

March 25, 2020 -- 2:30 p.m.

COMMUNICATION AND GUIDANCE REGARDING COVID-19

Employees are the heart of the Catholic Church to spread our mission of Jesus Christ. We hold the concern of our employees at the Archdiocese of Milwaukee and at each parish and school in our thoughts and prayers.

We are providing this *guidance* to address some of the many questions employers are facing in the midst of this global pandemic. Each parish and/or school is a separate entity with its own leadership that guides and directs the mission of each parish and/or school. We respect the uniqueness of each entity and recognize that each entity must make its own decisions based upon its structure, the needs of the entity and the community it serves, and its own financial obligation and policies. We offer this information as a guide, and ask that you prayerfully make your decisions with compassion and understanding of your staff, in the context of legal obligations and considerations.

As you know, issues related to the global COVID-19 pandemic are quickly changing and evolving, with many laws, directives, recommendations and mandates literally changing by the hour. This is therefore a very fluid situation. Employers *should* plan, but be ready to adapt, as each day (and sometimes hour, or even minute), brings new information and potential obligations.

Please watch for future communications to address some of these issues in more detail, but also please be aware of the rapidly changing developments in federal, state, and local laws and mandates.

General Background Considerations for employers:

- Remember that employees must be paid if they are working (see specific notes below).
- Understand that employees may be worried and anxious (personal health and health of loved ones; financial; child care; uncertainty about children schooling, general uncertainty and anxiety related to unprecedented global pandemic).
- Many entities will need to make some tough financial decisions, NOT because they are heartless or don't care for their employees, but because there will be financial realities related to sustainability and viability.
- Operationally, each entity will have to assess its own operations, needs, and options. There will be no one-size-fits-all response to this pandemic.
- Tone and messaging related to those decisions will be important. How an employer handles this situation will affect how employees AND members view the entity. In this regard, messaging should accurately reflect the reality of the business, and can acknowledge the uncertainty and fluid nature of the current pandemic and its effects. However, *especially* for religious entities, communications can also be an opportunity for positive, reassuring and unifying messaging.

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**NEW FEDERAL LEGISLATION REGARDING
EMERGENCY FAMILY AND MEDICAL LEAVE
AND EMERGENCY PAID SICK LEAVE**

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide employees with paid sick leave and/or expanded paid emergency family and medical leave for specified circumstances related to COVID-19. Although the law itself has been passed, the Department of Labor (DOL), the federal Department that administers and enforces the new law's paid leave requirements, will be issuing formal regulations regarding the FFCRA. As of 03/24/2020, the DOL has issued some initial guidance on the law. The formal regulations will provide additional guidance.

A more detailed communication regarding this new law is underway. In the meantime, please note the following:

EFFECTIVE DATES: The law is currently anticipated to go into effect as of April 1, 2020 (and expires on December 31, 2020).

WHICH EMPLOYERS ARE COVERED BY THE LAW: The law generally applies to private employers with fewer than 500 employees. **NOTE:** The law authorizes the DOL to exempt small businesses with fewer than 50 employees "when the imposition of such requirements would jeopardize the viability of the business as a going concern." The DOL's regulations will provide further guidance on interpretation of this provision. We will be closely monitoring regulations and guidance related to this provision.

WHAT DOES THE LAW REQUIRE? Generally, FFCRA has two separate Acts:

- (A) EMERGENCY PAID SICK LEAVE: Covered employers must provide paid leave to all employees:
- Two weeks (up to 80 hours for full-time employees) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
 - Two weeks (up to 80 hours for full-time employees) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition (as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor).

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- The law includes monetary caps on the amount of paid leave employees are entitled to under this Act.

(B) EMERGENCY FMLA: Covered employers must provide to employees that have been employed for at least 30 days:

- Leave if an employee is unable to work or tele-work due to a need for leave to care for a child under the age of 18 whose school or place of care is closed or unavailable for reasons related to COVID-19.
- First 10 days may be unpaid.
- Remaining leave (up to 10 weeks) of paid leave of at least two-thirds the employee's regular rate of pay.
- The law includes monetary caps on the amount of paid leave employees are entitled to under this Act.

HOW IS AN ENTITY EXPECTED TO FINANCE THIS? The law provides for refundable payroll tax credits. The DOL has stated that these credits are designed to “immediately and fully reimburse” covered employers, “dollar-for-dollar, for the cost of providing Coronavirus-related leave to their employees.” The DOL website (<https://www.dol.gov/newsroom/releases/osec/osec20200320>) also states as follows:

- *Reimbursement will be quick and easy to obtain.*
- *An immediate dollar-for-dollar tax offset against payroll taxes will be provided*
- *Where a refund is owed, the IRS will send the refund as quickly as possible.*

WHAT IF AN EMPLOYER HAS ALREADY VOLUNTARILY PROVIDED SOME PAID LEAVE TO EMPLOYEES? According to current DOL guidance, any paid leave provided before April 1 will not count towards the new requirements, and that leave will not be eligible for the tax credits available under the law.

CONCERNS ABOUT COMPLIANCE: The DOL has specifically stated it will be “issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the act. Under this policy, Department of Labor will not bring an enforcement action against any employer for violations of the act so long as the employer has acted reasonably and in good faith to comply with the act. The Department of Labor will instead focus on compliance assistance during the 30-day period.”

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Question: As this national crisis with Covid-19 continues, what are our options for managing our workforce?

Answer: As stated above, each entity will have to make an individualized decision in the context of legal obligations and government mandates. Some options for consideration:

- Maintaining the current workforce and hours with adjustments for tele-work, re-distribution of workloads, etc.
 - Consider tasks/projects that have been put on the back-burner.
 - Consider additional or alternative opportunities (i.e. a Pastoral Coordinator reaching out to parishioners via telephone to check in, a Music Director video recording music ministry and posting on social media or otherwise sharing with parishioners, etc.)
 - Although job duties *can* be re-distributed and new duties assigned, use caution for exempt employees.
 - Ensure that non-exempt employees are tracking time and being paid for all time worked.

- Reducing hours for some or all employees.
 - Consider wage and hour issues. Non-exempt employees must be paid for all time worked.
 - Consider status of exempt employees (see below).

- Providing employees (or certain employees) with option of voluntary leave (with use of remaining PTO and/or combination of PTO and unpaid leave).

- Converting exempt employees to non-exempt status and paying hourly for all hours worked. This may be an option due to diminished work.
 - Ensure that employees are tracking time and being paid for all time worked.
 - Return to exempt status can be considered when “normal” operations resume.

- Reducing pay.
 - Non-exempt employees must be paid minimum wage.
 - For exempt employees, if there is a desire to maintain exempt status, remember that the employee must still meet the salary threshold of \$35,568 per year. If re-distributing duties, consider whether the employee will continue to meet the duties test of the exemption.

- Temporary layoff or suspension of position. The term layoff has different meanings in different contexts, but generally means that the employee’s job is being suspended and the employee is relieved of job duties and obligations. To some, the term *implies* that employee may return to work, but makes no promises. Please refer to your policy, if one exists.

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- Consider potential applicability of WARN Act, discussed below.
- If the parish/school is on the Church Unemployment Pay Program, compensation benefits for a layoff are not available.
- Reduction in Force (RIF)/Termination of employees. This is a separation from employment which is generally considered to be permanent, meaning that there is no expectation that the employee will be returned to work.
 - Refer to Archdiocesan and local policy related to RIFs.
 - NOTE: Parish/school must have sought and followed the advice of a qualified attorney or other professional person that Catholic Mutual has approved. The Director of Personnel Services and/or the Director of Parish & Schools Human Resources at the Archdiocese of Milwaukee
 - Consider potential applicability of WARN Act, discussed below.
 - Employees on health insurance plan must be offered Insurance Continuation and must pay 100% of the premium.

NOTE: Regardless of which option (or combination of options) is pursued, each situation must be carefully evaluated, considering business necessity and ensuring that the decisions are made in a non-discriminatory manner. In this regard, consider both the reasons for the decisions as well as the result and potential perception of those decisions. For example, do your decisions disproportionately affect (or have the perception of disproportionately affecting) a specific group of employees based on sex, race, age, etc. Please review with the Director of Personnel Services and/or the Director of Parish & Schools Human Resources at the Archdiocese of Milwaukee and/or your employment attorney.

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Question: What are some of the laws that I need to consider?

Answer:

- Wage and hour issues, including state wage and hour laws and the federal Fair Labor Standards Act (FLSA)
 - Federal: <https://www.dol.gov/agencies/whd/flsa>
 - State: <https://dwd.wisconsin.gov/er/laborstandards>
- As stated above, consider all discrimination laws in decision-making, including Wisconsin Fair Employment Act, Title VII, Age Discrimination in Employment Act, Americans with Disabilities Act.
- The Uniformed Services Employment and Reemployment Rights Act (USERRA), a federal statute that protects servicemembers' and veterans' civilian employment rights. Among other things, under certain conditions, USERRA requires employers to put individuals back to work in their civilian jobs after military service. USERRA also protects servicemembers from discrimination in the workplace based on their military service or affiliation. See <https://www.justice.gov/crt-military/userra-statute>
- For employers with 100 or more employees, consider the federal Worker Adjustment and Retraining Notification Act (WARN).
 - See <https://www.dol.gov/general/topic/termination/plantclosings>
 - Generally, requires covered employers to provide at least 60 calendar days advance written notice of a plant closing and mass layoff affecting 50 or more employees at a single site of employment.
 - Note that the law makes certain exceptions to the notice requirements when layoffs occur due to unforeseeable business circumstances, faltering companies, and natural disasters.
 - Note that Wisconsin has a state law known as the Wisconsin Business Closing and Mass Layoff Law. However, the definition of employer under that law specifically states that, for purposes of the law, employer does not include "charitable or tax-exempt institutions and organizations." DWD 279.01(1)(d).

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Question: Do we need to give employees a written communication regarding employment decisions?

Answer: As always, although verbal discussions can (and in most cases, should) take place, documentation continues to be important. It is therefore recommended that discussions and decisions be memorialized in writing. **Sample communications will be forthcoming.**

Question: What happens to employee benefits during this time, i.e., unpaid leave, work from home, layoff, RIF, termination.

Answer: Please contact the Archdiocese of Milwaukee Benefits area.

Question: What about contract employees? Do I have to comply with the obligations in the current contract, including dates for non-renewal and offering of new contracts? Given our present circumstances, can we delay date to send out contracts this year?

Answer: It is recommended that current contract obligations be met, including as it relates to non-renewals and offering new contracts. Please look for further communication on a potential contract addendum to account for uncertainty and present circumstances.

- Dates/deadlines are defined in the current 2019-2020 contracts.
- If an employer is contemplating non-renewal of a contract for an employee that is currently on a PIP, consider whether, under the circumstances, the term of the PIP should be extended, modified, etc.
- Prior to taking an action that will result in a dismissal or termination, including a non-renewal, the parish/school must have sought and followed the advice of a qualified attorney or other professional person that Catholic Mutual has approved. The Director of Personnel Services and/or the Director of Parish & Schools Human Resources at the Archdiocese of Milwaukee are approved to consult on dismissals or terminations. If there is no such consultation and the terminated employee takes legal action, there is a risk that costs associated to legal action may not be covered.

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Additional Issues for Consideration:

- Employees refusing job assignments: fear of safety concerns (i.e. travel, cleaning, coming into contact with others)
 - If unreasonable to refuse an assignment, can *likely* discipline/terminate (but proceed with caution, as what is considered reasonable is ever-evolving)
 - Consider hazard/safety concerns and OSHA retaliation
 - Consider concerted protected activity
- If protective equipment is utilized (masks, gloves, etc.), consider donning and doffing issues, and ensure that employees are properly paid for donning and doffing safety/protective equipment
- Consider sick leave policies and potential consideration to relax requirements related to need to provide doctor note.
- Working remotely (also referred to as tele-work):
 - Can it be required? Generally, yes
 - Wage and hour issues: If an option, ensure that employees are paid for all time actually worked.
 - Establish system and procedures to ensure proper and accurate recording of time (and submission of the same to HR/payroll)
 - Consider privacy, confidentiality issues
 - Ensure that tele-work is offered to employees on a non-discriminatory basis (i.e. do not decide who can work remotely based on race, age, etc.)
- Special considerations regarding potential Race and national origin discrimination, **including harassment**

CONSISTENCY:

- Continue to document, document, document!

ADDITIONAL RESOURCES:

- US Department of Labor: COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers:
<https://www.dol.gov/agencies/whd/flsa/pandemic>

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