

GUARDIAN HR

Benefit Comply
Employee Benefit Compliance Support


LISI


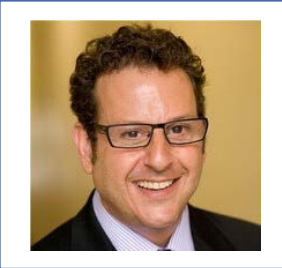


COVID-19 Related Employment Law and Benefits Issues

1

Our Presenters

Bob Radecki
President of Benefit Comply
Public Policy and Regulatory Analyst

Michael Goldfarb, Esq.
President of Guardian HR
Employment Law Attorney



2

Agenda

Employment Law

- Emergency Family & Medical Leave Expansion Act (FMLA)
- Emergency Paid Sick Leave Act
- Layoffs – Federal WARN Act
- FFCRA Exemption Definitions
- ADA Considerations and Q&A
- Record Keeping and Documentation
- Coronavirus and the workplace
- Coronavirus and time off

Benefits Issues

- Coverage for COVID-19 Testing
- Plan eligibility under different scenarios
- Other Benefits Issues
- Employer Tax Credits
- Public Exchange Coverage Issues

3

Emergency Family & Medical Leave Expansion Act

Paid Family Medical Leave

- Job-protected paid Emergency Family and Medical Leave Act (E-FMLA) leave
- Applies to employers with fewer than 500 employees
- Employees may use the leave if they are unable to work or telework to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

Employed by employer for at least 30 days prior to the designated leave (on payroll March 2nd)

First 10 days may be unpaid (see sick pay)

After 10 days employer must pay employees at an amount not less than 2/3 (66.7%) of their regular rate of pay*

Duration of 12 weeks in total

Provisions effective 15 days after the bill is enacted (on April 1, 2020) & expire December 31, 2020

* In no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate

4

Emergency FMLA - Rate of Pay

Full-time employee's rate of pay under the FFCRA:

- I. An amount that is not less than two-thirds of an employee's regular rate of pay; and
- II. The number of hours the employee would otherwise be normally scheduled to work

Variable hour employee's rate under the FFCRA:

- In the case of an employee's schedule varies from week to week
- The average number of hours that the employee was scheduled per day over the 6-month period leading up to the leave.
 - If the employee did not work 6 months, use the reasonable expectation of the employee at the time of hiring.

5

Emergency FMLA Restoration to Position (Exception)

Restoration shall not apply with respect to a highly compensated "key" employee as defined under the FMLA or if an employee of an employer with fewer than 25 employees, if the following conditions are met:

1. The employee took leave;
2. The position no longer exists due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave,
3. Reasonable efforts to restore the employee to an equivalent position, with equivalent benefits, pay, and other terms and conditions of employment, an
4. The employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
5. Contacting the employee over the course of 1 year from the beginning on the earlier of:
 - The date leave ends; or
 - 12 weeks after the date on which the employee's leave started.

6



Emergency FMLA Paid Sick Time

Purpose of Paid Leave (unable to work or telework):

1. Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. Employee is advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. Employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in subparagraph (2).
5. 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 childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. Employee is 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.

7

Emergency Paid Sick Leave Act

Duration Of Paid Sick Time	Full-time employees , 80 hours; Part-time employees , a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.
Use of Accrued Personal or Sick Leave	May be used during the first 10 days of a leave under FFRLCA.
Rate of pay	For leave reasons (1), (2), or (3): employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period). For leave reasons (4) or (6): employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period). For leave reason (5): employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period).
Employee Notice	Post a notice informing employees of their rights to leave.
Undue hardship exemption	Small businesses with fewer than 50 employees: the imposition of such requirements would jeopardize the viability of the business.
Carryover	Paid sick time does NOT carry over from 1 year to the next.
Termination Of Paid Sick Time	Paid sick time under this Act will cease at employee's next scheduled work shift immediately following the termination of the need for paid sick time.
Other paid leave	Employee is not required to use other paid leave provided by the employer before the employee uses the paid sick time. State and local paid sick leave laws still apply.

8

Emergency Paid Sick Leave Act

Notice Requirements

Model Notice:

Go to:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Post and keep posted, in conspicuous places on the premises where notices to employees are customarily posted.

Enforcement

- Unpaid Sick Leave, an employer who violates section 5102 shall:
- Be considered to have failed to pay minimum wages and
- Be subject to the penalties for each violation

Unlawful Termination

- An employer who willfully violates section 5104 shall:
- Be considered to be in violation of FLSA and
- Be subject to the penalties for each violation

9

FFCRA Exemption Definitions



Emergency Responder

Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.

EXAMPLES: military, law enforcement, fire fighters, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, ETC...



Health Care Provider

Anyone employed at any doctor's office, hospital, health care center, clinic, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution.

Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.



Small Business Exemption

An employer, with fewer than 50 employees is exempt when doing so would jeopardize viability.

Viability:

- (1) Would result in the small business's expenses and financial obligations exceeding available business revenues (cease to exist); or
- (2) Key employee is requesting leave.

10

Record Keeping and Documentation

E-PSL

Documenting paid sick leave or expanded family and medical leave:

- (1) The name of your employee requesting leave;
- (2) The date(s) for which leave is requested;
- (3) The reason for leave; and
- (4) A statement from the employee that he or she is unable to work because of the reason or the reason for the denial.

Documenting leave to care for child :

- (1) The name of the child being cared for;
- (2) The name of the school, place of care, or childcare provider that has closed or become unavailable; and
- (3) A statement from the employee that no other suitable person is available to care for the child.

E-FMLA

Employees must provide following documentation:

- (1) name;
- (2) date(s) for which the employee requested leave;
- (3) reason for leave;
- (4) statement that the employee is unable to work because of the above reason;
- (5) the name of the employee's child;
- (6) name of the school, place of care, or childcare provider; and
- (7) statement that no other suitable person is available to care for the employee's child.
- (8) an employee must also provide written documentation in support of paid leave as specified in applicable IRS forms, instructions, and information.

11

ADA Considerations and Q&A

1. Can employer send employees home if they display symptoms?

1. A: Yes.

2. What can the employer request from employees who report feeling ill at work or who call in sick?

2. A: Employers may ask employees if they are experiencing symptoms, such as fever or trouble breathing. Employee confidentiality must be maintained.

3. Can employer take its employees' temperatures to determine whether they have a fever?

3. Yes.

4. Upon return from travel, must an employer wait until the employee develops symptoms to ask questions about exposure to the virus during the trip?

4. No.

5. May an employer ask employees who do not have symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable?

5. Generally, no.

6. Can employer encourage employees to telework as an infection-control strategy?

6. Yes.

7. Can employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

7. Yes.

8. Can employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

8. Yes. *Be prepared to provide accommodations, if needed, e.g., non-latex gloves.*

9. Can employer require all of its employees to take a vaccine regardless of their medical conditions or their religious beliefs?

9. No. *Employers can encourage employees to get vaccinated. Depending upon circumstances employees who refuse could be sent home.*

10. Must an employer continue to provide reasonable accommodations for employees with known disabilities, barring undue hardship?

10. Yes.

11. Can employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

11. Yes.

12. Can employer ask an employee if they have the virus?

12. If an employee is exhibiting symptoms, an employer is permitted to ask the employee if they are feeling sick. An employer may not ask the employee about any specific illness they may be suffering from.

13. Can employer send an employee home who either exhibits symptoms or admits to having symptoms?

13. Yes.

14. Can employer demand that an employee get tested for the virus?

14. No.

15. Can employer demand medical clearance prior to return to work?

15. An employer may demand of any employee who exhibited symptoms or admitted to having symptoms, that prior to returning to work they obtain a medical clearance.

Note – Due to the difficulty of getting tested it may be hard for employees to get this type of medical release and therefore it is recommended that returning to work be left to the judgment of the individual employee regardless of a medical release.

12

Layoffs – Federal WARN Act

The “unforeseeable business circumstances” exception - applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

Not reasonably foreseeable - some sudden, dramatic, and unexpected action or condition outside the employer’s control.

- The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

Example - unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

Despite invoking an exception to the WARN Act’s 60-day notice requirement, a covered employer is still required to:

1. Give as much notice as is practicable, and
2. Include a brief statement of the reason for giving less than 60-days’ notice along with the other required elements of a WARN notice.

13

- **Sick Leave** – most employers have an internal sick leave policy and employees can tap into any available leave if presenting symptoms for the virus.
- Employees must be allowed to use the emergency FMLA/PSL under the FFCRA first before any Employer provided or State mandated paid time off.
- **State/City Mandated Sick Leave** – many states and municipalities require employers to provide paid sick leave to employees (usually 3 days each year). Check local requirements.
- **Vacation/PTO** – whether or not an employer’s vacation/PTO policy states that it may be used for reasons of illness, this should be offered.
- **FMLA** – for employers with 50 or more employees within 75 miles, any employee who is in need of time off for the coronavirus should be granted FMLA (and any state equivalent)
 - Follow all required protocols vis a vis notices
- **STD** – employees may have both public and private options for disability payments during any time off due to the virus.

Coronavirus and time off

14

Coronavirus policy options

• **Work From Home** – depending upon operational needs, employers can offer employees the ability to work remotely i.e. from home.

- Make sure there are policies in place regarding home office operation:
 - Times employees must work
 - Ability for employer to check on employee status
 - Covering cost of supplies for employees
 - Ergonomic needs of employees
 - Workplace safety
 - Consistent application of these policies

• **School Closures** – Employees’ children may be out of school due to closures.

- Leave options include:
 - Allow use of vacation/PTO
 - FMLA (state equivalent)
 - Sick leave
 - Personal leave
 - Continuation of health care benefits

*Note: If the physical location where the child received instruction or care is now closed, the school or place of care is “closed” for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as “distance learning,” the child is still expected or required to complete assignments.

15



Employee Benefit Plan Issues

Coverage for COVID-19 Testing

Plan eligibility under different scenarios

- Leave
- Furlough
- Termination

Other Benefits Issues

- COBRA
- Section 125
- HIPAA

Public Exchange Coverage Issues

16



COVID-19 Diagnostic Testing Coverage with No Cost-Sharing

Employers Covered

- All employer-sponsored health plans, fully-insured and self-insured

Most Health Plans Must Cover Costs Associated with COVID-19 Diagnostic Testing with No Cost-sharing

- Includes any costs related to taking the test (e.g. the office visit, lab costs, etc.) but does not apply to medical care to treat someone sick from COVID-19
- Applies to employer sponsored health plans (both fully-insured and self-funded), government-sponsored coverage, and individual health plans
- Unless agencies issue guidance indicating otherwise, it appears these requirements do not apply to excepted benefits, short-term health plans, or healthcare sharing ministries

HSA Eligibility

- IRS has already issued guidance in Notice 2020-15 - coverage of COVID-19 related to testing or treatment prior to meeting an HDHP's plan deductible will not interfere with an individual's HSA eligibility

17

Determining Eligibility Based on Leave Requirements

Qualifying Reason for Leave	Applicable Federal Leave Requirements
Time off needed due to employee or family member illness	Employee may qualify for Emergency Paid Sick Leave and regular FMLA Leave
Time off needed due to quarantine	Employee may qualify for Expanded Emergency Sick Leave
Employee cannot work because of need to care for a child	Employee may qualify for Emergency Paid Sick Leave and Expanded FMLA Leave

Other Considerations

- Is the employee eligible for other employer provided time off or leave benefits?
- What are the existing plan eligibility rules relative to any of the above situations?
- What will the carrier (or stop-loss carrier) provide if employer wants to expand eligibility beyond current rules?

18

Employee Furlough

If Furloughed, Employees Remain Employed

- If employment is not terminated, but there is a reduction in hours/leave of absence, it's necessary to consider plan eligibility rules and any applicable leave policies in order to properly administer benefits
 - An employer may already have a leave of absence policy for specified circumstances which extend benefit eligibility for a period of time
- ALE eligibility considerations (employer mandate)
 - If an employer is using the look-back measurement method, employees may remain eligible for benefits for the duration of the current stability period, unless employment is terminated
 - If an employer is using the monthly measurement method, employees may not meet current plan eligibility requirements during a period of reduced hours

19

Termination/Lay-Off

Termination of Employment

- If employment is terminated, employees will typically no longer be eligible for benefits
- Employer wishing to expand eligibility related to COVID-19
 - Employers have flexibility to amend current leave and eligibility issues

Employer wishing to expand eligibility related to COVID-19

Employers have flexibility to amend current leave and eligibility issues

- **IMPORTANT NOTE** – Carriers and stop-loss carriers are not automatically obligated to honor expanded eligibility rules. Employers must coordinate with carriers to expand eligibility

20



COBRA

(applicable to leave, furlough and terminations)

Loss of eligibility due to leave, furlough and terminations is a COBRA event

Employer could choose to subsidize COBRA for a period of time

- If employee elects COBRA, they may be ineligible to enroll in individual coverage through the exchange until next open enrollment period
- May vary by state and rules could be changed



HIPAA Privacy

Learning about an employee or family medical condition directly from the employee or family member is not subject to HIPAA rules

- HIPAA PHI protections for employer plans is for health plan related individual identifiable information – not all employee medical information
- Other employment law and general employee privacy rules may apply

Other Issues

21

§125 Issues

§125 (Cafeteria) Plan Election Changes

- Background
 - Pre-tax elections made through an employer sponsored §125 (Cafeteria) plan are irrevocable unless employee experiences one of the election change events specified in the §125 regulations
- Permitted election changes related to COVID-19 situation
 - A termination of benefit eligibility due to an employment status change (leave or termination) clearly permits a mid-year election change for any pre-tax elections made through an employer's cafeteria plan
 - A change in the cost of coverage initiated by the employer will also generally permit a corresponding change in pre-tax elections
- Other Changes
 - Existing §125 rules do not permit an election change due to a reduction in pay with no loss of benefit eligibility or change in the cost of coverage

22

Public Exchange Coverage & Subsidy Eligibility

Employer Communication of Exchange Coverage Options

- Employers may want to be more involved in communicating individual health insurance options to employees losing plan eligibility
- Employees who lose eligibility for group medical coverage, or for whom coverage becomes unaffordable due to a decrease in employer contributions, will likely qualify for a special enrollment through a public Exchange
- Some states have opened up a special open enrollment period due to the COVID-19 crisis allowing enrollments even when individual do not meet special enrollment requirements
- Subsidy eligibility toward coverage purchased through a public Exchange:
 - Not enrolled in any minimum essential coverage;
 - Not eligible for minimum value, affordable coverage offered through an employer; and
 - Household income of 100-400% of the federal poverty level.

23

COVID-19 Related Employment Law and Benefits Issues

Q&A

24