



Armstrong
Teasdale

Pandemic-Related Furlough and Termination Considerations and Updates on DOL Guidance

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Agenda

- Terminology
- Employment Considerations
- Benefits Considerations
- Updates on COVID-19 Legislation and Guidance
 - (Pending) Stimulus Package (“CARES” Act) Includes Relief for Retirement Plan and Health Savings Plan Participants
 - Families First Paid Leave Act Guidance from the Department of Labor
 - Executive Orders and Laws Requiring Shutdown of Non-essential Businesses

Terminology

▪ Layoff

- “Layoff” is a general term that can be applied to a temporary or permanent suspension of employment

▪ Furlough

- An unpaid leave of absence that is intended to be temporary
- Intent to return to service when permitted by law and work is available
- Employment relationship is not permanently terminated

▪ Termination

- Employment relationship is ended; no intent to return to work or rehire

Employment Considerations

- Selecting employees to furlough or terminate
- Unemployment issues
- Emergency Paid Sick Leave Act (EPSLA)
- Release agreements
- WARN Act and other notice requirements

Selecting Employees to Furlough or Terminate

- Business necessity
- Decisions subject to challenge
 - Age, Race, Sex, W/C, FMLA, whistleblower, etc., etc., etc.
- Objective criteria (tenure, performance ratings, attendance)
- Consistency
- Disparate impact analysis
- Communication to remaining employees?
- Other “cost-saving” options, such as reductions in hours or pay

Unemployment Issues

- Employees furloughed or terminated due to lack of work are generally eligible to receive benefits
- Most states have eliminated or will eliminate job search and waiting week(s) requirements
- Missouri's "shared work" program
 - Reduction in hours and pay between 20-40%
- Missouri's maximum weekly benefit amount is \$320 per week
- CARES Act proposes \$600 per week additional benefits

Emergency Paid Sick Leave Act (EPSLA)

- Applies to employers with less than 500 employees
- No length of employment requirement
- Provides up to 80 hours of full pay if “employee is unable to work (or telecommute) due to a need for leave because: [1] the employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19 or [2] the employee has been advised by a health care practitioner to self-quarantine”
- Payments (capped at \$5,110 per employee) are fully reimbursed by the federal government through tax credits

Does a “shelter-in-place” order constitute a quarantine or isolation order under EPSLA?

- **Risks of paying EPSLA benefit**
 - Potential denial of tax credit
- **Risk of not paying EPSLA benefit**
 - FLSA violation
 - Collective (class) action
 - Liquidated damages
 - Attorney fees
 - “This greedy corporation refused to pay their employees because they were worried that they might not get their tax credit”

Release Agreements

- Can be very simple in current circumstances
- The Older Workers Benefit Protection Act (OWBPA)
 - Mention the ADEA
 - Retroactive waiver only
 - Consideration
 - Advice in writing to consult with attorney
 - OWBPA attachment

The Older Workers Benefit Protection Act

- If release is requested in connection with an “employment termination program” offered to two or more employees
- Release must include a listing:
 - Job titles and ages of selected employees
 - Job titles and ages of non-selected employees
- Release must describe the layoff decision making
 - Group covered
 - Eligibility factors
 - Time limits
- 45 days consideration period required

The Worker Adjustment and Retraining Notification Act (WARN)

- Applies to an employer with 100 or more employees that conducts a “plant closing” or “mass layoff”
- Part-time employees not counted to determine coverage
- Requires 60 days advance notice of a plant closing or mass layoff resulting in an “employment loss” exceeding six months

The Worker Adjustment and Retraining Notification Act (WARN)

Mass Layoff – a reduction in force that results in an employment loss at a single site of employment for:

- 50 or more employees (if at least 33% of workforce); or
- 500 or more employees.

Plant Closing – the shutdown of a single site of employment or facility or operating unit that results in an employment loss for 50 or more employees.

- Includes greater than 50% reduction in hours.

The Worker Adjustment and Retraining Notification Act (WARN)

Notice requirements

- Bargaining representative
- Effected employees if no union
- Elected officials
- State dislocated worker unit
- **“Unforeseen Business Circumstances” exception to 60 days notice**
 - “conditions outside the employer’s control”
- **State “mini-WARN” laws may apply**

Emergency Paid Sick Leave Act (EPSLA Notice)

EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

- Full notice available online at:
<https://www.dol.gov/agencies/whd/pandemic>

Effect of Furlough on Health Benefits

- Review plan documents and communication from insurers and benefits consultants
- Consider if an amendment would be desired (or required)
 - Consider eligibility for furloughed employees
 - Ensure Families First Act required coverage for COVID-19 testing (with no cost-sharing)
 - Consider coverage for COVID-19 treatments
- **Self-Funded Plan: Amend plan to provide for desired outcome**
 - Communicate with administrators
 - Confirm changes to health plans have consent from stop-loss carrier
- **Fully Insured Plan: Request policy exceptions/changes from insurance carriers**
 - Communicate with benefits brokers
 - Check if your insurer has released updated policies or guidance

Effect of Furlough on Health Benefits

- **COBRA continuation coverage**
 - An employee who loses group health plan coverage due to a qualifying event may elect to continue group health plan coverage for a limited time on a self-pay basis
- **Qualifying events**
 - Expanded FMLA Leave
- **General / initial notice requirements**
 - Employee should receive within 44 days after a qualifying event that is a termination of employment or reduction of hours

Effect of Furlough on Other Benefits

- **Severance plans**
 - Clarification amendments
- **Life insurance**
 - Extend period of coverage for furloughed employees
- **Retirement plans**
 - Ceasing employer contributions
- **Bonus payments**
 - Deferral of 2019 bonus payments due in 2020
 - Potential for adverse tax consequences

Effect of Furlough on Other Benefits

- **Salary reductions**
 - Employment agreement amendments
- **Nonqualified plans**
 - Ceasing deferral elections
 - Deferring payouts

Stimulus Package

The CARES Act

- Update on the CARES Act

The CARES Act

Retirement Plan Provisions

- **Coronavirus withdrawals - up to \$100,000**
 - Three-year repayment period
 - Coronavirus affected participants - SARS-CoV-2 or COVID-19 diagnosis for employee, spouse or dependent or adverse financial consequences caused by pandemic
 - Taxed ratably over the three years beginning with year of distribution
- **One-year delay in required minimum distributions (RMDs)**
 - Applies to defined contribution plans, not defined benefit plans
 - Special right to rollover RMDs made in 2020

The CARES Act

Retirement Plan Provisions - continued

- Loans limit increased from \$50,000 to \$100,000 and from 50% of account to 100% of account
 - Repayments through Dec. 31, 2020, may be delayed one year
 - Available to coronavirus affected participants
- Plan amendment deadline – no earlier than Dec. 31, 2022
- Defined benefit plan minimum funding contributions delayed until Jan. 1, 2021

The CARES Act

Other Benefit Provisions

- **Health savings accounts**
 - First dollar coverage of telemedicine and COVID-19 expenses
- **Employer educational loan repayments**
 - Tax-free through 2020
- **Menstrual care products**
 - Eligible expenses under health savings accounts and flexible spending accounts

Emergency Family and Medical Leave Expansion Act (EFMLEA)

- **New form of FMLA leave**
 - Up to 12 weeks
 - Covers an eligible employee's inability to work or telework due to a need to care for son/daughter under 18 years old whose school/care provider is closed/unavailable, due to a public health emergency
 - First 10 days of this leave may be unpaid
 - Employee can substitute accrued paid leave or may be entitled to Emergency Paid Sick Leave Act benefits
 - Employer cannot force use of pre-existing accrued leave first
 - Remaining 10 weeks, paid at two-thirds the regular rate of pay with daily cap of \$200 and an aggregate cap of \$10,000

Emergency Paid Sick Leave Act (EPSLA)

- All employees are eligible
- Employees entitled to paid leave for the following absences:
 - 1) Employee subject to a quarantine or isolation order related to COVID-19.
 - 2) Employee advised by a health care provider to quarantine due to COVID-19 concerns.
 - 3) Employee experiencing COVID-19 symptoms and seeking a medical diagnosis.
 - 4) Employee caring for someone subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
 - 5) Employee caring for a son/daughter whose school/care provider is closed or unavailable, due to COVID-19 precautions.
 - 6) Employee experiencing any other substantially similar condition specified by the Secretary of HHS.

Department of Labor (DOL) Guidance

- **Effective date – April 1, 2020**
 - No credit for paid leave provided prior to effective date
- **The DOL’s guidance addresses several key points:**
 - Use of accrued leave during EPSLA
 - How to determine whether a business has “fewer than 500 employees” for purposes of the paid leave laws
 - How to calculate the value of paid leave under EPSLA and emergency FMLA

DOL Guidance – Determining Employer Coverage

- The question of what employers are covered presents, perhaps, the most risk.
- **Competing risks for an entity with fewer than 500 employees that is part of a larger control group of companies.**
 - If the coverage analysis is performed incorrectly and paid leave is not provided, there could be class action exposure under FLSA for EPSLA benefits (which means potential liquidated damages and attorney fee awards to successful plaintiffs).
 - If the coverage analysis is performed incorrectly and paid leave is provided, the IRS may at some point challenge tax credit eligibility.
 - Similarly, if the coverage analysis is performed incorrectly, there could be liability under FMLA (again, a risk of class litigation) for not providing the emergency FMLA benefits and/or tax credits may be rejected.



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