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FREQUENTLY ASKED QUESTIONS FROM EMPLOYERS AMID THE COVID-19 PANDEMIC – PART 2

Many employers are not sure how to handle issues related to the current pandemic. It is important that employers continue to follow existing laws and keep track of new laws in motion. Here are a few of the common questions we've been asked, and what to do.

Question: We may need to furlough some of our employees due to the COVID-19 crisis. We have no real timeframe that we think we can bring them back, but will say 90 days for now - but will keep them informed if anything changes. How long can a furlough extend? Can we bring an employee back from the furlough to do a project for a few weeks or a month or two and then furlough them again? Does the one year (or whatever timeframe) begin again? Are there any special considerations we need to take into account placing an employee on furlough?

Response: To our knowledge there is no specific federal or state law in your state that governs the length of a furlough, per se, nor that prohibits an employer from having a furloughed worker return to work and then back to furlough status. That said, generally furloughs are considered to be temporary in nature. The US Department of Labor addresses furloughs at https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs (we are not aware that state law differs in your particular jurisdiction) and we encourage you to review this resource for additional information.

To the extent the employer seeks to furlough only some employees and not others, it must ensure it has a legitimate justification for its selection criteria that is not otherwise unlawfully discriminatory or retaliation. The same is true in connection with recall or rehire. To this end, the employer would do well to avoid making contractual commitments as to reopening and job restoration at any particular time, including at the time of conveying any layoff or furlough, although if the employer learns that there is no intention or ability to rehire, it should consider converting anyone in this situation on furlough to a more permanent layoff (termination of employment). Employers should be candid with personnel at the time of a layoff or furlough as to the reason for such action (and for their impact/selection, if it will not affect all employees at once).

Employees whose employment has been adversely impacted by COVID-19 can seek to file unemployment compensation claims. Most states have relaxed their eligibility requirements for benefits. You can learn more about this by contacting your state's unemployment insurance agency for further information and instruction.

Question: One of our employees was going out in a few weeks to have a baby. The manager believes that she does not need to take any FMLA leave because she is working from home -- she can have the baby and work after a few days. Employees are assuming since they are working from home that FMLA does not apply. Am I correct that is wrong and FMLA guidelines remain the same for all employees, even if it is not related to COVID-19?

Response: While the new federal Families First Coronavirus Response Act (FFCRA) created an expansion of the Family and Medical Leave Act (FMLA) by lowering eligibility requirements and establishing a new reason for which leave can be taken (i.e., 30 days' tenure, and usable if employees are unable to work or telework because they are needed to care for a minor child whose school or place of care is closed in the wake of COVID-19), the existing provisions of the FMLA are unchanged.

Thus, if an employee is eligible under existing FMLA provisions (i.e., has at least 12 months tenure, has worked 1,250 hours in the 12-month period prior to taking leave, and works in a location where the employer has 50 employees within a 75 mile radius), then he or she can take up to 12 (or certain military-related cases 26) weeks of statutory leave if a qualifying reason -- including the birth of a child -- arises. The fact that an employee may be working from home due to COVID-19 and/or may be physically capable of working "after a few days" subsequent to giving birth (although this is a decision the employee's physician, and not employer, should make) does not change an eligible employee's entitlement to 12 weeks of baby bonding leave if he or she wishes to take it.

Question: Our company has taken maximum safety precautions and is recalling employees that were laid off temporarily due to a reduction in the workforce. What would be the outcome of those employees if they refuse to return to work because of COVID-19 concerns?

1. **Is it considered job abandonment?**
2. **Will they still benefit from unemployment?**
3. **Could they file an OSHA claim? Is the company protected?**
4. **What about employees living with high-risk people? Would they transfer into an EFMLA status?**

Response: We appreciate that many employees may be nervous to report for work (or back to work) out of fear of contracting COVID-19. In response, employers should attempt to strike a balance between addressing concerned employees' fears while also reminding them that they are generally required to come to work. Under most circumstances, employees may not refuse to go to work because they are afraid that they may contract COVID-19. The Occupational Safety and Health Act (OSHA) requires employers to provide a safe, healthy and hazard-free workplace for their employees. Unless employees reasonably believe they are in imminent danger, they may not refuse to work. OSHA defines "imminent danger" to mean "[a]ny conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." The Occupational Safety and Health Administration further summarizes the conditions that must be met before a hazard becomes an imminent danger as follows:

- "There must be a threat of death or serious physical harm. 'Serious physical harm' means that a part of the body is damaged so severely that it cannot be used or cannot be used very well.
- For a health hazard there must be a reasonable expectation that toxic substances or other health hazards are present and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency. The harm caused by the health hazard does not have to happen immediately.
- The threat must be immediate or imminent. This means that you must believe that death or serious physical harm could occur within a short time, for example before OSHA could investigate the problem.
- If an OSHA inspector believes that an imminent danger exists, the inspector must inform affected employees and the employer that he is recommending that OSHA take steps to stop the imminent danger.
- OSHA has the right to ask a federal court to order the employer to eliminate the imminent danger."

We invite you to review OSHA's guidance on this at https://www.osha.gov/as/opa/worker/danger.html for more information.

Even if an employee cannot demonstrate an imminent danger, the employer nevertheless may want to consider allowing him or her to work from home, at least in cases where the employee can complete his/her tasks remotely. That said, we recognize that this is not feasible in all employment settings. It is not clear whether the threshold for "imminent danger" is met in connection with the work the employees in question would be doing. If such circumstances exist or arise, the employer should attempt to find a resolution in order to avoid triggering an OSHA claim, as indeed the Act prohibits retaliation against an employee who has expressed concerns about workplace safety. Contacting OSHA to discuss circumstances when employees have such a right is recommended (as this is a safety/OSHA requirement). They may be contacted here: https://www.osha.gov/contactus/bystate.

Keep in mind as well that the National Labor Relations Act (NLRA) applies in both union and non-unionized settings, and affords employees the statutory right to act in concert for their mutual aid and protection without adverse employment action for doing so. To this end, "[t]wo or more employees discussing work-related issues beyond pay, such as safety concerns, with each other," is generally considered to be "protected concerted activity," and the NLRA prohibits employers from taking adverse action against employees on this basis (see https://www.nlrb.gov/rights-we-protect/rights/employee-rights).

If there is not, in fact, "imminent danger" as defined by OSHA in connection with the work and absent NLRA concerns, as noted the employer is arguably within its rights to require employees to report back to work when business operations resume, but it should be sure it has taken appropriate measures to ensure employee safety, including proper disinfection, training, equipment, and the like. The employer arguably can take disciplinary action in accordance with employer policy and practice if employees unreasonably fail or refuse to report to work absent statutory protection for not doing so, although as discussed below, this can result in employee and/or public relations concerns. Employers should follow guidance from the CDC and OSHA at https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html and https://www.osha.gov/Publications/OSHA3990.pdf, respectively, in ensuring proper workplace safety and protection. If, despite these measures and lack of imminent danger, one or more employees fails or refuses to report for work, as noted the employer is arguably within its rights to take action in accordance with policy and practice, in line with what the employer would ordinarily do if an employee refused to report for work without a statutorily protected reason for doing so. If employees have paid time off benefits available, they should be permitted to use them in accordance with company policy and practice for any personal time off as they may wish to take (including absences associated with nervousness to report to work). They

cannot, however, use paid sick leave benefits under the Families First Coronavirus Response Act (FFCRA), which does not afford entitlement to benefits in the described scenario (see question 62 at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions which provides the following guidance to employees: you "may not take paid sick leave under the FFCRA if you unilaterally decide to self-quarantine for an illness without medical advice, even if you have COVID-19 symptoms"). Of course, to the extent any employees indicate that their fear of returning to work is associated with illness or disability, the employer may have obligations under the FFCRA as well as the Americans with Disabilities Act (ADA) and/or Family and Medical Leave Act (FMLA) and similar state laws, depending upon the applicable facts and whether these statutes apply (see, for example, the discussion of questions 17 and 19 at https://www.eeoc.gov/coronavirus/webinar_transcript.cfm).

Ultimately, absent a statutory entitlement or risk of imminent danger at work, to our knowledge employers are not required to retain employees who refuse to report to work without statutory protection. The employer should adhere to its policies and practices in this regard relative to whether this is grounds for discharge or deemed a voluntary job abandonment. If employment relationships are terminated, while this may not be unlawful in all cases (i.e., no imminent danger), the employer may face potential backlash from an employee relations (if not public relations) standpoint. Of course, if the work presents imminent danger, the employer generally cannot mandate that such employee report to work and perform it.

Employees who are separated on these facts can file claims for unemployment compensation benefits; each state agency will assess whether benefits are payable depending upon the terms and conditions of the separation. You can learn more about unemployment insurance in your state by contacting your state unemployment insurance agency.

Finally, the Emergency Family and Medical Leave Act (EFMLA) leave provided under the FFCRA is available to eligible employees who are unable to work or telework because they are needed to care for a minor child whose school or place of care is closed or otherwise unable to continue operations due to COVID-19. Neither the EFMLA portion of the FFCRA nor the paid sick leave component of the Act provide paid time off solely because an employee is "living with high-risk people." The CDC publishes a risk assessment at https://www.cdc.gov/coronavirus/2019-ncov/hcp/assess-manage-risk.html that we encourage you to review along with the CDC guidance for employers linked above. You may also find the EEOC's guidance in response to question 4 (during a recent webinar) to be helpful relative to the issue of employees who may live with "high risk people." The transcript is available at https://www.eeoc.gov/coronavirus/webinar_transcript.cfm.