COVID-19 Webinars

Emerging Employment Law Issues Related to COVID-19 Pandemic

Monday, April 13, 2020

Steve Joffe
Partner – Los Angeles
213.330.8970
steve.joffe@wilsonelser.com

Bruno Katz
Partner – San Diego
619.881.3317
bruno.katz@wilsonelser.com

Yoora Pak
Partner – Virginia
703.852.7861
yoora.pak@wilsonelser.com

Dean Rocco
Partner – Los Angeles
213.330.8922
dean.rocco@wilsonelser.com
Emerging Employment Issues From The COVID-19 Pandemic

Your Panelists for Today's Webinar

Steven Joffe
Partner
Wilson Elser - Los Angeles

Bruno Katz
Partner
Wilson Elser - San Diego

Yoora Pak
Partner
Wilson Elser - Virginia

Dean Rocco
Partner
Wilson Elser - Los Angeles

The presentation is provided for informational purposes only and should not be relied upon for legal advice. Your participation in this webinar does not create an attorney-client privilege.
Questions?

Type questions in the Questions section

or

Email Yoora Pak at yoora.pak@wilsonelser.com

WHAT'S NEW?

Emerging Guidance From Federal, State & Local Government

- FFCRA Guidance
- OSHA Guidance
- IRS Guidance
- CARES Act Guidance
- Treasury Guidance
- IBA Guidance
- IRS Guidance
- CDC Guidance and State and Local Stay at Home Order
- Workplace Safety Guidance
- OSHA
- State Plans
Managing Risk & Maintaining Safe Workplaces

OSHA Guidance & Mandates:
• The General Duty Clause
• OSHA Issued Guidance on Preparing Workplaces for COVID-19
• OSHA’s Personal Protective Equipment (PPE) standards
• State Plan Guidance

Managing Risk & Maintaining Safe Workplaces

EEOC Guidance
• For what symptoms may employers screen or inquire?
• Can employers measure employees’ temperature?
• Can employers require employees with symptoms to stay home?
Responding to Workplace Exposures

What should I do if I have an employee test positive for COVID-19 who was working with other employees?

- Reporting Obligations?
- Remediation Obligations?
- Communications to Employees?
- Quarantining and Testing Infected Workers?

What should I do if an employee tells me they might have been exposed to someone who is COVID-19 positive outside work?

Other Common Workplace Safety Issues

- Do I have to provide my employees with masks?
- What if I cannot supply them with PPE despite best efforts?
- Should I encourage employees to bring their own PPE?
- What if an employee refuses to come to work because they are afraid of getting infected with COVID-19?

Bringing Back Furloughed Employees
Bringing Back Furloughed Employees

- Los Angeles Ordinance proposed regarding the rehire of employees laid off during pandemic.

Devise a Plan of Action:
1) Identify the goals of the staff decision, in terms of labor costs to be eliminated and the number of employees by which your organization might be overstaffed.
2) Identify the job functions and skills essential to successful operations after the staff decision.
3) Eliminate or consolidate unnecessary jobs.

4) Set a timetable for carrying out the staff decision.
5) Unless business conditions require otherwise, attempt to act quickly and decisively in an effort to reduce morale problems.
6) Be careful of cases where an employee can show he or she was laid off close to the time he would have qualified for a benefit (e.g., pension vesting rights, retirement eligibility). Even if technically lawful, these cases can appear to be inequitable and might be tempted to stretch the law.
7) Do not use a layoff as a substitute for terminating an employee based on poor performance.
8) Do not use age as a distinction in early retirement benefits provided as a result of a workforce reduction. For example, do not offer different benefits to employees under age 60 than those age 60 or older.

Set up a furlough committee:
- To develop, standardize and implement the selection process
- Function as “gatekeeper” and provide objective oversight
- Perform disparate impact analysis
- Consult with counsel about legal issues
Lawful Criteria for the Decision Making Process

1) By length of service/seniority
2) By identifying and eliminating unnecessary job classifications
3) By classes of employees, e.g., eliminating all temporary, part-time, or contract workers initially
4) Preexisting job appraisal data, initially select employees who have been disciplined for severe or persistent performance problems; thereafter, select from remaining employees by evaluating and comparing their ability to perform the essential job duties remaining after the staff decision is completed.

Lawful Criteria for the Decision Making Process

- Additional considerations when evaluating workforce needs:
  - Can employees be transferred into existing vacancies?
  - Is special high-level management review warranted for certain highly-paid or long-term employees?
  - Are older, minority, or female employees disproportionately affected by the company’s initial selection procedure? If so, can the selection of these individuals be justified by business necessity? If not, alternative selections of individuals outside such protected classifications should be considered.
  - Create a graduated plan for return to work.

Informing Employees

- Employees should be informed in a professional manner and with sensitivity:
  - If possible, two members of management should meet with affected employees individually.
  - The communicators should be brief, direct, and firm as to the company’s decision.
  - The communicators should be able to briefly explain the basis for the decision, if asked.
  - The communicators should also explain: a) recall/rehire rights, if any; b) severance benefits (if any), health insurance conversion rights, and other monetary issues; and c) outplacement or other transitional services being offered, if any.
  - The communicators should be prepared to cope with employee shock, surprise, and inability to absorb the information being imparted.
Return to Work from Furlough Template

Notification Return to Work from Furlough

Date: ______

To: <<Team Member Name>>

From: <<Company>>

Subject: Return to Work from Furlough

As you know, the recent National and State Declarations of Emergency and the State of California Shelter at Home orders due to the threat of COVID-19 resulted in the closure of all non-essential activities, including the closure of all bars and on-site dining.

The COVID-19 pandemic resulted in the company’s events and circumstances changing in ways that were not reasonably foreseeable, necessitating rapid changes in our actions. The decision we were faced with was unimaginable and heart-wrenching during these unprecedented times. Our Team Members mean everything to us.

Sales conditions in our ______ location allow us to bring back additional team members to work. We are excited to be able to return you to the schedule effective April 15th, 2020. Should you be able to pick up shifts in the meantime, we welcome you back sooner.

We continue to modify operations to minimize contact between our guests and team members. Throughout this time, we remain committed to following the guidelines set by the Governor, our local governments and health departments to keep our teams and our guests safe. We will continue to monitor advice from these agencies, as well as the Centers for Disease Control to ensure we can ensure a safe environment while providing our essential services to the communities and teams we serve.

Employees Who Remain In the Workplace

• Actions by your organization related to furloughed employees should be scheduled in close proximity to each other.

• Remaining employees should be provided with prompt and accurate information about the desired goals and anticipated timetables associated with bringing back furloughed employees. These could include new or increased work responsibilities, work schedule changes, direct report re-structuring etc.

• If possible, remaining employees can be provided with modest economic or non-economic incentives for increased productivity.

What if the Employee Refuses to Return to Work?

• Is the employee refusing for a qualifying reason under the FFCRA?

• Should employee be terminated?

• What obligations?

• Should employee be put at the end of the re-hire list?

• Employee wants to postpone return

• No guarantee of employment

• Is the employee afraid to come back to work?

• What OSHA guidance?

• Is there a reasonable basis to believe that there is a dangerous condition at work?

• Can you provide unpaid personal leave?

• What obligations?
When an Employee Refuses to Return to Work

Notification: Declined Offer to Return to Work from Furlough

Date: _______8, 2020
To: <<Team Member Name>>
From: <<Company>>
Subject: Declined Offer to Return to Work from Furlough

As you know, the recent National and State Declarations of Emergency and the State of California Shelter at Home orders due to the global COVID-19 outbreak in guidance to cease all non-essential activities, including the closure of all bars and on-site dining.

The COVID-19 pandemic resulted in the company’s needs and circumstances changing in ways that were not reasonably foreseeable, necessitating rapid changes in our workforce. The decision we were faced with was unimaginable and heart-wrenching during these unprecedented times. Our Team Members mean everything to us.

Sales conditions in our _______ location allow us to bring back additional team members to work. We offered you a return to the schedule effective April 15th, 2020, but you decided not to. If you change your mind in the future, please reach out to your General Manager_________, and he will add you back to the list of those eligible and willing to return to work should additional schedule slots become available.

We continue to modify operations to minimize contact between our guests and team members. Throughout this time, we remain committed to following the guidelines set by the Governor, our local governments and health departments to keep our teams and our guests safe. We will continue to monitor advice from these agencies, as well as the Centers for Disease Control to ensure we ensure a safe environment while providing our essential services to the communities and teams we serve.

FAQs re: FFCRA and CARES Act

What is the Cap Under FFCRA?

- Emergency Paid Sick Leave Act (EPSL)
  - 80 hours for full-time workers or the average number of hours across a two-week period for part-time employees.
  - Care for yourself-100% of regular rate of pay
  - Care for others due to COVID or School closure-2/3 regular rate of pay

- Emergency Paid Family Medical Leave Expansion Act (EPFMLEA)
  - Twelve weeks but first two weeks unpaid. Can Use EPSL in conjunction.
  - Paid at 2/3 of employee's regular rate of pay
  - EPSL and FMLA share same 12 weeks
Am I Eligible for FFCRA Paid Benefits if Laid Off or Furloughed?

• NO
  • If employer has no work for you, you are not eligible for EPSL or EPFMLEA
  • No difference if lack of business or closure due to government directive
  • Eligibility for Unemployment Insurance benefits
  • See Questions 23-24 https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

What Documentation Must An Employee Provide?

• The employee’s name
• The date or dates for which leave is requested
• COVID-19 related reason the employee is requesting leave and written support
• A statement that the employee is unable to work, including by means of telework
• If quarantine order, the name of the governmental entity or health care professional
• School closure-name and age of child and the name of the school closed
• If child is older than fourteen, a statement of special circumstances
• Alternative documentation other than health care professional note acceptable

CARES Act-Eligibility for Payroll Protection Program

• Less than 500 employees generally
• Location with no more than 500 employees i.e. food services, lodging
• Sole proprietors, independent contractors and self-employed
• Some franchises or
• Meets SBA size standards
CARES Act-Payroll Protection Program

- Forgivable loans through commercial lenders or FinTechs approved by SBA
- Term of loan 2 years at 1%
- Money can be used for all items related to payroll, mortgage, rent or utility payments
- 2.5 times of monthly payroll
- $100,000 for each employee's salary, plus employee benefits and state/local taxes

CARES Act-PPP Time Period to Use for Loan?

- Generally, aggregate payroll cost from previous 12 months or calendar year 2019
- Seasonal businesses may use average period between February 15, 2019 or March 1, 2019 and June 30, 2019
- If not in business from February 19, 2019 to June 30, 2019, may use average monthly payroll costs for January 1, 2020 through February 29, 2020

PPP-How does Loan Forgiveness Work?

- Will forgive payments on principal and interest equal to what you spend over eight week period following date of loan including:
  - Payroll costs
  - Interest of mortgage
  - Rent of a lease agreement
  - Utility payments
  - Additional wages paid to formerly tipped employees who no longer get tips
- Must spend at least 75% of loan on payroll
- Forgiveness amount may be reduced if have fewer number of employees or reduce wages by 25% or more from prior year
PPP-What If State Does Not Allow Reopening?

- PPP amount of forgiveness depended on payroll costs over eight weeks.
- Eight weeks begins on date of the first disbursement of the PPP loan.
- Lender first disbursement must be made - ten calendar days of approval.
- If reduced number of employees or cut back wages from February 5-April 26, 2020, loan forgiveness if you restore by June 30, 2020 the number of employees or wages to level they were at during the same period.
- If unable to do so due to state order, you can always return back the portion of the loan you did not use.