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Thinking It Through: Wage and Hour Implications of Employer Responses to the Coronavirus

By Claire Deason and Elisa Nadeau on March 10, 2020

The spread of the novel coronavirus and associated outbreak of the COVID-19 disease raise challenging questions for employers. This article will describe some of the U.S. wage and hour implications resulting from employers' measures addressing the COVID-19 outbreak, including compensation for employees who are quarantined or furloughed, business expense reimbursement, reporting time pay, and predictive scheduling laws. Littler's additional COVID-19 resources can be found here.

Compensation for Employees during Quarantine or Furlough Periods

Employers will need to consider issues regarding payment of wages and/or the use of PTO during a quarantine or furlough or when an employee is sent home due to COVID-19 concerns. In general—and subject to the below reporting time or predictive scheduling laws, as well as state and local paid sick leave laws—an employer can send a non-exempt employee home without pay and, so long as the employee does not perform any compensable work from home, no wages are due.

Compensation may be required during an extraordinary event, however, for waiting time or on-call time. The Fair Labor Standards Act considers employees to be "on call" if they must remain on the employer's premises and are unable to use their time for their own purposes. Thus, for example, employees who are required to remain at a location where operations have shut down to assist when they begin again should be paid for the time spent "holding down the fort" despite their inactivity.

As a practical matter, paying employees for missed shifts or for an employer-mandated quarantine period would encourage compliance with any company COVID-19 or other communicable disease policy (requiring employees to call in sick and not report to work, for example), bolster employee morale in uncertain times, and likely slow any spread of COVID-19 in the workplace. Each employer will need to consider both legal and operational factors when determining the best approach for its business.

Importantly, if a non-exempt employee performs any work during a quarantine or similar period, the employer should ensure that the employee accurately tracks their working time and is paid for that time in accordance with all applicable federal, state and local laws. Non-exempt employees working from home during quarantine should be directed to comply fully with any and all company policies related to timekeeping, overtime approval, and meal and rest breaks. Employers can consider implementing a policy signed by employees requiring them to acknowledge they are expected to schedule and take meal and rest breaks and to accurately and thoroughly record time worked. Approximately 20 states have some form of meal or rest break requirements. Importantly, recent court decisions in Oregon and Washington state have held that employers have an affirmative duty to "ensure" that non-exempt employees receive and take all required meal and rest breaks.

Exempt employees must be paid their full salary if they perform any work (whether approved in advance or not) in workweeks during which they are quarantined at home or furloughed (including only minimal tasks, such as checking emails). If an exempt employee is quarantined for a complete workweek, and performs no work in that week, it is possible that the employee may not need not to be compensated – however, this assessment should be determined on a case-by-case basis with counsel to ensure the employee's exempt status is not compromised.

In the event of a quarantine or furlough, employees may choose to use sick leave, PTO or vacation during this time, provided the employer's policies and applicable state law permit the use of such benefits.

When considering a temporary or permanent break in operations, employers should consult knowledgeable employment counsel with regard to the application of the federal WARN (Worker Adjustment and Retraining Notification) Act and the various "mini-WARN" laws in different states. Jurisdictions with generally-applicable state or local mini-WARN acts include: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Wisconsin.

Business Expenses during Quarantine or Furlough

If an employer asks employees to work remotely due to COVID-19 concerns, employers should furnish and/or reimburse the employee for the tools necessary to work remotely. These tools may include: a laptop with camera for video meetings; monitor; docking station; high speed internet access; ergonomic work space tools, such as a mouse pad, keyboard, and desk; mobile phone; televideo conferencing software; headphones; and messaging, calendar, and timekeeping software. Messaging and calendar software can include status information so that employees can indicate availability for meetings and calls. Federal law does not require specific "item-by-item" reimbursement of tools and services incidental to carrying on the employer's business; however, the employer must reimburse the employee to the extent the incurrence of those expenses causes the employee's wages to dip below minimum wage. In

addition, some states have laws or guidance addressing reimbursements and allowable deductions from wages. Often, these laws will allow deductions only when authorized in writing by the employee or will restrict the employer's right to take deductions that impact minimum wage. Over half of states and some local jurisdictions have laws or guidance impacting reimbursements and deductions.

Reporting Time Pay

If an employee is sent home from work due to illness or because the employer is implementing a mandatory furlough, certain jurisdictions may require reporting time pay to compensate the employee for reporting to work even if no work was performed or if the employee was sent home prior to working a full shift. Jurisdictions that have some version of a reporting time pay law include, for example, California, Connecticut (for hospitality or mercantile only), District of Columbia, Hawaii, Massachusetts, New Hampshire, New Jersey, New York, Oregon, and Rhode Island. Employers with non-exempt employees in these jurisdictions should consult applicable law to assess when and how much reporting pay is owed.

Some reporting time laws include an exception or partial exception for "acts of god," when civil authorities recommend that work not begin or continue, or in circumstances beyond the employer's control (as in Rhode Island, California, and Oregon). Whether such an exception would apply will depend on the applicable law and the circumstances under which the employer sent employees home.

As a practical matter, an administrative agency might hesitate to punish employers for implementing health and safety protocols to prevent community spread of COVID-19, especially where the employer's response is typical of that in the community. Employers facing such a situation might consider certain proactive measures to reduce risk, promote safety, and enhance communication. Potential measures might include:

1. Implementing an infectious disease policy that explains when employees should refrain from coming in to work due to symptoms and/or travel patterns. The policy might also include the criteria for determining when it is permissible to return to work.

2. In the event of a furlough, providing advance actual notice of the furlough so that employees understand they are not to report to work.

3. Documenting the reasoning for the action taken (*e.g.*, the reasons an employee was sent home as well as the notice provided to the employee of the policy or the reasons for the furlough).

These measures have the added practical benefit of discouraging sick employees from reporting to work, a critical component of slowing the spread of COVID-19.

Predictive Scheduling Laws

Some jurisdictions have implemented laws requiring employers to provide substantial notice, typically 7 or 14 days, of upcoming scheduled shifts. Changes to the schedule within the mandatory notice period often trigger compensation obligations, sometimes known as "predictability pay." If an employer decides to shut down operations temporarily due to COVID-19, it is doubtful the employer would be able to provide a week's notice (much less two) of a change to employees' schedules.

Many of the jurisdictions with predictive scheduling laws provide exceptions to the notice and/or predictability pay requirements for acts of god or other circumstances outside the employer's control that prevent operations from beginning or continuing. Whether the exception would apply would again depend on the applicable law and the particular circumstances of the furlough. Whether the predictive scheduling law would be strictly enforced by a state or local agency may depend on the community's sensitivity to the issue, including whether other companies have furloughed employees and the company's efforts to provide advance notice.

Separate from predictability pay requirements, some jurisdictions may require an employer to consider employee requests for flexible or predictable working arrangements due to caregiver obligations or other personal circumstances. In some jurisdictions, these laws require the employer to engage in an "interactive process" with the employee to discuss such employee-initiated requests for work schedule accommodations, and to grant the request if it is based on specified "major life events" (unless the employer can show a permissible bona fide business reason for declining the request). If the employer temporarily shuts down operations due to COVID-19, resulting in an alteration to an employee's previously granted flexible working arrangement, the law in question may require a certain notice period to alter the arrangement.

Employers might consider practical steps to alleviate concerns in jurisdictions with predictive scheduling laws, such as:

1. Providing as much advance notice as feasible of employer-initiated schedule changes and sending the notice in a manner designed to effect actual notice. Even before the furlough is decided upon, sending notices regarding COVID-19 and the employer's potential responsive actions could also demonstrate the employer's heightened awareness and efforts to prevent community spread.

2. Documenting the reasoning for the furlough.

There are several state and local jurisdictions with predictive scheduling laws that could be triggered by a COVID-19 furlough, including California (Berkeley, Emeryville, and San Francisco only), Chicago, Illinois (effective July 1, 2020), Oregon, Philadelphia, Pennsylvania (effective April 1, 2020), and Seattle, Washington.

Given the rapidly changing news and guidance on COVID-19, it is good for employers to think about contingency measures and be flexible in implementation.