

Coronavirus Guidance for Employers: Is Your Workplace Prepared?

Tara Eberline

Don Berner

Forrest Rhodes

Jason Lacey

Sarah Stula



Agenda

- Families First Coronavirus Response Act
- Kansas City Stay at Home Order
- Navigating leaves of absence under the FMLA and FLSA
- Protecting your employees/OSHA
- Employee confidentiality and the ADA
- WARN Act
- Q&A with panel of Foulston employment attorneys:
 - Forrest Rhodes
 - Don Berner
 - Jason Lacey
 - Sarah Stula

Families First Coronavirus Response Act

Two New Types of Paid Leave

- Up to two weeks of paid sick leave for isolation, illness, care of others, or childcare responsibilities due to COVID-19
- FMLA childcare leave to care for a child who cannot go to school or daycare because of COVID-19

Overview Applicable to Both New Employment Laws

- Effective no later than April 2, 2020; expires December 31, 2020
- Covers employers with fewer than 500 employees and all public agencies
- DOL can exempt businesses with fewer than 50 employees if complying will jeopardize the viability of the business
- Credits against payroll taxes will offset 100% of cost
- Healthcare employers may elect to exclude healthcare providers (MDs and DOs) and emergency responders

Emergency paid sick leave if employee cannot work or telework because:

- Employee is subject to a federal, state, or local quarantine or isolation order;
- Employee is advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- Employee is caring for an individual who is subject to a quarantine order or direction to self-quarantine;
- Employee is caring for son/daughter if the child's school or childcare provider is closed due to COVID-19; and
- Employee is experiencing any substantially similar condition specified by the Secretary of Health and Human Services

Emergency Paid Sick Leave

- Amount of paid leave: Up to two weeks
 - 80 hours for full-time employees
 - Average number of hours over two-week period for part-time employees
- Payment amount:
 - For rationales 1-3 (quarantine/illness), employee's regular rate, capped at \$511/day and \$5,110.
 - For rationales 4-6 (caring for children or others), two-thirds of employee's regular rate, capped at \$200/day and \$2,000.

Paid Sick Leave

- May not require employees to use other paid leave first.
- All employees are eligible, regardless of length of employment.
- Must post notice for employees (likely coming later this week).

Emergency FMLA Childcare Leave

- Paid FMLA leave available if employee cannot work or telework due to need for leave to care for son/daughter under 18 if school or daycare closed because of COVID-19.
- Must have been employed for at least 30 calendar days.
- This does NOT provide paid FMLA leave for isolation/quarantine.

Emergency FMLA Childcare Leave

- First 10 days of FMLA childcare leave may be unpaid.
 - Employer may substitute paid leave.
 - New federal paid sick leave may be used.
- Payment amount:
 - Not less than two-thirds employee's regular pay for hours otherwise normally scheduled to work
 - Up to \$200/day and \$10,000 total

Kansas City Area Stay-at-Home Order

- Sick and high-risk individuals urged to stay home other than for medical care.
- General public ordered to stay at home other than to perform “essential activities.”
- Essential activities includes work at essential businesses, healthcare operations, essential infrastructure, essential governmental functions.
- Childcare facilities are permitted, but must maintain a 10:1 ratio, and neither the children nor the childcare workers can change from group to group.

Do I Need to Pay My Employee Who is Sick or Quarantined at Home?

- General considerations:
 - Is telework an option?
 - Does the employee have paid time off available (federal paid sick leave, employer-provided sick, vacation, or PTO)?
 - Does the employee qualify for FMLA leave (unpaid)?
 - Is the employee salaried & exempt under FLSA?
 - What are the terms of the employment contract?
 - Is there a collective bargaining agreement in place?

Family and Medical Leave Act

- Eligible employee may take up to 12 workweeks of unpaid leave for their own or a family member's "serious health condition."
 - Infection with COVID-19
 - Care for an immediate family member with COVID-19
 - Old FMLA eligibility rules apply (employed for 12 months; worked at least 1250 hours in previous 12 months; 50 or more employees)
- For new FMLA Childcare Leave only, eligibility is all employers with 500 or fewer employees; worked for last 30 days.
- An employee who stays home due to self-, or employer-imposed isolation and is not symptomatic or caring for a sick family member is not entitled to FMLA leave.

Fair Labor Standards Act

For non-exempt, hourly employees:

- Pay for actual working time
- Pay overtime if over 40 hours worked
 - Require employees to keep track of and accurately report all teleworking hours

Fair Labor Standards Act

For exempt, salaried employees:

- If employee performed **any** work during that workweek, pay salary for that week, unless deduction is specifically permitted.
- Deductions are permitted for:
 - Full-day absences for personal reasons
 - Full-day absences for illness, if employer provides some paid time off
 - FMLA, including partial-day FMLA absences and new FMLA Childcare Leave (paid at 2/3 after waiting period)
- If employee performed **no** work during entire workweek, then salary need not be paid (unless eligible for Federal Paid Sick Leave or FMLA Childcare Leave)
- No deductions for partial-day absences other than intermittent or reduced-schedule FMLA

Fair Labor Standards Act

Deductions for exempt, salaried employees are permissible when Federal Paid Sick Leave and FMLA Childcare Leave is exhausted and:

- An employee is symptomatic and stays home;
- An employee is subject to a government-ordered quarantine; or
- An employee stays home to care for a child who can't go to school.

These could be fairly viewed as absences for illness or personal reasons.

Fair Labor Standards Act

Deductions are NOT permissible when an employer forces an employee who is not symptomatic to stay home such as if:

- The employer has imposed a quarantine rule; or
- The employer has closed a facility for operational reasons, like supply chain or labor shortages.

These missed days must be paid if the employee has performed any work during the workweek, but if an employee performs no work during a workweek then no salary is required.

If employment terminates, you can pro-rate during the final week.



Protecting Your Employees

FOULSTON
ATTORNEYS AT LAW

Duty to Protect Employees from Workplace Exposure

- Employers have a legal duty to maintain a safe workplace.
 - Take feasible measures to reduce the likelihood that your employees will be exposed to COVID-19.
 - Remember you could be liable for hazards to employees, contractors, and subcontractors.
- Workers' compensation coverage is unlikely, but possible, depending on state law and industry.
- Healthcare organizations: follow CDC guidance for healthcare facilities and check CDC website daily for updates.

Screening Employees for COVID-19

You should:

- Ask employees about exposure to COVID-19, recent travel, and symptoms of the virus;
- Require self-reporting of symptoms;
- Send home employees who report or show signs of illness; and
- Follow CDC guidelines and local government directions for screening employees and return-to-work rules.

If you have an employee who tests positive or is presumed positive:

- Notify coworkers, but do NOT disclose the identity of the infected individual (ADA requires confidentiality of that information).

Employees Discontinuing Isolation

- CDC recommends employees with symptoms who have not been tested remain isolated until:
 - No fever for at least 72 hours without fever-reducing medication;
 - Other symptoms have improved; AND
 - At least seven days have passed since symptoms first appeared.
- Employees who tested positive may discontinue isolation when:
 - No fever without fever-reducing medication;
 - Other symptoms have improved; AND
 - Two negative tests in a row, 24 hours apart.

OSHA Rules for Personal Protective Equipment

- Employers must follow OSHA rules for PPE use:
 - Assess workplace virus hazard
 - Provide PPE at no cost to employees
 - Train employees how to use PPE
- Surgical masks are different from respirators.
 - Surgical masks protect against fluid splatter.
 - Respirators protect against airborne contaminants. Be aware of special “respirator” definition (includes N95 mask).

Special Respirator Rules

- OSHA has stated that employees who work closely with patients known or suspected of being infected with coronavirus should wear respirators.
- If you *require* respirators, follow 29 C.F.R. § 1910.134:
 - Implement a respiratory protection program
 - Follow fit-testing and medical screening procedures
 - Train employees on proper use
- If you *permit* respirators, provide the notice found in 29 C.F.R. § 1910.134, Appendix D.

Americans with Disabilities Act

- Complications from COVID-19 could cause or aggravate a disability covered by the ADA.
- Employee with disability or pregnancy may need reasonable accommodation, if no undue hardship to employer.
 - Telework
 - Temporary removal from work rotation
- Employer can ask about COVID-19 symptoms, but not underlying disability.
- Employer may send home an individual who poses a “direct threat” to workplace (including signs of COVID-19).

Employee Separations

Employee Separations

- Consider shared work programs (available in KS, MO, and other states).
- Encourage laid off/furloughed employees to request unemployment. Currently no waiting period in KS (varies state by state).
- OWBPA requires specific language to be included in severance agreements to release age discrimination claims.
- Work with counsel on any group separation package (voluntary or involuntary).

Worker Adjustment and Retraining Notification (WARN)

- Federal law that requires employers with 100+ employees company-wide to provide employees with specific written notice at least 60 days prior to an employment loss that is caused by a plant closure or mass layoff.
- Plant closing occurs if a shutdown of a site of employment or a facility or operating unit with an employment site causes employment loss for:
 - At least 50 employees (excluding part-time* employees)
 - Measured over a rolling 90-day period
- Mass layoff occurs if there is not a plant closing and reduction in force that affects (i) at least 1/3 of employees and at least 50 employees (excluding part-time); OR (ii) at least 500 employees (excluding part-time*).

WARN Exception: Unforeseeable Business Circumstances

- An employer may order a plant closing or mass layoff in advance of the usual 60-day notice when the underlying business circumstances were not reasonably foreseeable at the time notice would have been required.
 - This does not make WARN inapplicable; it just reduces the requisite notice period.
- WARN has many technical provisions. If your employment actions may implicate these provisions, contact your employment law counsel to discuss.

Questions and Answers with Foulston panel

Tara Eberline, teberline@foulston.com

Don Berner, dberner@foulston.com

Forrest Rhodes, frhodes@foulston.com

Jason Lacey, jlacey@foulston.com

Sarah Stula, sstula@foulston.com

To engage Foulston attorneys to respond to your company or organization's legal questions, please contact:

Traci Anderson, 316-613-6603
tanderson@foulston.com