

NAVIGATING HR ISSUES DURING THE PANDEMIC

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I recently (6/12/20) had the pleasure of speaking to MVMA members about frequently asked questions I get regarding the handling of certain employment issues in light of COVID-19. Here is a summary of what we discussed:

Emergency Leave

The Family First Corona Relief Act features two types of emergency leave and pay that are related, but distinct. Emergency sick leave is available *immediately* to all employees, no matter how long they have been employed, if they cannot work or telework because they fall into at least one of six specified categories of either having to care for themselves or for someone else, because of COVID-19. (See graphic) Employers must provide and pay emergency sick leave first, before requiring an employee to tap into their accrued PTO.

In contrast, emergency family leave is only available to employees who have been with the employer for at least 30 days, and who have to care for a minor child because their school is closed, or their child care is unavailable. Employers must provide 12 weeks of emergency family leave, the last 10 of which are paid. While the first two weeks are unpaid, they can be covered through emergency sick leave if applicable, or through PTO. Emergency family leave can be used intermittently upon agreement between the employer and employee. Emergency family leave pay is at two-thirds the employee's normal pay rate, capped at \$200 per day and \$10,000 in the aggregate. It comes with job protection (with some limited exceptions).

Employers with fewer than 50 employees may be exempt from these requirements; however, an employer may only claim to be exempt if one or more of the following three criteria apply:

- The employee's leave request would result in the small business's expenses and financial obligations exceeding available business revenues and would cause the small business to cease operating at a minimal capacity; OR
- The employee's absence would entail a substantial risk to the financial health or operational capabilities of the business because of the employees' specialized skill, knowledge of the business, or responsibilities; OR
- The employee's absence would cause there to be an insufficient number of able, willing, and qualified workers at the time and place needed, to perform the labor or services needed for the small business to operate at a minimal capacity.

Employees who are denied leave may file a claim with the DOL, challenging the validity of the employer's exemption, so any employer wanting to rely on one of these exemptions should fully document its bases for doing so. Also, it is possible that the exemption may apply one week and not the next, so it will be equally important for the employer to regularly review and update any changes in its documentation.

Beyond emergency sick leave and emergency family leave, other leave is also still available for those who are eligible, including FMLA, ADA accommodations (which can include leave), sick time under certain city ordinances, and internal PTO policies.

Unemployment

Minnesota has removed the waiting period for unemployment benefits to make it quick and accessible for every worker affected by COVID-19. Applicants are eligible for unemployment benefits if:

- a healthcare professional or health authority recommended or ordered them to avoid contact with others;
- they have been ordered not to come to their workplace due to an outbreak of a communicable disease; or
- they have received notification from a school district, daycare, or other childcare provider that either classes are canceled or the applicant's ordinary childcare is unavailable, provided that the applicant made reasonable effort to obtain other childcare and requested time off or other accommodation from the employer and no reasonable accommodation was available.

These criteria might sound familiar, and under the right circumstances, it is possible that a person could simultaneously qualify for both emergency leave pay and unemployment.

While all applicants for unemployment benefits must actively seek suitable employment, Governor Walz's executive order stipulates that an employee need only look for suitable work that does not pose a risk to the employee's health or the health of others. If the employee has only been laid off temporarily, the employee can meet the work-search requirements simply by staying in contact with his/her/their current employer.

The unemployment benefits themselves remain at 50% an employee's regular rate of pay up to \$740/week, but the federal CARES Act provides an extra \$600/week bump through July 31, 2020. This bump has caused some employees to earn more on unemployment than they would if they were working.

COVID-related unemployment benefits do not affect the employer's UI rating.

Benefits

Employment benefits are a contractual issue, rather than being a matter of state or federal statute. Therefore, the answer to any question related to how reduced hours or a furlough will affect an employee's employment benefits lies within the terms of the policy or plan. For example, if your employees are required to work a minimum number of hours in order to stay eligible for health insurance benefits, and if they will not meet those requirements because of reduced hours or a furlough, then they will presumptively lose coverage. The employer has two options; it can either:

- Keep the employee on the plan as if he/she/they were an active employee, or
- Treat the reduced hours or furlough as a COBRA qualifying event.

There are risks associated with the first option. An insurance provider may not agree with the employer's decision to keep the employee on the plan and may refuse to cover benefits. Therefore, before you choose to go this route and give your employees false expectations, ask the insurer for a written waiver of the eligibility requirements. An employer will also want to make arrangements for how the employee portion of the premiums will be paid (especially if they are not getting a paycheck). Some options are to reduce it, waive it, arrange for direct payment, or enter into an agreement that the employee will make it up later.

If you cannot get a written waiver, the better option is likely to distribute the COBRA notice. An employer doesn't have to pay for the employee's COBRA coverage, but some employers are voluntarily choosing to do so. If you want to do that, proceed with caution so it is not seen as discriminatory; what you do for one, do for all.

Finally, the taking of leave does not generally constitute a COBRA qualifying event; unless or until the employee does not return to employment at the end of the leave.

Quarantining After Travel

The scenario is that an employee is traveling out of state for a wedding, or taking a family vacation that they planned a long time ago and they don't want to lose their deposits, etc. Do they have to quarantine when they get back?

First, Minnesota does not currently have a legal requirement that people coming into the state quarantine for any amount of time, but the same is not true for every state.

As an employer you should not be in the business of restricting your employee's activities outside of the office; however, here are some things you can do if you have concerns about a traveling employee:

- Recommend that they are familiar with the quarantine orders in the state where they are going; and
- Include return-from-travel quarantine protocols in your own Preparedness Plan. If you do implement such a policy, ideally do it before anyone leaves so they can factor the policy into their decision making. Apply the policy evenly/ equally across the board for everyone.

Preparedness Plans

A Preparedness Plan was not previously required for critical businesses, but on Friday June 5, Governor Walz issued Executive Order 20-74, which provides that critical businesses must have a written Preparedness Plan by June 29.

The Department of Labor website provides a plan template that complies with CDC and MN Dept of Health guidelines, and includes protocols regarding social distancing; identification, isolation, and infection prevention measures; hygiene; and housekeeping. By June 15, 2020, all plans must

comply with industry-specific guidance. The guidance for veterinary clinics can be found here: <https://www.health.state.mn.us/diseases/coronavirus/vetfacility.pdf>

Senior management must sign and certify the written plan, affirming its commitment to implement and follow the Plan. Then it must post and distribute the written plan, as well as train its workers.

Failure to comply may result in both civil and criminal penalties. See [Executive Order 70-24](#) for more information.

Finally, the COVID-19 situation is still extremely fluid. Executive orders and legislative acts are still being issued and amended. As a result, businesses are encouraged to stay abreast of any changes and consult with an attorney when employment issues arise.