Maryland State Dental Association
COVID-19: Employment-Related Questions & Answers

March 26, 2020

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• Your obligations may vary depending on your circumstances and applicable law.
Agenda

• Staffing Concerns during COVID-19
  • Layoffs + Unemployment Insurance
  • Reductions in Hours

• Employee Leave
  • Current laws (MHWFA, ADA)
  • Families First Coronavirus Response Act

• Commonly Asked Questions

• Participant Q&A
Current Restrictions on Dentists

• No federal or state mandates or restrictions on dental practice
• Governor Hogan’s Executive Action on 3/23 closing all non-essential businesses EXCLUDES dental practices
• ADA, MSDA, and CDC strongly recommend dental practices to postpone non-emergency procedures
STAFFING ISSUES
Layoffs + Temporary Layoffs

• Workers entitled to Unemployment Insurance
• Maryland Unemployment Insurance:
  • For workers who lose their jobs through no fault of their own
  • Financed by Federal Unemployment Tax Act (FUTA) and must adhere to federal guidelines
• Before COVID-19, Maryland law already allowed employees to receive unemployment benefits during layoffs + temporary layoffs
Maryland Public Health Emergency Protection Act of 2020

• Expands employee access to unemployment benefits to cover:
  • Employer’s temporary shutdown
  • Periods where the employee is quarantined, with an expectation to return to work after the quarantine is over
  • If the employee leaves employment due to:
    • A risk of exposure or infection of COVID-19; OR
    • To care for a family member due to COVID-19
Enhanced Unemployment Benefits Coming?

- New federal law provides emergency grants to states to assist with processing/paying unemployment insurance benefits
- In order to receive federal grant money, the state must meet certain criteria to enhance benefits, including:
  - Requiring employers to provide notification to employees, at the time of separation, of their right to unemployment benefits
  - Not charging employers directly impacted by COVID-19 due to an illness in the workplace or direction from a public health official to isolate or quarantine workers
  - Waiving the requirement that employees be “actively looking for work” to receive benefits
- New Stimulus may enhance unemployment benefits further – no clear details yet
Prospective Layoff Considerations

• Discrimination Issues
  • Employers must ensure selections for layoff are job-related
  • Selections cannot be based upon a protected characteristic under law, e.g., race, age, sex, national origin, etc.
  • General rule: Tenure is a job-related reason – last in, first out
Prospective Layoff Considerations (cont’d)

- Wage + Hour Issues
  - Employees must be paid for all hours worked – see further discussion below
  - Employers must communicate the expectation to employees being furloughed that they are NOT to work
    - This includes checking e-mail and voicemail!
Prospective Layoff Considerations (cont’d)

- Employees required to be isolated or quarantined MAY be protected by Maryland law
- Current legislation enables Governor to prohibit an employer from terminating an employee SOLELY on the basis the employee has been required to be isolated or quarantined pursuant to MD Dept. of Health order
- No formal orders from MD Department of Health at this time
Prospective Layoff Considerations (cont’d)

• Possible WARN Issues for large employers
  • Vast majority of dental practices <100 employees, so WARN not implicated
  • If dental practice is part of a large franchise or operating group, special rules may apply

• Special rules for unionized workforce
Reductions in Hours

• Most Common Question: Pay Issues
  • Non-exempt employees:
    • Entitled to receive overtime for all hours worked over 40 in a workweek
    • Covers most employees of a dental office: front desk, clericals, hygienist
    • Only have to be paid for hours ACTUALLY WORKED
    • Can be allowed to use any accrued PTO to cover their full week
Reductions in Hours (cont’d)

• Most Common Question: Pay Issues
  • Salaried exempt employees – are they properly exempt? Must meet three tests:
    • Perform exempt duties
    • Be paid at least $684/week (equivalent to $35,568 for full-time employees)
    • Be paid on a salary basis – see next slide
  • Office managers likely qualify.
    • If anyone else in the office (other than dentists) is treated as exempt, review that designation with counsel
Reductions in Hours (cont’d)

- Most Common Question: Pay Issues
  - Exempt Employees Being Paid on Salary Basis
    - Must be paid guaranteed weekly amount if ANY work is performed during the week
      - Again, this includes checking e-mail on phones!
    - Deductions can only be taken from employee’s pay in limited circumstances – and then, only in full-day increments
      - These limited circumstances do NOT include lack of work
Reductions in Hours (cont’d)

• Most Common Question: Pay Issues
  • Salaried exempt employees – are they properly exempt? Must meet three tests:
    • Perform exempt duties
    • Be paid at least $684/week (equivalent to $35,568 for full-time employees)
    • Be paid on a salary basis
Reductions in Hours (cont’d)

• Most Common Question: Pay Issues
  • Salaried exempt employees
    • Cannot adjust salary week to week depending on their amount of work performed
    • May be able to change salary amount prospectively, but this is a limited right.
Reductions in Hours (cont’d)

• Most Common Question: Pay Issues
  • Professional employees, i.e., dentists
    • Not entitled to overtime
    • Do not need to receive a guaranteed weekly salary
  • Most dentists have employment agreements
    • Terms of that Agreement would apply – seek review with counsel
Reductions in Hours (cont’d)

• Other Potential Issues with Hour Reductions
  • Employee may be entitled to unemployment insurance, depending upon salary and hours reduced
  • Possible WARN issues for large employers
  • If hours are reduced below eligibility requirements for health insurance, employee may be eligible for COBRA
Employee Leave
Employee Leave

- Leave issues very common for employees who are still working but may be impacted by COVID-19
- Review all Practice leave policies
- A number of federal and state laws already applicable
Employee Leave (cont’d)

• Maryland Healthy Working Families Act
  • Requires employers to provide employees with up to 40 hours of sick leave per year, among other requirements
  • Many, but not all, COVID-19 related reasons would be covered by this Act
  • Whether leave is paid or unpaid depends upon employer size
    • Whether employer had a monthly average of 15 or more employees in the immediately preceding year
Employee Leave (cont’d)

• Maryland Flexible Leave Act
  • Applies to employers of 15+ employees
  • Does not provide any leave
  • Allows employees to take any leave with pay available to them for an illness in the employee’s immediate family
Employee Leave (cont’d)

- Americans with Disabilities Act
  - Applies to employers of 15+
    - But – many local laws provide equivalent protection for fewer employees
  - Does not provide any leave by its terms
  - Prohibits discrimination on the basis of disability
  - Also requires employers provide reasonable accommodation to employees to allow them to perform the essential functions of their job
    - ADA has been construed that allowing unpaid leave can be a reasonable accommodation
Employee Leave (cont’d)

• Family and Medical Leave Act (FMLA)
  • Currently applies to employers of over 50 employees
  • If you are part of a larger franchise – consult with counsel to determine whether you could be considered a “joint employer” of a large number of employees
Families First Coronavirus Response Act (FFCRA)
FFCRA – What is it?

- Recently enacted bipartisan legislation
- Will become effective 4/1 – just clarified
- Four employment-related provisions
  - Emergency Paid Sick Leave mandate for six COVID-19 related reasons
  - Dramatic expansion of the FMLA – coverage and paid
  - Payroll Tax Credit to fund the Sick Leave and Emergency FMLA portions of the law
  - Grants for Unemployment Insurance Benefits
FFCRA – Where Do Things Stand Now?

• As many questions as answers about this law
• DOL published model notice that all covered employers must post – see “Resources” at end of presentation
  • Model notice appears to have errors
• DOL yet to issue any regulations interpreting the law – only limited Q+A document
  • Regulations supposed to be issued in April 2020
FFCRA – Where Do Things Stand Now?

• DOL has announced it will observe a “temporary period of non-enforcement” for the first 30 days after the law becomes effective, so long as the employer has acted reasonably and in good faith to comply with the law.
  • Good faith: employer must not make willful violations, must remedy violations immediately, and must make a written commitment to comply with the FFCRA in the future.
FFCRA – Emergency Paid Sick Leave (EPSL) Act

- Applies to employers with <500 employees
- Requires employers to provide 10 days (80 hrs) of paid leave if the employee is unable to work or telework for the following reasons:
  - 1. Employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19
  - 2. A Healthcare provider has advised the employee to self-quarantine
  - 3. Employee has symptoms of COVID-19 and is seeking medical diagnosis
  - 4. Employee is caring for an individual subject or advised to quarantine or isolation
  - 5. Employee caring for son or daughter whose school or place of care is closed, or whose childcare provider is unavailable, due to COVID-19
  - 6. Employee is experiencing substantially similar conditions, specified by the Secretary of HHS in consultation with the Secretaries of Labor and Treasury
FFCRA – Emergency Paid Sick Leave (EPSL) Act, cont’d

- **PAID Leave – How much?**
  - For Reasons 1-3 (employee self-care):
    - Paid at employee’s regular rate, to a maximum of $511/day (10-day maximum of $5,110)
  - For Reasons 4-6 (care of others):
    - Paid at 2/3 the employee’s regular rate, to a maximum of $200/day (10-day maximum of $2,000)
FFCRA – Emergency Paid Sick Leave (EPSL) Act, cont’d

• Sequencing of Leave
  • If employee qualifies for EPSL, employer MUST allow employee to first use EPSL before any other PTO
  • What employer has already provided in sick leave does NOT count against this new law’s requirement
FFCRA – Emergency Paid Sick Leave (EPSL) Act, cont’d

• Unresolved Issues
  • MAY be an exemption for employers with fewer than 50 employees – unclear!
    • If so, do not know under what circumstances employers with <50 employees will not be required to provide EPSL
  • Regulations should address this issue
FFCRA – Emergency Paid Sick Leave (EPSL) Act, cont’d

• Unresolved Issues (cont’d)
  • EPSL only to be provided if “employee is unable to work OR telework” – who decides whether employee is “able” to telework?
  • What does EPSL Reason 1. (employee being subject to a quarantine or isolation order) entail?
    • Is this an individual quarantine/isolation order? Collective? Both?
FFCRA – Emergency Paid Sick Leave (EPSL) Act, cont’d

• Unresolved Issues (cont’d)
  • How will “employee” be interpreted?
    • Temporary employees?
    • Staffing company employees?
  • How is this leave to be verified?
    • Law does not address whether employers even can request documentation, let alone what documentation employees should provide, to support need for leave
    • FMLA has never covered school or childcare closings – in new territory
FFCRA – Emergency Paid Sick Leave (EPSL) Act, cont’d

• Other Important Provisions
  • Available for immediate use – as soon as hired
  • Employer cannot require employee to find a replacement in order to use the leave
  • Employers may enforce normal call-out/notice procedures AFTER the first day of use
  • Employees not permitted to carry over EPSL into 2020
FFCRA – Emergency Paid Sick Leave (EPSL) Act, cont’d

• Other Important Provisions (cont’d)
  • EPSL is NOT required to be paid out upon termination
  • Special rules for employees with varying hours
  • Notice and Recordkeeping Responsibilities
    • Post DOL Notice
    • Retain Records for 3 years
  • Expires on December 31, 2020
FFCRA – Emergency Family and Medical Leave (EFMLA)

• What is the FMLA?
  • Leave law, entitling eligible employees of covered employers to take 12 weeks (with limited exceptions) of UNPAID, job-protected leave for specified reasons
• To be eligible, an employee must have:
  • Worked for at least 12 months and 1,250 hours of service during the 12-month period immediately preceding the leave
  • Worked at a location where the employer has at least 50 employees within 75 miles
What does the FFCRA do?

- Expands FMLA coverage to ALL employers with <500 employees – but only for ONE reason:
- Permits Eligible employees to take PAID FMLA (EFMLA) if they are unable to work or telework because of the closure of a child’s school or childcare facility, or the unavailability of a childcare provider, due to COVID-19
- Same reason as EPSL No. 5
FFCRA – Emergency Family and Medical Leave (EFMLA), cont’d

• Who is eligible?
  • Employees employed at least 30 days
  • However, small businesses (<50 employees) MAY be exempted.
    • Standard for which they can be exempted – “if providing leave would jeopardize the viability of the business” – needs to be clarified in regulations
    • Currently, businesses with <50 employees are exempted from civil damages in FMLA litigation
    • They are NOT expressly exempted from DOL action.
FFCRA – Emergency Family and Medical Leave (EFMLA), cont’d

- How much leave is to be paid?
  - First 10 days – Unpaid, but ...
    - Employee has choice to have leave covered by EPSL or any other paid leave under employer’s policies
    - Employee will almost assuredly choose EPSL
    - Only if EPSL already exhausted, and no other paid leave is available, is the leave actually unpaid
  - Remaining 10 weeks:
    - Paid at 2/3 of the employee’s regular rate, up to a maximum of $200/day ($10,000 total)
FFCRA – Emergency Family and Medical Leave (EFMLA), cont’d

- Employee Reinstatement Rights
  - Under FMLA, employees entitled to be restored to the same job or one that is “equivalent”
  - Under FFCRA, employers with <25 employees NOT required to reinstate after EFMLA if:
    - Employee’s position no longer exists
    - Employer made reasonable effort to restore employee to an equivalent position
    - Employer makes reasonable effort to contact employee about an equivalent position that becomes available within one year
FFCRA – Emergency Family and Medical Leave (EFMLA), cont’d

• Anti-retaliation Provisions
  • Employer may not discharge, discipline, or otherwise discriminate against an employee for:
    • Taking leave
    • Filing a complaint, instituting a proceeding under the FFCRA, or testifying in an FFCRA proceeding

• Special Rules for Varying Hours

• Act expires on 12/31/2020
FFCRA – “Healthcare Provider”

- One of the most important unanswered questions
- Impacts EPSL and EFMLA
- Law contains possible exemption for “healthcare providers” and “emergency responders”
- Is the employer or employee the “healthcare provider?”
  Best interpretation – the employee, but need clarification
FFCRA – “Healthcare Provider,” cont’d

- If the law exempts EMPLOYEE healthcare providers, who is included?
  - DOL has authority to exclude “healthcare providers” from the definition of “eligible employee”
  - Under current FMLA law, “healthcare provider” limited to doctors, dentists, etc.
  - Speculation that DOL could take much broader approach to defining what a healthcare provider is
- If it does not, a non-Healthcare Provider employee, e.g., payroll, HR, administrative staff, will be entitled to EPSL/EFMLA
FFCRA – Other Unanswered Questions

- Can either EPSL or EFMLA leave be taken intermittently?
- How does this affect state and local laws?
- What about terminations, layoffs, etc.? Do those employees still have paid leave rights under these laws?
  - Could be different answers depending upon whether action taken against employee is before or after the law’s effective date
FFCRA - Remedies

- Same remedies as are available under the FLSA
- DOL Action: $10,000 fine and 6 months imprisonment
- Private action:
  - Unpaid leave
  - Liquidated Damages
  - Equitable Relief
  - Injunctive Relief
  - Attorneys’ fees and costs
    - Often can be much greater than the other relief sought!
FFCRA – Payroll Tax Credits

• Law is set up to make employers whole after providing EPSL and EFMLA:
  • Act provides payroll tax credit equal to 100% of required EPSL and EFMLA, up to the statutory maximums

• DOL/IRS Guidance on How Credits will be Received:
  • Employers will be allowed to retain funds that otherwise would have been paid to the IRS in quarterly payroll taxes
  • In other words, any taxes held in escrow for payment on payroll taxes now could be used to pay employees taking EPSL or EFMLA
  • If the credit is greater than the taxes paid, employer will be able to submit an expedited claim for refund

• Businesses should consult with an accountant or tax counsel for further guidance
Common Employment Questions and Laws Implicated
Q1. Employee Refusing to Work because of Fear of Exposure

- Under OSHA, an employee is only entitled to refuse to work if s/he believes s/he is in immediate danger
  - Assess whether the employee is more susceptible to the virus due to age, pregnancy, or underlying medical condition
  - Assess whether the employee’s fear is reasonable, in light of current guidance about COVID-19 and the safety precautions taken by your Practice
- Only if the employee’s concerns are NOT reasonable, may an employer insist the employee report to work
Q1. Employee Refusing to Work because of Fear of Exposure (cont’d)

• If multiple employees express concern as a group, or if one employee speaks on behalf of a group – NLRA is implicated
  • Applies to both unionized AND non-unionized workplaces!
  • NLRA protects rights of employees to engage in “protected, concerted activities”
  • Employers may not discipline employees for engaging in such conduct
Q1. Employee Refusing to Work because of Fear of Exposure (cont’d)

• If employee wants to stay home because of underlying health condition, e.g., involving being immunocompromised:
  • Unpaid leave may be required under the ADA or a local law
• Bottom line: Strongly advise seeking counsel before taking disciplinary action against an employee for refusal to work in these times
Q2. Is Telework Required to be Offered?

- Employers must assess ability and capacity to permit remote work
- Employers have to consider a number of conditions if this is an option they have not yet explored, including, but not limited to:
  - Whether employees have the necessary equipment/access at home
  - How employees will record their time while at home
    - MAJOR FLSA implications involved in teleworking
  - Security considerations for your Practice and patient information
  - Whether employees have a safe home working environment
Q2. Is Telework Required to be Offered? (cont’d)

- If telework is permitted, employer should consider providing remote work equipment to employees – or reimbursing employees for necessary equipment – to avoid issues under the FLSA
  - Both for hourly and exempt employees
- If telework is permitted only under COVID-19 circumstances, employer must do so carefully so as not to establish precedent under the ADA that telecommuting will be provided as a reasonable accommodation
Q3: Can an employer require an employee to notify them if the employee has been exposed to COVID-19, has symptoms, or has tested positive?

- General Rule under ADA: Medical inquiries limited to those that are job-related and consistent with business necessity.
- EEOC recent guidance: Because an employee with COVID-19 is a “direct threat” to the health and safety of others, this standard is met.
- Does NOT give free reign to ask open-ended questions about the employee’s medical history!
Q4: Can an employer take employees’ temperatures at work?

• Typically – NO
  • Considered a “medical examination” under the ADA – strictly regulated

• Under current circumstances, EEOC, based on CDC Guidelines, has stated that employers may do so

• Note: not all those with COVID-19 have fevers
Q5: Employee calls out sick for a COVID-19 related reason. What kind of verification can employer require?

• Currently, under Maryland Healthy Working Families Act:
  • Can only require verification of sick leave after employee misses more than two consecutive shifts

• After April 1: FFCRA does not specifically provide for any verification.
  • Hopefully, this will be addressed in regulations

• BE REASONABLE. CDC warns that doctors and other healthcare professionals may be too busy to provide fitness-for-duty documentation.
  • May have to rely on “a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus” from a local clinic.
Q6: Employee exhibiting symptoms of COVID-19 in the workplace

• COVID-19 symptoms: fever, difficulty breathing, cough
• Should be sent home with instructions to:
  • Follow up with a healthcare provider
  • Update employer as to whether healthcare provider believes it may be COVID-19 or some other illness
Q7: An employee has COVID-19. What now?

- Immediately isolate and send the employee home, if working
- Contact MD Health Department – both for guidance and to satisfy reporting requirements
- Deep clean all areas of the office where employee was the previous 14 days
- Communicate with those coworkers who may have been in contact with the infected employee
  - This almost will certainly trigger a 14-day quarantine requirement for those individuals
  - Under HIPAA/ADA: Must NOT share the name of the affected employee
Q7: An employee has COVID-19. What now? (cont’d)

• If employee contracted virus while at work ...
  • Covered by workers’ comp – report to carrier
  • Recordable and reportable event under OSHA
Resources for Employers

- **DOL Guidance on FFCRA and FLSA Issues:** [https://www.dol.gov/agencies/whd/pandemic](https://www.dol.gov/agencies/whd/pandemic)
- **DOL FFCRA Poster:**
- **EEOC Guidance on Pandemic Preparedness and the ADA:** [https://www.eeoc.gov/facts/pandemic_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
Resources for Employers (cont’d)

• Maryland Coronavirus Information for Small Businesses:
  https://govstatus.egov.com/md-coronavirus-business

• Maryland Department of Health:
  https://coronavirus.maryland.gov/

• MD Department of Labor Division of Unemployment Insurance
  FAQs re COVID-19:
  https://www.dllr.state.md.us/employment/uicovidfaqs.shtml

• OSHA Workplace Guidance:
Q&A

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