[NAME OF PRACTICE]
COVID-19 PANDEMIC POLICIES AND PROCEDURES

Policy 2.1: Families First Coronavirus Response Act; Expanded Family and Medical Leave; Emergency Paid Sick Leave
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Purpose:
To implement the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, which is a part of the Families First Coronavirus Response Act.

Policy and Procedure(s):

Families First Coronavirus Response Act (FFCRA)

The Families First Coronavirus Response Act (FFCRA) became effective on April 1, 2020 created two new emergency paid leave requirements. The FFCRA included the Emergency Family and Medical Leave Expansion Act that amended the Family and Medical Leave Act (FMLA) and created the Emergency Paid Sick Leave Act.

This Policy contains several answers to frequently asked questions about the FMLA amendments under the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the new Emergency Paid Sick Leave Act (EPSLA) within the FFCRA, in addition to recommendations as to how they may be interpreted.

Coverage and Eligibility

Is our PRACTICE covered under the FFCRA?

- **Are you a Covered Employer?**
  - All public agencies are covered, except for certain specific Federal public employers
  - All private employers with fewer than 500 employees are covered

- **How should you count the 500 employees?**
  - Include:
    - all current full-time and part-time employees in the US (including the District of Columbia and US territories);
    - employees on leave (paid or unpaid);
    - employees of temporary placement agencies who are jointly employed by the employer and another employer (regardless of which employer pays them);

- day laborers supplied by a temporary placement agency (regardless of whether the employer is the temporary placement agency or the client firm); and
- any other common employees of joint employers or integrated employers.

- Exclude:
  - independent contractors (as defined under the Fair Labor Standards Act (FLSA));
  - workers who have been laid off or furloughed and not yet reemployed; or
  - workers outside the US.
- The Count of 500 employees is determined at the time of each request for leave, so employers who are close to 500 employees should count their employees prior to asserting that they are not covered under the FFCRA

Exceptions

- **Do any Exceptions apply?**
  - Small Business Exception
    - If the PRACTICE has fewer than 50 employees, an employer may be exempt from granting a leave request if providing leave would jeopardize the viability of the business as a going concern
    - An authorized officer of the PRACTICE must determine that:
      - granting the employee's leave request would cause the PRACTICE's expenses and financial obligations to exceed available business revenue and cause the business to stop operating at a minimal capacity;
      - the employee's absence would pose a substantial risk to the employer's financial health or operational capacity because of the employee's specialized skills, knowledge of the business, or responsibilities; or
      - the employee's services are needed for minimal capacity operations and the employer cannot find enough other workers who are able, willing, qualified, and available at the time and place needed to perform those services.

- To apply for this exception, the employer must document how these criteria apply to each leave request and retain the documents for four years.

- Health Care Provider and Emergency Responder Exemption
  - If an employee is a Health Care Provider, then they can be excluded from Emergency Paid Sick Leave and Expanded Family and Medical Leave
    - The FFCRA defines a Health Care Provider very broadly, and includes:
      - doctor's office, hospital, health care center, or clinic;
      - medical school or post-secondary educational institution offering health care instruction;
      - local health department or agency;
      - nursing facility, retirement facility, nursing home; or home health care provider;
      - laboratory or medical testing facility, pharmacy, or similar entity;
      - entity that contracts with any of these institutions to support the facilities' operations;
      - entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.
    - The FFCRA defines an Emergency Responder very broadly as well, and includes anyone necessary for the provision of transport, care, healthcare, comfort, and nutrition of patients, or others needed for the response of COVID-19
      - Some examples provided include:
        - doctor's office, hospital, health care center, or clinic;
        - medical school or post-secondary educational institution offering health care instruction;
        - local health department or agency;

- nursing facility, retirement facility, nursing home; or home health care provider;
- laboratory or medical testing facility, pharmacy, or similar entity;
- entity that contracts with any of these institutions to support the facilities' operations;
- entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

- The employer must affirmatively exclude any employer that it believes falls under the Health Care Provider or Emergency Responder exceptions, otherwise the employees are covered under the FFCRA.

- **What are qualifying reasons for leave?**
  - Emergency Paid Sick Leave
    - For all of these reasons, the employee must be unable to work or telework due to the qualifying reason
      - Reason 1: The employee is under a federal, state, or local quarantine or isolation order related to COVID-19, including a shelter in place or stay at home order (see Shelter in Place or Stay at Home Orders).
      - Reason 2: The employee has been advised by a health care provider to self-quarantine because of COVID-19 concerns.
      - Reason 3: The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis (but only for the time spent taking affirmative steps to seek a diagnosis). Recognized symptoms include:
        - fever;
        - dry cough;
        - shortness of breath; or
        - other symptoms identified by the CDC.

- Reason 4: The employee is caring for an individual subject to a quarantine or isolation order or advised to self-quarantine for COVID-19 reasons. The DOL Rule clarifies that the individual must be:
    - an immediate family member;
    - a roommate; or
    - a similar person with a relationship to the employee creating an expectation that the employee would provide care.
- Reason 5: The employee is caring for a son or daughter (as defined in the FMLA) where, due to COVID-19 precautions, the child's:
    - school or place of care has been closed; or
    - child care provider is unavailable.
- Reason 6: The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

- <u>Expanded Family and Medical Leave</u>
    - The employee is unable to work or telework due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.
    - What does it mean to be unable to work or telework?
        - If the employer has work for the employee and the employee can telework even though the employee has to stay home for one of the above reasons, then the employee is not entitled to leave.
        - Telework: When an employer allows an employee to perform work or at a location outside the normal workplace and pays the employee's normal wages for that work.
        - If the employer does not have any work for the employee regardless of the reason for leave, then the employee is not entitled to leave.

- **What Leave Amounts and Pay are given?**

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- Emergency Paid Sick Leave
  - ***Amount of Leave***
    - Full-time employees receive 80 hours of paid sick leave over a two-week period
      - Full time employees are either regularly scheduled to work at least 40 hours per week or on average works at least 40 hours a week in a fluctuating schedule
      - Overtime hours must be included in determining the hours worked
    - Part-time employees are entitled to leave based on the average number of hours they are scheduled to work during a two-week period
      - For employees with fluctuating schedules, the average hours are based on the estimate of the employee's weekly hours based on the average number of hours the employee was scheduled to work per calendar day over the six-month period prior to the first day of sick leave.
  - ***Amount of Pay***
    - For Qualifying Reasons 1-3, the employee gets his/her regular rate of pay, capped at:
      - $511 per day; and
      - $5,110 in total.
    - For Qualifying Reasons 4-6, the employee gets 2/3 the employee's regular rate of pay, capped at
      - $200 per day and
      - $2,000 total.
  - ***General Rules***
    - Leave is available for any employee with a qualifying reason, regardless of how long the individual has been employed.
    - The employer cannot require the employee to use other available paid or unpaid leave before or concurrently with Emergency Paid Sick Leave

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- Expanded Family and Medical Leave
  - ***Amount of Leave and Pay***
    - Employees are entitled to up to 12 workweeks of leave:
      - The first two weeks are unpaid leave, but leave under the Emergency Paid Sick Leave can apply
      - The next ten weeks are paid leave at 2/3 the employee's regular rate, capped at:
        - $200 daily; or
        - $10,000 total
    - The employee can elect to use Emergency Paid Sick Leave for the first two weeks of unpaid Expanded Family Medical Leave, if the Paid Sick Leave has not already been used
    - The employee can elect or the employer can require that any accrued or available leave under an employer's policies run concurrently with the paid Expanded Family Medical Leave and the employer must pay the employee's full wages (but the employer will only receive a tax credit remains capped at the above amounts.
    - Intermittent leave is only allowed when the employer and employee agree
  - ***General Provisions***
    - Notice by the Employee
      - Employers cannot require that an employee give advance notice
        - However, employers may require employees to follow reasonable notice procedures after the first workday of paid sick leave, except when taking leave for child care reasons
      - If an employee is taking leave for child care reasons and the need for leave is foreseeable, the employee must provide notice as soon as practicable.
        - Verbal notice by the employee is generally sufficient

- **Right to Return from Leave**

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- An employee returning from Paid Sick Leave or Expanded FMLA leave has the right to be restored to the same or an equivalent position
  - There are several exceptions:
    - An employee is not protected from employment actions, such as layoffs, that would have happened whether the employee took leave or not.
    - An employer also may deny restoration following EFMLEA leave of key eligible employees (as defined in the FMLA) if doing so is necessary to prevent "substantial and grievous economic injury to the operations of the employer."
    - If the employer has less than 25 employees, the employer can deny restoration to the position if:
      - employee took leave for child care reasons
      - the position no longer exists because of economic conditions or other changes caused by a public health emergency
      - the employer makes reasonable efforts to restore the employee to an equivalent position
      - if the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the year beginning on the earlier of the end of the employee's leave or 12 weeks after the employee's leave started.

<u>Employer (PRACTICE) Requirements</u>

- **Documenting Leave Requests**
  - The employer must maintain documentation of:
    - the employee's name
    - the dates of the requested leave
    - the qualifying reason for leave
    - a verbal or written statement that the employee cannot work or telework because of the qualified reason
  - The documentation needed differs with the qualifying reason

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        - For an order to self-quarantine, documentation should include the name of the health care provider or governmental entity that issued the order
        - for caring for a child, the documentation should include the name of the child, the school, and a statement that no other suitable person will be caring for the child
    - Employer must keep the documentation for four years
- **Notice Posting Requirements**
    - Employers must conspicuously post a notice on their premises regarding employee rights under the FFCRA.
        - Employers can satisfy the posting requirement by
            - distributing the notice online
            - posting the notice on the employer's website
            - mailing or emailing the notice to employees
    - The DOL Sample notice can be found at:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

References:

1. The Families First Coronavirus Response Act, Public Law 116-127 (FFCRA)
2. The Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136 (CARES Act)

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Policy 2.2: Managing Employee Claims for Unemployment Benefits Under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) during the COVID-19 pandemic.

Effective Date:

Purpose:
To implement and comply with the provisions of the Coronavirus Aid, Relief and Economic Security Act impacting employee claims for unemployment benefits.

Policy and Procedure(s):

1. The *Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")* was signed into law on March 27, 2020, provides an estimated $260 billion in enhanced and expanded unemployment insurance (UI) to workers facing unemployment because of the COVID-19 pandemic. The Act affects state-based unemployment programs in three ways: (1) provides a federal supplement to state-paid unemployment compensation; (2) expands who is eligible for unemployment compensation; and (3) extends unemployment compensation beyond the time normally provided by state law.

2. From March 27, 2020 through July 31, 2020, all regular UI and Pandemic Unemployment Assistance (discussed below) claimants will receive their usual calculated benefit plus an additional $600 per week in compensation referred to as the "Federal Pandemic Unemployment Compensation." The Federal Pandemic Unemployment Compensation is a flat amount to those receiving regular UI and those receiving benefits under the new Pandemic Unemployment Assistance program. This supplement will be paid to the individual by the State either with the regular UI payment or at a separate time, but on a weekly basis.

3. The "Pandemic Unemployment Assistance Program" matches the regular state unemployment benefit amount plus the Federal Unemployment Compensation ($600) for unemployed workers who would not normally be eligible for unemployment compensation (discussed further below). Benefits under the Pandemic Unemployment Assistance Program are provided for up to 39 weeks (which includes any weeks the individual received regular compensation or extended benefits under any Federal or State law). This program runs from January 27, 2020 through December 31, 2020, unless otherwise extended. Individuals will be eligible for benefits retroactively.

<u>Eligibility</u>

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1. Those eligible under the Pandemic Unemployment Assistance Program include self-employed workers and independent contractors, freelancers, workers seeking part-time work, and workers who do not have a long enough work history to qualify for the regular state UI benefit. Workers must be authorized to work to be eligible, meaning that undocumented workers will not qualify.

2. Eligibility for Pandemic Unemployment Assistance Program extends to individuals who have exhausted all right to regular unemployment or extended benefits under the State or Federal Law or Pandemic Emergency Unemployment Compensation, or are self-employed, seeking part-time employment, lacking sufficient work history, or otherwise ineligible for regular benefits under the State or Federal Law or Pandemic Emergency Unemployment Compensation.

3. To be eligible, individuals must also provide self-certification that he or she is otherwise able to work and available for work within the meaning of the applicable state law, but is unemployed, partially unemployed, or unable or unavailable to work because of one of the following reasons:

   (1) he or she has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

   (2) a member of the individual's household has been diagnosed with COVID-19;

   (3) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;

   (4) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;

   (5) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;

(6) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

(7) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;

(8) the individual had to quit his or her job as a direct result of COVID-19;

(9) the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or

(10) the individual meets any additional criteria established by the Secretary of Labor.

4. An individual is not a "covered individual" if he or she has the ability to telework with pay or is receiving paid sick leave or other paid leave benefits.

5. The Pandemic Emergency Unemployment Compensation Program provides an additional 13 weeks of unemployment benefits through December 31, 2020 to help those who remain unemployed after State unemployment benefits are no longer available. The weekly amount of unemployment benefits available to the individual is the amount payable to the individual under State law plus the Federal Pandemic Unemployment Compensation ($600). The individual must be "actively seeking work," but states must be flexible where individuals are unable to search for work because of COVID-19, including because of illness, quarantine, or movement restrictions. Louisiana has already waived work search requirements.

<u>Answers to Common Employer Questions about the CARES Act</u>

- **Does the Act encourage employees in low-to-mid-wage positions to quit so that they can collect the increased unemployment benefits?** The new employment scheme provides compensation in excess of prior wages in some cases and, therefore, may incentivize employees to quit or remain out of the workforce while the Federal

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Pandemic Unemployment Compensation is available until July 31, 2020. It is unclear if employees can simply quit because they think it would make more financial sense for them to do so and collect unemployment benefits. For example, for an employee to be eligible for Expanded Unemployment Benefits, covered individuals must have "had to quit their job as a direct result of COVID-19." This suggests that the individual must essentially have been forced to quit for reasons directly related to COVID-19.

- **Can an employee collect the full amount of Federal unemployment benefits even if he or she is only collecting partial State unemployment benefits?** The Act, as written, appears to provide the Federal Pandemic Unemployment Compensation ($600) to such individuals receiving only partial state unemployment benefits, and the Department of Labor has stated in its guidance that an individual who is eligible to receive at least $1 of underlying benefits for the claimed week will received the full $600 Federal Pandemic Unemployment Compensation.

- **Must a partially-employed worker, such as one whose work schedule has been reduced due to COVID-19, exhaust all available paid leave before making a claim for unemployment benefits?** There is no provision in the Act that an individual must use any available paid leave prior to filing a claim for unemployment benefits. However, certain state laws may disqualify individuals from unemployment benefits if the individual is receiving or has received paid leave such as sick/vacation pay for the week(s) they are seeking benefits. The Act does not appear to override such state laws.

References:

1. The Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136 (CARES Act)

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Policy 2.3: Handling Employee Terminations and Reductions in Work Force during the COVID-19 Pandemic
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Purpose: To assist the PRACTICE with handling potential employee terminations and reductions in our work force, if applicable, during the COVID-19 Pandemic.

Policy and Procedures:

Background

1. During economic downturns and other unforeseen business disruptions, employers may need to explore ways to ensure the continued viability of their businesses by reducing labor costs. Employers can unilaterally decide to lay off most employees or reduce their working hours unless prohibited by statute or agreement. However, any reduction in force (RIF) must be carefully planned to avoid incurring legal liability.
2. If the PRACTICE determines that reducing labor costs maybe necessary to ensure a business's continued viability, the Practice should first consider other options, such as a hiring freeze on affected departments, or a pre-layoff promotion and transfer freeze.
3. The PRACTICE may also consider less drastic alternatives to laying off employees, such as furloughing workers, reducing work hours for a temporary period, or reducing pay for a temporary period. Furloughs and reduced working hours or compensation can provide necessary cost-saving measures while retaining employees with institutional knowledge and experience. Retaining experienced employees reduces the costly and timely process of rehiring and retraining personnel when economic conditions improve and allows the employer to ensure some consistency in tough economic times.
4. While furloughs and other temporary cost-saving arrangements have many long-term benefits, they must be carefully structured to comply with the Fair Labor Standards Act (FLSA) (29 U.S.C. §§ 201-219) and state wage and hour laws. For example, certain cost-saving measures may jeopardize the exempt status of salaried exempt employees under the FLSA. Failure to comply with these laws can also lead to significant liability, including liquidated damages, attorneys' fees, and triple damages. For more information.
5. The primary risk of implementing these temporary cost-saving measures is that any loss of compensation for exempt employees may result in a loss of their exempt status

under the FLSA, requiring the employees to be paid applicable minimum wage and overtime pay. To remain exempt from overtime under the executive, administrative, professional, computer professional, or highly compensated employee exemptions, employees generally must be paid on a salary basis, meaning that:

(1) The exempt executive, administrative, and professional employees must be paid a guaranteed salary equal to or greater than the minimum amount set by the DOL (at least $684 per week and higher under some state laws) for any week in which work is performed. Computer professional employees are also subject to the salary basis test, but can still be exempt even if they are paid on an hourly basis, as long as they receive at least $27.63 per hour. Highly compensated employees must receive a minimum total annual compensation of $107,432, which includes at least $684 per week (and higher under some state laws) paid on a salary basis.

(2) The employee is paid on a weekly or less frequent basis (for example, monthly).

(3) The employee receives, during each pay period, a predetermined amount comprising all or part of the employee's compensation.

(4) The employee's salary may not be reduced because of either the quality or quantity of the employee's work.

(5) The employer must not take impermissible deductions from the employee's salary.

(6) Attempting to reduce labor costs by occasionally reducing an exempt employee's predetermined salary (for example, by occasionally asking exempt employees not to come to work one day a week and making a corresponding reduction in their salary for those weeks) generally violates the salary basis test and jeopardizes the exemption for both the affected employee and all similarly situated employees.

(7) If no state laws or contractual provisions dictate otherwise, an employer can lawfully require hourly nonexempt employees to take one unpaid day off per week. However, employers must continue to pay non-exempt employees at least minimum wage for all hours worked and overtime under the FLSA and applicable state wage and hour laws.

(8) State wage and hour laws may also limit an employer's ability to impose a desired cost-saving measure. For example, some states require employers to provide a

certain amount of notice before reducing pay or changing an employee's work schedule. Some states also impose higher minimum wage requirements or weekly salary thresholds than the FLSA.

Decreasing Labor Costs

1. Employers may be able to decrease labor costs while also reducing the risk of losing employees' exempt status under the FLSA through one or more of the following:

   (1) **Full-week shutdowns.** Employers can use furloughs in full week increments to avoid making improper salary deductions. This option is lawful because employers must only pay exempt employees a set salary in any week in which work is performed and conversely do not need to pay employees for any week in which no work is performed. If this option is used, however, it is vital to ensure affected exempt employees do not perform any work during these weeks. Any work performed triggers the obligation to pay employees their full salary for that entire week, even if the work is minimal. For example, an employee who checks email from home for a few minutes on just one of the days can trigger the obligation to pay that employee for the entire week. As a practical matter, however, it may be very difficult to prevent an employee from performing any work. To avoid this problem, employers should formally ban employees from performing any work at all during these weeks and clearly communicate the prohibition.

   (2) **Reduced workweek schedule and pay.** Employers can also prospectively adopt a reduced workweek schedule and a commensurate adjustment in employee salaries to avoid violating the salary basis test and jeopardizing the exemption, if the salary reduction is a bona fide change reflecting long-term business needs. The DOL and courts generally have approved this practice as consistent with the FLSA, reasoning that a reduction in the employee's pay is not a deduction in this scenario. To reduce the risk of losing employees' exempt status, employers should clearly notify employees before implementing the reduced workweek and salary plan. The notification and the accompanying details should be in writing and, preferably, provided at least one week in advance. Some states require more

advance notice. The reduced salary plan also must continue to satisfy the salary basis test.

(3) **Reduced pay without a reduced workweek.** Reducing employees' future pay without shortening their workweek also reduces labor costs. Absent contractual requirements or state laws to the contrary, an employer can generally set an employee's pay at whatever rate the employer wants (assuming exempt employees are paid a salary of at least $684 per week (effective January 1, 2020), or more if required by state law, and hourly employees are paid minimum wage and overtime pay). Like a reduced workweek schedule and pay, a prospective reduction in employee salaries generally does not violate the FLSA if it is a bona fide change reflecting long-term business needs.

(4) **Requiring use of vacation time.** While the FLSA allows an employer to require employees to use vacation or paid time off as a cost-saving measure, many state laws prohibit or significantly limit an employer's ability to do so. Employers should be familiar with the limitations on requiring the use of vacation time or paid time off under applicable state law.

2. In addition, employers that sponsor foreign workers for a green card or nonimmigrant visa status may have additional obligations to notify the United States Citizenship and Immigration Services (USCIS) or Department of Labor (DOL) in the event of a furlough, pay reduction, or hours reduction. Employers that must obtain Labor Condition Applications (LCAs) in support of H-1B, H-1B1, and E-3 work visas generally may not change the essential terms and conditions of the foreign worker's employment without first notifying the USCIS or the DOL, or both.

3. When employers determine that a permanent layoff is necessary, there are two options:

(1) **Voluntary reductions.** Employers may implement voluntary RIFs with special benefits offered to those who leave. These are often referred to as exit incentive programs.

(2) **Involuntary reductions.** Employers may always make involuntary reductions of at-will employees, subject to their obligations to comply with all applicable

federal, state and local laws, such as laws prohibiting discrimination, harassment, and retaliation. Reductions of employees employed under for-cause employment agreements require compliance with the termination provisions of these agreements.

(3) Each of these measures requires careful planning and implementation. Employers should record the reasons for taking these measures to demonstrate a business justification and minimize the risk of disparate impact discrimination and other legal claims. A lack of documents significantly enhances the ability of the affected employees to argue that prohibited factors (such as a discriminatory or retaliatory motive) were considered.

(4) An employer implementing a RIF must carefully consider its layoff selection criteria to prevent a disparate impact on employees in a particular protected class (where, for example, employees in a protected class, such as race or age, are affected more than what would be statistically expected given the demographics of all employees in the selection pool). This can involve various statistical analyses. Employers also should avoid any implication that employees were selected for having engaged in prohibited activity, such as making a discrimination complaint.

(5) Employers can reduce the risk of former employees bringing discrimination claims by:

(1) Ensuring there is a well-documented basis for a RIF based on legitimate business reasons, documenting the decision-making and selection process, and using objective, consistently applied selection criteria. Where subjective criteria must be used, apply objective evaluation guidelines to the selection decisions and document the legitimate, non-discriminatory reasons for each decision.
(2) Conducting a disparate impact analysis of the selection list to ensure no protected class is disproportionately affected. Where a disparate impact analysis reveals a disparate impact, make legitimate and non-discriminatory adjustments as necessary.

(3) Reviewing layoffs of individuals on protected leave or who recently returned from leave to ensure they are consistent with stated layoff goals and to ensure those individuals are not disproportionately affected.

(4) Using a severance package or plan with a legally enforceable release of claims.

(5) Employers should use objective, non-discriminatory and consistently-applied selection criteria. Adopting pure seniority-based layoff criteria is the best way to minimize liability exposure. Other layoff selection criteria that have withstood legal scrutiny by some courts include:
-Performance (supported by underlying documents such as a performance evaluations or performance ratings).

(1) Special skills.

(2) Productivity.

(3) Elimination of an entire job function, a particular department, and/or redundant positions.

4. However, note that using high compensation levels as a selection criterion can leave an employer more vulnerable to disparate impact claims under the ADEA because higher earning individuals tend to be among the older and more experienced employees.

5. Employers should avoid using subjective criteria to make selections for a RIF, as they allow laid-off workers to claim that decision-makers' true motives were discriminatory and that the subjective factors were a pretext for unlawful decisions. When subjective criteria are used to distinguish between employees, a sound case for individual layoff decisions should be made and documented by:

(1) Assigning lay-off selections to group or departmental level managers to ensure selections are made by management personnel with personal knowledge of the employees at issue (this helps to avoid claims that selections were centralized rather than made based on individual job qualifications)

(2) Creating an independent review committee comprised of decisionmakers of diverse races, sexes, and ages, including individuals who are not in the affected employees' chain of command and people from different parts of the organization,

to review the layoff selections made by group or departmental level managers and increase the objectivity of the decision-making process.

6. When making layoff decisions, employers should not rely solely on past performance evaluations and performance ratings. Performance evaluations and reviews are often written in highly complementary terms and are not designed for comparing employees based on skills or business needs. Instead, develop special performance ratings specifically for the layoff, looking at factors such as the employees' relative skills, qualifications, knowledge and training levels, and mental/physical ability to perform the duties of their positions.
7. Once a proposed list of individuals slated for layoff has been prepared, the employer should take the following steps to minimize liability and make it easier to defend any layoff decision:
   (1) Conduct a disparate impact analysis, preferably in consultation with legal counsel, and adjust the layoff selection procedures to preclude a disparate impact of the layoff on any protected groups.
   (2) Review the list, again with legal counsel if possible, to ensure that individuals on protected leave or who recently returned from leave are not disproportionately affected by the layoff, and that no employees selected for the RIF can claim retaliation for protected activity, such as preexisting claims, internal complaints, or whistleblowing activities.
   (3) Consider creating an independent review committee that includes minorities, women, and older workers to assess the tentative layoff decisions. Have the independent review committee and/or a senior human resources professional review selection decisions to ensure that the selection decisions comply with current guidelines and are consistent with the stated RIF goals.
8. Announce layoff decisions in a meeting with the individual employee unless an entire facility or department is being closed. In meetings with affected employees, the employer's representative should do the following:
   (1) Meet with affected employees in a confidential setting and with at least one witness present (typically, another member of management or human resources).

(2) Be honest, respectful, and empathetic, and thank the employee for his or her contributions. Answer any questions truthfully and without condescension or engaging in arguments. For example, if the employee questions why he or she was selected for the layoff, only advise him or her of the criteria used in making the layoff selection decision, not his or her relative scoring or why he or she was selected instead of other employees.

(3) Advise affected employees of their benefits rights and provide information related to severance pay (if any), COBRA coverage, applying for unemployment compensation, and any outplacement assistance or employee assistance programs that are available.

(4) Consider offering to provide a reference if the employee signs an appropriate release form. A reference may be appropriate if the selection criteria were not related to performance or productivity and the employee's performance warrants a positive reference. However, employers who have a policy or practice of providing a neutral reference (for example, a reference that only confirms dates of employment and position(s) held) should evaluate whether providing a positive reference for some employees and not others may lead to disparate treatment claims.

(5) If appropriate, tell the employee that he may re-apply for a position with the employer if conditions improve and the employer hires additional employees in the future.

9. The federal ***Worker Adjustment and Retraining Notification Act (WARN Act)*** requires that covered employers provide 60 days' advance notice of a covered plant closing or mass layoff unless limited exceptions apply (notably that the affected company is faltering despite its best efforts, unforeseeable business circumstances arise or a natural disaster occurs). The WARN Act also specifies how notice must be provided to the affected individuals, their union (if applicable), and designated state entities and local government officials. In addition, some states apply their own notice requirements on employers implementing a RIF (these state statutes are often called "mini-WARN Acts"). Employers should check the states where their layoff or plant closing will occur to determine whether state WARN Act requirements apply.

References:

1. The Fair Labor Standards Act (FLSA) 29 U.S.C. §§ 201-219

Policy 2.3: Handling Employee Terminations and Reductions in Work Force during the COVID-19 Pandemic
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2. The Worker Adjustment and Retraining Notification Act (WARN Act)

[NAME OF PRACTICE]
COVID-19 PANDEMIC POLICIES AND PROCEDURES

Policy 2.4: Wage and Hour Issues During the COVID-19 Pandemic
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Purpose: To assist the PRACTICE in addressing wage and hour issues that may arise during the COVID-19 Pandemic.

Policy and Procedure(s):

During the COVID-19 pandemic and the declaration of a Public Health Emergency by federal, state and local authorities, the PRACTICE may need to address certain wage and hour issues.

The following is a framework for the PRACTICE to use in handling certain wage and hour issues:

Telework As Infection Control

- Under the Fair Labor Standards Act (FLSA), an employer may encourage or require employees to telework as an infection control or prevention strategy.
- Telework may also be a reasonable accommodation under the Americans with Disabilities Act (ADA).
- An employer cannot single out employees to telework or report to work based on any protected class or characteristic under State or Federal EEO laws.

Pay for Telework

- If provided as a reasonable accommodation under the ADA or a state disability law, because of pregnancy or if required by a Union contract or employment contract, the employer must pay the same hourly rate or salary.
    - Otherwise if none of the above:
    - Under the FLSA, non-exempt workers must be paid at least the minimum wage for all hours worked and at least time and one half the regular rate of pay for hours worked in excess of 40 in a work week.
    - Non-exempt employees must receive the required minimum wage free and clear.

- Must pay non-exempt employees for off-the-clock work or work performed remotely, even if an employee did not have permission or violated company policy by doing so.
- Similar to exempt employees, non-exempt employees paid on a fluctuating work week basis under the FLSA normally must receive their salary for each work week in which they perform any work.
- Salaried exempt employees generally must receive their full salary in any week they perform any work, subject to limited exceptions.
- Exempt employees must be paid at least the federal, state or local minimum salary or compensation level required for the exemption.
- Where the Service Contract Act (SCA) or any state or local laws regulating the payment of wages also apply, the FLSA and its regulations and interpretations do not override or nullify any higher standards required by such other laws.
    - Illinois has a minimum wage of $9.25 per hour for employees 18 years or older (Effective 1/1/2020)

Employees Unable to Work From Home

- Non-exempt employees who are unable to work from home do not have to be paid under the FLSA.
- Salaried exempt employees must receive their full salary in any week in which they perform any work subject to very limited exemptions discussed below under Office Closures.
- Consider staggered work shifts to promote social distancing when all employees cannot work from home.

Additional Costs Incurred By Employees Working From Home

- Cannot require employees covered by the FLSA to pay or reimburse the employer for work tools that are business expenses of the employer if it reduces the employee's earning below the minimum wage. This includes deductions from pay.

- Means that when an employee is required to provide the tools and equipment like computer, internet connection, facsimile machines, etc., needed for telework, the cost of such tools and equipment may not reduce the employee's pay below the minimum wage required by the FLSA.
    - Some states have laws on reimbursements and allowable deductions from wages and often only allow deductions from wages when authorized in writing by the employee, or like the FLSA that prohibits deductions that impact minimum wage.
    - Also, some states have a higher minimum wage than the FLSA.
- Cannot require any employee to pay or reimburse employer or deduct for such items if telework is being provided as a reasonable accommodation to an individual with a disability under the ADA or any state disability law or possible because of pregnancy under state law.
    - Check state pregnancy laws.
    - The EEOC takes the position that a pregnant woman is entitled to reasonable accommodations because of pregnancy.

FLSA Telework Requirements: Timekeeping and Records

- FLSA requires employers to maintain accurate time records, including hours worked.
- Maintain records of hours worked each workday and workweek for non-exempt employees.
- Employers must also maintain pay records under the FLSA.
- This includes employees participating in telework or other flexible work arrangements.
- Provide employees with a system/mechanism for recording each telework employee's hours of work.
- Remind non-exempt employees that time spent reading and responding to emails constitutes "work."

- If an employer knows or has reason to believe an employee is performing work, count it as time worked.
- Post or otherwise display FLSA posters outlining FLSA requirements via email or by other means that remote employees can access in addition to at worksite.

  Policies and Procedures

  - Require daily and accurate timekeeping.
  - Require daily report to a supervisor and supervisor review and verification.
  - Prohibit off-the-clock work.
  - Prohibit overtime without written authorization from a designated supervisor.
    - Must still pay for time worked even if not approved.
  - Prohibit work outside designated working hours.
  - Prohibit employees from performing work at home that the employer does not want to be performed.
  - Require employees to take meal and rest breaks. (Certain state laws have additional requirements)
  - Discipline any employee or supervisor that violates any policy or procedure on timekeeping, reporting or overtime requirements.
  - Make falsification of time records or fraudulent practices subject to discipline and termination.
  - Acknowledgments signed by employees.

Telework Under the Occupational Safety and Health Act (OSHA)

- No regulations regarding telework in home offices.
- As of February 2020 the agency stated it will not inspect home offices, will not hold employer liable for an employee's home office, and does not expect employers to inspect home offices.

- Employers are required to maintain records of work-related injuries and illnesses (such as Covid-19) and will continue to be responsible to keep such records for home office injuries and illnesses.

Limit on Number of Hours Worked

- No limit under the FLSA as long as the employee is 16 years or older.
- Check state and local laws for scheduling notice limits.
- Illinois: Non-exempt employees generally cannot work more than six consecutive days.
    - Exemption: Employees needed in case of breakdown of machinery or equipment or other emergency requiring immediate service of experienced and competent labor to prevent injury to person, damage to property or suspension of necessary operation.
- Some states require premium pay for extra hours worked in any one day.
    - Illinois Once Day Rest In Seven Act (ODRISA) provides for employees a minimum of 24 hours of rest in each calendar week and a meal period of 20 minutes for every 7.5 hour shift, beginning no later than 5 hours after the start of the shift. Employers can secure permits from the Illinois Department of Labor to work an employee the 7th day, provided that the employee has voluntarily elected to work.

Partial Work Week – Reduced Hours

- Employers are free to reduce their non-exempt employees scheduled hours due to temporary closures or reduced demand.
- Must pay non-exempt employees actual hours worked at no less than minimum wage and must pay overtime.
- If unable to provide work, an employer need not pay non-exempt employees.
- Must pay exempt salaried employees their salary if they perform any work during a work week.

Reducing Pay Rates

- Pay rate changes must be prospective.
- State and local laws, Union contracts and other employment contracts may require advance written notice of rate changes or impose other restrictions.
- Non-exempt employees must still be paid at least the applicable federal, state and local minimum wage and overtime compensation.
- Salaried exempt employees must still satisfy the minimum compensation level to maintain the applicable exception.
    - Any pay rate change for an exempt employee should be made on a weekly basis, not changed mid-week, to satisfy the requirement that they receive their full weekly salary for any week they perform any work.

Staggered Shifts

- Generally allowed under the FLSA, but make sure not effecting non-exempt employees on fluctuating workweek schedules or their overtime.
- State and local laws may impose restrictions on changes to hours or work schedules. *See* predictive scheduling or fair workweek laws.

Office Closures

Non-Exempt Employees:

- Need not pay non-exempt employees if not working.
- Must pay for actual hours worked at minimum wage and pay overtime under the FLSA.

Exempt Employees:

- Exempt salaried employees generally must receive their full salary in any week they perform any work under the FLSA.
- Otherwise, the employer could lose the exemption for the salaried employee.
- Limited Exception:
    - Where an employer offers a *bona fide* benefits plan or offers vacation time (not an FLSA requirement) to employees the employer can require that such accrued leave or vacation time be taken on specified days.

- Will not affect an exempt employees' salary basis as long as that salaried employee receives an amount equal to the employer's guaranteed salary.
- But, if that salaried employee has no or limited accrued leave or PTO and the reduction or debit from their leave bank results in a negative balance in leave account, that employee must still receive her guaranteed salary for office closure absences to remain exempt.

Exempt Employees/Salary Deductions

- If an exempt salaried employee misses work during a pandemic, the employer can deduct under the FLSA from the employee's salary:
  - Full day absences for sickness or disability, pursuant to the employer's sick leave policy, plan or practice of providing compensation for salary loss caused by illness or disability.
  - Full day absences for personal reasons other than sickness or disability (ex. fear to ride public transportation to work).
  - Full day or partial day absences taken as unpaid FMLA leave.
  - Can require salaried exempt employees to use available paid leave, such as sick or vacation leave to cover full or partial day absences.
- Cannot, under FLSA, deduct for:
  - Absences occasioned by the employer or by the operating requirement of the business, for example, when the employer closes because of a pandemic.
    - Can require employee to use sick or vacation (PTO) for the days missed required to stay at home and can require salaried exempt employees to make up lost work time.
  - Absences due to illness or disability when the employer has no sick leave policy.
- Improper deductions can lead to declassification of exempt status subjecting the employer to pay overtime.
- If an exempt salaried employee misses the entire work week, the employer need not pay for the missed week.

- Exempt salaried employees are not required to be paid their salary in weeks they perform no work.
- If an exempt salaried employee is relieved of all duties, employer can elect not to pay for that work week.

Layoff or Furlough

- Comply with applicable state wage payment laws on last pay check requirements.
- Employees may be entitled to unemployment compensation.

Government Imposed Quarantine

See above on Closures or Partial Work Week. Department of Labor encourages telework.

Volunteers

Public Agencies

- Individuals that offer their services to a public agency (state, parish, city or county) in an emergency capacity are not considered employees due compensation under the FLSA **if:**
  - They perform such service for civic, charitable or humanitarian reasons with no promise, expectation or receipt of compensation.
  - They can receive payment for expenses or a nominal fee.
  - They offer their services freely and without coercion, direct or implied; and
  - They are not otherwise employed by the same public agency to perform the same services they propose to volunteer for.

Private Not-For-Profit Organizations

- Individuals that volunteer their services in an emergency relief capacity to private non-profit organizations without contemplation or receipt of compensation, are not considered employees under the FLSA due compensation.
- However, employees of such an organization are not allowed to perform uncompensated the same services they are employed to perform.

Private For Profit Organizations

- Stringent Requirements under the FLSA
- Covered non-exempt workers working for private, for profit employers have to be paid at least the minimum wage and cannot volunteer their services to their employer.

Government Request For Services

- Where employers are requested to provide their services, including their employees, in emergency circumstances under federal, state or local general police powers, those employees will be considered under the FLSA government employees while rendering such services.
- No hours spend on the disaster relief services are considered as hours worked for the employer.

Performing or Assigning Work Outside Job Description

- Not limited by the FLSA if 18 or older.
- Consult any Union contract you may have for any limitations.
- Consult with Human Resources.
- Be aware of any accommodations an employee may have under the Americans with Disabilities Act (ADA) or offered under any state law requiring accommodations.
- Exempt salaried employees still must satisfy the duties test each workweek to maintain their exempt status.

Workforce Supplementation/Temporary Employees From Staffing Agency

- Under FLSA, an employee can be employed by one or more individual entities.
- If one or more of these employers are deemed joint employers, they could both be responsible and liable for non-exempt employees' minimum wages and overtime pay.

Joint Employer Status

- DOL 2020 Final Rule Four Factor Test:
  - Hires or fires the employee.

- Supervises and controls work schedule or conditions of employment to substantial degree.
- Determines employee's rate and method of payment.
- Maintains the employee's employment records.

- Factors Not Relevant:
  - Whether employee is economically dependent on the potential joint employer.
  - Operating as a franchisor or entering into a brand or supply Agreement.
  - Contractual arrangements between employee and potential joint employer.
  - Potential joint employer providing a sample employee handbook or other forms to operate a "store within a store."
  - Offering an association health or retirement plan.
  - Jointly participating in an apprenticeship program with the employer or similar business practice.

Independent Contractor Issues

- If the workforce supplier misclassifies workers as independent contractors, there could be joint employer liability for owing minimum wages and overtime to those supplied workers.

Salaried Exempt Employees Performing Manual or Routine Tasks

- An exempt salaried employee does not become non-exempt when they must perform non-exempt work during an emergency. This does not include events within the employer's control, addressed in the normal course of business and reasonably anticipated.
- Exempt employees still must satisfy the applicable FLSA duties test to qualify for an exemption in any work week.

Waiting Time or On-Call Time

- Non-exempt employees must be paid for on-call time under the FLSA.

- On-call time is when employees are required to remain on their employer's premises or nearby and are unable to use their time for their own purposes.
- For example, requiring non-exempt employees to remain at a location where operations have been shut down in order to assist when those operations began again.

Training Time

- Training time required by the employer is considered compensable time under the FLSA.
- This includes training of employees on technology they will use for telework or on a new timekeeping system or to learn new temporary job duties.

Travel Time

- Travel time is generally not compensable for normal home to work travel, but in certain circumstances, may be compensable under the FLSA, such as when an employee must travel to a client site because of an emergency after their regular shift ends.

Certain State Laws Reporting Time or "Call In" Pay

- Certain states have laws that require reporting time or minimum call-in pay to compensate employees for reporting to work, even where no work was performed or if the employee was sent home before completing a full shift.
    - Some of these laws have exceptions for "acts of God" or other circumstances not within the employer's control.

Predictive Scheduling State Laws

- Some states and local jurisdictions have laws requiring substantial advance notice – generally 7-14 days of upcoming scheduled shifts and changes to schedules within the notice period often trigger compensation obligations called "predictability pay."
    - Some of these laws have exceptions for "acts of God" or other circumstances beyond the employer's control.

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Chicago has such a law that will take effect on July 1, 2020. It will require 10 days advance notice until 2022 when the notice requirement will increase to 14 days. (The Fair Workweek Ordinance).

References:

1. The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219.
2. The Americans with Disabilities Act of 1990 42 U.S.C. 12181.
3. The Fair Workweek Ordinance,

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