



EFFECTIVELY MANAGE YOUR BUSINESS AND PEOPLE DURING COVID-19 PANDEMIC

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Agenda

- ▶ What will we cover today:
 - ▶ Federal and State Measures Enacted in Response to COVID-19
 - ▶ Current laws and their Application
 - ▶ Other issues

COVID-19 Background

- ▶ Emerged in December 2019 in China
- ▶ Typical Symptoms
 - ▶ Cough
 - ▶ Fever
 - ▶ Shortness of breath
- ▶ But not everyone with these symptoms has Coronavirus; similar to flu-like symptoms
- ▶ Can be severe and can be passed person-to-person

COVID-19 Background

- ▶ No vaccine
- ▶ Symptoms tend to show up within 14 days of exposure.
- ▶ Ways to protect yourself from Coronavirus
 - ▶ Handwashing & don't touch your face or someone else's face
 - ▶ Cough etiquette
 - ▶ Social distancing.
- ▶ In Colorado, we have 720 positive cases.
- ▶ Currently, there is a 4 ½ % mortality rate.
- ▶ Ongoing efforts are being undertaken to improve treatment and therapy and “flatten the curve.”



**Paid job-protected leave
under the
Family and Medical
Leave Act (“FMLA”)**

Who is Covered?

- ▶ Until December 31, 2020, employees of employers with less than 500 employees have the right to take up to 12 weeks of job-protected leave under the FMLA.
- ▶ This is different from the FMLA's usual threshold of 50 or more employees and the Law's language also means independent contractors and self-employed individuals also get these benefits in the form of a tax credit.

Who is Not Covered?

- ▶ Employees of employers with more than 500 employees are not covered under the Act.
- ▶ Additionally, health care providers (like hospitals and nursing homes) and emergency responders can elect to exclude their employees from this Act.
- ▶ Finally, the Act gives the Secretary of Labor the authority to issue regulations exempting from taking this leave to: (1) certain health care providers and emergency providers; and (2) employees of small businesses with less than 50 employees if such leave jeopardizes the viability of the business.
- ▶ At this time, there is no guidance for what constitutes a “jeopardy” for a small business owner.

How does it work?

- ▶ A covered employee may take up to 12 weeks of paid, job-protected leave if the employee is unable to work (or telework) because the employee must care for their child under the age of 18 if the child's school or place of care has closed, or the child's child care provider is not available, due to closure because of the coronavirus.
- ▶ The first 10 days of such leave will be unpaid, unless the employee chooses to substitute accrued vacation, personal leave, or medical or sick leave. The employer cannot require an employee to do so.
- ▶ After the first 10 days, employees are entitled to paid FMLA leave for the next 10 weeks at two-thirds (2/3) the employee's rate, but capped at \$200 per day, up to \$10,000 total.

How does it work?

- ▶ Part-time employees or those that work an irregular schedule must be paid based on the average number of hours worked for the six (6) months prior to taking this leave.
- ▶ Employees who have not worked for at least six (6) months prior to taking this leave may receive an amount equal to their reasonable expectation at hiring of the average number of hours the employee would ordinarily be scheduled to work.
- ▶ As soon as practicable, employees must provide notice of leave to their employer.

How does it work?

- ▶ To cover the costs of providing paid FMLA, the Act provides employers a credit against the employer-portion of Social Security taxes (6.2% tax on the employee's salary) and a refund if the FMLA leave amount turns out to be more than the employer's Social Security bill.

How does it work?



- ▶ While upon return from this paid leave, covered employees must be restored to the position they held before their leave, or to an equivalent position with equivalent benefits, pay and responsibility, employers with less than 25 employees do not have to restore the employee as long as certain conditions are met (e.g., the employee's position no longer exists due to economic conditions or caused by a public health emergency during the period of leave and the employer makes reasonable efforts to restore the employee to an equivalent position for a year).

14-Days of Paid Sick Leave

Who is Covered?



- ▶ Until December 31, 2020, employees of employers with less than 500 employees and government employees are entitled to 80 hours of sick leave
- ▶ Government workers and union workers are also eligible for this leave. Part-time workers are also covered. There is no required minimum days of employment before a covered employee can take sick leave.

Who is Not Covered?

- ▶ Employees of employers with more than 500 employees are not covered under the Act.
- ▶ Additionally, the Act gives the Secretary of Labor the authority to issue regulations exempting from taking this leave to: (1) certain health care providers (like hospitals and nursing homes) and emergency providers; and (2) employees of small businesses with less than 50 employees if such leave jeopardizes the viability of the business.
- ▶ At this time, there is no guidance for what constitutes a “jeopardy” for a small business owner.

Small Business Exemption

- ▶ Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue. The exemption will be available on the basis of simple and clear criteria that make it available in circumstances involving jeopardy to the viability of an employer's business as a going concern. Labor will provide emergency guidance and rulemaking to clearly articulate this standard.
 - ▶ See IRS Website Article entitled, “*Treasury, IRS and Labor announce plan to implement Coronavirus-related paid leave for workers and tax credits for small and midsize businesses to swiftly recover the cost of providing Coronavirus-related leave.*”

How Does It Work?

- ▶ A covered employee may take up to 80 hours (pro-rated for part-time employees) of paid sick leave if the employee is unable to work (or telework) for the following five reasons:
 - ▶ The employee is subject to a federal, state, or local quarantine or told by a health care provider that s/he should self-quarantine due to COVID-19, which is paid at 100% the employee's pay, but capped at \$511 per day and \$5,110 total;

How Does It Work?

- ▶ The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis, which is paid at 100% the employee's pay, but capped at \$511 per day and \$5,100 total;
- ▶ The employee is caring for an individual who must self-quarantine for the same reasons above, which is paid at two-thirds (2/3) the employee's pay but capped at \$200 per day and \$2,000 total;

How Does It Work?

- ▶ The employee is caring for a child under the age of 18 if the child's school or child care provider is unavailable due to COVID-19, which is paid at two-thirds (2/3) the employee's pay, but capped at \$200 per day and \$2,000 total;
- ▶ The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, which is paid at two-thirds (2/3) the employee's pay, but capped at \$200 per day and \$2,000 total

How Does It Work?

- ▶ Part-time employees or those that work an irregular schedule must be paid based on the average number of hours worked for the six (6) months prior to taking this sick leave. Employees who have worked for less than six months prior to taking leave may receive an amount equal to the average number of hours the employee would ordinarily be scheduled to work over a two-week period.
- ▶ If requested by the employee, the employer must pay a full-time employee for 80 hours of paid emergency sick leave instead of the initial 10 days of unpaid emergency FMLA leave.

How Does It Work?



- ▶ Based upon the above five scenarios, employees do not have to have the coronavirus to get paid sick leave. In other words, not all employees will be able to provide a doctor's note but they are still entitled to paid sick leave if any of the five scenarios apply.
- ▶ "Individual" is not defined in the Act. Therefore, it is contemplated under the Act that an employee can take paid sick leave to care for a person who is not a family member.

How Does It Work?

- ▶ Employers cannot require the employee to find a replacement employee to cover the hours during which the employee is using paid sick time as a condition of taking paid sick leave.
- ▶ To cover the costs of providing paid sick leave, the Act provides employers a credit against the employer-portion of Social Security taxes (6.2% tax on the employee's salary) and a refund if the sick leave amount turns out to be more than the employer's Social Security bill.

How Does It Work?



- ▶ Employers must post a notice informing employees of their rights to emergency paid sick leave once the Department of Labor prepares it, which will be by March 25th.
- ▶ The Act specifically states the notice must be posted “in conspicuous places on the premises of the employer where notices to employees are customarily posted.” Under normal circumstances this would be a break room, copy room, or the HR Department.

How Does It Work?

- ▶ With employees moving to remote-work, or majority-remote work posting such notice in a break room will likely be impracticable or ineffective. In these situations, consider emailing the notice to all employees when it is made available.
- ▶ This paid sick leave is in addition to any sick leave provided by employers as of March 18, 2020, under the employer's existing policies. An employer cannot change its current paid leave policy to avoid this provision.
- ▶ Employers cannot require employees to use other paid leave before using paid sick leave.
- ▶ This paid sick leave cannot carry over to 2021.
- ▶ By April 3rd, the Secretary of Labor will issue guidelines to assist employers in calculating the amount of paid sick leave.

Federal Unemployment Contribution

- ▶ What is it?: This portion of the Act is designed to reduce barriers to unemployment benefits for those directly impacted by COVID-19.
- ▶ How does it work?:
 - ▶ Within 60 days after March 18, 2020, \$500 Million will be transferred to the states to assist states in processing unemployment insurance benefits as long as the states comply with certain requirements, such as requiring employers to notify employees of the availability of unemployment compensation and permitting individuals to apply for unemployment compensation in at least two of the following ways: in-person, by phone, or online. The
 - ▶ The remaining \$500 Million is reserved for states in which the number of unemployment compensation claims will increase by 10% over the same quarter in the prior calendar year. To receive monies under this portion, states must demonstrate steps it has taken to make it easier for individuals to obtain unemployment compensation such as by waiving work search requirements and waiting periods

Unemployment Considerations

- ▶ A qualifying reason to receive unemployment benefits is when an employee is subjected to “...hazardous working conditions when so determined by the division. In determining whether or not working conditions are unsatisfactory for an individual, the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, the distance of the work from his residence, and the working conditions of workers engaged in the same or similar work for the same and other employers in the locality shall be considered.”
- ▶ “Hazardous working conditions” means “such conditions, as are determined by the division to exist, that could result in a danger to the physical or mental well-being of the worker. In any such determination the division shall consider, but shall not be limited to a consideration of, the following: The safety measures used or the lack thereof and the condition of equipment or lack of proper equipment. No work shall be considered hazardous if the working conditions surrounding a worker's employment are the same or substantially the same as the working conditions generally prevailing among workers performing the same or similar work for other employees engaged in the same or similar type of activity. “

Partial Unemployment Benefits

- ▶ An Employee may be eligible to collect partial benefits if the employee is working fewer than 32 hours per week. However, the employee must continue to look for work and meet all eligibility requirements.
- ▶ The law states that an employee can earn up to 25 percent of the employee's weekly benefit amount and still be paid full benefit payment. After that, the benefit payments will be reduced by one dollar for each dollar you earn.
- ▶ An employee will need to report hours worked and gross earnings (pay before any withholdings, e.g., taxes or child support) information for each week when payments are requested.

Job Attachment

- ▶ The claimant need not seek work if:
 - ▶ 1. The employer intends to bring the worker back to work within 16 weeks of the last day of work.
 - ▶ 2. While attached to a job, the claimant must be able to work and be available for immediate recall to work.
 - ▶ 3. Job attachment is intended to benefit employers by ensuring that employers have a base of trained employees to return to your business after a short layoff.

Colorado Department of Labor's Paid Sick Leave

- ▶ On March 11, the Colorado Department of Labor released an emergency rule governing paid sick leave for certain industries. The rule temporarily requires employers in these industries to provide four days of paid sick leave to employees with flu-like symptoms who are being tested for the COVID-19 coronavirus

Colorado's Sick Leave

- ▶ Which Employers Are Affected? Employers in the following sectors are affected by this new rule:
 - ▶ Leisure and hospitality.
 - ▶ Food services.
 - ▶ Childcare.
 - ▶ Education, including transportation, food service and related work with educational establishments.
 - ▶ Home health, if working with elderly, disabled ill or otherwise high-risk individuals.
 - ▶ Nursing homes.
 - ▶ Community living facilities.

Colorado's Sick Leave Requirements

- ▶ Based on this temporary rule, employers must immediately provide up to four days of paid sick leave for an employee with flu-like symptoms who is being tested for COVID-19.
- ▶ If an employer already provides at least four days of sick pay, the employer does not have to provide more. However, if an employee has exhausted their sick leave, and then has flu-like symptoms and is being tested for COVID-19, they are entitled to the four days of paid sick leave.

CDOL's Sick Leave Requirements

- ▶ Employers must pay these workers at their regular rate and for their regularly worked hours. If an employee's rate of pay or hours worked varies, employers must pay them their average daily pay for the preceding month.
- ▶ The rule requests that employers and employees comply with the procedures of the federal Family and Medical Leave Act in pursuing leave. However, no employee can be terminated if they are unable to provide documentation during an illness that is due to the coronavirus.
- ▶ This rule will remain in effect for 30 days or longer if the state of emergency continues.

FLSA Implications

▶ Nonexempt Employees.

- ▶ Each nonexempt must be paid when the employee performs “work” for the employer (identified recently in COMPS as, potentially, anything longer than a minute), unless the employee has accrued, but unused leave, or has access to the previously discussed leaves.

▶ Exempt Employees.

- ▶ Exempt employee must receive their full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked.
- ▶ Employers do not need to pay an exempt employee for any workweek in which the employee performs no work; deductions can be made for full days that an exempt does not work due to personal reasons or sickness; but not employer closing.

Leaving-Sharing Programs.

- ▶ There are no statutes or regulations governing these arrangements. The only formal guidance available to employers seeking this favorable tax treatment for medical emergency leave-sharing programs is Revenue Ruling 90-29 (“Rev. Rul. 90-29”).
- ▶ The IRS requires that the donating employee be taxed on the value of the paid leave the employee donates to another employee unless the donation is for one of two purposes: (1) medical emergencies, or (2) declared national disasters (e.g., “Hurricane Katrina Rule”).
- ▶ In those cases, there is no tax burden on the donating employee, but the employer must tax the employee receiving the leave donation on the value of the benefits received.

Leave-Sharing Programs

- ▶ Revenue Ruling 90-29 defines a “medical emergency” as “a medical condition of the employee or a family member that will require the prolonged absence of the employee from duty and will result in a substantial loss of income to the employee because the employee will have exhausted all paid leave available apart from the leave-sharing plan.” Thus, a medical leave-sharing plan is for long-term serious medical conditions.
- ▶ The “national disaster” exception applies only during major disasters or emergencies declared by the president of the United States. To qualify for the exception, the plan must be available only to employees who suffer severe hardship as a result of the disaster or emergency that requires the employee to be absent from work. Further, a qualifying plan must establish a bank from which qualifying employees may draw. The disaster plan may not permit an employee to designate the recipient of the donation.

Leave-Sharing Programs

- ▶ In addition to the tax considerations of a leave donation program, employers should consider practical consequences.
 - ▶ Additional Leave for Employees.
 - ▶ Different rates of pay.
 - ▶ Discrimination claims.
- ▶ Practical Tip: Only a plan that qualifies for the two exceptions shifts the tax burden from the donor to the recipient who uses the leave. An organization may offer a plan that is broader than the two circumstances recognized by the IRS, but the plan should spell out clearly in writing whether the donor or recipient is taxed under each circumstance for which the program is used.

Announcement on March 22, 2020 by Governor Polis

- ▶ At a recent press conference, Gov. Jared Polis ordered all of Colorado's non-critical employers to reduce their in-person workforce by 50%. Businesses such as health care, critical retail, public safety and a few more will be exempt from reducing their workforce. See next slide.
- ▶ The executive order directs all employers to implement tele-work options to the greatest extent possible to have employees work from home.
- ▶ Employers are also encouraged to stagger work schedules to reduce the proximity of employees during work hours and to try and keep employees on payroll. The governor's order does not apply to employers that can prove that employees do not work closer than 6 feet from one another during any part of their work hours.
- ▶ The order takes effect on March 24th and is set to last through Friday, April 10.

March 22, 2020 Announcement by Governor Polis

- ▶ Businesses defined as "critical" are as follows:
 - ▶ Health care.
 - ▶ Critical infrastructure, including utilities, oil and gas, telecom, hotels, and agriculture.
 - ▶ Critical manufacturing, including food processing, chemicals, medical equipment.
 - ▶ Critical retail, including grocery stores and gas stations.
 - ▶ Critical services, including trash service, mail and shipping, warehouse distribution and fulfillment, laundromats, childcare, auto services, and animal shelters.
 - ▶ News media.
 - ▶ Financial institutions.
 - ▶ Basic necessities to disadvantaged populations, including homeless shelters and food banks.
 - ▶ Construction
 - ▶ Defense
 - ▶ Services to maintain safety, sanitation and critical operations of residences, including law enforcement, fire prevention, security and snow removal.
 - ▶ Vendors that provide critical services or products, including logistics and technology support, child care and services.
 - ▶ Critical government functions.

WARN REQUIREMENTS

- ▶ Employers with 100 or more full-time employees, subject to certain caveats, must provide 60 days' notice of an "employment loss" if there is a "plant closing" or a "mass layoff" impacting 50 or more employees over a 90-day period.
- ▶ For "mass layoffs," it must impact at least 50 full time employees and at least 33% of the active full-time employees at a "single site of employment," unless the layoff impacts 500 or more employees, in which case the one-third requirement does not apply.
- ▶ Under the federal WARN Act, an "employment loss" is: (1) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six consecutive months; or (3) a reduction in hours of more than 50% during each month of any six-month period.
- ▶ There are exceptions if either is due to "unforeseeable business circumstances." In those situations, an employer is only required to provide "as much notice as is practicable..." rather than 60 days.

EEOC/Protected Classifications

- ▶ Background: The EEOC enforces workplace anti-discrimination laws including the Americans with Disabilities Act and the Rehabilitation Act, including the requirement for reasonable accommodation and rules about medical examinations and inquiries.
- ▶ According to a recent publication from the EEOC, the ADA and Rehabilitation Act rules continue to apply, but, according to the EEOC, those rules do not interfere with or prevent employers from following the CDC's guidelines, or those from state/local public health authorities. about steps employers should take regarding COVID-19.

EEOC 2009 Pandemic Publication, including recent updates

- ▶ *Q. May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?*
- ▶ **A. Yes.** The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat. Applying this principle to current CDC guidance on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms associated with it.

EEOC's 2009 Pandemic Publication, including recent updates

- ▶ Q. *During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?*
- ▶ A. ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.
 - ▶ Applying this principle to current CDC guidance on COVID-19, employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19. Currently these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.

EEOC's 2009 Pandemic Publication, including recent updates

- ▶ *Q. During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?*
- ▶ **A.** Generally, measuring an employee's body temperature is a medical examination. But because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

EEOC's 2009 Pandemic Publication, including recent updates

- ▶ Q. *May an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?*
- ▶ A. Yes. Telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation. In addition, employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

EEOC's 2009 Pandemic Publication

- ▶ *Q. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?*
- ▶ **A. Yes.** According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

EMPLOYMENT LAW FOR BUSINESSES

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- Employee Handbooks and Policies
- Day-to-Day Employment-Law Questions
- Wage and Hour Issues
- Contracts/Agreements
- HR and Manager Training
- Recruiting and Hiring Procedures
- Termination Letters/Separation Agreements
- Department of Labor Audits
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