

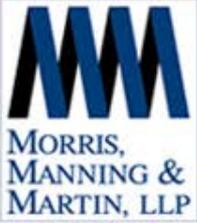
COVID-19 Webinar Series



COVID-19: What Employers Need to Know

March 20, 2020

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Agenda

- Recent paid leave legislation and tax credits
- Reductions, furloughs, and layoffs
- Wage and hour issues
- Remote workforce issues
- Misc. additional employees benefits issues
- Related tax extensions



The Families First Coronavirus Response Act

- March 18, 2020– President Trump signed the Families First Coronavirus Response Act into law.
- The Act includes:
 - Emergency paid sick leave for employees
 - Tax credits for employers
 - Expanded access to unemployment insurance
 - Health care coverage mandates for COVID-19 testing



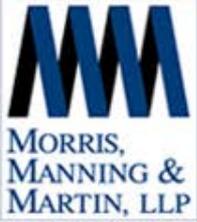
Emergency Paid Leave

- The Act establishes two new laws that require employers to provide emergency paid leave to employees:
 - The Emergency Family and Medical Leave Expansion Act
 - The Emergency Paid Sick Leave Act
- These laws will go into effect within the next 13 days (by April 2, 2020) and are effective until December 31, 2020.



Emergency Family and Medical Leave Expansion Act

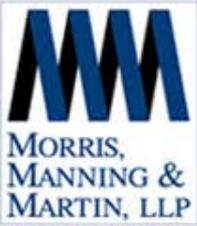
- Expansion of the Family and Medical Leave Act (the “FMLA”)
- Employers are required to provide **up to 12 weeks** of emergency paid leave for eligible employees that are unable to work (or telework) due to a need for leave to care for a son or daughter whose school or place of care has closed due to COVID-19.



Emergency Family and Medical Leave Expansion Act

Who does this apply to?

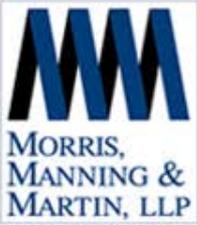
- **“Eligible employee”**: an employee who has been employed for at least 30 days
- **“Employer”**:
 - Private employers with less than 500 employees
 - All public sector employers
 - All governmental entities



Emergency Family and Medical Leave Expansion Act

How much is this going to cost?

- During the period of leave, employers are required to pay eligible employees at least **two-thirds of the employee's regular rate of pay** for the number of hours the employee would otherwise normally be scheduled to work.
 - Capped at \$200 a day and \$10,000 in the aggregate for any individual.
- First 10 days may be unpaid.



Emergency Family and Medical Leave Expansion Act

- Employee may substitute other PTO, accrued vacation, etc. for any part of the leave period—including during the first 10 days of unpaid leave.
- Restoration to position
 - Exception for employers with less than 25 employees, subject to certain conditions.



Emergency Paid Sick Leave Act

- Employers are required to provide all employees with **two weeks** of paid sick leave if the employee is unable to work (or telework) because:
 - The employee is subject to a government-issued quarantine or isolation order or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - The employee is caring for an individual who is subject to such an order or has been so advised.
 - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 - The employee is caring for a child whose school or place of care has been closed due to COVID-19 precautions.
 - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.



Emergency Paid Sick Leave Act

Who does this apply to?

- All employees are eligible
- Covered Employers
 - Private employers with less than 500 employees
 - All public sector employers
 - All governmental entities



Emergency Paid Sick Leave Act

How much is this going to cost?

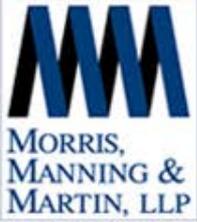
- Full-time employees = 80 hours of paid sick time.
- Part-time employees = paid sick time for the number of hours that the employee works, on average, over a two-week period.
- The amount of emergency sick wages an employer must pay depends on the reason for the employee's leave.



Emergency Paid Sick Leave Act

How much is this going to cost?

- If an employee is taking leave to self-quarantine or seek a medical diagnosis:
 - Employer is required to pay emergency sick time at the employee's **regular rate of pay**
 - Capped at \$511 per day and \$5,110 in the aggregate
- If an employee is taking leave to care for another individual or family member:
 - Employer is required to pay **two-thirds** of the employee's regular rate of pay
 - Capped at \$200 per day and \$2,000 in the aggregate



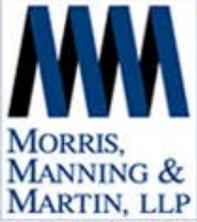
Emergency Paid Sick Leave Act

- Emergency paid sick time is available for immediate use, regardless of how long the employee has been employed.
- It stops beginning with the employee's next scheduled work shift following the termination of the need for leave.
- No carry-over to the following year.
- No requirement to pay or reimburse employee for unused paid sick time upon termination.



Emergency Paid Sick Leave Act

- **Employers cannot:**
 - Require that an employee search for or find a replacement to cover hours during leave
 - Discipline, discharge, or discriminate against an employee who takes leave
- **Employers can:**
 - Require an employee to follow reasonable notice procedures after 1st day of leave



Emergency Paid Sick Leave Act

Additional Requirements

- Employers are required to post (and keep posted) a notice describing the requirements the of the Emergency Paid Sick Leave Act.
 - A model notice will be made available by the Department of Labor



Emergency Paid Leave

Are there any exceptions?

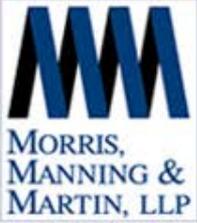
- An employer may elect to exclude:
 - Health care providers
 - Emergency responders
- The Secretary of Labor is authorized to issue additional regulations for “good cause” as necessary.
 - Potential exemption for employers with less than 50 employees



Emergency Paid Leave

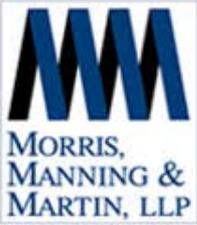
How are employers going to afford this?

- Payroll tax credits
 - equal to 100% of the qualified leave wages, subject to same caps (discussed next)
- Secretary of Treasury is authorized by the Act to issue additional regulations and guidance.
- Possible cash advances?



Tax Credits

- Refundable payroll tax credits for the employer portion (but not the employee portion) of the Social Security component of payroll taxes (the 6.2 percent employer portion of the Social Security tax) to cover wages paid to employees for time off under the required sick leave and family leave programs
- Can be claimed on a quarterly basis
- Refundable if exceeds the amount the employer owes
- Employers must include the amount of credits received in their gross income
- Wages considered in determining the payroll credit can't be used in determining the amount of credit under Section 45S related to paid family and medical leave



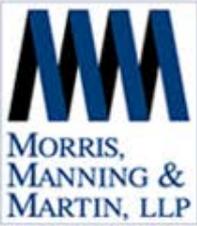
Tax Credits

- The sick leave credit for each employee will be for wages (includes “qualified health plan expenses” – health plan expenses related to leave) of up to \$511 per day while the employee is receiving paid sick leave to care for himself or herself, or \$200 if caring for a family member or child whose school has closed
- Sick leave credit limited to 10 days per employee per quarter
- The family leave credit for each employee will be for wages (including qualified health plan expenses relating to those wages) of as much as \$200 per employee per day, and \$10,000 in the aggregate for all calendar quarters
- Wages required to be paid under the Act shall not be considered wages or compensation to employee for purposes of determining Social Security tax liability

Emergency Unemployment Insurance Stabilization and Access Act

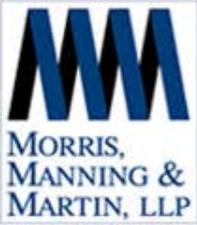


- Provides \$1 billion in additional funds to states to assist with paying unemployment insurance.
- In exchange, states are required to loosen eligibility requirements for unemployment, such as work search requirements or waiting periods.



Emergency Unemployment Insurance Stabilization and Access Act

- To receive these emergency grants, a state must also meet certain additional requirements including:
 - Requiring employers to provide notification of the availability of unemployment compensation to employees at the time of separation from employment.
 - Secretary of Labor will issue model notification language



WORK FORCE RESPONSES TO COVID-19 DISRUPTIONS

- Employers have several options when it comes to managing your workforce during the COVID-19 pandemic:
 - Furloughs and/or reductions in hours
 - Permanent and Temporary Layoffs
 - Facility closures

Furloughs

- What is a furlough?
 - There is no termination of employment
 - Generally includes a reduction in days or weeks worked
 - Employee **does not** perform any work while on furlough



Best Practices and FAQs

Q: Are my employees entitled to collect unemployment compensation while on furlough?

A: Unemployment benefits vary by state, so employers should consider reviewing unemployment eligibility in the various jurisdictions where operations will be impacted by a furlough. Additionally, many jurisdictions have expanded and/or relaxed eligibility for benefits in light of COVID-19.

Layoffs

- There is a termination of the employment relationship.
- Types of Layoffs:
 - Temporary Layoffs (< 6 months)
 - Permanent Layoffs (> 6 months or for an indefinite period)
- The size of a layoff is important.



Best Practices and FAQs

Q: Is there a pandemic exception to Federal and/or state mini-WARN requirements?

A: Fed WARN and most state mini-WARN statutes have provisions addressing terminations due to natural disasters or calamities. However, those provisions have not yet been interpreted as applying in the case of an epidemic.

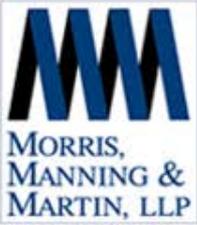
Notably, the Governor of California recently suspended the advance notice requirement of Cal WARN and other exceptions may apply to excuse the advance notice requirement.

Layoffs (cont.)

- Important considerations for temporary and permanent layoffs:
 - Compliance with state-specific laws regarding wage payments and accrued, but unused vacation.
 - Where possible, in the case of permanent layoffs, employers should consider providing severance benefits in exchange for release agreement.

Facility Closures

- State governments are regularly providing guidance regarding the continued operations of certain businesses in light of COVID-19.
 - This may result in the temporary or permanent closures of businesses.



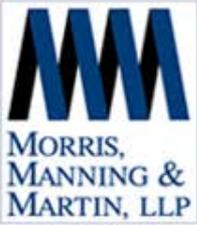
Layoffs and Reduction of Hours: Employee Benefits Considerations

- **Layoffs:**
 - Generally treated as a regular termination from the benefits perspective
 - Determine and communicate end of coverage date
 - Provide applicable COBRA notifications
- **Reduction in Hours:**
 - Plan document will generally control eligibility to continue coverage
 - Watch out for ACA Measurement Periods – If employee's hours are reduced, but the employee is in a stability period, need to comply with stability period rules
 - Section 125 election changes may be permitted in certain circumstances



Furloughs: Employee Benefits Considerations

- Furloughs:
 - Effectively treated as a reduction in hours for benefit plan purposes
 - Plan document will control whether benefits can be continued through furlough or terminated sooner, and when COBRA begins (i.e., beginning of leave, failure to return, etc.)
 - **Fully-insured plans** should also confirm with their broker/carrier before making any determinations or changes
 - **Self-insured plans** should confirm with their stop loss carrier before making any determinations or changes
 - Employers should determine how employees will pay for coverage while on furlough: i.e., pay as you go, catch up
 - If catch up, should be documented in writing to authorize recoupment
 - COBRA consideration – COBRA requires termination of coverage



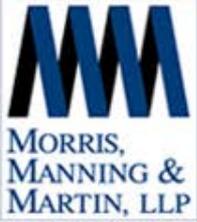
Retirement Plan Issues

- On March 19, the Senate passed a bill providing retirement plan relief:
 - Waiver of the 10-percent early withdrawal penalty for distributions up to \$100,000 for coronavirus-related purposes
 - Income attributable would be subject to tax over 3 years (with possibility to repay and avoid tax)
 - Flexibility for loans from certain retirement plans for coronavirus-related relief
 - **Not effective yet – stay tuned**
- Retirement Plan Reminders (pending new rules):
 - Eligible compensation: furlough pay vs. separation pay
 - Plan loan repayment cure periods – check plan documents (the max is end of the 2nd calendar quarter after the missed payment)
 - Partial plan terminations – 20% presumption (if partial plan termination, must vest all affected employees)
 - Distribution requests – make sure that there is a distribution event (i.e., is there an actual separation)
 - Hardship Requests – new rules allow employees to self-certify



Wage and Hour

- Ensuring compliance with your Company's time-keeping policies will be crucial while managing a remote workforce.
- Employers should be mindful of state and situation-specific requirements that prevent a unilateral change in wages or other compensation.



Wage and Hour

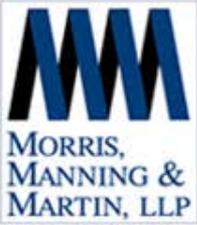
- Furloughs may involve changes to pay practices.
- Making improper deductions from/reductions to an exempt employee's salary may jeopardize their exempt status.



Best Practices and FAQs

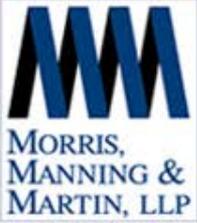
Q: Do employers have to pay non-exempt employees their same hourly rate or salary if they work at home?

A: If a remote work option is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then you must pay the same hourly rate or salary. If this is not the case, under the FLSA, employers generally have to pay non-exempt employees only for the hours they actually work, whether at home or at the employer's office.



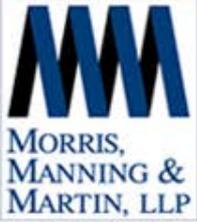
Remote Work Policies

- Convey that employees are expected to help maintain normal business operations to the extent possible.
- Consider all aspects of employees' work and ensure employees understand what's expected of them.
 - How strict will the policy be?
 - Expectations for employee's availability?
 - How will you handle meetings?
- Administer remote work policies in a non-discriminatory manner.



Ensuring Productive and Successful Remote Work

- Consider whether you will provide employees with necessary resources, such as computers.
- Agree on a single communications platform (i.e., email, instant messaging, Skype, Zoom).
- Consider whether remote work could result in reduced productivity.
- Watch for employee burnout.
- Use tactics to make sure remote workers don't feel untethered and disconnected.



Remote Work & Data Security

- Consider your existing policies.
 - Do current policies address confidentiality concerns? If not, now is the time to implement such a policy.
- Appropriately train employees on security measures relating to remote work.
- Protect trade secrets and confidential information.



Employee Safety

- OSHA's General Duty Clause: Employers must provide a safe and healthy workplace free from recognized hazards that are causing or are likely to cause death or serious harm.
- Consider what practical considerations you can do as an employer.
 - Take steps to avoid putting employees at elevated risk of exposure.
 - Vigilantly encourage good health and sanitation practices by employees.



Best Practices and FAQs

Q: What should I do when an employee has tested positive for COVID-19?

A: Send home anyone who worked closely with the infected employee for a 14-day period of time to ensure the infection does not spread; however, do not identify by name the infected employee or you could risk a violation of confidentiality laws.



Best Practices and FAQs

Q: Can I require an employee to notify the company if they have been exposed, have symptoms, and/or have tested positive for COVID-19?

A: Yes. Any employee who becomes ill at work with COVID-19 symptoms should immediately notify their supervisor. Employees who are suffering from symptoms should be directed to remain at home until they are symptom-free for at least 24 hours.



Best Practices and FAQs

Q: Can an employee refuse to come to work because they are fearful of infection?

A: Employees are only entitled to refuse to work if they believe they are in imminent danger, which is defined as “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the Occupational Safety and Health] Act.” Be mindful of issues with the ADA, as imminent danger may mean something different when the employee has underlying medical issues.



Best Practices and FAQs

Q: Can I require that a sick employee be tested for COVID-19 before returning to work?

A: Yes, you may seek to have an employee tested for COVID-19, subject to the availability of tests, if there is good cause to believe that the employee may pose a direct threat to the health and safety of others, such as if the employee became sick after traveling to high-risk areas or shows symptoms of infection with COVID-19.



Misc. Benefit Issues and Guidance

- HDHP plans can include COVID-19 expenses as “first dollar coverage”
 - Typically, to contribute to HSA, must have only high deductible health plan coverage
 - Expenses, such as preventive care, may be reimbursed as first dollar coverage
 - IRS guidance expands first dollar coverage to include testing and treatment for COVID-19
- Waived out of pocket co-pays / costs for testing: fully-insured (most are being waived) vs. self-insured (employer determined)
- Telemedicine considerations
- HIPAA reminders:
 - Employers should remind employees of their HIPAA obligations
 - Note the employment records exception
- Section 139 Plans - can provide “reasonable and necessary” expense reimbursement to employees



Tax Extensions

- The April 15, 2020 federal tax payment deadline has been extended to July 15, 2020
- Individuals, trusts and estates can defer up to \$1 million of tax payments (it appears that married individuals filing a joint return may only defer up to \$1 million combined)
- Corporations can defer up to \$10 million of income tax payments (applies to each consolidated income tax group)
- Relief is available only for federal income tax payments (including payments of tax on self-employment income) due on April 15, 2020, in respect of a taxpayer's 2019 taxable year, and federal estimated income tax payments (including payments of tax on self-employment income) due on April 15, 2020 with respect to the taxpayer's 2020 tax year
- Interest and penalties with respect to such postponed taxes will begin to accrue on July 16, 2020 to the extent payments are not made on or prior to July 15, 2020.
- No extension for any other type of federal tax (including payroll taxes and excise taxes)
- Taxpayers are still required to file their federal income tax returns by the due date



Phase 3 of Tax Relief

- New senate legislation passed last night extending tax *filing* deadline to July 15
- Postponement of all estimated tax payments to Oct. 15
- Delay of payment of employer payroll taxes (paid over the following two years, due December 31, 2021 and December 31, 2022)
- **Not effective yet.** Stay tuned...



Questions



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COVID-19 Resources

- MMM COVID-19 Task Force
- More information: <https://www.mmmlaw.com/practice-areas/coronavirus-covid-19/>
- Upcoming COVID-19 webinar topics:
 - Force Majeure, Insurance, and Contracting Issues
 - Privacy and Cybersecurity for the Remote Workforce