

Stuart Kane LLP
presents

COPING WITH COVID-19 IN THE WORKPLACE

April 16, 2020

Bruce D. May

bmay@stuartkane.com

(949) 791-5124



Who Must Stay At Home in California?

- On March 19, 2020, Governor Newsom issued an Executive Order directing California residents to stay at home except as needed to maintain operations of federal critical infrastructure sectors.
- Failure to comply is a misdemeanor punishable by up to \$1,000 fine and 6 months imprisonment.
- No announced end date. Governor Newsome will review the order in two weeks.
- Order likely to be lifted in stages.
- Local orders remain in place.

What are the “Essential Businesses?”

- Healthcare, public health, and emergency services;
- Food and agriculture;
- Energy, water, and wastewater;
- Transportation and logistics;
- Communications and information technology;
- Essential functions – includes certain commercial retail stores, construction workers, court systems, childcare for essential workforce;
- Critical manufacturing;
- Hazardous materials, and chemical manufacturing, testing, and transportation;
- Financial services; and
- Defense and industrial base.
- Details provided at:
 - <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>

Who Must Stay at Home in Los Angeles City and County?

- On March 19, the City of LA issued a Safer at Home Order which was revised on April 10:
 - All public and private gatherings are prohibited, and residents are ordered to isolate at home except for essential and outdoor activities as defined in the Order.
 - All businesses that require in-person attendance at a workplace ordered to cease operations unless considered essential.
 - Essential businesses include grocery stores; news outlets; food processing and cultivation; financial institutions; hardware stores; handyman services; restaurants for take-out or delivery; logistics; computer products; businesses providing support for other essential businesses; manufacturing; businesses providing social services; professional services such as legal, payroll, or accounting services; defense; and childcare facilities.
- On March 19, LA County also issued a Safer at Home Order which was revised on April 10 with similar requirements.
- Both LA City and County Orders have been extended through at least May 15.

Who Must Stay At Home In Orange County?

- On March 17, Orange County issued a health order, amended March 18:
 - Prohibiting gatherings of any size in the county,
 - Eliminating dining in restaurants and closing bars;
 - Encouraging those 65 and over and those with underlying health conditions to stay home;
 - Encouraging persons exhibiting symptoms of COVID-19 to self-isolate unless seeking medical care;
 - Recommending that all businesses enact social distancing, increase sanitation standards, and use telecommuting if possible.
- On March 21, local park amenities such as playgrounds closed, parks remain open for use compliant with social distancing.

Can Employees Be Required To Work From Home?

- Can employees be required to work from home? Yes.
- Does the employee have a suitable work area, free from safety risks and distractions?
- Remind employee to take meal and rest periods.
- What expenses must the Company reimburse: A percentage of cell phone bill? Utilities? Rent/Mortgage?
- Security and return of Company property?
- Should you schedule regular hours for teleworkers?
- Have a written agreement with the employee.

What Is A Furlough?

- “Furlough” is a military term meaning a leave of absence from duty.
- Traditionally, a furlough is short term with a definite return date.
- But “furlough” has come to mean a temporary layoff with the expectation of being called back.
- What is the difference between a furlough and a layoff? Not much!
- Furloughed workers can get unemployment benefits.
- Is a furlough a termination of employment? Probably!
- Better practice is to pay out final wages and vacation on date of furlough. That avoids a claim for waiting time penalties.
- Can you continue wage payments to a furloughed worker without defeating unemployment? Maybe.
- Can you continue medical benefits for furloughed workers? Yes.

Can The Company Cut Pay and Hours of Work?

- Employer can unilaterally cut pay of at-will employees, and reduce their hours of work.
- Cannot be retroactive, and employers should give as much advance notice as possible.
- Higher cuts for owners and managers?
- With hourly employees, a cut in hours also cuts pay.
- With salaried exempt, the better practice is to cut pay, and then allows flexibility to reduce days and hours per employee's preference, rather than telling the employee not work certain days.
- Will the employer pay back the cut when the crisis is under control?

When Do The Plant Closing Laws Require Advance Notice of Layoffs?

- The federal Worker Adjustment and Retraining Notification (WARN) Act applies to companies with 100 or more employees company-wide.
- Sixty (60) days' advance notice to employees, government entities, and labor unions required for:
 - Plant Closing at a single site that results in loss of employment of fifty (50) or more employees within any ninety (90) day period
 - Mass Layoff at a single site that results in loss of employment for either (A) 50 or more employees and this is at least 33% of the workforce at that site, or (B) 500 or more employees, within any ninety (90) day period.

Which Employees Are Covered By The Plant Closing Laws?

- Under WARN, part-time (under 20 hours/week) and short-term (less than 6 of prior 12 months) employees are not counted toward the 50 employee test.
- Under WARN, “employment loss” does not include (A) terminations for cause, resignations, and retirements; (B) layoffs of less than 6 months, or (C) reductions in hours of less than 50% per month or less than 6 months.
- Under WARN, certain employees who are offered or accept a transfer may be excluded.
- WARN provides exceptions for (A) “Faltering companies,” (B) Unforeseeable business circumstances, and (C) natural disasters.
- Examples of “unforeseeable circumstances” includes “unanticipated and dramatic economic downturn” and “government ordered closing of employment site.”
- Even with an exception, employer must give as much advance notice as possible.

When Does The California Plant Closing Law Apply?

- California's plant closing law (Cal. Labor Code 1400-1406) applies to any site with 75 or more employees in the prior 12 months.
- California law applies to (A) the closing of a covered site, (B) relocation of the site more than 100 miles, and (C) layoffs of 50 more employees within a 30 day period.
- Seasonal or temporary employees, and short term employees (less than 6 of prior 12 months) are excluded.
- Exceptions for (A) Faltering companies, and (B) "physical calamity or act of war."
- Even with exceptions, employer must give as much advance notice as possible.

What is the Families First Coronavirus Response Act (“FFCRA”)?

- Effective April 1, 2020 through December 31, 2020, all public employers, and private employers with fewer than 500 employees must provide:
 - Emergency Paid Sick Leave (EPSL) up to 80 hours for full-timers.
 - Emergency Family and Medical Leave (EFML) with partial pay for up to 10 weeks
- Full and part-time employees, employees on leave, temporary employees jointly employed with other employers, and day laborers supplied by a temporary agency must be included in counting employees.
- Each corporation is considered a separate employer—affiliated companies’ employees are not aggregated unless jointly employed by the subject employer.
- Employers may offset 100% of the cost of the paid leave through quarterly payroll tax credits.
- Posting requirements – employers must post DOL approved notice.

What Is Emergency Paid Sick Leave?

- Effective April 1, 2020, through December 31, 2020, the FFCRA requires all public employers and private employers with fewer than 500 employees to provide:
 - Two weeks (up to 80 hrs) of EPSL at regular rate of pay (capped at \$511/day, \$5,110 total) when employee is unable to work (or telework) because:
 - Employee is subject to a quarantine or isolation order;
 - Employee has been advised by doctor to self-quarantine; or
 - Employee has COVID-19 symptoms;
 - Two weeks (up to 80 hrs) of EMFL at 2/3 of regular rate of pay (capped at \$200/day, \$2,000 total) when employee is unable to work because the employee needs to care for:
 - A quarantined individual,
 - A child of employee whose school is closed due to COVID-19, or
 - A child of employee whose day care provider is unavailable due to COVID-19.

Do Cities And Counties Require Additional EPSL?

- LA and SF have extended EPSL to employers with 500+ employees as well.
- In Los Angeles, the order applies to any employee who performs any work within the geographic boundaries of the City of Los Angeles for an employer that has 500 or more employees within the City of Los Angeles or 2,000 or more employees nationwide.
- Exceptions include businesses that : (1) started operations in the City after September 4, 2019; (2) ceased operations for 14 days or more due to a COVID-19-related emergency order; or (3) already offer at least 160 hours paid time off annually.

Do Cities And Counties Require Additional EPSL?

- The Los Angeles Covid-19 Supplemental Paid Leave is broader and allows up to 80 hours of "supplemental paid sick leave" for any employee who worked for a covered employer between February 3, 2020 and March 4, 2020 if:
 - 1. A public health official or health provider recommends for the employee to self-quarantine;
 - 2. The employee is 65 years old or older;
 - 3. The employee has a health condition that puts them at risk, such as heart disease, lung disease, asthma, diabetes, kidney disease or a weakened immune system;
 - 4. The employee takes time off work because the Employee needs to care for a family member that has been required or recommended to be isolated or to self-quarantine; or
 - 5. The employee takes time off work because the Employee needs to provide care for a family member whose senior care provider or whose school or child care provider temporarily ceases operations.

What is Emergency Family and Medical Leave?

- Effective April 1, 2020 through December 31, 2020, all public employers, and private employers with fewer than 500 employees must provide Emergency Family and Medical Leave (EMFL) as follows:
 - 12 weeks of expanded family and medical leave, 10 weeks of which are paid at 2/3 the employee's regular rate of pay, if the employee is unable to work due to a need for leave to care for a child whose school is closed or child care is unavailable due to COVID-19.
- Employee need only have been employed for 30 calendar days for EMFL.
- First ten days are unpaid, but the employee may use preexisting leave or paid sick leave.
- Capped at \$200/day and \$10,000 in the aggregate.
- Employers may offset 100% of the cost of the paid leave through quarterly payroll tax credits.

Are Small Companies Exempt From EPSL and EFML?

- Employers with fewer than 50 employees are exempt from EPSL and EFML if the paid leave would jeopardize the viability of their business as follows:
 - Financial obligations of business would exceed revenue and cause employer to cease operating at a minimal capacity;
 - Absence of employee would pose a substantial risk to the financial health or operational capacity of the small employer;
 - Replacement workers unavailable to provide services needed for the employer to operate at a minimal capacity.
- Employers may exclude employees that are health care providers and emergency responders, including anyone employed at a doctor's office or hospital.

How Do EPSL/EFML Affect Existing Paid Sick Leave?

- The rule differs depending on whether it is EPSL or EFML.
- EPSL under the FFCRA is in addition to pre-existing paid leave the employee is entitled to under other laws or the Company policy.
- Employers may not require employees to use other leave before taking EPSL sick leave.
- But with EFML, after the first 2 weeks (which are unpaid), employers may require that employees use any accrued paid sick leave or other paid time off concurrently with their use of EFML.