

Employment Law Considerations in the Time of COVID-19

Amy Carlin

April 3, 2020

FURLOUGHS & LAYOFFS

FURLOUGHS/LAYOFFS

- Furlough (temporary layoff) - Unpaid leave of absence mandated by employer
- Layoff – Separation of employment
- Decision-making around who to furlough/layoff
 - Same considerations that apply in “typical” times
 - Legitimate business decision/document
 - No decisions made based on protected class of employee
- Other issues at play
 - Unemployment eligibility
 - Exempt v. Nonexempt employees
 - Payment of vacation or other PTO

DUA: UI BENEFITS COVID-19

COVID-19 emergency regulation updates

- One week waiting period waived
- Relaxed standards to receive benefits (temporary layoffs, quarantines)
 - Anyone temporarily unemployed due to lack of work because of COVID-19 will be eligible for unemployment benefits
 - Worker quarantined, even self-quarantined is eligible
- New “standby status” making claimants eligible to receive unemployment benefits when they are temporarily unemployed due to lack of work
- WorkShare program
- Missed deadlines for employers/employees excused
- Extensions for filing quarterly wage reports and paying contributions

DUA: WORKSHARE PROGRAM



- Allows employers to reduce the hours of work/pay for employees while employees receive a reduced weekly UI benefit.
- Work reduction can be across the entire company or a company unit (facility, department, shift, job function).
- Only permanent full-time and part-time workers are eligible (not seasonal and temporary workers)
- Eligibility/criteria:
 - MA Company
 - Reduced hours were necessary to avoid a full layoff
 - Two or more employees whose regular full-time hours will be reduced between 10% - 60%
 - Employer must certify that health insurance benefits will remain the same and specify reduction in any additional benefits

DUA: WORKSHARE PROGRAM



Benefits:

- Reduce payroll costs without full layoffs
- Retain high skilled workers/reduce future hiring costs when full business activity resumes
- Can modify/terminate at any time
- Can maintain several WorkSharing programs at one time.
(individual employee is only eligible to be on one WorkSharing program at a time)

DUA: WORKSHARE PROGRAM



WorkShare programs will be approved within 15 business days of application submission

How to apply for WorkShare Program:

- **Step 1** - Go to www.mass.gov/dua
 - Click UI online for employers button.
- **Step 2** - log into UI online using existing EAN and password
- **Step 3** - Select account maintenance option.
- **Step 4** - Select the “request benefit WorkShare benefits option” in the middle of the screen.**Step 5** – Select Add WorkShare Plan.
- **Step 6** – Review Workshare information.
 - When the plan will begin.
 - Must include number of affected employees.
 - Planned Percentage reduction of weekly hours between 10 and 60%
 - The specified duration of the plan.

WAGE & HOUR ISSUES



- Exempt salaried employees
 - Should receive their full salary in any week in which they perform any work
 - For shut-downs, exempt employees need not be paid but employers should take measures to ensure employees are not working during this time.
 - Employers can generally make prospective changes to exempt employees' schedules / pay but should provide clear, advance, and ideally written notice of the change.
- Teleworking
 - Be aware of expenses incurred by employees working from home.
 - MA and NH laws may require expense reimbursement in certain circumstances.
 - Some companies have proactively given employees work from home stipends.

CARES ACT

CARES Act Overview

Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

(1) Paycheck Protection Program: SBA loans to cover 8 weeks of payroll costs

(2) Employee Retention Credit

(3) Unemployment Expansion

PAYCHECK PROTECTION PROGRAM



- Are you eligible?
 - The PPP allows small businesses, non-profits, independent contractors, and self-employed individuals, with 500 or fewer employees, to apply for loans covering certain business costs and expenses.
- How much can you borrow?
 - Up to 2.5 x the borrower's average monthly payroll costs, not to exceed **\$10 million**.
- What is included in “payroll costs”?
 - Sum of payments of any compensation made to employees (includes salaries, commissions, tips, vacation or other paid sick, payment for group health benefits, state payroll taxes, e.g.).

The PPP

- Am I eligible to have loan forgiven?
 - Loan may be largely forgiven if loan applicants meet certain criteria for maintaining employees on payroll and maintaining salaries.
- Is the answer yes or no?
 - According to the Act, borrower is eligible for loan forgiveness equal to the amount the borrower spent on payroll costs, rent, utilities during 8 week “covered period” of the loan; payroll costs need to make up 75% of this amount (updated 4/2/20).
- You still haven’t answered yes or no.

The PPP

- Loan forgiveness could be reduced by:
 - Reduction of number of employees
 - Reduction in salaries
- New Rule from SBA as of 4/2/20:
 - “SBA will issue additional guidance on loan forgiveness.”
- Consult with your banker!

EMPLOYEE RETENTION CREDIT



- Fully refundable tax credit for employers equal to 50 percent of qualified wages up to \$10,000 during the crisis.
- For employers with business disruption or decrease of gross receipts of 50% or more compared to the same quarter last year
- For employers with 100 or fewer employees, credit can be claimed for all employees.
- <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>
- Consult with your accountant!

UNEMPLOYMENT EXTENSION

- CARES Act temporarily expands, through December 31, 2020, unemployment benefits to individuals who are not traditionally eligible including self-employed individuals and independent contractors, who would not otherwise be eligible for weekly unemployment benefits.
- CARES Act also extends the number of available weeks of benefits for all claimants, and supplements all claimants' weekly benefit amount by \$600.
- *As of April 3, 2020, the MA DUA is awaiting federal guidance on the CARES Act's application requirements.*

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)



What Employers Need to Know About FFCRA

- (1) Expanded required paid sick days.**
- (2) Expanded FMLA eligibility (with pay)**
- (3) Expanded unemployment benefits.**

Employers Eligible for Tax Credits for payments to employees under (1) and (2).

FFCRA: PAID SICK LEAVE

- The Emergency Paid Sick Leave Act (EPSLA) applies to private employers with fewer than 500 employees and employees of covered public-sector employers.
 - Employers must provide two weeks of paid sick leave up to 80 hours.
 - Employees should be paid for the number of hours the employee is normally scheduled to work.
- Small Business Exemption: Businesses with fewer than 50 employees may claim exemption from the requirements of the Emergency Paid Sick Leave Act (for leave related to school/daycare closure/unavailable child care provider only), when compliance would **“jeopardize the viability of the small business as a going concern.”**

FFCRA: PAID SICK LEAVE (Two Weeks)

- Employers must provide when employee is unable to work (or telework) because:
 - The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19;
 - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Payment for EPSLA leave for any of the above reasons must be the greater of the employee's regular rate of pay or the highest applicable minimum wage. Paid sick time is capped at **\$511 per day** per employee and **\$5,110 in the aggregate** per employee.

- Employers must provide when employee is unable to work (or telework) because:
 - The employee is caring for an individual who is subject to a quarantine or isolation order or health care provider advisory, as described above.
 - The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions;
 - The employee is experiencing any other substantially similar condition.

Payment for EPSLA leave for any of the above reasons must be the greater of 2/3 of the employee's regular rate of pay, or 2/3 of the highest applicable minimum wage. Paid sick time is capped at **\$200 per day** per employee and **\$2,000 in the aggregate** per employee.

FFCRA: EXPANDED FAMILY AND MEDICAL LEAVE

- EFML Employees may take up to 12 weeks of (EFML- job protected leave) when employee is unable to work (or telework) because:
 - The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.

- First two weeks of this leave is unpaid.
- Employee may use any sick time for first two weeks - employer provided or EPSL.
- Employer can require employee to use accrued paid time off.
- If not, employer must pay the greater of 2/3 of the employee's regular rate of pay, or 2/3 of the highest applicable minimum wage. EFML time is capped at **\$200 per day** per employee and **\$2,000 in the aggregate** per employee.

FFCRA: Small Business Exemption

- **Can I claim the Small Business Exemption?**

- Less than 50 employees
- Leave requested from employee is because child's school or place of care closed due to COVID-19 reasons
- "Authorized officer of the business" determines that at least one of the following exists:
 1. Providing paid sick or expanded FML would result in business's expenses and financial obligations exceeding available business revenues and cause small business to cease operating at minimal capacity;
 2. Absence of employee or employees requesting leave would entail substantial risk to the financial health or operational capabilities to small business because of employee's specialized skills, knowledge of business or responsibilities; OR
 3. Not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform labor or services provided by employee or employees requesting this leave, and these labor or services are needed for small business to operate at minimal capacity.

FFCRA



WHAT ELSE YOU NEED TO KNOW:

- **No carry over.** Sick time cannot be carried over from one year to the next.
- **Cannot force employee to use other PTO first.** Employers may not require employees to use other paid leave prior to using emergency paid sick time.
- **Must provide notice of employee rights under EPSL and EFML.** Emailing the DOL poster is sufficient.
- **Employees must be working.** No sick time or EFML if employer shut down or employees on furlough.
- **No retaliation.** It is unlawful to discharge, discipline, or discriminate against an employee who takes leave or files a complaint about EPSL or EFML.

FFCRA: EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- The Emergency Family and Medical Leave Expansion Act (EFMLEA) amends various aspects of the Family and Medical Leave Act (FMLA)

	Emergency Family and Medical Leave Expansion Act (EFMLEA)	Family and Medical Leave Act (FMLA)
Applicability	<ul style="list-style-type: none"> • Employers with fewer than 500 employees 	<ul style="list-style-type: none"> • Employers with 50 or more employees and covered
Eligibility	<ul style="list-style-type: none"> • Employees eligible after 30 days of employment 	<ul style="list-style-type: none"> • Employees eligible after 12 months of employment with at least 1250 hours of service
Reasons eligible employees can take leave	<ul style="list-style-type: none"> • In addition to the standard FMLA reasons, employees may also take leave when they are unable to work (or telework) due to a need for leave to care for their child under 18 years of age because of school/child care closures due to the public health emergencies. 	<ul style="list-style-type: none"> • For the birth and care of newborn child • For placement of a child for adoption or foster care • To care for immediate family member with a serious health condition • To take medical leave when employee is unable to work because of a serious health condition.
Paid/unpaid	<ul style="list-style-type: none"> • First 10 days may be unpaid, but employees may elect to use accrued vacation, personal, medical, or sick leave. • After first 10 days, employee must be paid not less than 2/3 of an employee's regular rate of pay. • The paid leave benefit is capped at \$200 per day and \$10,000 in the aggregate per employee. 	<ul style="list-style-type: none"> • Only requires unpaid leave, but employee may use accrued leave.

FFCRA: EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- **Employee Retention Tax Credit:**

- Employers paying benefits under the EFMLEA will be eligible for refundable tax credit equal to 100% of qualified family leave paid by the employer for each calendar quarter.
- The tax credit is capped at \$200 per day per employee, or \$10,000 in the aggregate per employee.
- **The credit does apply to the self-employed** but does not apply to public-sector employers.
- I am not a tax lawyer!

CONCLUSION

ADDITIONAL LAWS RELEVANT TO COVID-19



- **WARN (Worker Adjustment and Retraining Notification)**
 - WARN applies to mass layoffs and plant closures (only applicable for employers with 100 or more employees).
- **OSHA (Occupational Safety and Health Act)**
 - OSHA has issued guidance on best practices/precautionary measures to help employers better protect their work forces.
- **ADA (Americans with Disabilities Act)**
 - ADA medical exam/screening/inquiry rules apply to employers analyzing situations in the workplace.
- **FLSA (Fair Labor Standards Act)**
 - Among other things, FLSA dictates when employees must be paid (or do not have to be paid).
- **FMLA (Family and Medical Leave Act)**
 - The FFCRA expanded a number of FMLA protections.
- **Corresponding/additional state laws:**
 - State laws can add additional restrictions and rules
 - **State mini-WARN laws, state family and medical leave laws, etc.**
 - **See also MA Earned Sick Time Laws:** Most workers in Massachusetts have the right to earn and use up to 40 hours of job-protected sick time per year to take care of themselves and certain family members

Thank You!

Amy Carlin

acarlin@morganbrown.com

www.morganbrown.com