

**GUIDANCE FOR FLORIDA EMPLOYERS IN RESPONSE TO COVID-19**

Given the outbreak of the COVID-19 pandemic, employers must accommodate 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 Florida 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 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 <sup>1</sup>	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 tele-work) 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	Full-Time Employees are entitled to 2 weeks (80 hours) of paid leave.  *Employers receive a tax credit for any amount paid for such leave.  Part-Time Employees are entitled to 2 weeks of pay based on their average amount of hours worked.	<b>Time Off for</b>	Employers will be required to post an approved notice about the Emergency Paid Sick Leave Act once the Secretary of Labor makes it available.	<ul style="list-style-type: none"> <li>Employers of health care providers or emergency responders may elect not to provide leave to health care providers or emergency responders.</li> <li>Employers may require employees to follow reasonable notice procedures to continue to receive paid sick leave after</li> </ul>
			<b>Employee Self-Care:</b>		
			Employee must be compensated at the higher of: 1) the employee’s regular rate of pay; 2) The federal minimum wage; or 3) The local minimum wage.  • There is a cap of \$511 per day and an aggregate limit of \$5,110.		

Emergency Paid Sick Leave Act					
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	<p>related to COVID-19;</p> <p>3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;</p> <p>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;</p> <p>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; or</p> <p>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.</p>	<p>*Employers receive a tax credit for any amount paid for such leave.</p>	<p><b>Time Off to</b></p> <p><b>Care for a Sick</b></p> <p><b>Family member</b></p> <p><b>or a Child Not in</b></p> <p><b>School:</b></p> <p>Employee must be compensated at two-thirds of their regular rate of pay.</p> <ul style="list-style-type: none"> <li>There is a cap of \$200 per day and an aggregate limit of \$2,000.</li> </ul>		<p>the first workday (or portion thereof) an employee receives paid sick time.</p>

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 <sup>2</sup>	PAID LEAVE CAPS	JOB RESTORATION	EXEMPTIONS
All employers with fewer than 500 employees. <sup>3</sup>	An employee is eligible for Emergency FMLA (“E-FMLA”) leave 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 closed or his or her childcare provider is unavailable due to a public health emergency.	<ul style="list-style-type: none"> <li>The first 10 days of E-FMLA leave 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.<sup>4</sup></li> <li>After 10 days, employers shall provide partial paid 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</li> </ul>	Paid E-FMLA leave may not exceed \$200 per day and \$10,000 in the aggregate.	<ul style="list-style-type: none"> <li>FMLA’s standard job restoration requirements will apply to employers with 25 or more employees.</li> <li>For employers who employ <i>less than 25</i> employees, job restoration is not required if all the following are met:               <ol style="list-style-type: none"> <li>The employee takes E-FMLA leave;</li> <li>The employee’s position no longer exists due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave; and</li> <li>The employer takes reasonable efforts to restore the employee to</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>The Secretary of Labor has the authority to exempt certain employers, including health care providers, emergency responders, and businesses with under 50 employees.</li> <li>The FMLA Expansion Act exempts employers with less than 50 employees from private lawsuits alleging violations, but the Secretary of Labor could still bring suit against those employers for the alleged violations.</li> </ul>

**The Emergency Family and Medical Leave Expansion Act**

EMPLOYER COVERAGE	ELIGIBLE EMPLOYEES	WHAT THE LAW REQUIRES	PAY DURING LEAVE <sup>2</sup>	PAID LEAVE CAPS	JOB RESTORATION	EXEMPTIONS
			scheduled to work. <ul style="list-style-type: none"> <li>For employees who have weekly working hours that fluctuate, the employer is allowed to take an average over a six-month period.</li> </ul>		an equivalent position.	

**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.

While 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.

However, without running afoul of the salary test, employers may reduce salaries in response to a slowdown caused by COVID-19 without affecting an employees' exempt status. The overtime exemption will still 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. 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 RIF can be accomplished by terminating employees or by means of attrition. The employer may choose to immediately reduce the workforce or may start with a layoff that later turns into a RIF.

**C. The Federal WARN Act.**

Unlike other states, Florida does not currently have any laws that impose advance notification requirements on employers that are seeking to layoff or terminate the employment of numerous employees. Under a federal law called the 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 workers who work at least a combined 4,000 hours per week.	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 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.	A mass layoff means a reduction in force that is not the result of a plant closing and that results in an employment loss <sup>5</sup> 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	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 50 or more employees, excluding part time employees.	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 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.	Any terminated employees, including top executives, may sue for damages where a covered employer “orders” a “plant closing” or “mass layoff” without first giving advance notice to employees who suffer an “employment loss.”

COVERED EMPLOYERS	WHAT THE LAW REQUIRES	MASS LAYOFF	PLANT CLOSING	EXCEPTIONS	EMPLOYEE REMEDIES
		b. at least 500 employees, excluding part-time employees.			

**IV. HEALTHCARE COVERAGE RELATING TO COVID-19.**

***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 Florida also has a “mini-COBRA” law, known as the Florida Health Insurance Coverage Continuation Act, that provides a similar continuation of healthcare coverage for employees who work for small businesses with fewer than 20 employees and who are not covered under COBRA. Under Florida’s mini-COBRA law, an employee must notify the insurer that he is eligible for continued coverage within 30 days of losing his employer-sponsored health plan, and the coverage can last for a maximum of 18 months.

**V. KDV IS HERE TO HELP.**

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 either our Fort Lauderdale office at (954) 302-2360 or our Orlando office at (407) 789-0230.

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>2</sup> Employers with more than 500 employees are not covered by the Emergency Family and Medical Leave Expansion Act at this time.

<sup>3</sup> Employers with more than 500 employees are not covered by the Emergency Family and Medical Leave Expansion Act.

<sup>4</sup> For many employees, the first 10 days of leave will likely be paid as a result of the Emergency Paid Sick Leave Act of the FFCRA.

<sup>5</sup> 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. Emergency Family and Medical Leave Expansion Act