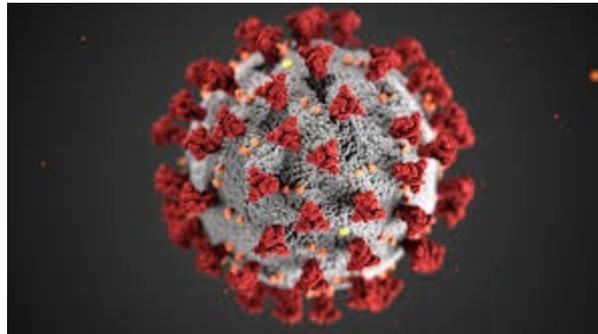


EMPLOYMENT LAW IMPLICATIONS AMIDST THE COVID-19 CRISIS



Bob Dunlevey

*OSBA Certified Specialist
Labor and Employment Law*

rdunlevey@taftlaw.com

(937) 641-1743

Nadia A. Lampton

*2019 & 2020 Super Lawyers Rising Star
in Ohio for Labor and Employment Law*

nlampton@taftlaw.com

(937) 641-2055

EMPLOYMENT LAWS IN PLAY

- Occupational Safety & Health Act
- National Labor Relations Act
- Fair Labor Standards Act
- American with Disabilities Act
- Family and Medical Leave Act
- Common law privacy
- Workers' compensation
- Unemployment compensation
- Families First Coronavirus Response Act

Text or Email questions to Nadia at 937-516-4397 or nlampton@taftlaw.com

WORKPLACE SAFETY ISSUES

- No specific OSHA standard to address coronavirus or other airborne infectious disease
- General Duty Clause → employers are obligated to provide a safe workplace free from recognized hazards
 - Employer must identify and assess workplace hazards, then identify control options
 - Elimination / Substitution
 - Engineering controls / Administrative Controls
 - Personal Protective Equipment
- Section 13 – Imminent Danger – Right to refuse to work
- Taking temperatures is permitted
 - Considered a “medical examination” under the ADA
 - Confidentiality obligations
 - PPE requirements
- OSHA 300/300A Logs

NATIONAL LABOR RELATIONS ACT

- Unionized operations governed by CBA
 - Section 8(a)(5) bargaining obligation
 - Managements' rights clause / established past practice / owner-mandates
 - Layoff provisions and no strike/lockout provisions
 - Information requests
 - **Bargaining demands** → not just a consideration or threat anymore
- Section 7 right to protected concerted activity
 - Applicable to non-union employees
 - Refusal to work may be cloaked under protections of Section 7
 - May be triggered by ONE employee if group concern is raised
 - Don't forget about remote work options!

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WAGE-HOUR LAWS & BENEFITS ISSUES

- Compensation for time off
- Compensation for home work
- Exempt employees' payment of salary
 - PTO
 - FMLA
- Unemployment compensation
 - Workers' compensation
- COBRA healthcare continuation

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OTHER CONSIDERATIONS

- Remote work policy
- Protection of confidential and trade secret information
- Employee goodwill and public relations image
- Contract obligations with force majeure clause
- Workplace changes forever?
 - Reasonable accommodations
- **COMMON SENSE!**

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STATE-BASED STAY AT HOME ORDERS

- Currently implemented in numerous states
 - California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Washington
 - Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Wisconsin
 - New Jersey, New Mexico, New York, Ohio, Oregon, Vermont, West Virginia
- Essential Businesses and Operations
 - Healthcare / public health operations
 - Essential government functions
 - Grocery stores / pharmacies / hotels and motels
 - Religious institutions / educational institutions
 - Gas stations and transportation companies
- Essential Infrastructure / Critical Trades
- Relevant Question → Is the work/service necessary to maintain the safety, sanitation, or essential operation of the business?
- Interplay with E-PSL / E-FMLA
 - Likely NOT a government-mandated quarantine/isolation order

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Signed by the President on March 18
- DOL issued guidance on March 24
- DOL will issue additional guidance in April
- Effective April 1, 2020, covered employers must provide emergency paid sick leave (E-PSL) and partially paid expanded FMLA leave (E-FMLA) for certain qualifying reasons related to the Coronavirus emergency

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FFCRA: Emergency Paid Sick Leave

Up to two weeks of paid E-PSL is available for any employee who:

1. Is subject to a government-mandated quarantine or isolation order
2. Has been advised by a health care provider to self-quarantine
3. Is experiencing COVID-19 symptoms and seeking a medical diagnosis
4. Caring for an individual covered under reasons 1 or 2 above
5. Caring for the employee's son or daughter if the school is closed or the child care provider is unavailable due to COVID-19 precautions
6. 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

FFCRA: Emergency Paid Sick Leave

- Two weeks of E-PSL is equal to:
 - 80 hours for full time employees
 - the number of hours a part-time employee would normally be scheduled to work in a two week period
- Rate of pay depends on reason for leave
 - Employee's regular rate of pay for first three reasons, up to \$511 per day (\$5,110 in the aggregate)
 - 2/3 employee's regular rate for last three reasons, up to \$200 per day (\$2,000 in the aggregate)

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FFCRA: Expanded FMLA Leave

- Up to twelve weeks of E-FMLA leave is available if employee has worked at least 30 days and:
 - Is unable to work (or telework) due to a need for leave to care for a son or daughter whose school is closed or child care provider is unavailable due to the COVID-19 public health emergency
- First two weeks are “unpaid”
 - But employee may receive payment through use of E-PSL or if employee elects to use paid leave (vacation, personal, sick, etc.) concurrently
- After the first two weeks of leave
 - Employee is paid 2/3 of regular rate for the number of hours the employee would normally be scheduled to work during that time

FFCRA: Expanded FMLA Leave

- Job Protection
 - Employers must restore employee to an equivalent position upon conclusion of E-FMLA leave
 - Limited exception for small employers with fewer than 25 employees
 - Must make “reasonable efforts” to restore the employee to an equivalent job unless position was eliminated due to economic conditions or other changes in operating conditions caused by COVID-19
 - Still, must make reasonable efforts to contact employee for any equivalent position that becomes available in the year following the first day of employee’s E-FMLA leave or conclusion of COVID-19 emergency (whichever is earlier)

FFCRA: Covered Employers

- E-PSL and E-FMLA must be provided by all employers with less than 500 employees
 - Separate corporations may be considered a single employer under the FLSA’s “joint employment” doctrine or the FMLA’s “integrated employer employers” doctrine
- Potential Exceptions
 - Small employers with fewer than 50 employees if providing leave would jeopardize viability of company
 - Certain health care providers and emergency responders at the employer’s option
 - Further action needed; DOL will issue regulations in April 2020

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FFCRA: Enforcement

- Effective dates
 - April 1, 2020 through December 31, 2020
 - Initial 30-day non-enforcement period for employers who have acted reasonably and made good faith attempt for compliance
- Penalties
 - Same as FMLA: lost wages and benefits, out of pocket costs, liquidated damages, attorney's fees, reinstatement
 - Same as FLSA: lost wages and benefits, liquidated damages, attorney's fees for failure to provide E-PSL, reinstatement, fines up to \$10,000 and criminal penalties (if prior violation) for intentional violations and unlawful termination

FFCRA: Tax Credits for Paid Leave

- 100% tax credit “reimbursement” for all paid leave
 - Amount matches daily and aggregate payment caps
- Additional tax credits for health insurance coverage
- Credit is applied to employer portion of the 6.2% social security tax
 - Employers may immediately use payroll taxes withheld from employees to pay employees for FFCRA-required leave
 - If payroll taxes are insufficient, employers may request an accelerated payment from the IRS
 - IRS will provide guidance and claims form next week
- Credit not available to state and local governments and political subdivisions

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FFCRA: FAQ

- Coordination with other leave policies
- Intermittent leave
- Certification
- Employee/employer notice obligations
- Fear of contracting COVID-19
- COVID-19 leave prior to effective date (4/1/20)
- Maximum FMLA and E-FMLA
- Record keeping
- Layoffs/retaliation
- Government mandated quarantine or isolation order
- Multi-employer CBA

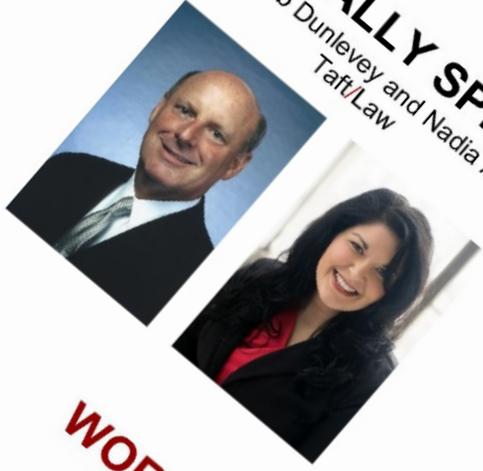
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CORONAVIRUS AID, RELIEF AND ECONOMIC SECURITY ACT

- Signed by the President on March 27, 2020
- No guidance or regulations yet
- The CARES Act provides \$2 trillion in direct financial assistance to Americans, but also provides several programs and interventions to provide financial relief to eligible employers and employees
 - Small business loans available to eligible employers
 - BUT, BE CAREFUL → union neutrality obligations
 - Enhanced unemployment insurance benefits
 - Confirms E-FMLA and E-PSL available to employees and tax credits to employers
 - Employees laid off after March 1, 2020, then rehired, are entitled to E-FMLA and E-PSL
 - Funds to federal agencies for federal contractor leave in cases where job duties cannot be performed remotely
 - Federal government loans to certain distressed businesses
 - Limitations on compensation paid to executives of businesses subject to these loans
 - Non-taxable “qualified disaster relief payments”

LEGALLY SPEAKING

by Bob Dunlevey and Nadia A. Lampton
Taft/Law



WORKPLACE DO'S AND DON'TS COVID-19 CORONAVIRUS

The recent outbreak and fears associated with COVID-19 are causing substantial disruptions to our everyday routines and greatly impacting businesses. COVID-19 presents unique challenges for employers and their customers trying to maintain business operations amid threatened shut-downs, travel bans, and the cancellations of major industry events and conferences. In the midst of what the World Health Organization has now labeled a worldwide pandemic, employers must still wrestle with the day-to-day decisions associated with running a business. Some of these challenges include mandates and obligations of employers to send home employees if they are exhibiting signs of illness, the rights and obligations of employers to require employees to wear face masks, and the rights of employees to refuse to work for fear of contracting COVID-19. Other challenges include the rights of employees to refuse to work for fear of contracting COVID-19. Other challenges include the rights of employees to refuse to work for fear of contracting COVID-19. Other challenges include the rights of employees to refuse to work for fear of contracting COVID-19.

consider the following guidance on these key issues:

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COMP DEFENSE ■ OSHA ■ BUSINESS LAW ■ CONSTRUCTION
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Please keep in mind that new guidance is being issued by the
Department of Labor and other authorities on a daily basis,
and the scope of every employer's legal obligation is
changing constantly. As a result, statements in these slides
may be qualified by subsequent developments.

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