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Resources for Employers and Employees in Response to the Coronavirus

With schools being closed, businesses being shuttered and government functions being doled out on an “essential” basis, the impact is being felt far and wide. It is the virtual wild, wild west with so much uncertainty and so many questions.

By **Jeffrey Campolongo** | March 24, 2020



Jeffrey Campolongo.

By now, we have all heard how important it is to stay inside and #FlattenTheCurve. There is not a single American who has not been impacted by the current coronavirus outbreak. With schools being closed, businesses being shuttered and government functions being doled out on an “essential” basis, the impact is

being felt far and wide. It is the virtual wild, wild west with so much uncertainty and so many questions. I thought we would use the space in this column to take a look at some of the guidance and direction from our local, state and federal officials.

Federal Government Response

- **Centers for Disease Control and Prevention**

Some simple tips, as recommended by the Centers for Disease Control and Prevention (CDC) are very useful. The CDC recommends that employers actively encourage sick employees to stay home and not come to work until they are free of fever (100.4°F or greater). Employers should ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies. Eliminate the need for a health care provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as health care provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.

To the extent a business is operating in the stone ages and does not already provide for it, employers should maintain flexible policies that permit employees to stay home to care for a sick family member and work remotely. The CDC also recommends that employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately.

- **Families First Coronavirus Response Act**

On March 18, the U. S. Congress passed the Families First Coronavirus Response Act (FFCRA). The President Donald Trump signed the measure into law the same day. The law goes into effect on April 2 and continues for the remainder of the calendar year 2020. This law includes numerous emergency measures to combat the ongoing COVID-19 pandemic, including important changes to unemployment compensation and establishes paid sick leave. The law also expands eligibility for paid family leave to care for healthy children in certain circumstances.

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

1. Is subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine related to COVID-19;
3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. Is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. Is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Employers are immediately required to pay the employee's full wages capped at \$511 per day and \$5,110 in the aggregate for leave taken for reasons 1, 2 or 3. For leave reasons 4 or 6: employees taking leave are entitled to pay at 2/3 their regular rate capped at \$200 per day and \$2,000 in the aggregate. For leave reason

5, employees taking leave are entitled to pay at 2/3 their regular rate up to \$200 per day and \$10,000 in the aggregate (over a 12-week period).

The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern. As for who pays for the leave, it is for the employer to pay, but the law provides for a fully refundable tax credit to small businesses to reimburse for all expenses due to the new leave mandates. The paid leave is subject to employee payroll taxes but not to employer payroll taxes.

Employers are also required to provide additional job-protected leave for child care under expanded Family and Medical Leave Act (FMLA) provisions if the required leave is greater than 10 days, and will be available up to 12 weeks. Under the amended FMLA provisions, when leave is needed due to a school or day care closure, the employer can provide the first 10 days of leave unpaid, then subsequent absences for this reason must be paid at 2/3 the employee's regular rate of pay. The act includes a cap of \$200 a day and \$10,000 in aggregate. If the first 10 days are unpaid, an employee may elect to substitute any accrued vacation leave, personal leave, or medical/sick leave for the unpaid leave or the employee could be compensated under the paid sick leave portion, above. For the duration of the leave, an employee is to be compensated at 2/3 of her or his regular rate of pay not to exceed \$200/day or \$10,000 in the aggregate. The closure of the child's school or childcare is the *only* reason allowed under the added FMLA provisions, and the only reason allowed for paid leave under the FMLA.

There is an exemption for employers with fewer than 25 employees if operating conditions change and positions are eliminated as a result of the public health emergency during the period of leave. These employers must make reasonable efforts to restore the employee to the position for a period of one year following the end of the public health emergency or 12 weeks after the employee takes leave, whichever is earlier. This provision does not apply to the paid sick leave portion of the act.

The law also prohibits retaliation against an employee for utilizing their paid sick leave benefits. Additionally, an employer may not require an employee find a replacement worker as a condition of using paid family leave.

- **New EEOC Guidance on COVID-19**

On March 18, the Equal Employment Opportunity Commission (EEOC) published new guidance regarding the interplay between COVID-19 and other federal disability protections titled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (https://www.eeoc.gov/facts/pandemic_flu.html)."

In light of the World Health Organization's declaration that COVID-19 is now a global pandemic, the EEOC has revised its guidance on handling pandemics to be consistent with the ADA. Some of the revised provisions state:

- During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- Employers may measure employees' body temperature. However, employers should be aware that

some people with COVID-19 do not have a fever.

- Employers may require employees with symptoms of COVID-19 to stay home.
- Employers may require a doctor's note certifying the employee's fitness for duty if he has exhibited COVID-19.
- Employers may measure applicants' body temperature as part of a post-offer, pre-employment medical exam and may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.
- Employers may delay a job applicant's start date due to COVID-19 or its symptoms, and if necessary withdraw the job offer, since the applicant cannot safely enter the workplace.

Statewide Efforts

- **Impact of Closures on Businesses and Law Firms**

As has been widely reported, Gov. Tom Wolf ordered all "non-life-sustaining" businesses in Pennsylvania to close their physical locations as of 8 p.m on March 19, to slow the spread of COVID-19. Enforcement actions against businesses that do not close physical locations went into effect on Saturday, March 21. The governor had previously encouraged non-life-sustaining businesses to close to mitigate the spread of COVID-19.

The shutdown order indicates that failure to comply could result in citations, fines or license suspensions. Private businesses, local organizations and other noncompliant entities that fail or refuse to comply with the governor's orders may forfeit their ability to receive any applicable disaster relief and may be subject to other appropriate administrative action. Such action, according to the directive, may include termination of state loan or grant funding, including redevelopment assistance capital project (RACP) grant funding and suspension or revocation of licensure for violation of the law.

The shutdown order was almost immediately sharply criticized by businesses throughout the commonwealth, including the Chamber of Commerce, resulting in at least one lawsuit against the administration. Some Republican legislators have dubbed Wolf a "dictator" for the shutdown edict contending that "all businesses that create jobs are life sustaining for the people who have the jobs." (See 3/19/20 Facebook post from Pennsylvania State Rep. Daryl Metcalfe

—<https://www.facebook.com/101909193196994/posts/2802966239757929/?d=n>
(<https://www.facebook.com/101909193196994/posts/2802966239757929/?d=n>)).

As a result of Wolf's original order, many attorneys were unclear about whether they could keep their offices open. To avoid more dissension and debate among the profession, the Administrative Office of Pennsylvania Courts (AOPC) issued guidance March 20 suggesting that law firms can stay open on a restricted basis so lawyers can continue to perform functions that courts have deemed to be "essential." The shutdown order was subsequently modified to allow attorneys to participate in court functions deemed essential by a president judge per the Pennsylvania Supreme Court's order, so long as social distancing and other mitigation

measures are employed for the protection of lawyers, staff and clients. Pursuant to the governor's order, all other business must be conducted remotely; necessary retrieval of files or other materials should be accomplished expeditiously. This will certainly cause a strain on lawyers who need access to snail mail to pick up deliveries, checks, payments or other "hard copies" of things.

Unemployment Compensation

The Families First Coronavirus Response Act provides for additional funds of \$1 billion from the federal government to assist states in managing unemployment benefits. Half of the funding immediately goes to states to manage their programs and the other half is for emergency grants if the state sees an increase of at least 10% in unemployment claims.

If you are employed in Pennsylvania and are unable to work because of COVID-19, you may be eligible for Unemployment Compensation (UC) benefits. The following changes to UC have been made to help Pennsylvanians during the COVID-19 pandemic:

- The waiting week is suspended. Previously, claimants were not eligible for benefits during their first week of unemployment (the waiting week). This has been suspended; eligible claimants may receive benefits for the first week that they are unemployed.
- Work search and work registration requirements are temporarily waived for all UC claimants. Claimants are not required to prove they have applied or searched for a new job to maintain their UC benefits. Claimants are also not required to register with PACareerLink.gov (<http://PACareerLink.gov>).

Local Municipalities

Many local governments are following the lead of state and federal officials in handling and responding to the pandemic. Locally, there is one county in Pennsylvania that has taken aggressive measures to combat the spread of the virus, while keeping first responders and government employees safe. Montgomery County was one of the first in making the very difficult decision to shut down county operations. Chair of the County Board of Commissioners, Dr. Valerie Arkoosh, spearheaded efforts to get out in front of the crisis by closing buildings, holding daily news conferences, sharing law enforcement services, engaging in contact tracing and educating the public about COVID-19. It did not hurt that Arkoosh spent decades as a practicing anesthesiologist and also holds a master's degree in public health. Montgomery County made it a priority to fortify its Board of Health by investing resources in its 80-plus employee workforce at a time when neighboring counties like Delaware completely dismantled their health department. Montgomery County is also the first in the area to offer drive-through COVID-19 testing.

Guidance for Employers Dealing with COVID-19

In response to the crisis, Montgomery County immediately set up a website with critical news and information. The county issued an online "Guidance for Employers Dealing with COVID-19 (<https://data-montcopa.opendata.arcgis.com/pages/covid-19-business>)" with tips advising employers to:

- Maintain open lines of communication with employees;

- Ensure your business has a continuity of operations plan;
- Cancel or postpone events, meetings, trainings and other face-to-face interactions that do not constitute core business operations;
- Adopt behaviors and encourage employees to maintain high standards of workplace and workspace cleanliness as well as “social distancing” behavior;
- Post information throughout the workplace on COVID-19 mitigation and preparedness;
- Work with suppliers, customers, and vendors to address and/or prepare for service and supply chain disruptions proactively.
- Confirm with benefits providers and insurers how they are supporting your business and employees related to COVID-19;
- Consider extending allowances for sick leave to employees and encourage and support employees who use sick time to go home and contact the appropriate medical provider about testing;
- Enact policies and work schedules that minimize exposure and risk, particularly to those employees with a higher risk of complications from COVID-19 infection; and
- Enact policies that support employees who need to be isolated or quarantined after exposure.

There are plenty of resources out there for employers and employees as we all navigate this unprecedented disruption into our lives and careers. The virus has the potential to infect as many as 40% to 60% of the U.S. population. With aggressive containment measures, social distancing, flexible leave policies and a common sense approach, we can stem the tide and #FlattenTheCurve. Businesses will recover. Workers will return to work. The economy will bounce back. Until then, stay safe, stay healthy and call your mother.

Jeffrey Campolongo, founder of the Law Office of Jeffrey Campolongo, focuses his practice on employment and entertainment law. For over a decade, he has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.

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