

The Coronavirus: How Employers Can Manage the Outbreak

Prepared for the Illinois Chamber of Commerce

Scott Cruz

Greensfelder, Hemker & Gale, P.C.

March 25, 2020

Emergency Paid Sick Leave Act

- **Effective date:**
 - April 2, 2020
- **Covered employers:**
 - Private employers engaged in commerce with fewer than 500 employees (full-time and part-time)
 - All public employers
- **Health care provider employees and first responders are exempt**
- **Hardship exemption for small employers:**
 - Secretary of Labor has the authority to “exempt small businesses with fewer than 50 employees” if requirements would “jeopardize the viability of the business as a going concern.”

Emergency Paid Sick Leave Act

- **Joint Employment: (when will two separate entities be considered a single employer?)**
- Fair Labor Standards Act provisions likely govern – **Focus is on Control.**
 - Hires or fires the employee;
 - Supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
 - Determines the employee’s rate and method of payment; and
 - Maintains the employee’s employment records.
- No single factor is dispositive
- Second employer must *actually* exercise — directly or indirectly — one or more of the four control factors.

Qualifying Reasons for Leave

Employee is **unable to work or telework** due to a need for leave because:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

• **The amount is capped at \$511 per day and \$5,110 in the aggregate for each employee taking leave for these reasons.**

Qualifying Reasons for Leave

- (4) The employee is caring for an individual who is subject to a quarantine order as described above or has been advised by a health care provider to self-quarantine.
 - (5) The employee is caring for a son or daughter whose school or place of daycare has been closed or the child's child care provider is unavailable due to COVID-19 precautions.
 - (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.
- **The amount is capped at \$200 per day and \$2,000 in the aggregate for each employee taking leave for these reasons**

Amount of Leave

- **Full-time employees:** 80 hours
- **Part time employees:** Number of hours employee works on average over a 2-week period.
- **Variable Schedules** (*i.e.* hours differ from week to week): Use the average number of hours that the employee was scheduled per day over a 6-month period ending on the day the employee takes sick leave.
- **New(er) employees:** use the “reasonable expectation of the employee at the time of hiring.”

Rate of Pay

- **Employee who is sick or directed to isolate, (1-3) *greater of:***
 - Regular Rate of Pay: total non-overtime rate of pay, which includes base pay, tips, non-discretionary bonuses, shift premiums, and incentive compensation; or
 - FLSA Minimum Wage (\$7.25/hour); or
 - State (Illinois \$8.25) or local (Chicago \$13.00) minimum wage
- **Caring for a child/another individual (3-6) – 2/3 regular rate of pay or applicable minimum wage.**

Emergency Paid Sick Leave Act

- Employees are immediately eligible as of April 2, 2020.
- Paid leave, *in addition* to any other leave provided by employers (e.g. PTO, vacation, sick leave, etc.)
- Employers cannot reduce existing leave policies following April 2, 2020.
- Employees may first use paid sick time, but employers may not require employees to use other paid leave **before** the employee uses paid sick time under the Act
- No payout on termination; no carryover to next year
- Expires December 31, 2020

Employer Prohibitions

- No discrimination or retaliation.
 - **Be careful – *constructive notice***
- Employers may not require employees who take leave to find a replacement for their shifts
- Enforced under the FLSA
 - Employee lawsuits
 - DOL action
 - Back wages, liquidated damages, attorney fees
 - Statutory penalties

Employee/Employer Notice Requirements

Employee:

- No provision for certification/documentation.
- May require reasonable notice procedures in order to continue receiving paid sick time.

Employer:

- DOL to publish poster within 7 days
- Must be posted in the workplace

Emergency Family and Medical Leave Expansion Act

- **Effective date:**
 - April 2, 2020
- **Covered employees:** Employed for **30 calendar days; not the 12-month, 1,250 hour rule.**
- **Covered employers:**
 - Private employers with fewer than 500 employees
 - All public employers
- Secretary of Labor has the authority to “exempt small businesses with fewer than 50 employees” if requirements would “jeopardize the viability of the business as a going concern.”
 - Joint Employment (multiple entities/single employer) – FMLA rules likely govern, focus on “control” factors.
- Health care provider employees and first responders are exempt.

Reason for the Leave

- If the employee is unable to work or telework due to a need for leave to care for the employee's son or daughter under 18 years of age, if the child's school or place of care has been closed; or
- The child care provider of such son or daughter is unavailable, due to a COVID-19 emergency declared by a federal, state, or local authority.

Amount of Leave and Pay

- 12 weeks of job protected leave, from April 2, 2020, until December 31, 2020.
 - Question as to whether it expands the 12-week FMLA entitlement for an employee who has exhausted prior to April 2.
- First 10 days of FMLA leave are unpaid. Employer may substitute paid leave, **but employer cannot require substitution.**
- After the first 10 days, $\frac{2}{3}$ regular rate (or minimum wage) multiplied by the number of hours the employee would ordinarily be scheduled to work.
- For variable schedule, use the 6-month average, or newer employees, the “reasonable expectation of the employee at the time of hiring.”
- Amount for each employee is capped at \$200/day; \$10K total.

Reinstatement Rights

- **Same as regular FMLA**
 - (reinstate to same or equivalent position with respect to pay, benefits, terms and conditions)
- **Small employer exception:**
 - Fewer than 25 employees
 - Position eliminated for reasons related to public health emergency
 - Employer made reasonable efforts to reinstate employee to equivalent position with similar pay, benefit, and terms and conditions of employment; and
 - The employer makes a reasonable effort to contact a displaced employee about an equivalent position if such position becomes available within 1 year after employee's need for leave ends (or 12 weeks after start of leave).

Emergency Family and Medical Leave Act Expansion

- **Employer Prohibitions**
 - No discrimination or retaliation
 - Employers may not require employees who take leave to find a replacement for shifts
 - Employee lawsuits (if over 50 employees); DOL action; Back wages, liquidated damages, attorney fees
- **Employer Notice Requirements**
 - DOL to publish poster – must be posted in the workplace
- **Employee Notice Requirements**
 - When need for leave is for foreseeable, the employee must provide as much notice as is practicable. No reference in legislation to certification or documentation.

Tax Credits for Paid Sick and Paid Family and Medical Leave

- Tax credits – Employers receive a quarterly tax credit against the employer portion of Social Security Tax for amounts paid
- Tax credit up to cap amounts.
- Any excess credit will be treated as an overpayment and refunded to the employer.

Tax Credits for Paid Sick and Paid Family and Medical Leave

- If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.
- If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Non-enforcement Period

- DOL will be issuing a temporary non-enforcement policy that provides a period of time (e.g. 30 days) for employers to come into compliance with the Act.
- Under this policy, DOL will not bring an enforcement action against any employer for violations of the Act, so long as the employer has acted *reasonably and in good faith* to comply with the Act.
- DOL will instead focus on *compliance assistance* during the 30-day period.

Wage and Hour Considerations

- **Non-exempt (hourly workers)**
 - Must be paid for all time worked, but only for time worked.
 - Does not matter where the work is performed – home or office
 - Must be paid at least the minimum wage and are entitled to overtime.
 - Still entitled to a meal period: 7/12 continuous hours, permitted to take a meal period of 20 minutes – which may be unpaid. **If they do not, must notify you in writing, potential overtime issues!!**
 - Must still track hours!!! (**non-exempt and exempt** [as of 2/19/19]).
 - Consider specific, written instructions as to when non-exempt employees are permitted to start/end day (e.g. 9-5).

Wage and Hour Considerations

Exempt (salaried workers)

- Exempt employees entitled to full salary so long as they perform a de minimus amount of substantive work.
- Courts have held, just checking work email likely not considered substantive work requiring payment.

Wage and Hour Considerations

- **Reduction in Exempt Employee's Salary**
 - Has to be prospective and in writing *i.e.* the next pay period, not the existing period.
 - Has to be for a “bona fide” reason. An economic downturn likely qualifies.
 - Most importantly, it CANNOT reduce the employee below the exempt salary threshold of \$684/week. If the reduction brings the employee BELOW \$684/week, the employee is now non-exempt.
 - Duties must remain the same.

Wage and Hour Considerations

- **Reducing an Exempt Employee's Days of Work**
 - Exempt employees who work less than an entire work week because of a furlough or reduction of work still must be paid a guaranteed salary.
 - However, an employer can require that the exempt employee use vacation/PTO **on days when the employee does not work.**
 - For example, an exempt employee works Monday and Tuesday, but not Wednesday through Friday. An employer would still comply with the salary requirement by paying the exempt employee for Monday and Tuesday and “dock” the employee's vacation/PTO bank to pay them for Wednesday through Friday.

Wage and Hour Considerations

- **Temporary Reclassification of Pay Status**
 - An employer can reclassify the exempt employee to non-exempt and pay the employee by the hour.
 - Employee is now entitled to overtime, however.
 - After things settle down, an employer can change the status to exempt again by paying the guaranteed salary.

Employment Expenses

- Under the Illinois Reimbursement Law (1/1/19), if the employer requires employees to work from home (based on shelter in place or otherwise), the employer must reimburse the employee for all necessary and reasonable business expenses incurred in working from home.
- For example, if the employee is required to make business calls on their cell phones, may seek reimbursement for the costs of the calls, or cell phone bill. Likely have to reimburse for internet usage to connect to the employer's platform and perform work.
- If the employee is required to install additional electronic equipment to work from home, then the employee may seek reimbursement for the cost of that equipment.

Unemployment Benefits

- IDES has created a Q&A for employers/employees answering questions related to unemployment benefits.
<https://www2.illinois.gov/ides/Pages/COVID-19-and-Unemployment-Benefits.aspx>
- Employment contribution rate increase: TBD.
- 7-day waiting period is waived. Employees can file as soon as they are laid off.
- When workers are laid off for a period of 7 days or more, or separated from the payroll for any reasons, Illinois employers are required to provide employees with a copy of an IDES publication that provides some basic information regarding unemployment benefits.

Unemployment Benefits

- Temporarily laid off/furlough because of temporary closure – **eligible**, so long as the employee is prepared to return to work as soon as the employer reopens
- Employee voluntarily quits because of a concern over COVID-19 in the workplace – **depends**, on whether employee has a good faith basis, reason was attributable to the employer, and tried to get it resolved before quitting.
- Employee refuses to come to work for fear of contracting COVID-19.; same as above.
- Confined to home because (a) doctor imposed self-quarantine; (b) care for a family member who has been diagnosed with COVID-19; or (3) government imposed quarantine – **depends**, on whether employee is able and available to work from home.
- School closure: **depends**, on whether employee is able and available to work from home.

Employee Status Changes

Pros/Cons

- **Paid Time Off** - An employee has a significant amount of vacation or PTO. The employer approves the available time off for the employee during office/plant closure and while not paying the employee.
- **Reduction of Hours** - A full-time employee was regularly working 40 hours per week and now, for example, the employee is asked to work 20 hours per week.
- **Temporary Layoff** - Layoff for six months or less with the intent to re-hire.
- **Furlough** - The employer wishes to not terminate the employees. Furloughs are a form of temporary layoff that may consist of a complete stoppage of work or reduced work hours over a period of time. For example, a reduction of one day a week for a year.
- **Termination** - no intent to re-hire.

WARN Act and IL Mini-WARN Act

- The Federal Worker Adjustment and Retraining Notification (WARN) Act generally requires employers to provide advance notice to affected employees if there is a “plant closing” or a “mass layoff.”
- Federal WARN applies to employers with **100 or more employees**.
- Generally requires 60 days’ advance notice to covered employees.
- There are exceptions, however, including for “unforeseen circumstances” and natural disasters.”
- **Does not apply to temporary layoffs of less than six months.**
- Many states have enacted mini-WARN Acts with longer notice periods and lower employee thresholds in determining covered employers

IL Mini-WARN Act

- IL WARN Act also requires employers to provide advance notice to affected employees if there is a “plant closing” or a “mass layoff.”
- IL WARN applies to employers with 75 or more employees.
- Under Illinois WARN, a **mass layoff** means a reduction in force that **is longer than 6 months** and:
 - is not the result of a plant closing; and
 - results in an employment loss at a single site of employment during any 30-day period for either:
 - at least 33% of the employees (excluding part-time employees) and at least 25 employees (excluding part-time); or
 - at least 250 employees (excluding part-time)

WARN Act and IL Mini-Warn Act

- **Plant Closing**
 - Under Illinois WARN, a plant closing means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for **25 or more employees** excluding part-time employees.

WARN Act and IL Mini-Warn Act

- Under Illinois WARN, an employer is not required to provide 60 days' notice if the mass layoff was necessitated by a physical calamity or an act of terrorism or war.
- The regulations addressing the exceptions provide no guidance on the meaning of “physical calamity” in the case of mass layoffs or the circumstances that could be considered sufficient to not be reasonably foreseeable in the case of plant closures.
- However, employers are still required to provide as much notice as practicable and provide a brief explanation on why you couldn't provide 60 days' notice.

OSHA

- **Are there special OSHA rules for COVID-19 that businesses need to follow?**
 - No. OSHA has provided a guidance document for employers.
 - In general, OSHA would base its enforcement on the General Duty Clause of the OSHA Act, which requires employers to provide a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm.

OSHA

- **Do employers need to record COVID-19 illnesses on our OSHA 300 logs?**
 - In some cases, yes.
 - OSHA requires employers to record work-related illnesses, which, unlike the flu or the common cold, could include COVID-19, if the employee was exposed to the virus while working.
 - Employers are required to assess whether an employee contracted the illness while at work based on the circumstances.

OSHA

- Employee Rights and COVID-19
 - Section 11(c) – prohibits retaliation against employees for raising concerns about safety and health conditions.
 - Section 13(a) – entitles employees to refuse to work if they reasonably believe they are in “imminent danger.”
 - OSHA defines imminent danger as “any conditions or practices in any place of employment which are such that a danger exists which could 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 this Act.”
 - This means that the employee must believe that death or serious physical harm could occur within a short time, for example before OSHA could investigate the problem.

Social Media

- Social Media –
 - Employee complains on social media that employer is falsifying that it is an “essential business” and putting the lives of its employees at risk.
 - Employer wants to discipline/terminate.
 - Protected concerted activity under Section 7 of the National Labor Relations Act (applies to non-union employers, too) because the employee is discussing terms and conditions of employment.
 - Terminate – unfair labor practice charge.

COVID-19 Resources

- Greensfelder's COVID-19 resources page is a source for continuing updates:
<https://www.greensfelder.com/covid-19-resources.html>



The screenshot shows the Greensfelder website's COVID-19 resources page. The header features the Greensfelder logo and navigation links: People, Practices, Industries, News & Insights, About, Careers, and Offices. The main content area is titled "COVID-19 RESOURCES" and includes a PDF icon and an "ADD TO PACKET" button. The text describes the firm's COVID-19 team's mission to help businesses and organizations address issues related to the coronavirus outbreak. It also provides a list of resource headings: Construction, Consumer Protection, Contracts, Employment & Labor, Environmental, Franchising & Distribution, Health Care, and Firm Updates. A "HELPFUL RESOURCES" sidebar on the right contains three sections: "Situation Summary" (updates from the CDC), "COVID-19 in the U.S." (daily statistics from the CDC), and "OSHA/HHS Guidance" (guidance on preparing workplaces for COVID-19).

Questions?



Scott Cruz

312-345-5008

scruz@greensfelder.com

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.