



VANDERPOOL, FROSTICK & NISHANIAN, P.C.
Solutions from lawyers you trust®

Resources to Help Employers Respond to Workplace Issues From COVID-19 (Corona Virus)

March 20, 2020

By Kristina Keech Spitler, Esq.

Given the fast-paced and changing nature of the impacts of the COVID-19 (Corona Virus) pandemic, businesses are working to respond in the best manner possible for the safety of their employees and customers while remaining in compliance with various employment laws and evaluating their ability to keep their businesses viable. On the evening of March 18, 2020, President Trump signed Families First Coronavirus Response Act (“FFCRA”) which amongst other provisions, includes the Emergency Family and Medical Leave Expansion Act, the Emergency Paid Sick Leave Act, and the Tax Credits For Paid Sick and Paid Family and Medical Leave that generally apply to all employers with fewer than 500 employees.

Businesses are evaluating how to respond to this pandemic which includes dealing with the following challenges (to name just a few of the many issues and concerns):

1. Determine how to keep their employees safe and comply with various federal, state and local mandates, laws, and guidance.
2. Determine how to comply with the Occupational Safety and Health Act.
3. Evaluate if they can continue business operations by allowing employees to work remotely, and if so, which employees can work remotely. Ensuring that employees have the technology in place to effectively work remotely, and determine what policies and practices need to be put in place or amended.
4. Determine what leave they should or must offer to their employees and whether they need to amend their existing leave and vacation policies and practices. Determine how to continue to comply with existing Family Medical Leave Act (FMLA) requirements (generally applicable to employers with 50 or more employees) and now comply with the new Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act requirements pursuant to the FFCRA.
5. Determine how to comply with laws that prohibit discrimination based upon disability.
6. Determine how to correctly pay employees (exempt and nonexempt) under the Fair Labor Standards Act given all the variables in play.
7. Evaluate whether they should just close down and conserve resources with the hope of being able to reopen in the future.
8. Evaluate what unemployment benefits can employees who have been terminated, laid off, or furloughed may be eligible for through the Virginia Employment Commission.

To help businesses with these challenges, I have provided some helpful information, a summary of some applicable employment laws, and identified where you can find additional useful resources. Please note that this summary is designed to provide general information, is not intended to constitute legal advice, and should not be utilized as a substitute for professional services in specific situations. If legal advice or other expert assistance is required, please consult with an attorney.

Employee and Customer Safety

Employers should frequently review the website for the Center for Disease Control (CDC) regarding guidance and regular updates including its Interim Guidance for Businesses and Employers.

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Employers should also frequently visit the website for the Virginia Department of Health.

<http://www.vdh.virginia.gov/coronavirus/>

Occupational Safety and Health Act (“OSHA”)

“The Occupational Safety and Health Act requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act’s General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.” This statement is contained in OSHA’s Guidance on Preparing Workplaces for COVID-19. Employers should review this resource at the website referenced below.

<https://www.osha.gov/Publications/OSHA3990.pdf>

Remote Working/Telecommuting

While working remotely (also called telecommuting or teleworking) is not new and many employers (both small and large) have been allowing employees to do so and/or providing it as a benefit to employees for flexibility and work/life benefit reasons, the COVID-19 pandemic is forcing all employers to consider this as an option for business continuity reasons. If you already allow remote working, you should review and if necessary, amend existing policies – particularly if you previously only allowed remote working for limited periods such as one day per week. If you are new to teleworking or who have previously been reluctant to allow it, there are many resources available on the internet that can help you manage teleworking employees. Below is a site for an article from Harvard Business Review on how to manage newly remote workers.

<https://hbr.org/2020/03/a-guide-to-managing-your-newly-remote-workers>

Employee Leave

Employee leave is not a simple issue and involves various laws (and now including the newly enacted Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act as part of the Families First Coronavirus Response Act). Employers should consult with legal counsel to ensure compliance with leave laws.

Generally, employers will need to comply with their current policies or amend them regarding any paid or unpaid leave to provide employees. Employers should also look at their vacation policies. Employers will need to decide if they are going to allow employees to take advance leave/vacation and/or go into the negative if employees need to take leave related to the Corona virus or other illnesses. Employers may need to amend various policies to address these issues. In addition, please see the FFCRA summary below as the Act requires paid sick leave related to the Corona virus under certain conditions for all employers with fewer than 500 employees.

Employers will also need to comply with existing FMLA laws and regulations. Generally, the FMLA applies to employers with 50 or more employees within a 75-mile radius and would not apply to smaller employers. However, please see the FFCRA summary below as the Act amends the FMLA to deal with the Corona virus and applies to all employers with fewer than 500 employees.

For convenience, I have included the website below for Department of Labor's "COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers" which was published prior to the enactment of FFCRA.

<https://www.dol.gov/agencies/whd/fmla/pandemic>

Leave Under the Families First Coronavirus Response Act (FFCRA)

The FFCRA was enacted quickly in response to the Corona virus and, in part, requires all private for-profit and not-for-profit employers with fewer than 500 employees along with government employers ("Covered Employers") to provide certain paid sick leave and paid family and medical leave to employees. It also provides that these employers will get a tax credit as described below. There are a lot of unanswered questions about this new legislation. As of the date of this article, DOL has not published any regulations or guidance on compliance with FFCRA. Stay tuned as guidance is expected.

Both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act provide that they "shall take effect not later than 15 days after the date of the enactment of this Act." As part of FFCRA, it was signed by President Trump on March 18, 2020 so that it would go into effect under the Act by April 2, 2020 at the latest. Both acts end on December 31, 2020.

FFCRA Emergency Paid Sick Leave Act – Covered Employers shall provide employees for immediate use (regardless of how long they have been employed) with up to 10 days of paid sick leave if the employee is unable to work or telework for the following reasons:

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.
4. The employee is caring for an individual who is subject to a quarantine or isolation order as described in (1) above, or has been advised as described in (2) above;

5. The employee is caring for a son or daughter whose school or place of care has been closed, or the childcare provider is unavailable, due to COVID-19 precautions; or
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.

The amount of hours of paid sick time for full-time employees is up to 10 days (80 hours). Part time employees are entitled to “a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.” Unused paid sick leave may not be carried over from one year to the next.

The amount Covered Employers must pay to an employee who is unable to work or telework for one of the above reasons will be the following:

- paid at the employee’s regular rate, up to \$511 per day (\$5,110 in the aggregate), to quarantine or seek a diagnosis or preventive care for COVID-19 (reasons 1, 2 or 3 above); or
- paid at two-thirds the employee’s regular rate, up to \$200 per day (\$2,000 in the aggregate), to care for a family member for such purposes or to care for a child whose school has closed, or whose child care provider is unavailable, due to COVID-19, or the employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services (reasons 4, 5 and 6 above).

Covered Employers may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave provided under this Act. The Act does not address how to handle if the employer has already provided sick or other type of leave to employees prior to its enactment.

It shall be unlawful for employers to discharge, discipline, or in any other manner discriminate against any employee who takes leave under this Act and who has filed any complaint related to this Act or has or will testify about any such proceeding. Violations of this Act will be considered violations of the Fair Labor Standards Act and employees may be entitled to unpaid wages, liquidated damages, and attorneys’ fees and costs.

Covered Employers are required to post and keep posted in conspicuous places on their premises a notice regarding the rights under this Act. This notice will be prepared by the Secretary of Labor and available at a later date. Secretary of Labor shall make a publicly available model notice within 7 days of enactment.

Covered Employers of health care providers or emergency responders may elect to exclude such employees from the application of this subsection.

In addition, the Secretary of Labor shall have the authority to issue regulations to: 1) exclude certain health care providers and emergency responders from the definition of employee, including allowing employers of such health care providers and emergency responders to opt out; 2) to exempt small businesses with fewer than 50 employees from the requirements of providing

paid sick leave under reason #5 above (the employee is caring for a son or daughter whose school or place of care has been closed, or the childcare provider is unavailable, due to COVID-19 precautions) when the imposition of such requirements would jeopardize the viability of the business as a going concern; and 3) as necessary to carry out the purposes of this Act.

FFCRA Emergency Family and Medical Leave Act – This Act amends the existing Family and Medical Leave Act of 1993. The Act provides that Employees who have been employed for at least 30 days with a Covered Employer will be entitled to take up to 12 weeks of job-protected Emergency FMLA leave for a qualifying need related to a public health emergency of COVID-19. The Act defines this to mean that the employee is unable to work or telework in order to care for a child (under the age of 18) if the child’s school or place of care has been closed or the childcare provider is unavailable due to COVID-19. The first two weeks of the Emergency FMLA leave are unpaid under this Act. During this time, Employee sick leave may be under the Emergency Paid Sick Leave described above or the employee may elect, but may not be required, to substitute any accrued vacation leave, personal leave, or medical or sick leave already provided by the employer. Thereafter, the remaining 10 weeks would be paid Emergency FMLA leave. The amount of pay shall be no less than two-thirds (2/3) of the employee’s usual pay, up to \$200 per day (\$10,000 total). When the need for such leave is foreseeable, employee shall provide the employer with such notice as is practicable.

It is unclear at this time whether or how employer-provided paid leave would run concurrently with this Emergency FMLA leave and how it would interact with the traditional FMLA leave benefits.

As this is job-protected leave, this means that the employer must restore the employee to the same or equivalent position when s/he returns to work from such leave. However, for Covered Employers who employ fewer than 25 employees, the Act provides that this job restoration provision shall not apply if 1) the position does not exist 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; and 2) the employer makes reasonable efforts to restore the employee to an equivalent position during the year following the conclusion of the leave period.

Similar to the Emergency Paid Sick Leave Act, Covered Employers of health care providers or emergency responders may elect to exclude such employees from the application of this subsection. In addition, the Secretary of Labor shall have the authority to issue regulations to 1) exclude certain health care providers and emergency responders from the definition of employee; and 2) 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.

FFCRA Tax Credits for Employers Providing Emergency Paid Sick Leave and Emergency FMLA Leave – Covered Employers who provide Emergency Paid Sick Leave and Emergency FMLA Leave will be eligible for refundable tax credits on their payroll tax payments equal to 100% of the amount paid (up to the maximum amount authorized by each Act) during each quarter.

Americans with Disabilities Act (“ADA”)

For employers who are covered by the Americans with Disabilities Act (15 or more employees), the U.S. Equal Employment Opportunity Commission (“EEOC”) has provided guidance on complying with the ADA and Rehabilitation Act, including requirements for reasonable accommodations and rules about medical examinations and inquiries. On March 19, 2020, the EEOC clarified that while both Acts continue to apply, they do not interfere with or prevent employers from following the guidelines and suggestions by the CDC or state/local public health authorities. See the EEOC’s webpage and the EEOC’s Pandemic Preparedness in the Workplace and the Americans With Disabilities Act below.

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

https://www.eeoc.gov/facts/pandemic_flu.html

Fair Labor Standards Act (“FLSA”)

Employers need to be careful to ensure that they are complying with the FLSA when evaluating how to correctly pay their employees (exempt and nonexempt) given all the variables in play during this pandemic. Employers should consult with legal counsel to ensure they are complying with the FLSA. In addition, please see the guidance that the Department of Labor has provided: “COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers.”

<https://www.dol.gov/agencies/whd/flsa/pandemic>

Closing Your Business, Terminating Employees, and Unemployment Benefits

Evaluating whether a business should close down now and conserve resources with the hope of being able to reopen in the future is a complicated and difficult decision. The decisions regarding whether to terminate, layoff or furlough some or all employees is equally as difficult. Both issues are beyond the scope of this article. In the event that employers do terminate employees and/or significantly reduce their hours, generally the employees may apply for unemployment benefits with the Virginia Employment Commission. Note that beginning March 15, 2020, the one week waiting period and the requirement to conduct a weekly job search has been suspended by the Governor in response to the pandemic. See the Virginia Employment Commission website below.

<http://www.vec.virginia.gov/>

Businesses should also be aware of the Worker Adjustment and Retraining Notification Act (“WARN Act”) which generally requires that employers with 100 or more employees provide certain notices of intention when closing a facility with 50 or more employees and/or laying off 50 or more employees. The Virginia VEC has established a rapid response team to help in this situation. See VEC website above.

Employers have a number of issues to consider in this difficult time. If you need legal counsel, please feel free to contact me. In addition, please stay safe and healthy.

Kristina Keech Spitler, Esquire
Vanderpool, Frostick & Nishanian, P.C.
9200 Church Street, Suite 400, Manassas, Virginia 20110
(703) 3369-4738 • Fax (703) 369-653 • email kspitler@vfnlaw.com