Small Business FAQs related to COVID-19 – Employment

(Last Updated April 10, 2020)

1. What are the legal consequences of laying off employees due to COVID-19?

Employers may terminate an employee if they have a legitimate business reason. Such legitimate business reasons for termination of employees include if the position is no longer needed or if the reduction is necessary for the employer’s business to remain financially viable. Employers should take care to make such determinations free from discrimination and/or retaliation where an employee has exercised his or her legal rights.

Under the federal WARN Act, an employer with more than 100 full-time workers is required to provide 60 days’ advance notice of any lay-offs of 50 or more workers.¹ Many states, including Illinois, have similar notice requirements for mass lay-offs. In Illinois, such notice requirement applies to employers with more than 75 full-time employees and may apply to lay-offs of 25 or more workers.² Note that both federal and state WARN have additional provisions that determine whether or not notice is required. If your organization is considering a lay-off that meets these criteria, it is important to consult further to determine whether or not advance notice is required in your situation.

Note that a lay-off, which here is used to mean an actual termination of employment, could be a temporary pause in the position that is expected to last 6 months or more, or a reduction in hours of 50% or more in each month of a 6 month period, or a permanent termination of employment. The term “furlough” is used to describe a temporary pause in the position that is not expected to last 6 months or more, while the individual remains an employee of the organization. The legal consequences of furloughs are discussed below.

Each employer will need to carefully analyze the consequences of a layoff under its employment arrangements and benefit plans. For example, a layoff can trigger severance obligations under an employment agreement or severance plan. Laid off employees will likely have rights to elect continued health coverage under COBRA or a similar state law, and the employer should ensure that qualifying event and election notices are sent on a timely basis. Layoffs may even trigger a partial plan termination and vesting under the employer’s 401(k) plan.

2. What unemployment benefits are available for business owners (not just W-2 employees)?³

Illinois unemployment insurance is not usually available to self-employed individuals. However, unemployment insurance has been temporarily expanded to cover independent contractors and self-employed individuals during the COVID-19 crisis if they cannot continue their work remotely. As of April 7, 2020, Illinois had not yet finalized its unemployment program for self-employed individuals. The Illinois Department of Employment Security (“IDES”) will provide more information on how to apply once the program has been finalized.

3. Can furloughed employees get unemployment benefits? 

In Illinois, an individual temporarily laid off due to the COVID-19 crisis could qualify for benefits as long as he or she was able and available for and actively seeking work. Under emergency rules IDES recently adopted, the individual would not have to register with the employment service. He or she would be considered to be actively seeking work as long as the individual was prepared to return to his or her job as soon the employer reopened.

4. What paid sick leave obligations do employers owe to employees impacted by COVID-19? What is the Families First Coronavirus Response Act and what does it require?

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (“FFCRA”). The FFCRA applies to employers with fewer than 500 employees and requires employers to: (a) provide employees with two weeks of paid emergency sick leave for those unable to work as a result of certain COVID-19 reasons; and (b) provide employees with up to 12 weeks of emergency leave in the event they have a “qualifying need” because of COVID-19; the first 10 work days are unpaid, but the following leave period of up to 10 weeks is paid leave. Both the paid sick leave and the paid family leave provisions are subject to daily and aggregate caps. Employers who are required to provide these paid leaves pursuant to the FFCRA are entitled to refundable tax credits against payroll taxes for the leave payments.

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

- is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- has been advised by a health care provider to self-quarantine related to COVID-19;
- is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
- is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

Under the FFCRA, small businesses with fewer than 50 employees may qualify for an exemption from providing paid sick leave and/or expanded family and medical leave due to the closure of a child’s school or place of care due to a COVID-19 public health emergency if doing so would jeopardize the viability of the business. A small business may claim this exemption if an authorized officer of the business has determined that:

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• The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
• The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
• There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Although an employer does not have to submit any materials to the Department of Labor to authorize the exemption, an employer should nevertheless maintain a record substantiating the reason for the exemption.7

5. **Is employer reimbursement available for COVID-19 paid sick leave or extra family leave under the FFCRA?**8

Employers who are required to provide COVID-19 paid leaves pursuant to the FFCRA are entitled to refundable tax credits against payroll taxes for the leave payments up to the maximum amount provided under the FFCRA.9 The refundable credit generally equals 50% of each employee’s “qualified wages” paid on or after March 13, 2020 through December 31, 2020. The maximum amount of qualified wages taken into account for any employee for all quarters in 2020 is $10,000; as a result, the maximum credit per employee is $5,000.10 The tax credit is called “refundable,” because the government will provide the employer with a refund on a dollar for dollar basis if the amounts the employer pays in required FFCRA leave up to the maximum amounts provided in the FFCRA exceeds the employer’s payroll tax obligation. Consult your tax advisor for details on required forms and timing of applications and refunds.

6. **Is employer reimbursement available in any form for the employer who keeps employees on payroll rather than laying off or furloughing employees?**

The CARES Act created the Paycheck Protection Program (“PPP”), authorizing eligible employers to apply for loans up to $10 million to cover up to eight weeks of payroll costs (including employee wages, commissions and benefits) and most rent, mortgage interest and utility costs. An eligible employer may receive a loan equal to up to 2.5 times the employer’s payroll costs, capped at $100,000 per employee.

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The loan is forgivable, provided the employer: (a) continues employing the employees whose wages it includes in determining the PPP loan amount through June 30, 2020; (b) does not reduce such employees’ salaries by more than 25 percent; and (c) uses the loan proceeds for eligible expenses. In the event the employer uses the loan to pay non-payroll expenses, no more than 25 percent of the loan will be forgiven. While the initial round of funding for the PPP has been exhausted, negotiations are underway in Congress which may provide additional funding in the future.

All business with 500 or fewer employees, including nonprofits, sole proprietorships, self-employed individuals and independent contractors, may apply for an Small Business Administration (“SBA”) loan, as long as they qualify as a “small” business under the SBA’s industry-specific thresholds. These rules differ for certain types of employers. For instance, a hospitality or food services employer may qualify for a loan if it employs fewer than 500 workers per physical location.

7. **Furloughs: What is a furlough and how is it implemented?**

Typically, furlough is used to mean a temporary and often partial period of leave, where the furloughed employees retain the right to work once the furlough is complete. Furloughs may be voluntary, involuntary, or partially voluntary (e.g. where the employer orders each employee to take a certain amount of time off, such as two weeks in the next three months, but allows the employees to select the timing). Furloughs may be full-time or part-time. Furloughed employees do not work while on furlough and do not get paid; however, furloughed employees usually retain their status as employees during the furlough – they are typically treated like employees on an unpaid personal leave. Furloughed employees are usually eligible for benefits to some degree while on furlough, though this needs to be analyzed on a plan by plan basis.

8. **Wages: What are the legal consequences of reducing employee wages and hours?**

Employers are required under Illinois law to give employees advance written notice of a salary or wage reduction or a change in hours that affects wages or salaries or significantly changes the employee’s obligations. So long as employees are not covered by a written employment agreement or a collective bargaining agreement, an employer is free to reduce employee wages and hours for time not already worked, so long as the employer complies with the above notice requirement and with wage and hour requirements, and so long as the employer does not violate other laws, such as discrimination prohibitions.

Wage and hour law prohibits any reduction that would reduce employee wages below the federal, state or local minimum hourly wage. For an employee who is treated as an exempt salaried employee, if the reduction in wages reduces the employee’s salary to a level below the minimum required for an exempt salaried employee, or the reduction in hours changes the employee’s duties in such a way as to make the employee’s duties no longer sufficient to be an exempt employee, the employee must be treated as a non-exempt employee. This means that the employer must keep records of the time worked by the non-exempt employee, must provide minimum breaks, and must pay overtime at the rate of 1.5x the hourly wage for work that exceeds 40 hours in a given workweek.

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9. What actions should an employer take if one of its employees is diagnosed with COVID-19 or have symptoms? 12

The current guidance from the Centers for Disease Control and Prevention (“CDC”) states that employees who become ill with symptoms of influenza-like illness at work during a pandemic or symptoms consistent with COVID-19 should leave the workplace and remain home until they have met the CDC’s criteria for discontinuing isolation. 13 Currently, symptoms recognized to be consistent with COVID-19 include fever, cough, and respiratory symptoms. 14 Although not yet recognized by the CDC, there is some evidence that loss of sense of taste or smell, or gastrointestinal issues are also symptoms associated with COVID-19. If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace while maintaining the employee’s confidentiality (which is required by the Americans with Disabilities Act). The fellow employees should follow CDC guidance based on their level of exposure to the diagnosed employee (which may provide for self-monitoring or isolation). 15

10. What COVID-19 protections must an employer provide to employees in the workplace? 16

The “General Duty” clause of the Occupational Safety and Health Act (“OSHA”) generally requires employers to provide employees with a safe and healthy workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm, and to comply with occupational safety and health standards and rules. In a pandemic, an employer may be cited for a general duty clause violation by OSHA if the virus was present in the workplace and the employer’s efforts to control exposure were insufficient, or an employee was required to perform tasks that exposed them to the hazard of the virus.

An employer’s duty to implement certain protective measure, such as personal protective equipment, may depend on whether its workers have a specific exposure hazard. Employers should assess the hazards to which their workers may be exposed; evaluate the risk of exposure; implement appropriate control measures; and ensure workers follow the measures to prevent exposure. 17

Reinforce Good Hygiene Practices and Take Related Safety Precautions. All employers should remind employees to take basic preventive measures and safety precautions that may help to reduce the risk of contracting the coronavirus or spreading it in the workplace, including:

- frequently washing their hands thoroughly with soap and water for at least 20 seconds or an alcohol-based hand sanitizer that contains at least 60 percent alcohol;
- avoiding touching their eyes, nose and mouth;
- covering sneezes or coughs with tissues, if possible, or else with a sleeve or shoulder;

• avoiding close contact with people who are sick;
• staying home when sick; and
• cleaning and disinfecting frequently touched surfaces and objects.

To facilitate these practices, employers should ensure that they maintain adequate supplies in the workplace, including tissues, soap, alcohol-based hand sanitizer that contains at least 60 percent alcohol, and hand wipes. The CDC has also recommended that employers provide no-touch disposal receptacles for use by employees, place no-touch sanitizer dispensers in multiple locations or in conference rooms to encourage good hand hygiene, and provide employees with disposable wipes so that they can wipe down commonly used surfaces before each use.

Encouraging good hygiene practices extends beyond employees themselves. Employers that rely on staffing services for contingent or temporary employees should ensure that those services are taking appropriate precautions for workers sent to the employers’ premises.

Employers should also review their cleaning operations to ensure that frequently touched surfaces, such as door handles, elevator buttons, phones, keyboards, workstations and countertops are routinely disinfected. Depending on the work environment, employers may need to coordinate this effort with their landlords or tenants. Employers should review their leases to understand their duties and obligations in this regard. It also is important to ensure that cleaning personnel are properly trained and equipped to disinfect frequently touched areas and that they have appropriate personal protective equipment to avoid contracting the coronavirus while cleaning. If the employer learns that an infected employee or other person has been in the workplace, the employer should also consider contracting with specialists for additional deep-cleaning and sanitizing services to prevent the spread of the virus.

Actively Encourage Sick Employees to Stay Home and Immediately Send Sick Employees Home.
Consistent with CDC guidance, employers should actively encourage employees to stay home if they are sick or have been exposed to someone who is sick, and to remain home until they are free of a fever, signs of a fever or other symptoms for at least 72 hours. This is especially important for employees who have symptoms of acute respiratory illness. In fact, CDC guidance specifically recommends that employers send home immediately any employees who appear to have symptoms of an acute respiratory illness.

Screen Visitors to the Workplace. Employers have a duty to protect visitors to the workplace from hazards that are not open and obvious. If an employer is aware of known cases of coronavirus infection among its employees, the employer may have an obligation to notify visitors. If the employer is also a landlord, the employer may have additional obligations to notify tenants of known infection events. By the same token, visitors to the workplace, including vendors and delivery persons, should be screened for exposure to or symptoms of coronavirus and should be excluded from the workplace if they exhibit symptoms consistent with the coronavirus.

11. What actions can an employer take if an employee refuses to come to work due COVID-19 concerns?  
An employee can only lawfully refuse to attend work if a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before OSHA can investigate it. But an

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employee may not be disciplined or discharged for refusing to report to work if the employee genuinely believes that there is an imminent danger of being infected with COVID-19 by coming to work, and a reasonable person would conclude that there is a real danger of being infected. However, other than using accrued vacation or paid time off, the employee would not be entitled to be paid for the time missed from work. Employees generally are not entitled to leave under the ADA, Family Medical Leave Act (“FMLA”) or sick leave laws if they wish to stay at home for the purpose of avoiding the risk of getting sick, if there is no indication of any imminent danger of being exposed to the virus. But an employee-by-employee analysis is the best approach, as each employee may have unique circumstances or vulnerabilities that should be considered. If an employee submits a recommendation from their doctor that the employee not attend work, this should be carefully reviewed, including under the ADA, FMLA and sick leave laws and policies.


An ADA-covered employer (generally those employers with 15 or more employees21) may not ask employees who do not have influenza symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications. Note that the Illinois Human Rights Act (“IHRA”) includes a disability discrimination prohibition that applies to employers with one or more employees and has provisions that are quite similar to the ADA. It is reasonable for IHRA-covered employers to look to the ADA interpretation with regard to COVID-19 matters until further specific guidance is issued by the Illinois Department of Human Rights.

ADA-covered employers may ask such employees if they are experiencing recognized symptoms of COVID-19, such as fever or chills and a cough or sore throat. As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting. For information about symptoms associated with COVID-19, employers should consult the CDC, other public health authorities, and reputable medical sources.22 Additionally, 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. Employers must maintain all information about employee illness or the fact that an employee had a fever or other symptoms as a confidential medical record in compliance with the ADA.

13. Staying Open: What obligations do employers have if they stay open? 23

The main areas of an employer’s legal liability associated with coronavirus in the workplace include:

- Ensuring so far as reasonably practicable the workplace health and safety of employees (i.e., obligations under OSHA);

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20 The EEOC’s employer’s guide to pandemic preparedness is available at https://www.eeoc.gov/facts/pandemic_flu.html (visited April 17, 2020).
21 The EEOC’s guidance regarding the ADA and COVID-19 is available at https://www.eeoc.gov/facts/ada17.html
• Complying with applicable shelter-in-place orders and other directives restricting movement and business activities;
• Complying with wage-and-hour obligations under the Fair Labor Standards Act and applicable state laws (e.g., continuing to pay wages);
• Complying, where applicable, with the ADA and related state laws;
• Complying with the federal FMLA and analogous state laws;
• Complying with the FFCRA, as well as state and local sick leave laws; and
• Ensuring that employees are covered by Workers' Compensation insurance and timely reporting illnesses/death under OSHA and analogous state laws. Employers may also wish to review existing insurance policies and consider any applicable business interruption insurance, medical insurance and evacuation coverage.

An employer should also ensure that they are legally permitted to remain open based on the applicable state laws or guidelines. See Question 14.

14. Shelter in Place: What does “Shelter in Place” mean for a business?

Some states have imposed strict limits on which businesses can remain open and/or have imposed requirements that “nonessential” workers stay home. What businesses qualify as essential is constantly evolving. Please view this link for more information: https://covid19.mayerbrown.com/legislation-who-or-what-is-an-essential-business-or-service-that-may-be-exempt-from-shelter-in-place-or-stay-at-home-orders/

15. Immigration: How can businesses plan proactively to avoid lapses in status and compliance issues in visa and immigration processes for foreign national employees?

The novel coronavirus, COVID-19, has transformed worksite operations throughout the globe, including for the visa holder population employers need to manage. Three primary issues are important for employers to address to maintain compliance in this area.

Travel Bans and Restrictions. Visa holders who had planned to apply for a renewal of their visas in the March to June 2020 period may be stranded longer than expected (see Mayer Brown’s Global Travel Navigator). Staying informed on forgiveness “grace” periods extending visa deadlines, or capitalizing on in-country filings (either normal or extraordinary), is critical to ensure work permit and tax compliance, as well as to temper employee anxiety.

Remote Work. A shift in worksite, even to a nearby residence, may require new notifications, registrations, or amendment of current visas. In the United States, for example, posting of notice of the change in worksite is a minimum requirement for employers to undertake for H-1B visa holders (if the worksite is further than normal commuting distance, full amendment filings may be required). In addition, because many countries, including the United States through the I-9 process, require employers to validate employment eligibility when new hires join or to revalidate time-limited work authorization of existing employees, employers need to conduct these processes in a remote work environment. How to complete the RTW process has changed, and virtual video review, use of agents, or, in some limited cases, online government portals (e.g., UK, Australia), may facilitate temporary solutions.

Changes to Compensation, Furloughs, or Layoffs. Visa holders may be subject to particular ongoing salary payments that prevent benching (unless pay continues) or set a floor for salary reductions. Even when the change is permissible, amendments to visa filings may be required. Any employer considering
austerity measures will need to ensure that visa regulations, some of which include strict liability penalties, are reviewed in advance of announced or implemented changes.

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