

HR COVID-19 Advice & Input Webinar




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March 26, 2020

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Today's Agenda

- Legal Issues
- Your Questions
- Common Questions
- On the Horizon
- Resources

This program does not constitute the rendering of legal advice by AICC or the presenter (despite the title). You should consult with your company's employment or other legal counsel for advice.




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Americans with Disabilities Act (ADA)

- EEOC's March 19th and 21st updated guidance.
 - https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
 - https://www.eeoc.gov/facts/pandemic_flu.html#secB
- They will publish a pre-recorded webcast on Friday.
 - <https://www.eeoc.gov/eeoc/newsroom/release/3-23-20.cfm>
- Avoid adverse treatment based on actual, perceived disability or association with a person with a disability.



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Age Discrimination in Employment Act (ADEA)

- Avoid treating older workers differently from younger workers. Examples might be giving them different job tasks, requiring them to telework before others or reducing their hours before others. Your actions may be well-intended and borne out of a desire to protect those who may be more at risk. But the risk may end up being yours for discriminating against workers age 40 or above in violation of the ADEA.



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Fair Labor Standards Act (FLSA)

- Hours/Pay reductions – many states require notice in advance of a decrease in an employee’s pay or pay rate. One could argue that a reduction in hours worked is not a reduction in the pay rate. You may want to avoid having to make that argument, give your employees notice as soon as you determine that a reduction in hours will be required. Most states require notice at least one pay period in advance, some more.



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Fair Labor Standards Act (FLSA)

- Hours/Pay reductions - If you reduce an exempt employee’s hours, that also reduces the employee’s minimum salary, ensure it remains at or above \$684/week, which is the current minimum salary to qualify for exempt status under the FLSA *and* meets your state’s minimum salary test if different (higher).



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Fair Labor Standards Act (FLSA)

Remember exempt employees must be paid their full day's salary even if they work only a partial day. They may also have to be paid on any day we have no work for them, if they performed any work in that work week.

Reclassifying an exempt employee to non-exempt and paying hourly, including overtime, could be an option. It could also appear that you are trying to "circumvent" the purpose and intent of the FLSA. Stay tuned.



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Fair Labor Standards Act (FLSA)

Furloughs, such as requiring an exempt employee to work four rather than five days a week and pro-rating the employee's guaranteed, minimum weekly salary may be permissible. The DOL has noted, "a fixed reduction in salary effective during a period when a company operates a shortened workweek due to economic conditions would be a bona fide reduction not designed to circumvent the salary basis payment."



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(Emergency) Family and Medical Leave Expansion Act

- [H.R. 6201](#) Family First Coronavirus Response Act (FFCRA) takes effect April **1st** (Division C)
- Covered employer – fewer than 500 employees
 - Look at joint and integrated employer definitions
 - [Click here](#) and see Q2
- Covered employee – any that has worked for you for at least 30 days immediately prior to the leave
 - This includes a temp you brought on as a regular EE
 - Pending DOL regulations to determine if and how small business (< 50 employees) might be exempt



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Emergency Family and Medical Leave Expansion Act

- 1 new qualifying reason
- If the employee is unable to work or telework due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care providers of such son or daughter is unavailable, due to a public health emergency.



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Emergency Family and Medical Leave Expansion Act

- First ten (10) days may be unpaid (at employee’s discretion)
- Thereafter, leave must be paid at:
 - 2/3’s of EE’s regular rate of pay and hours “normally scheduled to work” not > \$200/day and \$10K total
 - Variable schedule – use 6-month look-back, if EE did not work over such period, then “reasonable expectation of the employee at the time of hire of average number of hours per day...”
- Job restoration may not apply for employer of fewer than 25 EE’s if four conditions are met.



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OSHA

- General Duty clause - requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”
- Recordkeeping requirements – an employee who is diagnosed with COVID-19 may be a reportable, occupational illness. [Click here](#) for a list of factors to make that determination (see the blue box on the right).



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Paid Sick Leave, Emergency FFCRA, Division E

- Covered Employer – same as EFMLEA (incl. 4/1 eff. date)
- Covered Employee – any
- Provides paid sick leave for up to two weeks
 - 80 hours max; prorated for part-time employees, average over an average 2-week period) in addition to any and all sick leave that you already offer.
- For any of the following reasons...
 1. EE is subject to federal, state, local quarantine or isolation order re: COVID-19
 2. EE's HCP advised self quarantine re: COVID-19



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Paid Sick Leave, Emergency - FFCRA

- For any of the following reasons...
 3. EE has COVID-19 symptoms *and* seeking medical diagnosis
 4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
 5. The employee is caring for EE's son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
 6. The employee is experiencing any other substantially similar condition specified by the HHS Secretary in consultation with the Secretaries of the Treasury and Labor.



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Paid Sick Leave, Emergency - FFCRA

- Requires a [poster](#) to be posted (DOL issued March 25th)
- The amount of sick leave offered must be at:
 - the employee's regular rate of pay not to exceed \$511/day or \$5,110 total for reasons 1, 2 and 3;
 - 2/3's of the employee's regular rate of pay not to exceed \$200/day and \$2,000 total for reasons 4, 5 or 6.



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Title VII

- Avoid making assessments based on the national origin or race of any individual, an individual with whom your employee associates or associated country, other than Level 3 ([CDC](#)) or Level 4 ([Dept of State](#))
- Adverse impact analysis – if you are reducing a portion of your workforce, assess whether it may adversely impact a protected group.



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- Unemployment Insurance Benefits (UIB) - Many states have relaxed and/or expanded this benefit in accordance with FFCRA, Division D. Please visit your [state's website](#) for more information. Give any of your employees that may be impacted as a result of reduced hours or layoff the state website so they may apply as soon as possible.
- Worker Adjustment Retraining and Notification Act (WARN) Act – if you have at least 100 employees and will be closing a plant, facility or have a “mass layoff” you may have certain notice requirements.



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- Workers' Compensation - ask your carrier for any recommendations they have for avoiding compensable illness, injury and how to facilitate claims administration if an employee does file a related claim.



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State Law & Related Issues

- Fair Scheduling – will these still be enforced?
- Liability Insurance – are you covered? Talk to your carrier.
- Sick and Safe Leave Laws
- (Mini) WARN - At least 19 states have mini-WARN laws. Know yours.




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Some of *Your* Questions

1. Can we take employees' temperatures and, if so, how?
2. How do we reduce employees' hours?
3. Can we require a doctor's note?
4. How do we communicate to our workforce if an employee tests positive for COVID-19?




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Some Common Questions

- Travel restrictions
- Furlough v. Layoff
- When and how that impacts FFCRA eligibility



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On the Horizon

- EEOC’s webcast (tomorrow)
- DOL Regulations on
 - Model notice on UI eligibility
 - Guidelines re: calculating the amount of sick time (15 days, April 1st (?))



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Resources

- Department of Homeland Security [Guidance on Infrastructure](#)
- Department of Homeland Security [Update](#) on Form I-9 Processing
- Department of Labor’s Latest [Guidance](#) on all related matters
- Department of Labor’s [website](#) to submit your questions
- Department of Treasury [website](#) on business tax credits
- EEOC’s Pre-Recorded COVID-19 [Webinar](#) (available 2:00 EDT, March 27th)
- OSHA [Guidance on Preparing Workplaces for COVID-19](#).
- I4CP (this company provides research findings, information and *not* consulting services) has a [dedicated webpage](#) with COVID-19 resource page for employers.
- NIH’s [Guidance for Businesses and Employers](#) (scroll down and click on “Businesses and Employers” on the right; *very* similar, if not identical, to CDC’s)
- Small Business Administration ([SBA](#)) Small Business Guidance and Loan Resources
- SHRM has a [page](#) dedicated to related resources and information, including sample memo’s and policies (SHRM membership required for some).



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