS AID, RELIEF & ECONOMIC SECURITY ACT (CARES ACT)

- Still pending in Congress
- Potential Employment-related provisions
- **Delays Payroll Tax Payments for Employers:** Employers would be able to delay the payment of their 2020 payroll taxes until 2021 and 2022, leading to approximately \$300 billion of extra cash flow for businesses
- **Paycheck Protection Program**
  - \$350 billion to help prevent workers from losing their jobs and small businesses from going under due to economic losses caused by the COVID-19 pandemic
  - Provide 8 weeks of cash-flow assistance through 100 percent federally guaranteed loans to small employers who maintain their payroll during this emergency
  - If the employer maintains payroll, the portion of the loans used for covered payroll costs, interest on mortgage obligations, rent, and utilities may be forgiven

# FEDERAL CORONAVIRUS AID, RELIEF & ECONOMIC SECURITY ACT (CARES ACT) (CONT.)

- **Unemployment**
  - **About \$250 billion to Expand Unemployment Benefits:** The Senate economic relief package provides much-needed support for workers by making a significant investment
  - Makes benefits more generous by adding \$600 per week on top of what the state normally pays in unemployment and provides an additional 13 weeks of benefits
- May change decision-making for employers that can delay furlough and layoff decisions

# MARYLAND COVID-19 PUBLIC HEALTH EMERGENCY PROTECTION ACT OF 2020

- Signed and effective March 19, 2020 through April 30, 2021
- Establish or waive telehealth protocols
- Prohibits employers from terminating an employee solely on the basis that the employee has been isolated or quarantined
- Provides flexibility to the Secretary of Labor to allow workers who have not been terminated to collect unemployment insurance if their employer has been closed due to COVID-19, if they have been quarantined, or if they are caring for a family member who is quarantined

# DC COVID-19 RESPONSE EMERGENCY AMENDMENT ACT OF 2020

- Passed and effective March 17, 2020
- Provides expanded DC FMLA rights and relaxed requirements for unemployment benefits
- DC FMLA (**Unpaid leave**)
  - Erases requirement that employee must have worked at least 1000 hours in last 12 months
  - Erases the 20 employee threshold; applies to all employers
  - Provides for Declaration-of-Emergency (DOE) leave for any employee who is unable to work “as a result of circumstances giving to the public health emergency”
  - No need for medical certification for leave to self-quarantine or self-isolate
  - Declaration of the Mayor, Dept. of Health, any DC/federal agency is sufficient

# CHANGES TO DMV UNEMPLOYMENT REQUIREMENTS

- **Maryland**
  - Allows the Maryland Secretary of Labor to determine that an individual can be eligible for unemployment even if she hasn't been terminated if:
    - (1) her employer has ceased operation because of COVID-19,
    - (2) she has been quarantined, or
    - (3) she has ceased work because of risk of exposure or infection or to care for an infected family member
  - DLLR has put out helpful Q&A making it clear that:
    - Employees who have not been terminated but who are unable to work because their employer has temporarily ceased operations due to the virus may be eligible for unemployment benefits; and
    - Employees whose hours have been reduced because of business slow down as a result of COVID-19 may be eligible for partial unemployment benefits
  - Employees must still file weekly certificates that they are seeking work

# MARYLAND DLLR WORK SHARING PROGRAM

- Maryland also has a [Work Sharing Program](#)
  - Voluntary program that provides an alternative to layoffs for employers faced with a temporary, non-cyclical decline in business due to lower economic activity
  - Retain an entire employee group by reducing that group's hours of work by a percentage equal to the total reduction of hours that would have been achieved by a layoff
  - Employees are not subject to the same conditions as those on regular Unemployment Insurance (UI) such as making an active search for work or accepting offers of suitable work from employers other than the Work Sharing employer.
  - The employees whose hours are reduced receive partial UI benefits to supplement lost wages
  - Both the employer and employees must develop and agree to the conditions of Work Sharing

# CHANGES TO DMV UNEMPLOYMENT REQUIREMENTS (CONT.)

- **District of Columbia**
  - Legislation provides that during the period while the Mayor has declared a state of emergency due to COVID-19, employees who have become unemployed or partially unemployed (including where employees are quarantined or an employer has ceased operations) are eligible for unemployment benefits even if:
    - They have a date certain to return to work, or
    - They have a reasonable expectation that the current employer will return them to work.
  - The emergency law specifically provides that benefits paid under the expanded eligibility won't count against the experience rating for the employer's account
  - Employees must still file weekly certificates that they are seeking work

# CHANGES TO DMV UNEMPLOYMENT REQUIREMENTS (CONT.)

- **Virginia**
  - Virginia Gov. Ralph Northam announced a number of emergency measures for the Commonwealth, including related to unemployment insurance. Specifically, the Governor directed that:
    - (1) the one week waiting period for unemployment applications be waived and benefits be paid as soon as possible,
    - (2) that workers may be eligible to receive benefits if their employer slows or ceases operations, if they have been issued an order to self-quarantine, or if they have to stay home to care for an ill family member and doesn't have paid family medical leave to cover such time, and
    - (3) that impacted workers will get special consideration with respect to deadlines, mandatory re-employment appointments and work search requirements
  - Virginia Employment Commission has also put together a [helpful Q&A](#) on this issue

# UNEMPLOYMENT BOTTOM LINE

- Yes - an employee may be able to get unemployment benefits if they can't work because their employer has temporarily ceased to operate during the virus
- Yes – an employee may be able to get partial unemployment benefits if their hours are reduced because of the virus.
- DC/MD: There is nothing so far lifting the typical requirements for following the unemployment filing process
- VA – Claimants excused from obligation to seek other employment

# QUESTIONS & ANSWERS

# How does FFCRA interact with Montgomery County Earned Sick & Safe Leave (ESSLA)?

- ESSLA available for employee or family member during sickness or isolation.
- Unlike Federal leave, ESSLA is also available when employer is closed and not operating b/c of public health emergency.
- ESSLA is fully paid, at 1 hour for every 30 worked (up to 56 hours per year—or 32 hours if less than 5 employees)

**Best Practice:** If closing, be prepared to pay up to maximum available ESSLA hours. If open, ESSLA could require higher pay than EFMLA/PSLL

# How does FFCRA interact with DC's new "Declaration-of-Emergency" (DOE) Leave

- DOE Leave is available for all employees
- DOE Leave is unpaid
- DOE Leave lasts for entirety of public emergency, whether employer is closed or whether employee is isolating or quarantining consistent with advice of govt. or doctor.

\*although the recent bill enacting DEO Leave will expire in 90 days if not extended.

**Best Practice:** Employers covered by FFCRA, who remain open, will need to pay eligible employees accordingly during the 10 weeks (EFLMEA) or 80 hours (PSLL), but after those periods are over, DOE Leave could provide unpaid leave, during which employees could use available PTO.

# Will companies under 50 employees be exempt from FFCRA?

- FFCRA provides for exemption where there is “good cause”
- DOL to provide criteria for what constitute “good cause”

# Are health-care providers exempt from FFCRA?

## Maybe

- DOL Secretary given discretion to exempt certain “health care providers and emergency responders” from the definition of “eligible employers.”

# Can employers require workers to use PTO during FFCRA coverage?

**No - cannot require that other paid leave be used first**

- PTO optional during first 2 weeks under EFMLEA
  - But, if employees also sick/self-isolating, then paid at 100% during that time under amended PSLL

**Best Practice:** For employees missing work due to child-care issues only, they are allowed to use 80 hours of PSLL during the first two weeks of (unpaid) EFMLEA at 2/3 pay. An employer may allow an employee to also supplement this with their accrued but unused PTO.

## What happens to business that close before April 2<sup>nd</sup>?

- If open but furloughed as of April 2<sup>nd</sup>, benefits will kick in.
- If closed as of April 2<sup>nd</sup>, PTO and other leave benefits will not be available (only MoCo ESSLA and DC DOE Leave).

**Best Practice:** Be careful with “two-week” plans, and be prepared for trigger leave payments or to simply close as of April 2<sup>nd</sup>.

# Can I reduce salaries for exempt workers?

- Yes, but frequent changes can result in the loss of the employees' exempt status
- Maryland typically requires two-weeks notice
- One-time cuts that affect all employees equally are most likely to be compliant
- Written acknowledgement from employees is advisable, if practical, but not necessary
- Be wary of discriminatory appearance of cuts

# Can my non-exempt employees receive Unemployment Insurance if they are transitioned from full to part-time?

## Probably yes

- If they are willing and able to work full-time
- For Maryland residents, Maryland Workshare program might apply
  - UI available in the amount of their decreased shifts, provided that total work is shared among staff.
- For DC residents, UI available for (self) isolation, quarantine, and reduction or closing of business due to health emergency—with no one-week waiting period or requirement to actively seek employment

## Salaries: Exempt employees during closures

- Even if “furloughed,” exempt employees must receive salaries if they do any work or use PTO
- Salaries can be eliminated during furloughs, if no work performed
- Salaries can be reduced by 75%, but Maryland generally requires two-weeks notice—see earlier slide

## Wages: Non-exempt employees during closures

- Employer can reduce or eliminate hours/shifts
  - Potential for Unemployment Insurance—see earlier slide
- Be wary of non-uniform reductions or eliminations, and any discriminatory appearance.

# Does the WARN act apply to closures or layoffs?

## Maybe

- Applies to employers with over 100 employees (excludes employees who have worked less than 6 months in the calendar year and those who work less than 20 hours per week)
- Requires 60-day notice of layoffs of 50 or more employees (within 30 days), or closing of entire facilities.
- “Unforeseen circumstances” objection might apply to provide exemption for COVID-19-related layoffs.

# How to handle Health Insurance premiums during furloughs, closings, etc.?

- Without time worked, staff might be deemed ineligible for coverage—Confer with your benefits broker proactively
- Option to pay premiums for furloughed workers as an advance on future compensation
  - Need written authorization for future deductions

# Have the rules governing tele-health been relaxed?

## CMS 1135 Waivers:

- Medicare can pay for telehealth visits in any health care facility or in patient's homes.

- Greater flexibility to see out-of-state Medicare/Medicaid patients

- HHS OIG is providing flexibility for providers to reduce or waive cost-sharing for telehealth funded by federal programs.

- States can apply for Medicaid, Medicare, and CHIP waivers to provide greater flexibility in provider enrollment.

# Can employers refuse in-person appointments with certain patients, for protection of staff?

- OSHA requires that measures be taken to protect staff from dangerous conditions
- Questionnaires are useful to screen patients
- Use other means of encouraging healthy practices, and encourage remote work if possible.

# Can an employer restrict an employee's personal travel to high-risk areas?

## No

- Since employees may be traveling to their homeland to check on family and friends during this difficult time, restricting what countries an employee can travel to could be construed as a form of national origin discrimination
- However, employers may require employees to self-quarantine upon arrival from travel outside of the country or even with the United States

# Can an employer prohibit employees from returning to worksite until 14 days after their arrival back to the United States if the employee traveled to a high risk country?

## YES

- If an employee chooses to travel to a high risk country (based upon CDC recommendations), then it is reasonable to require the employee to remain away from the office for at least 14 days following his/her return to the United States
- In fact, requiring an employee to return to work inside of a 14-day quarantine period is a bad idea
- Arguments could be made that doing so violates the Americans with Disabilities Act and/or the Family or Medical Leave Act
- Certain states like Maryland, make it illegal to fire an employee who is ordered to isolate or quarantine by the state Governor
  - See, § 18-906(e) of the Health-General Article of the Maryland Annotated Code

# Can an employer mandate that an employee not return to the office or worksite until 14 days after their arrival back to the United States if the employee traveled to a country not on the CDC's high risk or watch lists?

- We suggest having an open dialogue with such an employee before they return to the worksite or office
- Technically, these employees will not be under a formal obligation to self-quarantine
- The employer (and the rest of the workforce) may have a strong preference that the employee remain home and self-quarantine
- If the employer wants to encourage this behavior, they should consider allowing the employee to telework and, if that is not an option, the employer should consider paying the employee for the time at home (especially if the employee is exempt under the FLSA).
- This approach does have some **risks**:
  - An employer should be careful to offer the same benefits and options to all employees who return from overseas travel
  - To encourage (or force) one employee to stay home upon his/her return from a trip to Vietnam (as an example), but to allow a different employee to immediately return to the office upon his/her return from Australia (as another example), could potentially expose the employer to a claim of national origin discrimination

# CAN AN EMPLOYEE REFUSE TO WORK BECAUSE THEY ARE CONCERNED ABOUT CONTRACTING THE VIRUS?

- Under the federal Occupational Safety and Health Act (“OSHA”), an employee is only entitled to refuse to work if they believe that they are in “imminent danger” which typically means death or serious physical harm
  - At the moment, most work conditions in the United States are not putting workers in imminent danger
  - Therefore, an employee cannot refuse to go to work based on a fear of the virus
- An employer could allow the employee the option to use unpaid or paid leave (if applicable)

# ARE THERE OTHER LEGAL RISKS FOR EMPLOYERS?

## YES

- OSHA and many similar state laws may require employers to protect workers from exposure to airborne infectious diseases in the workplace, such as the novel Coronavirus
- While there is no specific federal OSHA standard covering COVID-19, the Department of Labor, Occupational Safety and Health Administration, suggest that the General Duty Clause may apply, as well as OSHA's Personal Protective Equipment standards, which require using gloves, eye and face protection, and respiratory protection
- There are 28 OSHA-approved State Plans and California, in particular, has taken the position that its Aerosol Transmissible Diseases (ATD) standard is aimed at preventing worker illness from infectious diseases that can be transmitted by inhaling air that contains viruses such as COVID-19
  - The ATD standard is mandatory for certain healthcare employers in California
  - Employers will want to check their State Plans if they operate in one of those 28 states

# THANK YOU!



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*Thank you for joining us!*

Keep an eye on your inbox for an email with resources from this webinar.

## **Mark Your Calendar**

Our next webinar in this series will be held on Tuesday, March 24 and will address rapid implementation for remote patient monitoring.

## **COVID-19 Resources**

Visit us online at [montgomerymedicine.org/covid19](https://montgomerymedicine.org/covid19) for the latest updates for Montgomery County medical practices.