KASOWITZ
BENSON TORRES

COVID-19: Employer Frequently Asked Questions

Kasowitz Benson Torres LLP's Employment Practices and Litigation Group has been fielding questions from numerous employers requiring strategic counseling and advice related to COVID-19 issues. We have compiled the most frequently asked questions and answers into this employer FAQ, and will regularly update the FAQ, available on our COVID-19 resource page, here.

The laws and regulations relating to COVID-19 change rapidly. Employers should consult with employment counsel for the latest developments and specific guidance on the issues described in this FAQ.

FAMILY FIRST CORONAVIRUS RESPONSE ACT ("FFCRA") LEAVE

1. When is an employer required to provide leave under the FFCRA?

The FFCRA requires that employers with fewer than 500 employees provide up to 80 hours of emergency paid sick leave to employees ("FFCRA Emergency Leave") if the employee is:

- subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- advised by a health care provider to self-quarantine due to COVID-19 concerns;
- experiencing COVID-19 symptoms and seeking medical diagnosis;
- caring for an individual[1] who is subject to a federal, state, or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
- caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to COVID-19 precautions; or
- experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The FFCRA also requires employers with fewer than 500 employees to provide up to twelve weeks of paid and job-protected leave to allow an employee to care for his or her child if the employee is unable to work or telework because the child's school or place of care is closed, or if a childcare provider is unavailable, due to COVID-19 precautions (the "Expanded FMLA Leave").

2. Is an employee entitled to his or her regular full rate of pay during the FFCRA Emergency Leave or Expanded FMLA Leave?

It depends on the employee's rate of pay and the reasons for the leave. FFCRA Emergency Leave for any of the first three qualifying reasons set forth above is paid at the employee's

[1] According to the Department of Labor's regulations, the individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined. *See* §826.20(a)(5).

regular full rate of pay (capped at $511/day). An employee who takes leave for any other qualifying reason is paid at two-thirds the employee's regular rate (capped at $200/day). An employee who takes Expanded FMLA Leave is unpaid for the first 10 days, then paid at two-thirds of the employee's regular rate (capped at $200/day) for the number of hours the employee would otherwise be normally scheduled.

3. Does the FFCRA provide any tax credits to employers?

The FFCRA provides businesses with tax credits to cover certain costs of providing employees with required FFCRA Emergency Leave and Expanded FMLA Leave for reasons related to COVID-19, from April 1, 2020, through December 31, 2020.

4. What documentation must an employer obtain from an employee to receive the tax credits under the FFCRA?

According to guidance issued by the Internal Revenue Service, an employer must substantiate its eligibility for the credits by receipt of a written request for the leave from the employee in which the employee provides:

- The employee's name;
- The date or dates for which leave is requested;
- A statement of the COVID-19-related reason the employee is requesting leave and written support for such reason; and
- A statement that the employee is unable to work, including by means of telework, during such leave.

If an employee's request for leave is based on a quarantine order or self-quarantine advice, the statement from the employee must include the name of the governmental entity ordering the quarantine or the name of the health care professional advising self-quarantine and, if the person subject to quarantine or advised to self-quarantine is someone the employee is caring for, that person's name and relation to the employee.

If an employee's request for leave is based on a school closing or child care provider unavailability, the statement from the employee must include (i) the name and age of the child or children; (ii) the name of the school that has closed or place of care that is unavailable; (iii) a representation that no other person will be providing care for the child during the period for which the employee is receiving leave; and (iv) with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care for that child.

5. Does the FFCRA eliminate an employer's obligation to provide leave to employees for COVID-19 under other federal, state, or local laws?

No. If an employee qualifies for leave under any federal, state, or local law, an employer must provide the leave even if the request is related to COVID-19. For example, an employer must provide FMLA leave to an employee who develops a serious health condition due to his or her exposure to COVID-19.

State law may also require employers to provide leave to employees. For example, under the New York Paid Family Leave Act, an employee is entitled to take leave to care for a family member with COVID-19, which the New York State Department of Labor has identified as a serious health condition for the purposes of the law. Additionally, states and localities have enacted additional laws to supplement the leave provided by the FFCRA.

EMPLOYEE PRIVACY AND WORKPLACE SAFETY

6. Does the Americans with Disabilities Act ("ADA") allow an employer to take the body temperature of employees who are coming to work to determine whether they might be infected with COVID-19?

Yes. As of March 21, 2020, the Equal Employment Opportunity Commission ("EEOC") advised that an employer may take the body temperature of its employees, pursuant to a policy to test all employees, prior to the employees entering the workplace or commencing their shift in response to COVID-19. As with all medical information, however, the fact that an employee had a fever or other symptoms of COVID-19 must be kept confidential pursuant to the ADA.

If an employer suspects that one of its employees has COVID-19 but does not have a policy requiring all employees to submit to the temperature checks upon entering the workplace, the employer must have a reasonable belief based on objective evidence that the employee might have COVID-19 before taking the employee's temperature. *See* Question 9.

7. Aside from taking the body temperature of their employees, is there anything else employers can do to determine if employees have COVID-19 or symptoms associated with the disease?

Under the ADA, the EEOC has advised that employers may ask all employees, before they enter the workplace, if they have COVID-19 or symptoms associated with COVID-19, or ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, cough, sore throat, fever, chills, and shortness of breath.

For teleworking employees, employers are generally not permitted to ask whether an employee has COVID-19 or associated symptoms because they do not pose a "direct threat" to the health or safety of the workplace given that they are not physically interacting with coworkers.[2]

8. May an employer ask employees to stay home or leave work if they are diagnosed or exhibit symptoms associated with COVID-19?

Yes. The EEOC has advised that an employer may exclude those with COVID-19 or symptoms associated with COVID-19 from the workplace because their presence would pose a "direct threat" to the health or safety of employees in the workplace.

[2] A "direct threat" is "[a] significant risk of substantial harm to health or safety of self or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r).

9. May an employer require only certain employees – as opposed to all employees – to answer questions, or have their body temperatures taken, to determine if they have COVID-19?

The ADA requires that an employer have a reasonable belief based on objective evidence that this person might have COVID-19 before asking the employee any questions or taking the employee's temperature to determine whether the employee has COVID-19. For example, because a persistent cough is associated with COVID-19, the EEOC has advised that an employer may ask an employee who has a persistent cough whether the employee has been to the doctor or has or might have COVID-19. On the other hand, an employer may not ask whether an employee has COVID-19 if the employee is not displaying symptoms of COVID-19 and the employer otherwise does not have objective evidence that the employee may have been exposed to COVID-19.

10. May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19?

No. The Genetic Information Nondiscrimination Act ("GINA") prohibits employers from asking employees medical questions about family members. The EEOC has advised that if an employer is concerned about the employee's potential exposure to COVID-19, the employer should ask whether the employee had contact with anyone who the employee knows has been diagnosed with COVID-19.

11. What may an employer do if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he or she has COVID-19?

The EEOC has advised that the ADA allows an employer to bar an employee from physical presence in the workplace if the employee refuses to answer questions about whether he or she has COVID-19, has symptoms associated with COVID-19, has been tested for COVID-19, or if the employee refuses to have his or her body temperature taken. The EEOC notes, however, that employers should first ask such an employee if the refusal is because of concerns regarding the disclosure of confidential medical information, and should reassure employees that they are taking these steps to protect everyone in the workplace and that they are required to keep all medical information strictly confidential.

12. If an employer learns that one of its employees has COVID-19, may the employer inform other employees of their potential exposure to COVID-19?

If an employer learns that one of its employees has COVID-19, the employer should inform other employees of their possible exposure to COVID-19. The EEOC has advised that the employer may interview the infected employee to determine with whom the employee had contact in the workplace so that the employer can then take action to notify those who may have come into direct contact with the employee. However, an employer cannot, without authorization from the employee, disclose the identity of the infected employee because the ADA prohibits the disclosure of employee medical information.

13. Under the ADA, employers are required to keep medical information confidential and store such information separately from ordinary personnel files. How should an employer comply with this requirement if the individuals responsible for such information are teleworking?

If an employer receives medical information while its employees are teleworking, the employer should follow existing confidentiality protocols to the extent feasible. If the existing confidentiality protocols are not feasible, employers must protect the confidentiality to the greatest extent possible. The EEOC advises that teleworking employees should properly secure electronic devices and paper documentation so that others may not obtain access to the files. The EEOC suggests that an employer code or use an employee's initials in the employee's medical documentation to ensure that the employee's confidentiality is protected.

14. Does the Health Insurance Portability and Accountability Act ("HIPAA") apply in the employer-employee context?

HIPAA prohibits "covered entities"[3] from disclosing or using an individual's medical information without authorization. Covered entities are defined as: (1) health plans; (2) health care clearinghouses; and (3) health care providers that electronically transmit certain health information. Employers generally do not fall into these categories. Moreover, even if an employer is a "covered entity" for the purposes of HIPAA, HIPAA does not apply to health information in employment records held by a covered entity in its role as an employer.

Although HIPAA does not generally apply in the employer-employee context, employers cannot ignore employee privacy concerns. The ADA prohibits the unauthorized disclosure of employee medical information even if the medical information is not about a disability. Additionally, employers may be subject to various state privacy laws which provide additional confidentiality protections to employees.

WAGE AND HOUR

15. Is an employer required to pay non-exempt employees who are not working due to a lack of work?

Under federal law, generally no. Under the Fair Labor Standards Act ("FLSA"), an employer need only pay non-exempt employees for the hours worked. State and local law, however, may impose additional obligations on employers. For example, the New York City Fair Work Week law requires fast food and retail employers to pay fast food and retail employees above their normal rates of pay when their schedules are changed with fewer than 14 days' notice.

16. Is an employer required to pay exempt employees who are not working due to a lack of work?

It depends. Under the FLSA, most exempt employees are compensated on a salary basis and thus must be compensated for the entire workweek if the employee performs any work during the workweek. Failure to compensate an exempt employee for a week where any work is performed jeopardizes that employee's exempt status. If the exempt employee does not

[3] "Business associates" that provide services involving medical information for or on behalf of Covered Entities are required to abide by HIPAA regulations.

perform any work during the workweek, an employer generally is not obligated to pay the employee for that week under the FLSA.

An employer may be obligated to continue to pay the employee due to obligations under state law, collective bargaining agreements, or employment agreements.

Additionally, employers must generally continue to pay workers under certain visa categories (e.g., H-1B and E-3) even where there is a lack of work because of the prevailing wage requirements in their visa category.

17. May employers force employees to use vacation time and/or paid time off during periods of business slowdowns?

It depends. The FLSA generally does not regulate the accumulation of and use of vacation and leave. However, state law, collective bargaining agreements, employment contracts, and/or an employer's leave policies can restrict employers from requiring employees to use such leave.

18. May employers reduce their employees' rates of pay due to business slowdowns?

Unless otherwise restricted by a collective bargaining agreement or employment contract, it is generally permissible for an employer to reduce an employee's rate of pay provided the new rate is above the minimum wage and, for exempt employees, the salary threshold under federal, state, or local law. Advance notice of such reductions, however, is often required before the employee works any time at the new rate. For example, in New York, an employer must notify an employee of any change to his or her wage rate at least 7 calendar days before the hours are worked at the new wage rate.

WORKFORCE REDUCTIONS

19. Is the federal Worker Adjustment and Retraining Notification ("WARN") Act triggered if an employer has to temporarily lay off its employees, or reduce employee hours, due to the COVID-19 business disruptions?

It depends. The federal WARN Act requires employers with more than 100 employees[4] to provide 60 days' advance written notice of a "mass layoff" or "plant closing" that impacts 50 or more employees at a "single site of employment" over a 90-day lookback period. An employer's temporary workforce reduction may not trigger the federal WARN Act if it entails (i) a temporary layoff of less than six months or (ii) a reduction of an employee's hours of less than 50% during each month of any 6-month period.

[4] Included in this calculation are employees on temporary layoff or on leave who understand, through notification or through industry practice, that their employment with the employer has been temporarily interrupted and that they will be recalled to the same or to a similar job. Employers with 100 or more full-time and part-time employees who work an aggregate of at least 4,000 hours/week (exclusive of overtime) are also included in this calculation. Under the WARN Act, a "part-time employee" is defined as an employee who works fewer than 20 hours/week or who has been employed less than 6 months in the 12 months preceding the date the advance notice is required.

20. Are there any exceptions to the federal WARN Act's 60-day advance written notice requirement that may apply to the COVID-19-related layoffs?

Under the federal WARN Act, an employer may order a "plant closing" or "mass layoff" with less than 60 days' notice if the plant closing or mass layoff is caused by: (1) unforeseeable business circumstances; (2) a natural disaster; or (3) a faltering company. Although the application of any of these exceptions to the federal WARN Act's notice requirements is fact dependent, COVID-19's disruption to a company's business operations may fall within the unforeseeable business circumstances exception. According to the U.S. Department of Labor regulations, an "unanticipated and dramatic major economic downtown" or the "government ordered closure of an employment site that occurs without prior notice" may qualify as an unforeseeable business circumstance.[5] Even if any exceptions apply, however, an employer must give written notice "as soon as practicable," including a statement explaining the reason for the reduced notice period.

21. If the federal WARN Act is triggered, to whom must an employer give notice and what must the notice contain?

If the federal WARN Act applies, an employer must provide written notice to the affected workers or their representatives (*e.g.,* a labor union), and to the applicable state regulatory bodies (*e.g.,* the New York State Department of Labor) and the chief elected official of the local government where the layoff or closing is to occur.

The notice to each affected employee who does not have a representative must contain the following:

- The name and phone number of a company official to contact for further information;
- A statement as to whether the planned action is expected to be permanent or temporary and if the entire plant is to be closed;
- The expected date of the first separation, and the expected date when the individual employee will be separated; and
- An indication of whether or not "bumping" rights exist (*e.g.*, the right of workers with greater seniority whose jobs are abolished to bump workers with less seniority so that the worker who ultimately loses his or her job is not the worker whose job was abolished).

The notice to an affected employee's representative (if applicable), the state dislocated workers unit, and the chief elected official of the local government where the closing or layoff is to occur must also contain the following:

- The name and address of the employment site where the plant closing or mass layoff will occur;
- The job titles of positions to be affected and the number of employees to be laid off in each job classification;
- For multiple lay-off locations, a breakdown of the number of affected employees and their job titles by each location;
- The name of each union representing affected employees, if applicable; and
- The name and address of the chief elected officer of each union, if applicable.

[5] *See* 20 C.F.R. § 639.9.

DISCRIMINATION AND REASONABLE ACCOMMODATIONS

22. May an employer decide to lay off or place on furlough employees that the CDC has identified as at higher risk for COVID-19, such as older employees or employees with pre-existing health conditions?

An employer cannot furlough or lay off these workers because they have pre-existing health conditions or because of their age. Employment actions based on age and disability are prohibited under the Age Discrimination in Employment Act ("ADEA") and the ADA, respectively. An employer must ensure that its decision about furloughs and layoffs is not influenced by these protected characteristics and treat all employees the same.

23. Under the ADEA, is an employer required to grant a teleworking request from an employee who is 65 or older because the CDC has identified such individuals as a higher risk for COVID-19?

No. The ADEA does not require an employer to grant a worker's request to telework because the CDC has identified such individuals as a higher risk for COVID-19. Unlike the ADA, the ADEA does not have a reasonable accommodation provision. However, if an employer is allowing younger workers in comparable positions to telework, it must ensure that is not treating the older employees differently by refusing their teleworking requests.

24. What are an employer's obligations under the ADA when an employee asks for a reasonable accommodation because his disability puts him at a greater risk of severe illness if he contracts COVID-19?

The employer should verify the existence of the employee's disability (*e.g.*, by requesting that the employee provide medical documentation) and discuss with the employee why an accommodation is needed and the type of accommodation that would meet the employee's health concerns. The employer should then assess whether the requested accommodation would pose an undue hardship, which is an accommodation that would impose significant expense or significant difficulty on the employer.

Because an employee's health care provider may have difficulty responding to requests for documentation quickly given the current circumstances, the EEOC has advised that employers may use other ways to verify the existence of an employee's disability (*e.g.*, a health insurance record or prescription). The EEOC also encourages employers to provide the requested accommodation on a temporary basis until the employer receives documentation.

25. Are employers required to provide a reasonable accommodation to an employee that lives in the same household as someone who, due to a disability, is at greater risk of severe illness if the employee contracts COVID-19?

No. The employee only has a right to reasonable accommodation for his own disability. However, employers should, as a best practice, treat the employee the same as other employees. Employers should evaluate whether they offered any similar accommodations to other employees before responding to such requests.

26. If an employer currently provides a reasonable accommodation to an employee due to the employee's medical condition, does an employer need to provide that same accommodation to the employee at the employee's home if the employer requires its employees to telework?

It depends. The employer and employee should discuss what type of accommodation the employee needs in his or her home. The employer must also evaluate whether the new accommodation imposes an undue hardship. The EEOC recommends that employees and employers be flexible about accommodations and, if feasible, provide interim accommodations while an employer discusses the request with the employee or is waiting for additional information.

* * *

Kasowitz Benson Torres LLP's Employment Practices and Litigation Group has been named the 2019 Litigation Department of the Year for Labor and Employment by *New York Law Journal*. We represent companies in connection with employment policies and practices, and have been regularly advising our clients on COVID-19 related employment issues. Our lawyers are well-versed in the new laws and regulations relating to COVID-19, and regularly advise on layoffs, furloughs, plant closings, and reductions in force, and on litigation arising from statutory and contractual employment-related claims. If you would like to discuss these issues, please contact Mark W. Lerner at mlerner@kasowitz.com or +1 (212) 506-1728 or Jessica T. Rosenberg at jrosenberg@kasowitz.com or +1 (212) 506-1789.