

COVID-19 – Leaves and Unemployment Issues

Presented by

S. Michael Nail



Ogletree
Deakins



Initial Considerations

- What level of payroll can my business currently support?
- What is my company's employee wage profile (number of employees, wages earned by classes of employees/individual employees)?
- Which employees are critical to maintaining operations?
- Do my company's paid leave policies require paid leave to be paid out upon termination, and if so, what is the potential pay-out cost for employees who are terminated?
- How are my company's benefits programs affected by paid leave, leave without pay, layoff, termination, business cessation?
- What state(s) is/are my employee's located?

Initial Considerations, cont.

- Consider employee morale. How can I help them?
 - i.e. keeping them informed of unemployment law/applications, etc.
- Re-visit Handbook/Policies.
- Re-visit Employment Agreements.
 - i.e. force majeure clause

New Federal Laws

- Families First Coronavirus Response Act (FFCRA)
 - The FFCRA requires small businesses to provide temporary paid leave to employees for circumstances relating to the COVID-19 pandemic.
- Coronavirus Aid, Relief, and Economic Security Act (CARES Act)
 - Lending assistance.
 - Provides tax incentives to assist employers in efforts to maintain operations, among others.

New Federal Laws, cont.

- CARES Act, cont.
 - CARES expands the Unemployment Insurance system to permit more displaced workers, including business owners, to qualify for benefits and to supplement the benefits provided under the traditional Unemployment Insurance system.
 - CARES adds \$600.00 per week to every eligible employee's benefit (through 7/31/20).
 - CARES extends benefit period for an additional 13 weeks, for a total of 26 to 33 weeks (through 12/31/20).

New Federal Laws, cont.

■ CARES Act, cont.

- CARES encourages states to approve and operate short-term compensation (STC) programs, also sometimes called work share programs, to provide employers an alternative to reductions in force.
- Currently, SC does not have a STC program, but SC does allow employers to file claims on behalf of employees.

FFCRA Overview

- Emergency Paid Sick Leave (EPSL)
- Emergency FMLA (EFMLA)
- Tax Credits for EPSL and EFMLA
 - Provides dollar-for-dollar reimbursement for the costs of providing EPSL and EFMLA.
 - Keep sufficient records to receive tax credits.
 - IRS FAQs:
 - <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>
- When?
 - Applies to leave taken between April 1, 2020 – December 31, 2020.
 - Non-enforcement period through April 17, 2020 as long as employer makes “good faith attempt” at compliance and promises to comply moving forward.

EPSL

- Coverage
 - All employers with fewer than 500 employees (full-time and part-time) (includes employees on leave, temporary employees who are jointly employed)
 - Small business exemption (fewer than 50 employees) (must meet certain criteria) (also applies to EFMLA)
 - (1) providing the pay would result in business expenses exceeding available revenues, and would cause the small business to cease operating at a minimal capacity;
 - (2) permitting the absences would entail substantial risk to the financial health or operational capabilities of the business because of the employee's specialized skills, knowledge of the business, or responsibilities; OR
 - result in there being insufficient workers available at the time and place needed to perform the labor or services provided by the employee, and these labor or services are needed for the small business to operate at a minimal capacity.
 - Only applies to leave for school closures/childcare (see number (5) below); no application process
 - Minimal, additional exceptions
 - i.e. Health Care Providers and Emergency Responders
- Eligibility
 - All employees

EPSL, cont.

■ Qualifying Events

- (1) state/federal quarantine order;
- (2) self quarantine on advice of healthcare provider;
- (3) experiencing COVID-19 symptoms and seeking medical diagnosis;
- (4) caring for another person subject to one of the above;
- (5) a child's school or childcare provider is closed or unavailable due to a public health emergency;
- (6) any "substantially similar condition" (still to be defined by USDOL).

EPSL, cont.

- Employers may not require employees to use other paid leave before they use emergency paid sick leave, which is available for immediate use.
- EPSL up to 80 hours (2 weeks).
- Compensation for items (1) – (3) (employee's own condition)
 - Higher of their regular rate or minimum wage; capped at \$511 per day (\$5,110 in the aggregate)
- Compensation for items (4) – (6) (care for someone else)
 - 2/3 regular rate; capped at \$200 per day (\$2,000 in the aggregate)

EPSL, cont.

- Penalties include FLSA / wage payment violations, liquidated damages in equal amount, and attorneys' fees and costs.
- Prohibits discharge, discipline, or otherwise discriminating against eligible employees.

EFMLA

■ Coverage

- Same as EPSL.
- Differs from usual FMLA coverage.

■ Eligibility

- Employee who has been “employed” for at least 30 calendar days (replaces all other eligibility requirements)
 - Means “30 days on payroll,” not “worked.”
 - Temp time counts.

EFMLA, cont.

■ Qualifying Events

- The FFCRA provides for an amendment to the FMLA to grant EFMLA leave to care for a minor child when the need is related to a public health emergency (PHE). The following must be satisfied in order for the employee to qualify for E-FMLA leave:
 - The leave must be taken between April 1, 2020, and December 31, 2020.
 - The employee must be unable to work or telework because of a need to take care for a minor child. There is nothing in the FFCRA to help employers determine when an employee is needed to care for the child. Nothing in the FFCRA appears to grant the employer the right to question whether others are available to care for the child. It remains to be seen whether an employee would be disqualified from taking EFMLA leave if his or her employer merely offered telework, or if the employee can claim that he or she cannot perform telework even if the employer offered it.

EFMLA, cont.

■ Qualifying events, cont.

- The employee must provide notice of the need for leave as soon as practicable. Failure to do so will cause a delay in when FMLA leave can start.
- The need to care for the minor child must be because of a “declared” PHE related to COVID-19 that has caused:
 - a.the child’s school (elementary school or secondary school) to be closed;
 - b.the child’s place of care to be closed; or
 - c.the child’s normal childcare provider (a person paid for providing childcare on a regular basis) to be unavailable.
 - The declaration of a PHE can be made by the applicable federal, state, or local authorities.

EFMLA, cont.

- Employers may want to keep in mind that the other provisions of the FMLA are still in effect. A normally covered employer (that has greater than 50 employees in 20 or more calendar weeks) with normally defined eligible employees (who have worked for one year, worked for 1,250 hours in the year preceding leave, and worked at a worksite that has 50 or more employees within 75 miles) may need to analyze requests for leave related to COVID-19 under the normal provisions of the FMLA (i.e., an employee's serious health condition; or an employee's need to care for a first-degree relative with a serious health condition).
- EFMLA only provides a new leave *reason* for FMLA, *not more weeks*.

EFMLA, cont.

- Is EFMLA paid or unpaid?
 - Both
 - The first 10 days of leave are unpaid. As you now know, the FFCRA also includes a paid sick leave provision that would theoretically cover these first two weeks unless they have been exhausted for other reasons. The paid emergency sick leave (ESL) provisions of the act permit leave in a much wider array of scenarios related to COVID-19, so it could be exhausted before an employee seeks leave under the FMLA portion of the FFCRA.
 - After the first 10 days, E-FMLA leave becomes paid (for up to another 10 weeks). An employer must pay the employee up to two-thirds of the employee's regular rate of pay (an FLSA calculation) for E-FMLA leave. But this amount is capped at a maximum amount of \$200 per day and \$10,000 total (the aggregate maximum of all paid FMLA leave under this provision).

EFMLA, cont.

- Eligible for reimbursement of costs of leave through refundable tax credits.
 - Check IRS guidance for documentation requirements.
- Penalties similar to Emergency Paid Sick Leave
- According to DOL guidance, if an employer discharged or furloughed an employee due to economic conditions, he or she will not be eligible for E-FMLA leave or paid sick leave under the FFCRA.

CARES Act

- The Economic Injury Disaster Loan (EIDL) and Paycheck Protection Program (PPP) are designed to extend SBA type loans to small employers to fund business continuation during the COVID-19 pandemic.
- Check SBA standard for small business and consult with tax professional.
- The loan must be necessitated by the economic conditions associated with the COVID-19 pandemic.
- Qualifying small businesses must use the funds borrowed to make payroll for retained workers, and pay mortgage, rent and utility payments.
- Cannot cover the same expenses on both loans.
- Some prohibitions on loan proceeds, including for leave under FFCRA.
- The PPP is designed to keep employees on payroll. If your company reduces the number of employees or reduces wages by more than 25%, the amount of the loan that may be forgiven will be reduced.
- But, if the reduction in employees or wages is restored by June 30, 2020, then the penalty will be removed.

CARES Act, cont.

- CARES also includes tax incentives to assist employers in efforts to maintain operations.
- In certain circumstances, all employers can take a tax credit against payroll taxes paid up to \$5,000.00 per employee under certain conditions related to COVID-19.
 - i.e. operations fully or partially suspended due to a COVID-19 related shutdown order; or gross receipts declined by more than 50 percent when compared to the same quarter in the prior year, until their gross receipt exceed 80% of their gross receipts for the same calendar quarter in the prior year.
- All employers can defer payment of payroll taxes.
- Allowable tax deductions for net operating losses are expanded
- Payment of 2020 contributions to single employer pension plans may be deferred to 1/1/21
- Check in with SBDC
 - Free consultation
 - Is this right for my business?
- Check SBA for details on loan FAQs and issues (amounts, limitations, etc.)

CARES Act, cont.

- Expands the Unemployment Insurance system to permit more displaced workers, including business owners, to qualify for benefits and to supplement the benefits provided under the traditional Unemployment Insurance system.
- CARES creates a new form of Pandemic Unemployment Insurance (PUI) that enables people whose employment is disrupted by the COVID-19 pandemic (but who otherwise would not qualify for UI) to receive benefits. This expansion applies to a variety of situations, most of which concern people who cannot attend work because of the pandemic. It also extends benefits to self-employed persons, independent contractors, and sole proprietors, GIG workers and part-time workers.
 - There is a long list of COVID-19-related reasons for PUI.
 - If they telework with pay or received other paid benefits, they are not eligible for PUI.
- Whether a person is eligible for traditional UI or needs PUI, s/he still applies for benefits with the state agency responsible for UI benefits administration.

CARES Act, cont.

- CARES adds \$600.00 per week to every eligible employee's benefit (through 7/31/20) related to COVID-19.
- So, the weekly benefit will be the traditional benefit amount based on the state formula plus \$600.00 per week.
- The duration of the UI benefit period varies from state to state. In South Carolina, it is between 13 and 20 weeks.
- CARES extends that period for an additional 13 weeks, for a total of 26 to 33 weeks (through 12/31/20).
- Waiting week waiver.

CARES Act, cont.

- UI tax payments for the first quarter of 2020 due April 30 will now be due June 1, 2020. Penalty and interest will not be charged if payment is made by June 1. However, employers are still required to submit their quarterly wage reports by April 30. SCDEW is also relieving employers of account charges for those employees receiving UI benefits due to the COVID-19 pandemic.
- CARES also encourages states to approve and operate short-term compensation (STC) programs, also sometimes called work share programs, to provide employers an alternative to reductions in force.
- SC does not current have a STC program.

Unemployment

- Increased coverage.
- New benefits administered by state unemployment agency.
- Feds will reimburse the states for the cost of the new benefits paid to individuals plus the cost to the state for the administration of the benefit.
 - \$600 benefit (available through July 2020)
 - CARES PUI (retroactive to January 27, 2020 and available until December 31, 2020)
- Coverage is still state agency decision. Review updated FAQs on SCDEW website.
- the CARES Act provides benefits if an employee “had to quit as a result of COVID-19”. This is an unusual provision in an unemployment law. Normally, if an employee has a job and makes the choice to leave that job they are not eligible for unemployment. The term “quit” is not defined in the law.
- If receiving paid sick leave or EFMLA, probably not eligible for unemployment benefits.

Unemployment – SC Developments

- Waived waiting week
- Waived online work search regulation
 - “Actively seeking” requirement still applies, but will be satisfied if employee actively (and reasonably) seeking to return to same employer after COVID-19 layoff.
- Removed charges for COVID-19 claims
 - COVID-19 claims will not affect employer’s experience rating (tax class)
- Extended deadline to pay 1Q unemployment taxes – no penalty/interest charged if paid by June 1
- But still requiring employers to submit wage reports by April 30
- Frequently updating guidance on COVID-19-related issues
 - Temporary closures / lay-offs due to COVID-19: eligible
 - Employer remains open, but lays off some staff due to lost business caused by COVID-19: eligible
 - Employer remains open, but reduces hours for staff due to lost business caused by COVID-19: unclear

To-Dos

- Post required notice poster in conspicuous location where notices are normally posted.
 - In addition, and particularly given the prevalence of employees working remotely due to COVID-19 concerns, employers may provide notice through email or direct mail to employees, or by posting on an employee-facing intranet or external website. This model notice posting is now available. At this time, this model notice is available only in English—employers are not required to provide this notice in any other language—but the DOL is working to translate this notice into other languages.
- Update handbook provision as soon as practicable.
- Other notice(s)?
 - i.e. SC's 7-day notice requirement for wage reduction.
- Communication is key.

Relevant Ogletree Resources

- Flat fee menu of template documents and surveys
- FFCRA compliance documents
- Ogletree Coronavirus resource center for clients/public
 - FAQs
 - Articles
 - Podcasts

Other Resources

- DOL Website
- US/SC Chambers of Commerce
- <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>
- U.S. Department of Treasury Guidance
- SCDEW Website
- <https://www.careeronestop.org/LocalHelp/service-locator.aspx>.

Thank you!

Presented by

S. Michael Nail

Ogletree
Deakins



www.ogletree.com

© 2020, Ogletree Deakins