

# Updated Guidance for Employers on COVID-19

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Employers across the United States continue to respond to and implement guidance from public health authorities to mitigate the spread of COVID-19. Both the rapid spread of the virus and the prolonged incubation period present unique challenges for the workplace. Here we update our Guidance for Employers on COVID-19 and provide additional answers to the more frequently asked employers' questions and present guidance on several hypothetical scenarios to assist employers in managing COVID-19 concerns in the workplace.

## **Has there been any further guidance on the paid FMLA and paid sick leave benefits provided under the Families First Act?**

On Friday, March 20, the IRS issued a Newswire, IR 2020-57, discussing the benefits and explaining how they will be subsidized by the federal government through a dollar-for-dollar refundable payroll tax credit. The IRS explains that the aim of the payroll tax credit is to make the paid FMLA and sick leave benefits cost neutral and cash-flow neutral for employers. Presumably, this is intended to assuage concerns expressed by many employers that they would not have sufficient cash-flow to pay the benefits.

A link to the IR 2020-57 Newswire is [here](#).

## **How will Emergency FMLA Act and Paid Sick Leave Act be enforced?**

The Wage and Hour Division of the US Department of Labor will administer and enforce the new law's paid leave requirements. The paid sick time and unlawful termination sections of the Families First Act are subject to the penalties and enforcement provisions of the Fair Labor Standards Act. The paid FMLA obligations will be enforced under the existing Family and Medical Leave Act. The DOL has stated that it "will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, 'good faith' exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future."

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**Can an employer just lay off employees before the Emergency FMLA Act and Paid Sick Leave Act become effective?**

We think so. The FMLA and Paid Sick Leave benefits in the Families First Coronavirus Response Act do not come into effect until April 2, 2020. For certain employers who already are feeling the impact of the pandemic on their bottom lines, this delay may encourage those employers to turn to layoffs before the close of March.

**If an employer is forced to turn to a layoff, must the employer provide advanced notice?**

The federal WARN Act, and min-WARN Act statutes in certain states, place notice requirements on employers. The federal WARN Act applies to employers with at least one hundred employees in certain circumstances when fifty or more employees are terminated. Under the WARN Act, an employer must provide at least 60 days' notice to its employees before a facility closure or a mass layoff that impacts more than 50 employees. However, there are exceptions to this obligation that may be applicable in the current health crisis—(a) an employer can provide less than 60 days' notice if the facility closure or mass layoff is the result of unforeseeable business circumstances that did not permit the employer to provide notice, or (b) if the layoff is for less than six months. In those cases, the WARN Act notice provisions would not be triggered. Of course, in any circumstance, the employer should provide the affected employees and the appropriate governmental bodies with the as much notice as possible.

**Looking at the Emergency Family and Medical Leave Expansion Act, can both parents take this benefit or is one parent required to work while the other is home with children?**

We have heard this question more than once, but the answer isn't clear. It appears both parents may use this benefit, *unless* they both work for the same employer. First, the EFMLA text does not limit the benefit only to primary caregivers. Second, the existing FMLA regulations limit the combined total amount of leave to 12 weeks for spouses who work for the same employer for certain qualifying events, such as birth of a child, adoption or caring for a parent. However, this limitation is not applicable to all qualifying events, and it is not certain that it will be applied in the circumstances provided for in the EFMLA.

**Has there been any further guidance on whether an employer can require an employee to submit to a temperature check before working?**

Yes. Earlier this week, the EEOC updated its guidance on this issue: "Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever."

**In order to reduce costs, can an employer require employees to work a reduced schedule?**

For hourly, non-exempt employees, the answer is an unqualified "yes." Such employees need only be paid for the hours they actually work (and time and a half for overtime hours), so their work hours can be adjusted as needed.

It is more complicated for an exempt employee paid on a salary-basis, meaning the employee must be paid his or her regular salary for any workweek in which the employee performs any work. An employee's exempt status can be lost if the employer adjusts an employee's work schedule and commensurate salary up and down (e.g., between 4- and 5-day weeks) to meet business needs. However, an employer can reduce a salaried employee's weekly schedule from 5 days to 4 days on a prospective basis and reduce the salary accordingly for a fixed period of time.

Further, several courts and the US Department of Labor have ruled that an employer can reduce an employee's schedule temporarily for some fixed period of time to meet a bona fide business need, so long as it does not appear to be an attempt to circumvent the salary basis test. Employers choosing to pursue this route should make very clear to the affected employee(s), in writing: (i) when the change will begin (and it cannot begin retroactively or in the current pay period), (ii) when it is expected to end, and (iii) that the employee is not expected or authorized to perform any work on the off day.

### **Can an employer cut employee salaries to reduce costs?**

Yes, but only prospectively and the employer should be careful in doing so. All employees must always earn at least minimum wage, which in Massachusetts is currently \$12.75 an hour. This is the case whether the employee is receiving an hourly wage or a salary for all hours worked. The employer must provide the employee with written and advance notice that his/her salary is changing temporarily. For any time already worked, the employee must receive his/her current salary. And, of course, if there is a contract in place with any employee that promises a certain salary, an employer cannot cut a salary without breaching that contract.

### **How far can and should an employer go in terms of notifying its workforce and the public if an employee has tested positive for COVID-19?**

In its updated guidance, the EEOC has reinforced the importance of confidentiality: "Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA." In addition to the ADA, there are other federal and state legal protections afforded to employee privacy and confidentiality of medical information. We suggest that an employer notify co-workers or others that they may have been exposed at a particular place and time to an individual who has tested positive, or has been exposed and subject to quarantine, without specifically identifying the individual.

**This advisory was prepared by Chris Lindstrom, Laura Martin, Liam O'Connell, and David Rubin in Nutter's Labor, Employment and Benefits practice group and Melissa Sampson McMorrow in the Tax Department. For more information, please contact these attorneys or your Nutter attorney at 617.439.2000.**

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