



Coronavirus Response for Employers – Next Steps and New Questions

March 17, 2020

We know you are receiving numerous emails providing guidance on how to handle the impact of COVID-19 on your workforce. We have also received such emails and unfortunately not all guidance being issued is accurate or based on the law. Instead, it appears some of the guidance is based on news reports, tweets and summaries of proposed laws as opposed to the actual laws in place. Please know that we at Auman, Mahan & Furry believe it is more important to be accurate than first at sending out information. At the same time, we know you are being forced to make quick decisions on these issues. As such, we are providing the information below as a supplement to the March 11, 2020 article (<http://www.amfd Dayton.com/index.php/articles/item/43-coronavirus-response-for-employers>) posted on our website in response to additional questions we have received. The information below discusses specifics for Ohio employers relating to unemployment compensation but also addresses issues applicable to all employers throughout the United States.

If an employer reduces the work hours of employees due to the impact on its business, do the employees have to be paid their full wages?

- Absent a union contract or other agreement or understanding, wage-hour laws only require you to pay hourly employees for hours actually worked.
- Importantly, if you reduce the hours of exempt salaried employees because of business conditions, you normally must pay them their full salary unless they do no work during the entire week. You normally can require them to use paid leave for the time missed, as long as they receive their full pay. Other options include converting them to hourly or reducing their salary, provided that you provide notice and it is not done retroactively.
- An employer can take a proportionate deduction from the salary of an exempt employee if they take intermittent FMLA leave. See below for additional information on FMLA.

Are employers required to allow employees to work from home?

- In most situations, no. An employer is not required to allow an employee to work from home unless it is determined to be a reasonable accommodation under the Americans With Disabilities Act or state law for medical conditions that qualify as a disability. COVID-19 normally will not qualify as a disability.

Are there any long-term consequences to allowing employees to work from home during the pandemic?

- If an employer permits an employee to work at home during the pandemic, the employee may assert that physical presence at work is not an essential function of the position and try to continue to work at home after the pandemic has subsided. In order to limit the effectiveness of this argument, employers should provide written notification to any employee working at home that telework is being permitted on a temporary basis only because of the extraordinary situation in the workplace caused by the coronavirus and that it is being permitted even though the employee may not be able to perform all of the employee's essential job functions during this temporary period.

Will employees be eligible for unemployment benefits in Ohio if an employer closes or lays off employees because of a coronavirus-related reason?

- Yes. Governor DeWine issued an executive order to expand unemployment benefits for individuals otherwise eligible who are requested by a medical professional, local health authority or employer to be

isolated or quarantined as a consequence of COVID-19, even if the employee is not diagnosed with COVID-19. In addition, the normal one week waiting period for unemployment benefits will be waived.

If an employer sends an employee home because the employee is exhibiting symptoms or has been exposed to someone who tested positive for COVID-19, will the employee be eligible for unemployment benefits in Ohio?

- Yes. If the employee is not otherwise receiving pay, the employee will be eligible for unemployment benefits pursuant to Governor DeWine's executive order as explained above.

Are employees entitled to unemployment benefits in Ohio if they stay home from work to self-quarantine or due to lack of childcare available?

- In most cases, no. If an employee stays home at the individual's own choosing, not based on the employer or medical professional's advice, the employee would not be eligible for unemployment benefits.

Does an employer have to excuse an employee who calls off of work to self-quarantine or to practice social distancing even if the employee does not have symptoms or previous known exposure to COVID-19?

- At this time, no. An employer's normal attendance policy can apply to any such absences. However, if the employee has an unrelated medical condition that qualifies as a disability under the Americans With Disabilities Act or state law and has been advised by a physician to not attend work, it may, depending on the circumstances, be a reasonable accommodation to allow the employee to take a leave of absence. In addition, OSHA provides protections for employees who refuse to work if they believe they are in imminent danger and the National Labor Relations Act provides protections to employees, union and non-union, who engage in protected concerted activity for mutual aid or protection. As such, we recommend caution and contacting legal counsel before disciplining or terminating an employee for such absences.
- The amendments to the Family and Medical Leave Act (FMLA) being considered by the U.S. Senate at this time may permit employees to use FMLA leave for this purpose. However, until such amendments become law, FMLA does not apply to absences solely to self-quarantine or practice social distancing.

Are employees eligible for short-term disability benefits?

- Medical professionals currently indicate that most individuals who test positive for COVID-19 will not require medical treatment or experience serious or long-term symptoms. An employee will be eligible for short-term disability benefits only if their symptoms and medical condition meet the requirements of the policy. Employees who are off work for self-quarantine purposes only normally will not qualify for short-term disability benefits.

If an employer decides or is required to close or lay off employees for COVID-related reasons in Ohio, is the employer required to give advance notice?

- The federal WARN Act applies to business with 100 or more full-time workers and requires advance notice for mass layoffs and plant closures affecting at least 50 employees. However, WARN Act requirements are not triggered if the layoff is for 6 months or less. If the employer determines that the layoff will be extended for more than 6 months, written notice will be required at the time the need for the extension becomes known. We are hopeful based on the information currently available that the COVID-19 pandemic and closures will not extend to the 6-month mark.

What will be required if the Families First Coronavirus Response Act, H.R. 6201, passed by the House becomes law?

- Significant changes are anticipated when the Senate considers H.R. 6201 this week. At this point, it is too early to anticipate the extent of unpaid and paid leave that may be required and the specifics as to the size of employer it will cover. Under the current Family and Medical Leave Act (FMLA), eligible employees are entitled to up to 12 weeks of unpaid leave for a serious health condition or to care for a family member with a serious health condition. An employee with COVID-19 may, if they experience severe symptoms or complications, qualify for unpaid FMLA leave but not all employees with COVID-19 will be eligible under the FMLA. The Department of Labor has previously issued guidance confirming that employers cannot

apply FMLA leave to absences which do not qualify under the law. Once the law is finalized, we will be issuing additional guidance based upon the actual provisions of the new law. We have draft guidance waiting for final revision based upon any changes that are made to the current draft bill.

What else can I do?

- Understand and comply with the law. Try to keep up with changes. If in doubt, get good legal advice before acting. Check back often on our website for updates.
- Look for opportunity in adversity. While nobody knows the future, there is a good chance that this will be short-lived. Keeping good employees through bad times often builds loyalty and pays long-term dividends. There also may be a temporary opportunity to pick up some workers that less than a month ago were not available.

Additional Questions:

- Please contact Amy Mitchell (acm@amfd Dayton.com), Matt Bakota (mjb@amfd Dayton.com) or Steve Waring (saw@amfd Dayton.com) for questions specific to your business and as additional questions and circumstances arise.

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