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Date: **April 21, 2020**

To: **Employers**

From: **The Lefton Group, LLC**

Re: **Employment guidelines for the coronavirus pandemic**

Now that Ohio is getting closer to reopening businesses, many Employers have questions about their rights and responsibilities when recalling workers and welcoming customers. Here's a quick look at Frequently Asked Questions:

1. **If I need my workers back on the job, must a worker return?**

If you are an essential business, you can require your workers to report to work, and you should comply with safety guidelines – that Employees are allowed to wear masks and gloves or that they are separated from others by at least six feet, that they have access regularly to disinfectant or to a place to wash their hands, and that you are cleaning the workplace regularly. A complete list of essential businesses is available in the Governor's closure order online, and they are numerous, including stores that sell groceries, medicine, marijuana, liquor, and hardware; transportation, airlines, taxis, Uber, Lyft, auto supply, boat and bicycle repair and gas stations; financial institutions, including banks, payday lenders and pawnbrokers; religious entities; media; laundry services, including dry cleaners; professional services, including legal, accounting, insurance and real estate; hotels and motels; manufacturing, distribution and supply chain for critical products and industries, including pharmaceuticals, technology, and mining. Among others.

If you are a non-essential business, you should wait until the governor lifts the "stay at home" order that he issued on March 22. That order allowed workers at non-essential businesses to continue operating if their workers could do so from home. For non-essential businesses that need their workers on the job site, there is to be a gradual easing of the "stay at home" order starting May 1. Which businesses can reopen first and under what conditions have not yet been announced, but businesses are developing their reopening plans now so that they are prepared.

2. **What happens if the worker comes back and then gets sick with Covid-19?**

The CDC is recommending that a person who is sick with Covid-19 or coronavirus-like symptoms should be sent home and not permitted to return to the workplace for at least fourteen (14) days after his symptoms abate. If you are an Employer who must comply with the Families First Coronavirus Response Act (FFCRA), as explained more fully below, the Employee is entitled to up to 80 hours of sick leave paid at his regular salary up to a maximum of $511 a day. (Prorated for part-time Employees.)

In addition, if any other Employees had close contact with the sick Employee, they also should be sent home to self-quarantine for fourteen (14) days. They, too, are eligible for up to 80 hours of sick leave at their regular salary, up to a maximum of $511 a day. (Prorated for part-time Employees.)

3. **What happens if a worker comes back and his spouse or roommate gets sick with Covid-19?**

If that worker has had close contact with his spouse or roommate, he should be sent home to self-quarantine for fourteen (14) days. During that 14-day period, he is entitled to up to 80 hours of pay at his regular salary, up to a maximum of $511 a day. (Prorated for part-time Employees.)

Once the quarantine period is over, the worker may be entitled to leave under the regular Family and Medical Leave Act. Generally, this is available to Employees who have worked at least 1,250 hours over the previous 12 months for an Employer that has at least 50 Employees. FMLA is generally available to workers who need to care for a loved one with a serious health condition, whether Covid-19-related or not. It is unpaid, and it allows the worker to be off for up to twelve (12) weeks in a 12-month period.

4. **What if my Employee wants FMLA for a Covid-19 related illness, but he's already used his FMLA earlier this year to be off for 12 weeks when his baby was born?**

The law limits an Employer's obligation under FMLA or EFMLA to twelve (12) weeks in a 12-month period, regardless of the number of reasons. If an Employee has already taken all or part of his FMLA entitlement, there is no need to provide more.

5. **What happens if an Employee wants to come back to work, but cannot find daycare for his child?**

The Emergency FMLA – unlike the regular FMLA which has been in effect since 1993 – requires Employers to provide up to twelve (12) weeks of paid leave for a worker who is off to care for his child whose daycare or school is closed due to the Covid-19 pandemic. Unlike the regular FMLA, this leave must be paid at the Employee's regular rate, up to a maximum of $200 a day. (Prorated for part-timers.)

6. **Do I really have to pay this Employee to be at home when his child is 15 years old and can watch himself? Or when his spouse is also at home and can watch the child? The child would have been alone all summer when school is out anyway.**

No. The EFMLA provisions generally apply only to children 14 and younger, and when there is no other person to take care of them. If the Employee's mother generally comes over to watch the children, and can continue doing so, the Employee is not entitled to paid EFMLA. However, if the grandmother cannot do the childcare because she's staying at home due to Covid-19 concerns, the Employee is entitled to paid EFMLA for the time he's caring for the child.

7. **Can I just assign that Employee to work from home?**

Telecommuting is always an option, but if the Employee's childcare responsibilities interfere with his ability to work, he generally would be entitled to EFMLA on an intermittent basis.

8. What happens if a worker wants to come back, but is concerned that he might be exposed to the coronavirus in the workplace?

The Employer should provide a safe work environment, including masks and gloves where appropriate, six feet of distance between all Employees and customers or vendors, ample disinfectant and cleaning supplies.

9. What happens if a worker does not want to come back because he is receiving more on Unemployment Compensation than he would in his pay? Must I give him a pay raise? Must I hold his job until the extra $600/week benefit runs out on July 31?

This appears to be a Congress-created conundrum that may be solved with a slight amendment to the legislation that granted the additional $600 weekly benefit – if it can be amended to have it end at a time that coincides with the lifting of the state's "stay home" order. Otherwise, the extra benefit will last until July 31, perhaps dissuading workers from returning to work. A fix is expected shortly. Until then, Employers should notify their Employees in writing that they are being recalled and that they should report to work on a specific date and shift. The Employee becomes ineligible for Unemployment Compensation if he refuses to return to work as requested. Unfortunately, the Ohio Department of Job and Family Services seems overburdened fielding claims for Unemployment Compensation – nearly 1 million in Ohio alone – so it is unclear how quickly ODJFS will act on an Employer's objection to continued U.C. for recalled Employees.

10. Are my furloughed workers entitled to paid sick leave and paid FMLA under the Families First Coronavirus Response Act (FFCRA)?

Not when they're on furlough. If they've been furloughed, they are presumably receiving Unemployment Compensation. When they have been recalled, they will be entitled to the benefits of FFCRA if (a) you are a covered Employer; and (b) they have not yet used the benefits, which expire on December 31, 2020.

11. What is a covered Employer under FFCRA?

An Employer – public or private, for profit and non-profit – with fewer than 500 Employees. There are a few minor exceptions, such as for those in medical-related fields, for example. Also, a business with fewer than 50 Employees may avoid FFCRA obligations if complying would jeopardize its viability as a going concern.

12. Which workers are entitled to paid sick leave under the FFCRA?

A person is entitled to up to 80 hours of sick leave at his full rate of pay – up to $511 a day – if he is unable to work or telework because he (a) is subject to a federal, state or local quarantine or isolation order related to Covid-19; (b) has been advised by a health care provider to self-quarantine due to Covid-19 concerns; or (c) is experiencing symptoms of Covid-19.

A person is entitled to up to 80 hours of sick leave at a maximum 2/3 of his salary – up to a maximum of $200 a day – if he is (a) caring for a person who has been advised to self-quarantine; (b) caring for his child whose school has been closed; or (c) "any other substantially similar condition." At this point, it is still unclear what "other substantially similar condition" would qualify.

13. Which workers are entitled to paid FMLA under the Emergency Family and Medical Leave portion of the FFCRA?

If the person is caring for his child 14 years of age or younger whose school or daycare has been closed, and there is no other person (such as a spouse who is also at home), then the Employee is eligible for an additional 10 weeks of paid Emergency FMLA (12 weeks total at 2/3 the Employee's full rate of pay up to a maximum of $200 a day, total of $12,000). (Prorated for part-timers.)

14. What is the difference between EFMLA and regular FMLA?

EFMLA was passed as part of the FFCRA in March specifically in response to the coronavirus pandemic. It provides paid leave for childcare purposes, but only at 2/3 the Employee's regular rate of pay, up to a maximum of $200. An Employee needs only to have been employed for thirty (30) days before applying for the leave to qualify. For example, if you hire someone June 1, 2020, and he applies for EFMLA on July 1, 2020, due to his child's daycare being closed for a Covid-19-related reason, he is entitled to 12 weeks of paid EFMLA.

FMLA was passed in 1993 to compel covered Employers (generally those with more than 50 Employees) to give up to 12 weeks of leave to workers with a serious health condition, to care for a family member with a serious health condition or for the birth or adoption of a baby. The regular FMLA leave is unpaid. If a person is caring for a loved one with Covid-19, he would appear to be eligible for this unpaid FMLA (as long as he has not exhausted his 12 weeks in a 12-month period).

15. What happens when a worker uses up his paid FMLA under the FFCRA's Emergency Family and Medical Leave Act (EFMLA)?

The FMLA and EFMLA work in concert, allowing for a total of 12 weeks of leave per 12-month period – whether Covid-19-related or not.

16. What if my workers are represented by a union?

The benefits required under FFCRA appear to be *in addition to* those provided in a collective bargaining agreement. However, the DOL is expected to issue further guidance on this soon.

17. What if I already give generous sick pay and leaves of absence? Must I do even more?

That is unclear right now. Initial guidance from the Department of Labor seemed to require the benefits of FFCRA be in addition to any paid sick leave or leaves of absence voluntarily provided by Employers. However, it appears that may be reconsidered as the DOL strives to find a way to give adequate benefits for all but a windfall for none. More complete guidance is expected shortly.

18. What if I cannot afford to pay my workers for the sick and EFMLA leave that FFCRA requires?

That appears to be a common problem that Congress is still wrestling with. First, the cost of sick and emergency FMLA under FFCRA can be recouped by private Employers immediately and directly through credits from their tax payments. (Congress is now re-thinking this as it applies to public Employers, and there seems to be a huge divide between the parties about whether money should be allocated to public entities for this cost. More on that likely to come soon.)

Also, the CARES Act (Coronavirus Aid, Relief, and Economic Security Act) has provisions to allow small businesses to borrow money under the Paycheck Protection Program – specifically for the purpose of paying workers – either to work or for their sick leave and family leave. The first $349 billion was depleted in about two weeks; a second pot is on the horizon, but there is still no guarantee that all businesses who need it are going to get it. Even essential businesses – like car repair shops and doctors' offices – are in a financial bind because their customers are staying away and their vendors are slow to pay because they're in financial binds of their own.

One solution would be to layoff those workers, as then they would qualify for Unemployment Compensation. The downside, of course, is that those workers would still be entitled to the benefit – with the cost still being borne by the Employer – when they return to work. Hopefully, by that time the Employer would be on more stable financial footing.

19. What effect will mass layoffs have on my Unemployment Compensation experience? Will my unemployment taxes increase?

For contributory Employers, charges during Ohio's emergency declaration period will be mutualized. Reimbursing Employers should follow existing charging requirements under Ohio Revised Code §4141.

20. Is there anything I can do to help my Employees get Unemployment Compensation?

As an Employer, you could facilitate their receipt of Unemployment Compensation benefits, which will be charged to a mutualized account and not to each individual Employer, using the mass-layoff number – 2000180 – and send them the instruction sheet off the JFS website (www.jfs.ohio.gov) to speed the processing of their unemployment claim. The best time to go online is between midnight and 5a.m.

21. Can I let my workers telecommute indefinitely?

Sure. There is no law that requires Employees to report to a specific worksite. If it works for you and it works for them, that's a good solution. Some Employers have found, however, that the effectiveness of telecommuting depends on the individual Employee. Some are more productive and better communicators in person. If you're inclined to allow some members of a job classification to work remotely and others not, be sure you can articulate and document sound business reasons for those decisions.

Further, if you're agreeing to modify a job – whether it's telecommuting, job sharing, flex-time, responsibilities or any of the myriad other options – it is advisable to put the modification in writing, setting it for a limited period of time with a date when it will be revisited and either renewed or revoked.

22. I furloughed my entire staff on April 1. Now that Ohio is going to start to reopen on May 1, I want to recall them gradually. Are there any special considerations?

Base your recall decisions on business necessity. In regular times – and this pandemic is not a regular time – Employers would have carefully assessed each worker – his qualifications, responsibilities, effectiveness, value he brings to the organization, attendance, leadership, longevity – and conducted the furlough accordingly. As Employers decide whom to bring back and when, they should do a similar assessment and be able to articulate and document their business reasons.

As your Employees return, remember that you're still subject to the same workplace statutes as before Covid-19, including the Americans with Disabilities Act (ADA) and the FMLA, as mentioned above. If you're changing your attendance or performance expectations, evaluate how the new expectations will impact your business and how long they will last.

23. I furloughed my entire staff on April 1. I am not sure I'll ever be able to reopen. Are there any special considerations?

Most Employers who were suddenly shut down when the Governor issued his "stay at home" order would not have been required to comply with the WARN (Worker Adjustment and Retraining Notification) Act because they were anticipating a temporary shutdown. WARN triggers the notice requirement only if there is a layoff exceeding six months or a reduction in hours of work of more than 50 percent during each month of a six-month period. If you come to realize that your plans for a "temporary" shutdown appear to be creeping up on those parameters, you should give the WARN notices.

WARN usually requires advance notice of plant closings, but there is an exception for a layoff caused by a "natural disaster." While the statute does not specifically list "worldwide pandemic," we anticipate that it would qualify as a natural disaster. If you think your closing will last longer than six months and you otherwise are compelled to comply, it would be advisable to give the 60-day notice of closure in advance of the expiration of the six-month period.