

RESOURCES FOR WORKFORCE RESILIENCY: IS YOUR BUSINESS READY FOR EMPLOYMENT CHANGES?

Addressing COVID-19 in Employment
Presented to Broken Arrow Chamber of Commerce

I. State of Oklahoma Currently

- A. Governor's Executive Order (last amended 4/02/2020)
- B. Governor's Executive Memorandum (last amended 3/25/2020)
- C. Source for A and B: <https://www.sos.ok.gov/gov/execorders.aspx>
- D. Relevant topics in Governor's Order and Memorandum
 - Non-essential business closures March 25 at midnight until April 30
 - Stay at Home Order for Vulnerable Individuals (over 65 or persons with serious underlying medical conditions) – two exceptions
 - Social gatherings of 10+ are prohibited
- E. Local Governmental Orders
 - i. Broken Arrow's Amended Proclamation (Shelter in Place), March 31, 2020
<https://www.brokenarrowok.gov/home/showdocument?id=2844>
 - ii. City of Tulsa's Stay at Home Order, March 28, 2020
<http://www.cityoftulsa.org/media/12617/2020-04.pdf>
 - iii. City of Oklahoma City's Stay at Home Order, March 28, 2020
<https://www.okc.gov/home/showdocument?id=16535>

II. General Overview

- A. All laws that applied to your business still apply unless expressly amended
- B. All of your policies that applied to your employees still apply unless expressly altered by law or order

III. Anti-Discrimination Laws During the Pandemic

- A. Federal laws apply if you have at least 15 employees or at least 20 employees (in the case of age); however Oklahoma protects the same classifications and requires you only employ one person
- B. Special Considerations in the age of COVID-19
 - 1. Discrimination based upon race or national origin

2. Disability Discrimination – ADA Considerations Generally

IV. EEOC's Guidance on the Americans with Disabilities Act During the Pandemic

- A. Pandemic Preparedness in the Workplace and the ADA
https://www.eeoc.gov/facts/pandemic_flu.html
Originally published in 2009; reissued March 19, 2020
- B. What You should Know about the ADA, the Rehabilitation Act, and COVID-19
https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- C. EEOC Webinar: COVID-19 "Ask the EEOC"
<https://www.youtube.com/watch?v=X50G7l41NKg>
https://www.eeoc.gov/coronavirus/webinar_transcript.cfm
- D. Confidentiality under the ADA and COVID-19

V. Family and Medical Leave Act

- A. "Original" FMLA remains intact. Provides unpaid leave for up to 12 weeks (26 weeks for one category) to eligible employees of covered employers. To be a covered employer, you must employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.
- B. Expanded FMLA (part of the Families First Coronavirus Response Act) works in tandem with the original FMLA in that it also provides up to 12 weeks of leave, only ...
 - 1. for a new reason: "the employee is unable to work (or telework) 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." (aka COVID-19)
 - 2. for a new group of covered employers: employers engaged in commerce or in any industry or activity affecting commerce who employs fewer than 500 employees; ...

3. for a new group of eligible employees: "an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested" under this law.
4. and the Expanded FML requires the last 10 weeks of the 12 weeks be paid at 2/3 of the regular rate of pay, capped at \$200 per day or \$10,000 in total (subject to tax credits)

VI. Families First Coronavirus Response Act

- A. The FFCRA has two acts addressing employees. The Act is effective April 1 and currently expires December 31, 2020.
 - i. Emergency Paid Sick Leave Act – **Paid Sick Leave**
 - ii. Emergency Family and Medical Leave Expansion Act – **Expanded FML**

DOL Website of resources and links regarding FFCRA:

<https://www.dol.gov/agencies/whd/pandemic>

- B. Who is covered? Employers who employ fewer than 500 employees.

Small Business Exemption – Limited – Applies only to Paid Sick Leave and Expanded FML related to child care / school. 29 CFR § 826.40(b) provides:

(1) An Employer, including a religious or nonprofit organization, with fewer than 50 Employees (small business) is exempt from providing Paid Sick Leave under the EPSLA and Expanded Family and Medical Leave under the EFMLEA when the imposition of such requirements would jeopardize the viability of the business as a going concern. A small business under this section is entitled to this exemption if an authorized officer of the business has determined that:

(i) The leave requested under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

(ii) The absence of the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or

(iii) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity.

(2) To elect this small business exemption, the Employer must document that a determination has been made pursuant to the criteria set forth by the Department in § 826.40(b)(1). The Employer should not send such documentation to the Department, but rather retain the records in its files.

(3) Regardless of whether a small Employer chooses to exempt one or more Employees, the Employer is still required to post a notice pursuant to § 826.80.

If you are covered, including if you are a small business, you must display or distribute the posters

- Private sector:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- Federal:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Federal.pdf

- C. Who is eligible?
- For the Paid Sick Leave, every employee.
 - For the Expanded FML, any employee who has been employed (on the payroll) for at least 30 days as of the start of the leave.
- D. What does it provide and how much is this going to cost an employer?
- See chart.
 - The money paid under these laws will be reimbursed through a tax credit.
 - IRS Guidance on Tax Credits
https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#how_to_claim
- E. What proof of entitlement must the employee give? Two different answers.

Department of Labor, 29 CFR § 826.100, reads:

- (a) An Employee is required to provide the Employer documentation containing the following information prior to taking Paid Sick Leave under the EPSLA or Expanded Family and Medical Leave under the EFMLEA:
 - (1) Employee's name;
 - (2) Date(s) for which leave is requested;
 - (3) Qualifying reason for the leave; and
 - (4) Oral or written statement that the Employee is unable to work because of the reason for the leave.
- (b) To take Paid Sick Leave for a qualifying COVID-19 related reason under [the first reason on the chart], an Employee must additionally provide the Employer with the name of the government entity that issued the Quarantine or Isolation Order.
- (c) To take Paid Sick Leave for a qualifying COVID-19 related reason under [the second reason on the chart], an Employee must additionally provide the Employer with the name of the health care provider who advised the Employee to self-quarantine due to concerns related to COVID-19.
- (d) To take Paid Sick Leave for a qualifying COVID-19 related reason under [the third reason on the chart], an Employee must additionally provide the Employer with either: (1) the name of the government entity that issued the Quarantine or Isolation Order to which the individual being care[d] for is subject; or (2) the name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19.

[Note: I believe this is a typographical error. I believe it should relate to the fourth reason.]
- (e) To take Paid Sick Leave for a qualifying COVID-19 related reason under [the fifth reason or Expanded Family and Medical Leave, an Employee must additionally provide
 - (1) The name of the Son or Daughter being cared for;
 - (2) The name of the School, Place of Care, or Child Care Provider that has closed or become unavailable; and
 - (3) A representation that no other suitable person will be caring for the Son or Daughter during the period for which the

Employee takes Paid Sick Leave or Expanded Family and Medical Leave.

- (f) The Employer may also request an Employee to provide such additional material as needed for the Employer to support a request for tax credits pursuant to the FFCRA. The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. For more information, please consult [IRS guidance].

The IRS has issued guidance as well (citation above; ¶ VI.D). IRS FAQ 44 reads:

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

The IRS advises you keep these records for at least 4 years from the latter of the date the taxes become due or are paid.

- F. Must I hold the job open for them? Short answer, yes. There is a longer answer but you should seek legal counsel if you are not relying on the short answer.

VII. National Labor Relations Act / NLRB

- A. Elections resume April 6, 2020 (two-week suspension of elections lifted)
- B. General Counsel Memo. Subject: Case Summaries Pertaining to the Duty to Bargain in Emergency Situations
file:///C:/Users/kbrightmire/Downloads/GC%2020_04%20Case%20Summaries%20Pertaining%20to%20the%20Duty%20to%20Bargain%20in%20Emergency%20Situations.pdf.pdf
- C. Several initiatives regarding electronic means of filing, etc.

VIII. OSHA

- A. Guidance on Preparing Workplaces for COVID-19
<https://www.osha.gov/Publications/OSHA3990.pdf>
- B. Webpage on COVID-19
<https://www.osha.gov/SLTC/covid-19/>

IX. Changes – *Yes, expect changes...*

Entitlements for a Full-Time Employee under the EPSLA and the EFMLEA

Paid Sick Leave under the Emergency Paid Sick Leave Act			Paid Leave under the Emergency Family and Medical Leave Expansion Act	
Reasons for the Leave for Up to 80 Hours	Pay for the Up to 80 Hours	Cap on the Paid Sick Leave	Expanded FML for up to 12 weeks	Cap on the Pay for the last 10 Weeks
(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.	not less than the greater of the following: (I) The employee's regular rate of pay ... (II) The minimum wage rate in effect under [the FLSA]. (III) The minimum wage rate in effect for such employee [locally]...	\$511.00 per day and \$5,110.00 in the aggregate	Not available for these reasons	n/a
(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).	Two-thirds of "not less than the greater of the following: (I) The employee's regular rate of pay ... (II) The minimum wage rate in effect under [the FLSA]. (III) The minimum wage rate in effect for such employee [locally]..."	\$200.00 per day and \$2,000.00 in the aggregate	Not available for these reasons	n/a
(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.			[first 2 weeks <u>unpaid</u> , then] Paid (I) an amount that is not less than two-thirds of an employee's regular rate of pay [under the FLSA]; and (II) the number of hours the employee would otherwise be normally scheduled to work [subject to rules for employees whose hours vary greatly from week to week]. ¹	\$200.00 per day and \$10,000.00 in the aggregate
(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.			Not available for these reasons	n/a

¹ The specific reason is stated as: "The employee is unable to work (or telework) 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."

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Ms. Brightmire began her practice at Doerner Saunders in 1990 representing employers in a myriad of labor and employment matters. In 2002, she left to join one of her clients, CITGO Petroleum Corporation, as in-house counsel responsible for its employment, labor, and employee benefits legal matters. She remained with CITGO until its relocation of its corporate offices to Houston. Ms. Brightmire returned her practice to Doerner Saunders and now heads the firm's Employment Law Practice Group.

Ms. Brightmire has substantial legal experience in the labor and employment area, representing employers in every aspect of the practice. In non-litigation matters, Ms. Brightmire has counseled numerous clients as to employee-related matters as well as drafted and reviewed policies, handbooks, employment contracts, severance programs, severance agreements, and relocation programs. She has also represented clients at every step of the litigation process from the administrative agency through trial and appeal.

Ms. Brightmire is recognized in her field by Best Lawyers, Super Lawyers, Chambers USA, and has an A-V® Preeminent™ Martindale-Hubbell Peer Review Rating. She was selected as one of the Top 25 Women Attorneys for Oklahoma by Super Lawyers® in 2010-2019 and 2013-2019. She was named by Best Lawyers as 2013, 2017, and 2020 Tulsa Litigation – Labor & Employment “Lawyer of the Year.” She is also a Fellow with the Litigation Counsel of America.

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