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GUIDANCE FOR TEXAS EMPLOYERS IN RESPONSE TO COVID-19

Given the outbreak of the COVID-19 pandemic, employers must accomodate their workforce by permitting employees to telecommute or work-from-home. If an employer is an essential business and cannot operate its business through telecommuting or working-from-home arrangements, however, the employer may be forced to consider reducing staff to the minimal number necessary to ensure that essential operations can continue. In the midst of the COVID-19 pandemic, below are some federal and Texas specific guidelines to assist employers in navigating this unprecedented societal terrain.

I. FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act ("FFCRA"), which will go into effect on **April 2, 2020**. The FFCRA, in pertinent part, includes: 1) the Emergency Paid Sick Leave Act; and 2) the Emergency Family and Medical Leave Expansion Act.

A. The Emergency Paid Sick Leave Act.

Emergency Paid Sick Leave Act					
COVERED EMPLOYERS	**WHAT THE LAW REQUIRES**	**AMOUNT OF PAID LEAVE**	**PAY DURING LEAVE[1]**	**REQUIRED POSTING**	**EXCEPTIONS**
The Emergency Paid Sick Leave Act covers private employers with fewer than 500 employees, as well as governmental employers.	The Emergency Paid Sick Leave Act requires covered employers to provide paid sick time to employees if the employee is unable to work (or telework) because: **1.** The employee is subject to a federal, state or local quarantine or isolation order	**Full-Time Employees**: • Entitled to 2 weeks (80 hours). *Employers receive a tax credit for any amount paid for such leave.	**Time Off for Employee Self-Care:** Employee must be compensated at the higher of: 1) the employee's regular rate of pay; 2) The federal minimum wage; or	Employers will be required to post an approved notice regarding the Act once the Secretary of Labor makes it available.	• Employers of health care providers or emergency responders may elect not to provide leave to health care providers or emergency responders. • Employers may require employees to

[1] The Emergency Paid Sick Leave Act provides for a limited refundable employment tax credit equal to the amount that an employer pays to an employee. Those amounts are increased by the amount of nontaxable health insurance premiums the employer pays for employees who are out on Emergency Paid Sick Leave, for the days of leave, and further increased by the amount of Medicare tax the employer owes for the Emergency Paid Sick Time payments (generally, around 1.45%). The total credit amount is then also included in the employer's income for income tax purposes.

Emergency Paid Sick Leave Act					
COVERED EMPLOYERS	**WHAT THE LAW REQUIRES**	**AMOUNT OF PAID LEAVE**	**PAY DURING LEAVE[1]**	**REQUIRED POSTING**	**EXCEPTIONS**
	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 is seeking a medical diagnosis. **4.** The employee is caring for a person who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine. **5.** The employee is caring for a son or daughter because the child's school or place of care has been closed or the child's childcare is unavailable due to COVID-19 precautions. **6.** The employee is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretaries of the Treasury and Labor.	**Part-Time Employees**: • Entitled to 2 weeks of pay based on their average amount of hours worked. *Employers receive a tax credit for any amount paid for such leave.	3) The local minimum wage. • Cap of $511 per day and an aggregate limit of $5,110. **Time Off to Care for a Sick Family member or a Child Not in School:** Employee must be compensated at two-thirds of their regular rate of pay. • Cap of $200 per day and $2,000 in the aggregate.		follow reasonable notice procedures to continue to receive paid sick leave. after the first workday (or portion thereof) an employee receives paid sick time.

The Emergency Paid Sick Leave Act also prohibits employers from retaliating against an employee for taking paid sick time or engaging in protected activity as to rights provided to the employee under the Emergency Paid Sick Leave Act. An employee's remedies for a violation of the Emergency Paid Sick Leave Act are the same remedies as those provided for a violation of the Fair Labor Standards Act—namely, damages, an equal amount as liquidated damages, attorneys' fees, costs, and injunctive relief or reinstatement.

B. The Emergency Family and Medical Leave Expansion Act.

The Emergency Family and Medical Leave Expansion Act						
EMPLOYER COVERAGE	**ELIGIBLE EMPLOYEES**	**WHAT THE LAW REQUIRES**	**PAY DURING LEAVE[2]**	**PAID LEAVE CAPS**	**JOB RESTORATION**	**EXEMPTIONS**
All employers with fewer than 500 employees.	An employee is eligible for Emergency FMLA ("E-FMLA") if the employee seeking leave has been employed for at least 30 calendar days.	Covered employers must provide paid E-FMLA leave if an employee is unable to work (or telework) due to a need for leave to care for the employee's son or daughter who is under 18 because the child's school or place of care has been	• The first 10 days of E-FMLA may be unpaid, but an employee may elect (and an employer may require an employee) to substitute any accrued vacation, personal leave, or medical or sick leave for unpaid leave.[3] • After 10 days, employers shall provide partial paid	Paid E-FMLA may not exceed $200 per day and $10,000 in the aggregate.	• FMLA's standard job restoration requirements will apply to employers with 25 or more employees. • For employers who employ *less than* 25 employees, job restoration is not required if all the following are met: 1. The employee takes E-FMLA; 2. The employee's position no longer exists due to economic conditions or	• The Secretary of Labor has the authority to exempt certain employers, including health care providers, emergency responders, and businesses with under 50 employees. • The FMLA Expansion Act exempts employers who do not

[2] Employers may claim a limited refundable employment tax credit equal to the amount paid to employees for E-FMLA leave, subject to a maximum per employee of $200 for each day of qualifying leave up to $10,000 per employee for the year. Additionally, those amounts are increased by the amount of nontaxable health insurance premiums the employer paid for employees who are out on E-FMLA Leave, for the days of leave, and also increased by the amount of Medicare tax the employer owes for the E-FMLA leave payments. The employer's total available credit amount is also added to its income for the year. Unlike the credit for Paid Sick Time, however, there is already a general business credit available to certain employers who provide paid FMLA leave, and the new E-FMLA credit is not allowed with respect to any wages for which the general business credit is allowed—in other words, "double dipping" is not permitted.

[3] For many employees, the first 10 days of leave will likely be paid as a result of the Emergency Paid Sick Time Act of the FFCRA.

The Emergency Family and Medical Leave Expansion Act						
EMPLOYER COVERAGE	**ELIGIBLE EMPLOYEES**	**WHAT THE LAW REQUIRES**	**PAY DURING LEAVE[2]**	**PAID LEAVE CAPS**	**JOB RESTORATION**	**EXEMPTIONS**
		closed or his or her childcare provider is unavailable due to a public health emergency.	leave for each additional day of leave at an amount that is not less than two-thirds of an employee's regular rate of pay for the number of hours the employee would otherwise be scheduled to work. • For employees who have weekly working hours that fluctuate, the employer is allowed to take an average over a six-month period.		other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave; and 3. The employer takes reasonable efforts to restore the employee to an equivalent position.	have 50 or more employees from private lawsuits alleging violations, but those employers could still be sued by the Secretary of Labor for alleged violations.

II. FURLOUGH.

A furlough is an alternative to layoff. When an employer furloughs its employees, it requires them to work fewer hours or to take a certain amount of unpaid time off.

A. Exempt Employees.

Employers must be careful when furloughing exempt employees so that they continue to pay them on a salary basis and do not jeopardize their exempt status under the Fair Labor Standards Act ("FLSA"). An exempt employee is entitled to pay for any workweek in which they perform any work. Employers should therefore inform employees that work is not authorized during the furlough period without advance written approval.

B. Non-exempt Employees.

Employers also should notify non-exempt employees about the same issue as non-exempt employees generally are entitled to compensation for performing work when not in the office. A signed policy indicating the types of activities that require supervisor approval and the company's expectation for recording any time spent on such activities is something employers should seriously consider.

C. Fair Labor Standards Act-Wages for Exempt Employees.

Under the FLSA, reductions in the predetermined salary of an exempt employee will ordinarily cause a loss of the exemption. Such employees must then be paid at least $684 per week on a salary basis and overtime pay required by the FLSA.

Many employers would like to have employees work fewer hours each week and pay them less. The FLSA does not permit employers to reduce the pay of exempt employees in exchange for working fewer hours. By way of example, an employer who elects to have exempt employees work four days instead of five per week cannot simply pay them 80 percent of their salaries for these weeks. Any change in exempt employees' salaries must be "permanent." Short-term changes can endanger the employees' exempt status. For example, reducing hours (and salaries) over the summer is not acceptable because the salary change is not permanent.

Without running afoul of the salary test, employers may reduce salaries in response to a COVID-19 slowdown without affecting an employees' exempt status. The overtime exemption will be viable if the reduction in salary and work schedule is implemented prospectively based on a policy designed to address a legitimate business need.

A furlough that encompasses a full workweek is one way to accomplish this, since the FLSA states that exempt employees do not have to be paid for any week in which they perform no work. Courts have approved furlough policies that achieve a salary reduction when done prospectively and for a fixed period. In addition, employers may allow exempt employees the autonomy to decide which days they work.

An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services. Generally, the theory is to have the majority of employees share some hardship as opposed to a few employees losing their jobs completely. If the employer seeks volunteers to take time off due to insufficient work, and the exempt employee volunteers to take the day(s) off for personal reasons, other than sickness or disability, salary deductions may be made for one or more full days of missed work. The employee's decision must be completely voluntary.

An exempt employee must be paid for partial-day absences but may have his or her salary reduced for full-day absences due to sickness if the employer offers a paid sick leave benefit and the employee has exhausted that leave or is not yet eligible for the leave.

III. LAYOFFS, REDUCTIONS IN FORCE, AND THE FEDERAL WARN ACT.

A. Layoffs.

A layoff is a temporary separation from payroll because there is not enough work for the employee to perform. For example, an employer may consider initiating layoffs related to the COVID-19 crisis. Employers should advise an employee of the following: "While difficult to predict given the COVID-19 crisis, we expect the layoff to last until at least [date]; however, we may need to extend this timeframe. We will recall laid-off employees as business needs dictate." Employees are typically able to collect unemployment benefits while on an unpaid layoff, and frequently an employer may allow employees to maintain benefit coverage as an incentive to remain available for recall.

B. Reductions in Force.

A reduction in force ("RIF") occurs when a position is eliminated without the intention of replacing it and involves a permanent cut in headcount. A layoff may turn into a RIF or the employer may choose to immediately reduce their workforce. A RIF can be accomplished by terminating employees or by means of attrition.

C. The Federal WARN Act.

Like the majority of states, Texas does not currently have any laws that impose broader advance notification requirements on employers that are seeking to layoff or terminate the employment of numerous employees than are imposed by federal law. Under the federal Workers Adjustment and Retraining Notification Act (the "WARN Act"), employers are required to provide advance notice (i.e., 60 days) to employees, as well as certain governmental agencies, in certain situations. Notably, however, not all layoffs trigger the requirements of the federal WARN Act and exceptions may apply.

Important considerations for employers looking to ensure compliance with the federal WARN Act are summarized in the following chart:

COVERED EMPLOYERS	WHAT THE LAW REQUIRES	MASS LAYOFF	PLANT CLOSING	EXCEPTIONS	EMPLOYEE REMEDIES
A covered employer is an employer that employs at least 100 employees, excluding part-time employees, or employs 100 or more	The WARN Act requires covered employers to provide at least 60 days' advance notice of a mass layoff or plant closing to employees, the state dislocated worker unit and the chief elected official of the unit of	A mass layoff means a reduction in force that is not the result of a plant closing and that results in an	A plant closing means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units	Under the WARN Act, an employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the plant closing	Any terminated employees, including top executives, may sue for damages where a covered employer "orders" a "plant closing"

COVERED EMPLOYERS	WHAT THE LAW REQUIRES	MASS LAYOFF	PLANT CLOSING	EXCEPTIONS	EMPLOYEE REMEDIES
workers who work at least a combined 4,000 hours per week.	local government where the employment site is located. If the employee is represented by a collective bargaining representative, notice may be provided to either the employee or said representative.	employment loss[4] at a single site of employment during any 30-day period for: a. at least 33% of the employees and at least 50 employees (excluding part-time employees); or b. (b) at least 500 employees, excluding part-time employees.	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 50 or more employees, excluding part time employees.	or mass layoff is caused by: a. business circumstances that were not reasonably foreseeable as of the time notice would have been required; or b. a natural disaster. There is also the faltering business exception which allows employers to provide reduced notice for plant closings if they had been actively seeking capital or business for their faltering enterprises and believed in good faith that giving notice would have prevented them from getting the capital or business necessary to continue their operations.	or "mass layoff" without first giving advance notice to employees who suffer an "employment loss." *See* 29 U.S.C. § 2104(a).

[4] An employment loss means: a) an employment termination, other than a discharge for cause, voluntary departure or retirement; b) a layoff exceeding six months; or c) a reduction in hours of work of more than 50% during each month of any six-month period. The regulations indicate that "an employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination."

IV. HEALTHCARE COVERAGE.

A. Healthcare Insurance.

A group health plan must provide coverage without any cost-sharing requirements, such as deductibles, co-payments and co-insurance, or prior authorization or other medical management requirements, for:

- The costs of a test to detect or diagnose the virus that causes COVID-19; or
- Healthcare provider visits, including telehealth visits, urgent care and emergency room visits, that result in an order for or administration of a test to detect or diagnose the virus that causes COVID-19.

B. Healthcare Coverage After Termination or Reduction in Hours.

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") requires employers that employ at least 20 employees to temporarily extend their group health coverage in certain instances where coverage under the plan would otherwise end. No amendments or modifications have been made to COBRA in response to the COVID-19 pandemic. The law remains the same for continued healthcare coverage after an employee separates from its employer as a result of certain qualifying events. For example, if an employee is terminated (other than for gross misconduct), has a reduction of hours, or leave of absence, the employee, their spouse, and dependent children are entitled to 18 months of health coverage. For loss of coverage due to the death of the employee, the continuation term for dependents is 36 months.

The State of Texas also has its own law, which is referred to simply as "state continuation." Texas's state continuation provides a similar continuation of group healthcare coverage for employees who work for small businesses with fewer than 20 employees beyond what is provided under COBRA. For an employee that is not eligible for continuation coverage under COBRA, state continuation ensures coverage for nine months after the date the employee elects to continue the group coverage. For any employee that is eligible for continuation coverage under COBRA, that employee receives six additional months of coverage following any period of continuation coverage provided under COBRA.

Under Texas's state continuation law, an employee must provide to the employer or group policyholder a written request for continuation of group coverage not later than the 60th day after the later of (1) the date the group coverage would otherwise terminate; or (2) the date the individual is given notice by either the employer or the group policyholder of the right to continuation of group coverage.

If an employee is eligible for both COBRA continuation coverage and state continuation coverage, the carrier may send the notice for state continuation coverage with the COBRA continuation notice. If the carrier sends both notices simultaneously, the carrier must allow the employee to elect both COBRA continuation coverage and state continuation coverage, which will

be effective at the expiration of COBRA continuation coverage. An employee's election of only COBRA continuation coverage does not waive the employee's right to elect or waive state continuation coverage at a later date, provided the election is made within the statutory time frame.

V. WORKPLACE SAFETY.

LAW	WHAT THE LAW REQUIRES	COVERAGE	WHAT EMPLOYERS SHOULD CONSIDER
The Occupational Safety and Health Act ("OSHA")	OSHA requires employers to provide employees with a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."	OSHA covers most private sector employers and their employees in the 50 states, the District of Columbia, Puerto Rico, and other U.S. territories	Employers should consider: • Restricting employee travel to areas known to be affected by the COVID-19 virus, such as China and Italy. • Imposing self-quarantines – away from work – for those employees who have: 1) Tested positive for the virus; 2) Traveled to an area significantly affected by the spread of the virus; or 3) Otherwise been exposed to someone who has tested positive for the virus or even may have the virus. *Employees should not be permitted to return to work until they have produced a Fitness for Duty certification from a healthcare provider (for employees taking FMLA) or a doctor's return-to-work note (for those not taking FMLA). • Permitting leaves of absence from work and/or work from home. • Educating employees about the virus, its symptoms (fever, cough, difficulty breathing), how it spreads, and safety

LAW	WHAT THE LAW REQUIRES	COVERAGE	WHAT EMPLOYERS SHOULD CONSIDER
			measures that should be utilized to mitigate spread. • If an employee who has the coronavirus has entered the workplace, contact the Centers for Disease Control and local health department immediately and consider contacting a hazmat company to disinfect the workplace. • Review company safety policies to ensure that the company's policies adequately address communicable diseases and comply with OSHA protocols.

In this challenging and unprecedented time, the Kaufman, Dolowich & Voluck attorneys look forward to assisting employers who are grappling with complex issues in an effort to mitigate the impact of the COVID-19 pandemic on their employees and businesses. KDV's Labor and Employment Law Group is continuing to monitor all governmental directives and will provide updates accordingly. For guidance and/or more information, please contact an experienced member of KDV's Labor & Employment Law Practice Group at (954) 302-2360.