

SMITH DOLLAR

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Employment Law Notes



*From the desk of Diane, Justin, and Glenn
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Dear Colleagues and Clients:

As we all struggle to cope with the new “normal”, legal developments have almost outpaced our ability to keep up. Below is the latest regarding the new laws passed by the Federal Government and State of California. We will continue to monitor interpretations and regulations developed under these new laws. Please contact either Diane or Justin with any questions and concerns you may have regarding this.

This update provides general information on the new law and is not intended to and may not be relied upon as legal advice. Every employer’s situation is different and there are other laws and facts which may affect your own legal obligations under these orders. If you have questions regarding the application of this law to your specific situation or business, you should consult with qualified legal counsel.

Q. WHAT IS THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT?

A. This new law was just signed by President Trump and will go into effect on April 2, 2020. Of most immediate impact to employers is the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act sections of the law.

The Emergency Paid Sick Leave Act requires all Employers with less than 500 employees to provide up to 10 days (80 hours) of paid sick leave when an employee is unable to work (or tele-work) for the following reasons:

- (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 related to COVID-19.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a 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 a son or daughter of such employee 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 Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The Emergency Family and Medical Leave Expansion Act requires all employers with less than 500 employees to provide up to 12 weeks of leave for an employee with a “Qualifying Need Related to a Public Health Emergency”. The term ‘qualifying need related to a public health emergency’, with respect to leave, means the employee is unable to work 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 provider of such son or daughter is unavailable, due to a public health emergency. The first 10 work days of the leave are unpaid (but, see the Emergency Paid Sick Leave Act), and the employee may use their vacation or sick leave. The remaining 50 work days are paid by the employer.

Q. What am I required to pay employees who are eligible and take up to 80 hours under the Emergency Paid Sick Leave Act?

A. There are two pay scales for this leave depending on the reason for the leave. For employees who take this leave for the following conditions, you pay them their regular wages, up to \$511 per day (capped at \$5,110 in the aggregate):

(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 related to COVID–19.

(3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.

For employees who take this leave for the following conditions, you pay them their regular wages, up to \$200 per day (capped at \$2,000 in the aggregate):

(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 a son or daughter of such employee 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 Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Q. What am I required to pay employees who are eligible and take the 12 weeks leave under the Emergency Family and Medical Leave Expansion Act?

A. First, remember not all your employees will be eligible for this leave. They must have a “Qualifying Need Related to a Public Health Emergency”— i.e., a school-aged child or no child care. The first 10 work days of this leave is unpaid, but the employee may use vacation and sick leave. The employer pays for the remaining 50 work days at 2/3 of the employee’s daily wages, up to a maximum of \$200 day and a total maximum for the entire period of \$10,000.

Q. Is the Sonoma County or other Bay Area Counties “Shelter-in-Place Order a “local quarantine or isolation order related to COVID–19” under the Emergency Paid Sick Leave Act?

A. No. According to the Centers for Disease Control and the Code of Federal Regulations, an isolation order separates sick people with a contagious disease from people who are not sick. A quarantine order separates an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who is/are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease. The Shelter-in-Place Orders are neither an isolation or a quarantine order. However, the individuals who are quarantined at Travis Air Force Base are under a Federal quarantine order.

Q. Does this new law apply to businesses with less than 50 employees?

A. Yes. It applies to all employers with “fewer than 500 employees”. However, the law states that the Secretary of Labor has the authority to issue regulations for good cause 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.” Since this law was just passed yesterday, and will not go into effect until April 2, 2020, it is expected that the Secretary of Labor will issue regulations shortly setting forth the criteria and the process to apply, if necessary, for the exemption.

Q. I just hired 3 new employees and now I have 52 employees. If I terminated these new employees, would I be eligible for this exemption?

A. Maybe. It’s not certain how the Secretary of Labor will interpret the “fewer than 50 employees” for the exemption-i.e., whether that is at a moment in time, or over the prior calendar year or other period of time is unknown. It is expected that this will be clarified when regulations are issued setting forth the criteria and process to apply for the exemption.

Q. How long does an employee need to work for my company before they are eligible for this leave?

A. An employee eligible for the Emergency Family and Medical Leave Expansion Act is defined as “an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested.” However, the Emergency Paid Sick Leave Act has no similar—or any—time requirement for defining eligible employees.

Q. If an employee takes the leave under the Emergency Family and Medical Leave Expansion Act, am I required to hold their job open for them?

A. If you have at least 25 employees, then yes. If you have fewer than 25 employees, you do not have to bring the employee back if their position is eliminated due to economic or other operational conditions caused by the public health emergency, you make reasonable efforts to offer them a comparable position, and if none, you make reasonable efforts over the following 12 months to contact them should a new position arise.

Q. Who pays for all this, other than us?

A. The federal government plans to reimburse employers for 100% of paid leave provided under the law via a refundable payroll tax credit in the quarter the leave was paid. Where the amounts paid by an employer exceed the payroll tax due, the excess credit will be refunded.

Q. I have more than 75 employees and need to lay off at least 50 in order to keep my business going. Does the California WARN Act apply to me?

A. The California WARN Act requires employers with more than 75 employees to provide 60 days’ notice of a mass layoff (i.e., 50 or more employees). Recognizing that this 60 day notice period is impractical (and impossible) due to the current public health emergency, Governor Newsom issued an Executive Order which reduced this notice requirement to “as soon as practicable”. The Order directs the Labor & Workforce Development Agency (LWDA) to provide guidance by March 23, 2020 on how the Order’s provisions are to be implemented.

Q. What if I begin implementing reduced Work Hours?

A. Employers experiencing a slowdown in their businesses or services as a result of the coronavirus impact on the economy may apply for the UI Work Sharing Program. This program allows employers to seek an alternative to layoffs — retaining their trained employees by reducing their hours and wages that can be partially offset with UI benefits. Workers of employers who are approved to participate in the Work Sharing Program receive the percentage of their weekly UI benefit amount based on the percentage of hours and wages reduced, not to exceed 60 percent.

Governor Newsom’s most recent Executive Order waived the one-week unpaid waiting period for employees, so employees can collect UI benefits for the first week the employee is out of work or experiencing reduced working hours. If the employee is eligible, the EDD processes and issues payments within a few weeks of receiving a claim.

Q. What Payroll Tax Assistance is available?

A. Employers experiencing a hardship as a result of COVID-19 may request up to a 60-day extension of time from the EDD to file their state payroll reports and/or deposit state payroll taxes without penalty or interest. A written request for extension must be received within 60 days from the original delinquent date of the payment or return.

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