

Keeping Your Business Safe and Nimble During COVID-19: Part II

March 20, 2020

A lot has happened since we sent [Part I](#) of our advice last week. Many localities in the United States and much of Europe are in a de facto lock-down including the Bay Area, as well as all of Italy, France, Spain. In the United States, federal, state and local officials have imposed widespread curbs in business activity, including, most recently, New York State's announcement that most employers must require at least 75% of their employees to work from home, starting today. The Senate's passage of the federal Families First Coronavirus Response Act ("Coronavirus Response Act") is a first helpful step by the U.S. federal government to respond to the widespread economic disruption caused by COVID-19, but more will need to be done by governments at all levels.

We're providing Part II of our memo to let you know about the most recent government actions and to highlight their legal consequences and answer many of the employment questions our clients have been asking us in the last week. We hope this update (and the links to other detailed technical information) helps you take practical steps to reduce the negative effects of COVID-19 on your business and all of its stakeholders, especially employees.

I. Latest Developments

A. Congress Passes Coronavirus Relief Act

The Coronavirus Response Act has now been signed into law. Among other things, it requires businesses with fewer than 500 employees to provide up to 12 weeks of paid leave under the Family and Medical Leave Act ("FMLA") and up to 80 hours of emergency paid sick leave for any full time employee who cannot work or telework. Businesses implementing these measures will receive refundable tax credits to cover the cost of these measures, which we discuss further below.

B. Workers Directed to Work From Home

New York Governor Andrew Cuomo announced that most businesses in New York State must transition entirely to telecommuting. The only businesses exempted from this mandate are those that provide "essential services," which includes food producers, pharmacies, health care, shipping, warehousing, and other industries critical to the supply chain. We expect that in the coming days and weeks other states will adopt similar mandates or issue an even more strict "shelter in place" order.¹

¹ While on Thursday, California Governor Gavin Newsom issued an order directing anyone living in the state to stay at home, the exceptions to the order cover most businesses, including entertainment, retail,

C. CDC Issues Guidelines to Slow Spread of COVID-19

On Monday, the Center for Disease Control issued a set of guidelines intended to slow the spread of COVID-19 over the course of the following fifteen days. The guidelines included several circumstances under which employees should stay home, including if an employee a) feels sick, b) has someone in their household who tested positive for COVID-19, c) is an older person, or d) has a serious underlying health condition, as COVID-19 poses an increased risk for such individuals. The guidelines also encouraged everyone to work from home whenever possible and to avoid gatherings of more than ten people.

Modified versions of this guidance have been implemented as mandatory orders in certain localities, including the San Francisco Bay Area and the County of Los Angeles.

D. SBA Announces New Economic Assistance Program

The Small Business Association has announced a COVID-19 disaster relief lending program that offers up to \$2 million in low-interest loans to small business and non-profit organizations that do not have other sources of credit. Also, the Federal Reserve announced a \$10 billion backstop to the commercial paper market to enable large companies to draw down their existing lines of credit to ride out the economic contraction created by COVID-19.

E. White House Announces Extension for Filing and Paying 2019 Taxes

After weeks of suggesting that it might extend the filing and payment deadline for taxes, the White House has just confirmed that the filing date for 2019 taxes will be extended to July 15, 2020 and that no penalties or interest will accrue. The extension applies to both business and individuals.

II. Impact on Start-ups and Emerging Companies

Recent COVID-19 events and the above governmental responses have had a major impact on the finances and operations of businesses. Below we are focusing on two of the most important consequences of the governments' actions for start-ups and small businesses -- namely, effects on the work-force and the economic assistance available to start-ups and small businesses.

A. Workforce Considerations

Industries such as manufacturing, retail, restaurant, hospitality and travel have been among the most affected by COVID-19-related shutdowns since it is not possible for their workers to work remotely. As a result, businesses in these industries have to make difficult choices regarding their employees. To date, we have generally seen clients manage their workforce through one of the following approaches: furloughs; reduced schedules; and temporary closures.

financial services, and restaurants, such that we expect the order to have minimal additional impact on business operations.

1. Furloughs

A furlough is an unpaid leave of absence. It is a good option for employers who are faced with a drop-off in revenue but do not want to terminate or layoff their employees. A furlough allows employers to reduce their labor expenses during a period of decreased revenue.

Although both exempt and non-exempt employees can be furloughed, an exempt worker must be paid in full for any workweek in which they perform any work (such as checking email, participating in calls or working in any other capacity). Employers should instruct furloughed employees in writing that they're not authorized to work while on furlough² and remind all other employees not to contact any of their furloughed colleagues about work matters without approval.

Furloughed employees may be eligible for unemployment insurance (UI). Several states, including New York and California, have waived the typical waiting periods before UI benefits begin for employees who are out of work as a result of COVID-19.

Furloughed employees may be able to receive continued employer health insurance coverage if their policy allows for it. If not, COBRA coverage will typically be available. Because COBRA is more expensive than employer-provided health insurance, employers may want to subsidize some or all of the COBRA premium during the first weeks or month of the furlough period if possible.

2. Reduced Schedules

An alternative to furloughing employees is to adopt a reduced work schedule. This is generally straightforward for non-exempt and hourly employees. Employers should be careful, however, in implementing reduced schedules for exempt employees since such employees must be paid their full salary for any week in which they perform any work. For an employee on a reduced schedule to maintain exempt status, the employee must continue to receive at least the minimum weekly salary required under federal law (currently \$684).

Many states, including New York and California, allow employees working reduced hours to collect "partial" UI benefits. Careful attention to these rules will allow employers to maximize the potential unemployment benefits for employees on a reduced schedule.

3. Temporary Closures

Due to the CDC guidance and similar state and local orders, some employers may need to temporarily close all of or parts of their business. Companies can generally require their employees to use accrued vacation time in the event of an office closure unless the employee handbook or other preexisting internal policy prohibits this. If a company would rather not require its employees to take paid vacation, it can also give them the option of taking unpaid leave.

² Consider having employees sign a document acknowledging that they cannot work while on furlough absent prior approval.

A temporary closure is essentially the same as a wide-scale furlough, and the same procedures and issues will apply. As with furloughed employees, employees out of work due to a temporary closure because of COVID-19 are also eligible for UI benefits. The U.S. Department of Labor has issued new guidance on this topic, available [here](#). Thoughtful employers will take this new guidance into account when designing temporary closure plans.

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If you are considering managing your workforce in any of the above ways in response to COVID-19, you may also need to consider taking the below steps.

4. WARN Act

Furloughs, reduced schedules and temporary closures may give rise to notice obligations under federal and state Worker Adjustment and Retraining Notification (WARN) laws depending on the size of the business and the number of employees that will be affected by the employment action. Applying WARN laws to a COVID-19 related action raises several difficult issues. Those issues include how to account for remote workers and what to do if a temporary closure that would otherwise be exempt from WARN laws has to be extended into a longer-term closure.

It's also possible that the advance notice requirements under WARN laws will be relaxed in connection with COVID-19 closures. For instance, earlier this week, California Governor Gavin Newsom issued an Executive Order exempting layoffs, relocations or closures due to COVID-19 from the 60-day notice period under California's WARN law as "unforeseen business circumstances." The federal and New York WARN laws contain a similar exception, which we expect affected businesses to seek to rely on when taking COVID-19 related actions.

5. Severance

Employees are generally not entitled to severance payments during a furlough or office closure since they have the right to return to the company. You should, however, review your internal policies and plans addressing severance payments to determine if a furlough might give rise to severance obligations if it continues for an extended period or indefinitely.

6. Executive Compensation

Many of our clients who have furloughed employees without pay have imposed pay cuts on the management team as well. Management teams that are seen to benefit from furloughs or closures, or that do not show solidarity with affected employees, may be at risk of being pilloried in the press or on social media. Keep in mind that in the midst of the 2008-2009 financial crisis companies such as AIG that were viewed as benefiting from government funding and bailouts without restricting executive compensation were savaged for this behavior in Congress.

Management pay cuts can be structured as a percentage reduction in management team salaries and bonuses or as a deferral of compensation with a bonus payable at the end of the deferral period. Arrangements that defer compensation to later tax years should be carefully reviewed with counsel to

ensure compliance with (or ideally, exemption from) the IRS' deferred compensation tax regime under Section 409A. Violations of Section 409A can result in hefty excise tax penalties on the employees and reporting obligations on the employer.

B. Economic Assistance

The COVID-19-related laws and policies recently enacted by federal, state, and local governments also provide for some forms of economic assistance to businesses.

1. Federal Assistance for Honoring Paid Leave Under the Family and Medical Leave Act (FMLA) and Paid Sick Leave

a. Paid FMLA Leave

The Coronavirus Response Act requires businesses with fewer than 500 employees to provide up to 12 weeks of paid leave under the FMLA to any employee with more than 30 days' tenure who is unable to work or telework because of child care responsibilities resulting from COVID-19. While we expect that interpretations of when an employee is unable to physically work will track existing interpretations of the FMLA, we believe that there will be some degree of uncertainty as to when an employee is unable to telework given that mass, required telework in response to COVID-19 is a novel situation.

The first 10 days of this FMLA leave may be unpaid, although employees are entitled to compensation during such a period via existing unused PTO and paid vacation or sick days, including the sick leave entitlement created by the Coronavirus Response Act. Employers are required to pay employees taking leave at least two-thirds of their normal pay rate for any time after the first 10 days, up to a maximum of \$200 per day and \$10,000 in the aggregate.

b. Paid Sick Leave

The Coronavirus Response Bill also requires employers with fewer than 500 employees to provide up to 80 hours of emergency paid sick leave for any full time employee who cannot work or telework because such employee, or an individual such employee is caring for, (a) is subject to a COVID-19 quarantine or isolation order, or (b) has been advised by a health care provider to self-quarantine due to COVID-19 concerns. An employee also may take emergency paid sick leave if he or she is (a) suffering from COVID-19 symptoms and is seeking a medical diagnosis or (b) caring for a child whose school is closed or whose child care provider is unavailable due to COVID-19 precautions.

Part-time employees are entitled to take sick leave in an amount equal to the number of hours the employee works, on average, over a 2-week period.³

³ If it is not possible to determine with certainty the number of hours a part-time employee works over a 2-week period, employers can use either of the following metrics: (a) the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid sick time, including hours for which the employee took leave of any type; (b) if the employee did not work during the prior six-months, the reasonable expectation of the employee at the

Employees taking leave because they are subject to a quarantine or isolation order, have been advised by a health care provider to self-quarantine, or are suffering from COVID-19 symptoms and are seeking a medical diagnosis are to be paid the greater of their normal wage or the applicable federal, state, or local minimum wage up to a maximum of \$511 per day and \$5,110 in the aggregate.

Employees taking time off to care for their family members or children must be paid two-thirds of the greater of their normal wage or the applicable federal, state, or local minimum wage up to a maximum \$200 per day and \$2,000 in the aggregate.

c. Tax Credits + Reimbursement

For each calendar quarter in which a company grants paid medical leave or pays employees wages in connection with paid sick leave under the Coronavirus Response Act, the company will receive refundable tax credits in an amount equal to 100 percent of the COVID-19 FMLA and paid sick leave wages the company paid in that calendar quarter.

As a result, COVID-19-related FMLA leave and COVID-19 sick leave are essentially “free” to employers (with the exception that it will be treated as taxable income). Employers faced with workforce and staffing decisions will therefore want to determine whether their employees are eligible for COVID-19 FMLA or sick leave before implementing a furlough.

Further, the extended FMLA and paid sick leave entitlements created by the Coronavirus Response Act will not be subject to the employer portion of social security payroll tax, which reduces the overall cost of the benefit.

d. Exceptions

The Coronavirus Response Act grants the Secretary of Labor the authority to issue regulations to exempt businesses with fewer than 50 employees from the Act’s leave requirements where these requirements would jeopardize the viability of the business as a going concern. However, it is unclear when any regulations will be issued. Thus, for companies that have sufficient cash, we recommend encouraging employees to take FMLA or sick leave, as opposed to a furlough, since the government will refund the costs of such leave.

For companies without sufficient funds from which to draw, and to support companies that might otherwise be exempt, Steve Mnuchin announced that the Treasury Department would make advances to small businesses to cover the costs of sick leave wages. Though Mnuchin did not address the costs of FMLA leave, we expect that the Treasury Department will make advances to cover FMLA wages as well.

time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

2. Loans & Grants for Small Businesses

A number of federal, state, and local governments, as well as some businesses and non-profit organizations, are making funds available to small businesses that are struggling as a result of the economic impact of COVID-19. The SBA disaster relief program is offering up to \$2 million loans for certain small companies and private, non-profit organizations in designated areas at interest rates of 3.75% and 2.75%, respectively. For more information on the SBA program or to apply for a loan, see [here](#).

New York City is providing no-interest loans of up to \$75,000 to companies with fewer than 100 employees and that have seen sales decreases of 25% or more as a result of COVID-19-related events. New York City is also offering small businesses with fewer than five employees a grant to cover 40% of payroll costs for two months to help retain employees. For more information on these loans and grants, or to apply for either, see [here](#).

San Francisco is offering emergency grants of up to \$10,000 to local businesses that have fewer than 5 employees, have less than \$2.5 million in gross receipts, and can show a loss of revenue of 25% or more. The application can be found [here](#).

Los Angeles created the Small Business Emergency Microloan Program, which will provide loans between \$5,000 and \$20,000 to local businesses for the purpose of retaining low-income jobs. The loans are interest free for a term of 6 months to 1 year, and have an interest rate of 3% to 5% for terms of up to 5 years. More information, including how to apply, can be found [here](#).

Among private entities, Facebook has announced a Small Business Grants Program through which it will be offering \$100 million in cash grants and ad credits for up to 30,000 eligible small businesses in the over 30 countries where Facebook operates. The company has not yet announced complete details for the Program or how to apply, but information can be found [here](#) as it becomes available.

3. Tax Payments and Deadlines

In addition to the extension of the federal deadline to file taxes, New York State is weighing whether to extend the deadline for restaurants, bars and other small businesses to make quarterly payments of outstanding sales and payroll tax amounts. San Francisco is deferring payment of quarterly business taxes for nine months to February 2021, with no interest or penalties, for businesses with up to \$10 million in gross receipts, and deferring collection of annual small business license and permit fees for three months to June 30, 2020.

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We encourage you to contact us with any questions about how the issues discussed above might impact your company or your employees. We look forward to working with you as we all continue to navigate the impacts of COVID-19.

Agatha Kluk
Sonia Farber
Eitan Hoenig
Matthew Weiser
Jessica Thompson