



Coronavirus Q&A for Employers

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John S. Gannon has defended employers against claims of discrimination, retaliation, harassment, and wrongful termination, as well as actions arising under the FMLA, and wage and hour law. John also has experience with lawsuits seeking to enforce restrictive covenants and protect trade secrets. John frequently assists employers in litigation avoidance strategies. He regularly counsels employers on compliance with state and federal laws, including the Americans with Disabilities Act, Fair Labor Standards Act, and Occupational Health and Safety Act. John is a regular contributor to business publications and to the Massachusetts Employment Law Letter.



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Erica E. Flores has successfully defended employers in single-plaintiff and class action litigation involving claims of discrimination, harassment and retaliation, wage and hour violations, contract disputes, and other employment issues. Erica also regularly advises clients with respect to compliance challenges, personnel policies and day-to-day employment issues, and provides custom training programs and materials to clients on a variety of important topics, including sexual harassment, paid and unpaid leave, ADA accommodations, and drugs and alcohol in the workplace. Erica received her J.D. from the University of Pennsylvania Law School.



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Andrew J. Adams focuses his practice in management-side labor and employment law, including employment litigation, handbook reviews, and labor disputes. Andrew also regularly advises clients with respect to compliance challenges, personnel policies, and day-to-day employment issues, and provides custom training programs and materials to clients on a variety of important topics, including sexual harassment, paid and unpaid leave, ADA accommodations, and drugs and alcohol in the workplace. He is a frequent contributor to business publications and the Massachusetts Employment Law Letter.



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Agenda

- Practical Considerations
- Closures/Layoffs
- EEOC Guidance
- New Federal Legislation
- Changes to Unemployment
- Q&A

Practical Considerations

- Frequent (remote) meetings with leadership
 - Workforce needs and expectations
 - Further limitations on travel to work?
 - Policy updates/changes
 - Changes to PTO – allow for sick/vacation for temp shutdown
- Notice to workforce
 - Will differ based on business needs/industry
 - Reinforce CDC/department of health safety guidance
- Changes to work environment
 - Remote vs. Non-remote

Practical Considerations

- Remote Work Considerations
 - Be creative and flexible
 - Work with IT on plan/solutions
 - Equipment; communication software; connection issues/concerns
 - Wage/hour issues
 - Hourly: Tracking time; paying for all hours worked; no unauthorized overtime
 - Cutting pay? Ok even as to salary; don't base salary on hrs worked each week
 - Telecommuting policy/notice
 - Should address these issues; temporary plan

Closures/Layoffs

- *“Layoffs Are Just Starting, and the Forecasts Are Bleak”* – NY Times, March 17, 2020
- *“Call It a Layoff, a Furlough or a Cut Shift: Americans are Losing Work”* – The Wall Street Journal, March 18, 2020
- WARN Act (basic rules)
 - Employers of 100 or more with “mass layoffs” or “plant closings” require 60 days notice to worker and local officials
 - Mass layoff: RIF results in 50 employees with employment loss and affecting 33% of workforce
 - Plant closing: Perm or temp closing of a site or operating unit if shutdown results in loss of employment of 50 or more employees

WARN Act

- Notice required for employment loss
 - Temporary layoff/furlough less than 6 months not an “employment loss”
- Penalties
 - Pay impacted employees for duration of notice period (up to 60 days); civil penalties
- Exception
 - “Business circumstances that were not reasonably foreseeable as of the time notice would have been required”
 - Still, as much notice as practicable
 - Practical to give notice now?

EEOC Guidance

- Updated March 19, “likely to change as the COVID-19 pandemic evolves”
- Makes a few things clear:
 - Ok to ask employees calling in sick whether experiencing symptoms of COVID-19
 - including “fever, chills, cough, shortness of breath, or sore throat”
 - Ok to measure employees’ body temperature
 - Ok to request RTW notes certifying fitness for duty
 - Ok to withdraw job offer if application cannot start immediately due to COVID-19 or symptoms of it
 - https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_a_da_rehabilitaion_act_coronavirus.cfm

Families First Coronavirus Response Act (H.R.6201)

H.R. 6201

- Two major (temporary) changes to employee leave
 - Emergency Family and Medical Leave Expansion Act
 - Emergency Paid Sick Leave Act
- Tax Credits for Paid Sick and Paid Family And Medical Leave
- Other provisions
 - Health Provisions
 - Unemployment Insurance
 - Nutrition Waivers

Emergency Family and Medical Leave Expansion Act

Emergency Family and Medical Leave Expansion Act

- Adds an additional circumstance under which an employee can take leave under the FMLA
 - During the period from April 2, 2020 until December 31, 2020 eligible employees are entitled to twelve workweeks in a twelve month period because of a qualifying need related to a public health emergency
- Qualifying Need Related to a Public Health Emergency
 - Unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

Emergency Family and Medical Leave Expansion Act

- Employee Eligibility
 - An employee who has been employed for at least 30 calendar days (in lieu of 1,250 hours of service and twelve months)
- Employer Threshold
 - Fewer than 500 employees (not 50 or more)

Emergency Family and Medical Leave Expansion Act

- How does the leave work
 - The first ten days may be unpaid
 - Employee can use their other available vacation, personal, or sick leave here
 - After ten days the leave is paid for the remaining twelve weeks
 - Leave is paid at an amount not less than two-thirds of the employee's regular rate of pay
 - However, pay is capped at \$200 per day and \$10,000 in the aggregate
 - Notice – if foreseeable such notice as is practicable

Emergency Family and Medical Leave Expansion Act

- How does the leave work (cont.)
 - Job Restoration
 - Exemption for employers with less than 25 employees if certain requirements are met
 - However, for the one year period following the leave the employer must make reasonable efforts to contact the employee if an equivalent position becomes available
 - Employer Liability Exemption
 - Special Rule for Healthcare Providers and Emergency Responders

Emergency Family and Medical Leave Expansion Act

- Still waiting on a few things:
 - Regulations from the Secretary of Labor
 - (A) to exclude certain health care providers and emergency responders from the definition of eligible employee; and
 - (B) to exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern.
 - What HCP and ER employer exclusions entail

Emergency Paid Sick Leave Act

Emergency Paid Sick Leave Act

- Employees may take leave if:
 - At full compensation subject to cap:
 - (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
 - (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID - 19.
 - (3) The employee is experiencing symptoms of COVID- 19 and seeking a medical diagnosis.
 - At two-thirds compensation subject to cap:
 - (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
 - (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter H. R. 6201—19 has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
 - (6) The 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.

Emergency Paid Sick Leave Act

- Duration of Sick Time
 - Full-time – 80 hours
 - Part-time – a number of hours equal to the number of hours that such employee works, on average, over a 2-week period
- Sick time will not carry over
- Cannot require an employee to search for or find a replacement employee to cover hours
- No eligibility period (no 30 day requirement)

Emergency Paid Sick Leave Act

- Covered Employers
 - Private entity or individual employing fewer than 500 employees
- Compensation Caps
 - \$511 per day and \$5,110 in the aggregate for uses (1), (2), or (3) in the Act; and
 - \$200 per day and \$2,000 in the aggregate for uses (4), (5), and (6)

Emergency Paid Sick Leave Act

- Employer cannot require an employee to use other paid leave provided by the employer before using this sick leave
- Notice Posting Requirement
 - Model notice to be developed by March 25, 2020 by the Secretary of Labor to be posted in all workplaces
- Nothing in this Act shall be construed—
 - To in any way diminish the rights or benefits that an employee is entitled to under any—
 - other Federal, State, or local law;
 - collective bargaining agreement; or
 - existing employer policy

Emergency Paid Sick Leave Act

- What we are waiting on from Secretary of Labor
 - Guidelines to assist employers in calculating the compensation amounts for employee use of paid sick time under the law
 - Exclusions for certain health care providers and emergency responders from the definition of employee including allowing the employer of such health care providers and emergency responders to opt out;
 - Exemptions for small businesses with fewer than 50 employees from some uses when the imposition of such requirements would jeopardize the viability of the business as a going concern.

Changes to Unemployment

Emergency Legislation

- Governor Baker signed emergency legislation that waives the one-week waiting period for unemployment benefits.
- Applies to anybody claiming unemployment benefits due to COVID-19 and/or the effects of the declaration of emergency.
- Applies to claims filed from March 10, 2020, through 90 days after the declaration of emergency has been lifted.

Other Emergency Action

- EOLWD and DUA have broadly expanded eligibility for unemployment benefits.
- Now available to workers who:
 - Are under mandatory quarantine;
 - Stop work due to reasonable risk of exposure or infection, or to care for sick or quarantined family member;
 - Are out of work due to a coronavirus-related business shutdown that is expected to be temporary (no longer than 8 weeks).

Other Emergency Action

- Workers who stop work due to quarantine, exposure, or to care for a family member need not provide medical documentation.
- Workers whose workplaces have shut down must remain available to employers but need not actively seek alternative work.
- Requirement to register with career center and take related seminar are waived.

Other Emergency Action

- Employers who are impacted by COVID-19 may request extension to file quarterly reports and pay contributions.
- Grace periods will be granted for up to 60 days.
- Unclear what employers will have to show to warrant the DUA granting the extension.

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