

MEMORANDUM

TO: All Business Clients

FROM: William S. Barrett, Chief Executive Officer
wbarrett@lawfirm.ms
(973) 243-7952

RE: COVID-19: Employment Issues with Emergency Business Closures

DATE: March 17, 2020

Many of our business clients are asking us about their legal obligations to employees, should they close their businesses due to COVID-19. What follows are our answers to the questions we have received to date. As you read through, please note that this Q&A does not address any specific federal or state emergency unemployment compensation pay benefits, because as of today, no such legislation has been finalized. As more questions arise, and as more information becomes available, we will amend and recirculate this memo.

Please feel free to circulate this memo to whomever you feel might benefit from this information. You are encouraged to circulate it to business associates and others with whom you do business. While this memo does discuss specific employment laws in New Jersey and California, this is only by way of example.

For the most part our answers to the questions are generic in that they are applicable in most situations in most states. The memo does indicate where we recommend checking the specific law in your state.

This memo is for informational purposes only and should not be relied upon as legal advice. The law differs depending upon the state where you are located and your particular employment policies and practices. Should you need legal advice, please contact one of the Mandelbaum Salsburg attorneys listed.

- ***Am I required to pay my employees, if I voluntarily close my business or I am ultimately ordered by the government to do so?***

No; except for possible requirements under any employment agreements, and state mandated paid sick or other leave, as address below, you are not required to pay your employees whether you decide to voluntarily close your office or are ordered by the government to do so.

- ***Can I give my employees salary advances?***

Yes, as a general proposition, you can give salary advances. However, many states have laws regulating employers doing so. In some states there are employment, wage and hour, and consumer lending laws which may be applicable (depending on the number of times a company gives employee salary advances, federal consumer lending laws may also apply).

In general, the employer must have a written agreement with the employee on the terms of the salary advance including, obviously, the amount of the advance; whether any interest will be charged; when the employee must begin repaying the advance; over how many pay periods will the advance be repaid; and the dollar amount which will be deducted from each of the employee's paychecks until the advance is repaid (the repayment of the advance is accomplished through a deduction from these future paychecks).

One last point is that federal and state income tax and payroll benefit taxes (Social Security, Medicare, unemployed compensation fund taxes and the like) must be deducted from the salary advance. We suggest that you work with your payroll company or accountant on making any salary advances.

- ***Am I required to permit my employees to use vacation, sick leave, personal time or other paid time off, if I voluntarily close my business or I am ordered by the government to do so?***

As discussed below, these employees are technically on total or partial temporary layoff. Therefore, they generally are not entitled to be paid for unused PTO or accrued sick or vacation time and, depending on any written policies you have, they may or may not be entitled to continue to accrue those benefits while on temporary layoff.

Unless they have contracted the virus or are otherwise sick, employees are not entitled to take paid sick leave. They are not taking time off for personal business, unless to care for children, due to school closings, or a sick child or other family member.

If an employee does try to take vacation time, the employer has the inherent managerial right to deny the request, even if it does not have a personnel policy which specifically advises employees of this right. However, in California, and perhaps in other states, the

employer does have to pay the employee for any unused vacation or other paid time off when the employee leaves.

Nevertheless, if it is financially possible, we recommend as a proper HR policy that you permit your employees, including those who do not fit any of the situations described above, to use any paid time off they have while your business is closed during this emergency (as discussed below, depending on the laws in your state, employees may be entitled to paid sick leave or other paid time off mandated by state law).

- ***What if all my employees ask to take all their paid sick leave, required by state law, and I cannot afford to pay it all now?***

First, let's be clear on the distinction between sick/personal time which your business may provide under its personnel policies and the sick leave which is required by law in some states, like New Jersey. The prior question includes our recommendations on how to deal with the issue of sick/personal leave provided by your business in its personnel policies. This specific question addresses the sick leave which is mandated by law in states like New Jersey.

This question is obviously only applicable in those states which have laws requiring employers to provide paid sick leave for their employees. First, it is very important to check your specific state law regarding when an employee is entitled to paid sick leave, in order to determine on an employee-by-employee basis whether they are entitled to this paid leave.

For example, in California, employees are entitled to use the state required paid sick leave only if they or an immediate family member is ill due to the coronavirus or otherwise (there are other situations when California employees can use this leave which are not relevant to this emergency). Consequently, if COVID-19 is successfully contained in California, there will be fairly limited situations in which employees will be immediately entitled to use all their accrued state mandated, paid sick leave.

However, in contrast, the New Jersey Paid Sick Leave law permits employees to take this leave in the same two situations as in California, but also when their employer's business is closed due to a public health emergency or their children's school or daycare is closed due to a similar emergency. In effect then, all employees in New Jersey who have children home due to school or daycare closings in this emergency are now entitled to use all the state mandated paid sick leave they have accrued. If there is a government ordered closing all but essential businesses in New Jersey, then nearly all employees will be entitled to now use all this paid sick leave.

For those employers who do not have sufficient cash in their business bank accounts to pay all this state mandated sick leave, we suggest taking the following steps. First, calculate how much of a cash reserve you need to pay essential operating costs to stay in business, and what projected income you still expect to receive over the short term (e.g.; the next two months). Second, calculate how much remaining cash on hand and

projected income you will have to pay those employees who request paid sick leave (you do not have to offer it; employees have to request it).

Keep records and provide them to these employees of the time and dollar amounts you have paid them now and what you owe them; and let them know that you will pay them what you owe as soon as you can. Remember all sick leave is paid through regular payroll with all deductions and withholding.

- ***If you decide to remain open, under what circumstances can employees stay home?***

If they are sick with the coronavirus or otherwise, they may be entitled to paid sick leave depending on your policies and state law. Whether or not the absence is paid, you should have a policy requiring employees to remain home if they do not feel well or suspect that they may be contagious.

Similarly, they may be entitled to stay home to care for a family member or a child who is home due to his or her school closing, or due to their family member being sick with the coronavirus or being contagious.

If it is financially possible for the company, we recommend, as a proper HR policy, that it permit its employees, including those who do not fit any of the situations described above, to use any paid time off they have while your business is closed during this emergency (as discussed above, depending on the laws in your state, employees may be entitled to paid sick leave or other paid time off mandated by state law).

- ***What procedures should my company follow with its employees in closing the business?***

We recommend documenting, at least to some extent, the drop-off of your business; for example, cancellations by your customers for goods or services, and then provide employees with a written notice that they are being temporarily laid off due to “lack of work” because of this drop-off.

Another option is to reduce the hours of your employees so that they qualify for partial unemployment compensation benefits. (most states, including New Jersey, provide partial benefits) when an employee has their hours of work reduced instead of being completely laid off. We recommend checking the website of the Department of Labor in your state to determine how much an employee’s wages must be reduced before they can qualify for partial benefits and what is the dollar amount of the benefits. This information will enable your company to adjust the reductions in hours and wages to the amount which will result in the maximum partial unemployment compensation benefits.

- ***What should I tell employees about the length of the temporary layoff?***

We have no idea how long this situation will last; particularly if we have a complete shutdown on a local, state-by-state or national level. Consequently, in any written notice

of layoff we recommend advising employees that this temporary layoff is for an indefinite period of time, and the company will give them as much advance notice as possible of the date when it will be reopening.

- ***Should I advise my employees to apply for unemployment compensation benefits?***

Yes. Following the above recommended procedures for either a total or partial temporary layoff, your employees may qualify for unemployment compensation benefits because they are being temporarily laid off due to “lack of work.” However, we recommend advising employees that this decision will be made by your state Department of Labor; it is not a decision made by your company; and you cannot make any representations to your employees that they will qualify for unemployment benefits. We also recommend advising your employees that if they do use any paid time-off, it may disqualify them from unemployment compensation benefits for the period of time they are being paid by your company.

- ***Will there be a cost to my company for employees receiving unemployment compensation?***

It varies from state-to-state how employer tax contributions to the state’s unemployment compensation plan are calculated. With essentially all the company’s employees applying for total or partial unemployment benefits, and depending on the length of the benefit payments, it is possible that the company’s tax contributions (its experience rating) will increase. It is also possible that the company will not experience this increase until 2021. Again, this depends on the plan in your state.

- ***Do I deal differently with employees who have employment agreements versus those who do not?***

As a general proposition the answer is “no.” Except to the extent that, for those employees who do have Employment Agreements, the company needs to comply with the terms of those agreements with regard to terminations, layoffs, the use of vacation, sick and personal time or other paid time off. You also need to review these Employment Agreements to determine if they include any provisions requiring payment of salary during a required notice period, or payment of severance as part of, or prior to, any cessation of employment.

We also recommend that you clarify to employees who have Employment Agreements that they are not being terminated; they are simply being temporarily laid off for the duration of the emergency. Also advise them that they are entitled to apply for unemployment compensation.

- ***Is my company obligated to continue paying for health insurance during this temporary layoff?***

If your company has the equivalent of 20 or more full-time employees, then it is covered by a federal law known as COBRA for the continuation of health insurance when employees cease actively working. If the company has less than this number of employees, then it may be covered by any state law, if your state has one, which, like COBRA, addresses the continuing of health insurance for employees when they cease actively working. Under either COBRA, or a comparable state law (if your state has one), an employer is required to continue an employee's health insurance during a temporary layoff. New Jersey has such a law.

Most employers require employee contributions to health insurance premiums with the employer paying the balance of the premiums. During this temporary layoff the employer can require that the employee pay the entire premium. However, if the temporary layoff is for less than a month, or even for a full month, and because premiums are paid on a monthly basis, it may be impractical for such a short time to change this contribution scheme to the employee paying all the premiums and then revert back to this employer/employee split of premium payments. Best to check with the company's insurance broker on this point.

A company may adopt a policy that it will pay its portion of the premium for the first month of a temporary layoff, and then the employee has to pay the full premium if the layoff continues into a second month and beyond. This is the policy we recommend; although the company is free to continue to pay its portion of the premium for a longer period if it chooses. In addition, if during this temporary layoff the employee is on federal Family and Medical Leave, or is on leave under a comparable state law, like the New Jersey Family Leave Act, then the company will have to continue paying its portion of the health insurance premiums during this layoff.

- ***Are there any other state or federal benefits to which my employees may be entitled during this temporary closure?***

There is the federal Family and Medical Leave Act which only applies to employers with 50 or more employees within a 75-mile radius, and has had these many employees during at least twenty weeks in the preceding twelve months. The employee must also have worked for the company for at least 12 months, and have worked at least 1250 hours, to be eligible for this benefit.

Some states have similar laws for employers with less than this number of employees. For example, the NJ Family Leave Act was recently reduced to employers with 30 or more employees. A few states also have laws mandating any one or more of the following benefits: paid sick leave; paid family leave; paid employee temporary disability leave; and even paid family temporary disability leave.

These state laws vary widely from state-to-state, and many states have none of them. For those companies with less than 50 employees, we suggest you advise employees to check their state Department of Labor website to determine their eligibility for any state benefits. For those companies which have 50 or more employees, we recommend

advising employees to also check the federal Department of Labor website for this same purpose.

In New Jersey, in addition to the Family Leave Act and the Paid Sick Leave Act, there are also Temporary Disability and Family Temporary Disability compensation laws which entitle employees to benefits from the state when they or a family member are ill, or disabled; to care for a new borne or newly adopted child, or to care for a child due to school and daycare closings or due to business closing in a public health emergency.

▪ ***What should my company do if we decide to stay open?***

We recommend that you check the CDC [website](#) for health and safety protocols, as well as other applicable federal and state agency websites and the ADA website. In addition, we recommend you review recent COVID-19 articles from our [employment blog](#).

Preparing for COVID-19

Employers should be gearing up for a possible outbreak of coronavirus in their area. This includes establishing certain safety precautions as well as issuing a policy concerning protocols to be followed in the workplace. The policy should include:

1. notification concerning how the virus is transmitted;
2. the incubation period of the virus;
3. whether the company will provide any protective clothing;
4. for companies in certain industries, the guidelines OSHA has issued; and
5. steps the company wants employees to follow including hand washing, working from home, providing a doctor's note before returning to work, etc.

Policies need to be in conformity with the requirements of the Americans with Disabilities Act ("ADA") and state disability laws such as the New Jersey Law Against Discrimination ("NJLAD") concerning inquiring about employee's health and the need to provide any reasonable accommodations. Leaves of absence also may be necessary and must comply with the federal Family and Medical Leave Act ("FMLA") for employers with at least fifty (50) employees and the New Jersey Family Leave Act ("NJFLA") for employers with at least thirty (30) employees. Employers should also review the EEOC's guideline entitled "[Pandemic Preparedness in the Workplace and the Americans with Disabilities Act.](#)"