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EMPLOYER'S GUIDE IN REOPENING THE ECONOMY

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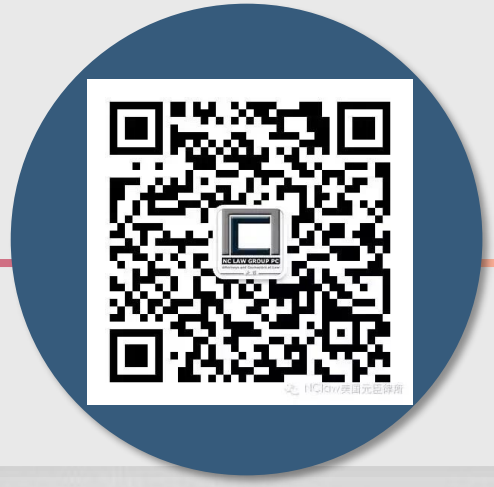

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RECENT LEGISLATION, REGULATIONS, AND EXECUTIVE ORDERS

01

Governor Abbott's Executive Orders and Texas Guidelines

02

Mayor Turner and Judge Hidalgo's Executive Orders and Local Guidelines

03

Families First Coronavirus Response Act (FFCRA)

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CURRENT UPDATES ON RELEVANT LEGISLATIONS, REGULATIONS, AND EXECUTIVE ORDERS

- **Texas Gov. Abbott has laid out his plans for reopening Texas:**
  - Schools closed for the remainder of the current 2019-2020 school year.
  - Starting April 24, 2020, retail services that are not essential services but can provide services through pick up or mail/home delivery can be reopened but should proceed in accordance to social distancing and Texas Dept. of State Health Services guidelines:

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CURRENT UPDATES ON RELEVANT LEGISLATIONS, REGULATIONS, AND EXECUTIVE ORDERS

- All employees must be trained on environmental cleaning and disinfection, hand hygiene, and respiratory etiquette.
- All employees must be screened before coming into the business for new or worsening cough; shortness of breath; sore throat; loss of taste or smell; feeling feverish or a measured temperature greater than or equal to 100.0 degrees Fahrenheit; or known close contact with a person who is lab-confirmed to have COVID-19. Any employee who meets any of these criteria should be sent home.
- Upon entering the business, employees must wash or sanitize hands.
- All employees must wear face coverings.
- Employees must maintain at least 6 feet separation from one another.
- Customers may purchase items from a retail location for pickup, delivery by mail, or delivery to the customer's doorstep, but may not enter the premises.

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CURRENT UPDATES ON RELEVANT LEGISLATIONS, REGULATIONS, AND EXECUTIVE ORDERS

- Access to gyms, salons, in person dining, bars, food courts, massage establishments, tattoo and piercing studios is still prohibited.
- People currently cannot visit nursing homes, state supported living centers, assisted living facilities, etc. unless to provide critical assistance.
- From 11:59pm on April 21, 2020 to 11:59pm on May 8, 2020, elective medical procedures remain postponed unless:
    1. Procedure would not be expected to deplete hospital capacity or personal protective equipment (PPE) needed to cope with COVID-19; or
    2. Procedure will be performed in a facility that has certified it will reserve at least 25% of its hospital capacity for COVID-19 patients and will not request PPE from any public source for the duration of the crisis.
- More announcements will come from Gov. Abbott on April 27, 2020 and in May 2020.

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CURRENT UPDATES ON RELEVANT LEGISLATIONS, REGULATIONS, AND EXECUTIVE ORDERS

01

President Trump has also announced 3 phased approach for opening states based on criteria regarding trajectory of cases.

02

President Trump has also recently announced an upcoming executive order that will temporarily affect immigration into the United States. No specific details have been announced.

03

Houston Mayor Turner and County Judge Hidalgo have not offered specific plans for reopening Houston. However, they have urged caution and stated that reopening plans will include social distancing and wearing face coverings in public.

04

Harris County Judge Hidalgo recently issued a face mask requirement for Harris County, Texas.

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CURRENT UPDATES ON RELEVANT LEGISLATIONS, REGULATIONS, AND EXECUTIVE ORDERS

President Trump recently signed an executive order suspending immigration into the United States:

- Order temporarily suspends access to immigrant visas for certain groups of people that are outside of the U.S. for 60 days (with possibility of extension).
- This group includes family members of permanent residents who are abroad, parents and siblings of American citizens who are outside of America, and applicants through the Diversity Visa program.
- This executive order **does not** apply to any green card applicants who are spouses or minor children of U.S. citizens, green card applicants filing from within the U.S., EB-5 Visas, and any temporary visas such as F-1 and H-1B. There are also exceptions for certain professions such as a physician or nurse and for medical professionals performing research to combat COVID-19.
- The order also does not apply to members of the U.S. Armed Forces, their spouses and children, and anyone entering the country for law enforcement reasons or for national interest.

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FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Act applies only to employers with fewer than 500 employees
- Emergency Sick Leave Situations 1 to 3: employee qualifies for paid sick time if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:
  1. Is subject to quarantine or isolation order due to sickness from coronavirus
  2. Has been advised by a health care provider to self-quarantine due to coronavirus concerns
  3. Is experiencing symptoms of coronavirus and is seeking a medical diagnosis
- Situations 1-3: Employees have to be paid at least their **normal wage** or the applicable minimum wage, whichever is greater.
- Emergency sick leave is capped at $511 per day and $5,110 total for leave taken in categories 1 to 3.

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FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Emergency Sick Leave Situations 4 to 6: employee qualifies for paid sick time if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee is:
  4. an employee caring for an individual described in 1 or 2 above;
  5. an employee caring for a child whose school or place of care is closed, or the child care provider of the child is unavailable, due to coronavirus precautions; or
  6. an employee who is experiencing any other substantially similar condition specified by HHS in consultation with the Treasury and Labor Departments.

Situations 4-6: Employees have to be paid **2/3 of their normal wage** or 2/3 the applicable minimum wage, whichever is greater.
Emergency sick leave is capped at $200 per day and $2,000 total for leave taken in categories 4 through 6.

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EMPLOYER ELIGIBILITY

- Employers of employees that are health care providers or emergency responders may choose to exclude those employees from emergency sick leave or emergency family leave
- Act applies only to employers with fewer than 500 employees
  - The employer must count its full-time and part-time employees within the United States as well as any Territory or possession of the United States.
  - When counting employees, the employer should include employees on leave, temporary employees who are jointly employed by the employer and another employer (regardless of whether the jointly-employed employees are maintained on the employer or the other entity's payroll), and day laborers who are supplied by a temporary agency.
  - Laid off or furloughed employees that have not been reemployed by the company do not count.
  - Workers who are independent contractors are not considered employees for the purposes of the 500-employee threshold.

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EMERGENCY SICK LEAVE

- Full-time employees can receive up to 80 hours of sick leave, and part-time workers can receive leave equivalent to their average hours worked in a two-week period.
- ***Employers are required to grant this emergency sick leave for immediate use regardless of how long the employee has worked at the employer.***
- Employers **may not discharge, discipline, or otherwise discriminate** against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.
- Employer **cannot require a worker to use any other available paid leave** before using the sick time allowed under FFCRA (FFCRA is in addition to any other sick leave allowed by employer).
- Employers also cannot require workers to find replacements to cover their hours during time off.

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HYPOTHETICAL 1

- Company A is a manufacturer and has 300 total employees. Employee A and Employee B are full-time employees that have gotten sick from COVID-19 and have been diagnosed by a doctor to stay at home and self-quarantine. Employee A and Employee B asks the company for a sick leave. The company says Employee A is not eligible for a sick leave because he has only worked at the company for 3 days. Employee B is told that he has to find someone to cover his shifts first. Then, he has to use 5 company vacation days before he is allowed to have a maximum of 5 sick days covered under FFCRA. Employee A files a complaint against Company A, and Company A decides to terminate him.

- What did the company do wrong?

HYPOTHETICAL 2

- Company B has a total of 490 employees on April 30, 2020. Employee A requests sick leave under the FFCRA on April 30, 2020 due to COVID-19 illness. Company B gives the emergency paid sick leave to Employee A. On May 30, 2020, Company B hires additional workers and now has 510 employees. On June 1, 2020, Employee B gets sick with COVID-19 and requests the same emergency paid sick leave as Employee A. Company B denies the emergency paid sick leave under FFCRA for Employee B. Employee B then threatens to sue under the FFCRA because Employee A was given a different treatment.

- Will Employee B win?

HYPOTHETICAL 3

- Company C has 60 employees on April 30, 2020. On this day, Employees A and B ask the company for paid emergency leaves. Employee A takes the leave on April 30 and is scheduled to be out until May 10, 2020. Employee B is scheduled to take the leave on May 4, 2020 and is scheduled to be out until May 20, 2020. However, on May 3, 2020, the company has to close the worksite due to a lack of work available. Employees A and B tell Company C that it has to pay them for the entire 10 days of sick leave because they have already agreed.

- Will Company C have to keep paying Employees A and B during their entire leave?

HYPOTHETICAL 4

- Company D has an employee who is sick with flu-like symptoms. He has already used up his company vacation and sick time during the year. He believes he has COVID-19 and takes two weeks off without going to the doctor for COVID-19 diagnosis. Once he comes back, he asks the company for his sick leave pay due to his illness. The company refuses to give him pay for his leave.

- Who is right?

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EMERGENCY FAMILY LEAVE

- Up to an **additional 10 weeks of paid expanded family and medical leave** at two-thirds the employee's regular rate of pay where an employee is **unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed** or unavailable for reasons related to COVID-19.

- Only employees who have been **on the job for at least 30 days are eligible** for this emergency family leave.

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POSSIBLE SMALL BUSINESS EXEMPTION

- Possible Exemption - Small businesses with fewer than 50 employees can be exempt from the paid emergency sick leave and emergency family and medical leave if the reason for leave is **due to a child's school/place of care unavailability** when the imposition of such requirements would **"jeopardize the viability of the business as a going concern."**

- **No application process to Dept. of Labor needed, but employer must make official determination of applicability and have proper documentation to support internal finding.**

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POSSIBLE SMALL BUSINESS EXEMPTION

- Small business has to prove:

  (1) Such leave would cause the employer's **expenses and financial obligations to exceed available business revenue** and cause the employer to **cease operating at a minimal capacity**;

  (2) the absence of the employee would pose a **substantial risk to the financial health or operational capacity of the small employer** because of their specialized skills, knowledge of the business, or responsibilities; or

  (3) the employer **cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed**, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

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TAX RELIEF TO EASE BURDEN ON EMPLOYERS

- The federal government will provide payroll tax credit in order to help ease the burdens for employers.
- Employers are normally required to withhold federal income taxes and the employees' share of Social Security and Medicare taxes from their employees' paychecks. The employers are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns with the IRS.
- With these new tax credits, eligible employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS.

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HYPOTHETICAL 5

- Company E is a manufacturer, and Employee A is a plant worker. Employee A's child has to stay at home because the school has closed due to a quarantine order from the city. Employee A cannot find someone to watch her child, so she asks Company E for a family leave to take care of her child at home. She is not able to telework at home because Company E does not offer that option. Company E tells her that because she is not working at home while taking care of her child, they will not have to pay her.
- Is Company E correct?

HYPOTHETICAL 6

- Company F has an employee that has a child. Because of COVID-19 reasons, this child's day care is now only open 3 days a week. The employee will now have to stay at home to take care of the child 2 days a week. The company does not offer the option to telework. Because of this situation, the employee asks the company to give her paid emergency family leave for two days a week for the next 10 weeks.
- Is Company F allowed to give it to her?

HYPOTHETICAL 7

- Company G has two employees that are married to each other. They have 4 children, whose schools have closed due to COVID-19. The kids must now be cared for. Because they have 4 kids, the two employees ask Company G for paid emergency family leave at the same time because they claim two parents are needed to take care of the 4 kids at home. Company G tells them that only one parent can take paid emergency family leave at a time.
- Can Company G do this?

IMPLICATIONS FOR CUTTING COSTS FOR EMPLOYERS DURING COVID-19 PANDEMIC

- More than 2.1 million people around the world have become infected with COVID-19, and more than 140,000 people have died from the disease. The United States, now approaching 650,000 infections, is the new epicenter of the outbreak.
- As federal, state, and local officials rush to contain the spread of disease, the government is also grappling with the dramatic—and unprecedented—toll the epidemic has had on the economy. In four weeks, 22 million Americans have filed for unemployment benefits. Technical glitches have prevented millions of Americans from receiving their stimulus checks from the U.S. Department of the Treasury, and the Small Business Administration, which supports U.S. entrepreneurs with loans and funding, has run out of money for its Paycheck Protection Program.
- The purpose of a for-profit business is to make money which is simply Revenue is greater than the Costs/Expenses.
- As many businesses have been shut down, they cannot generate any or sufficient revenue to even pay their costs and expenses.

SO WHAT CAN BUSINESSES DO? WHAT SHOULD YOUR BUSINESS DO?

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DECREASING OPERATING COSTS AND EXPENSES

- **TWO PRIMARY OPTIONS**: **Increase revenue** or **Decrease costs and expenses**. There are other options which is the subject of another presentation.
- Since most business do not have the time or the ability to develop new streams of sufficient revenue, most must decrease operating costs and expenses.
- As the pandemic has forced many businesses to close or stop operating, many businesses have sustained a halting of or a significant decrease in operating revenue. As such, many business cannot cover the cost of their workforce and make payroll, and as a result, many businesses are forced to drastically cut their workforce or reduce compensation in order to stay afloat.
- How best to implement a workforce reduction depends on several factors: 1) the length of time a business will be shut down; 2) the current revenue stream; 3) the anticipated/projected revenue stream when the business reopens; 4) the current cost of the workforce; 5) the amount of revenue generated by the workforce-each worker; and 6) the replacement value (qualitative and quantitative) of the workforce-cost to replace the worker and the worker's productivity in normal operating circumstances.
- Choosing what type of workforce reduction to implement may impact continuation of benefits and other employer obligations under federal and state law.

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WORKFORCE REDUCTIONS

- **TYPES OF WORKFORCE REDUCTIONS**: 1) Furloughs; 2) Layoffs; 3) Firing for Cause; 4) Reducing the amount of work hours that are available for employees-hourly employees; 5) Cutting holiday bonuses and freezing salary increases; 6) Shifting employee tasks to reduce the number of employee positions; and 7) Lowering or getting rid of supplemental payments for overtime. The most pertinent we will discuss are Furloughs, Layoffs, and Reducing hours and/or compensation.

I. Furloughs.

- Furlough is an unpaid leave of absence. Furloughs offer companies with more discretion over which workers are affected. Employees are furloughed usually due to a lack of work available for employers. This is usually temporary arrangement, and workers will one day be able to return to their jobs. Furloughs can allow employers to conserve resources during low business demand while remaining ready for eventual recovery. They may make employees feel more valued than in a layoff situation and let them preserve their benefits.
  - When employees are furloughed, they are still employed. Because employees are still employed during a furlough, many employer obligations may continue, including continued benefits.
  - Furloughed employees remain employed and generally count towards employee thresholds under state and federal law. This can impact what laws the employer is subject to and what requirements are imposed.

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WORKFORCE REDUCTIONS

IA. Rotating Furlough

A modification of the standard furlough. An example of a rotating furlough is to take a department and divide it into two groups: Group A and Group B. Group A goes on unpaid leave for two weeks, then returns as Group B goes on unpaid leave for two weeks. The rotation continues for the entirety of the furlough period. The key here is making sure that each group contains all of the positions needed to keep the department running smoothly while the group on furlough is on leave. However, a rotating furlough is more difficult to implement logistically and may create more of a challenge from an administrative standpoint as payroll for each group switches from paid to unpaid. For example, exempt employees must be paid their normal salary for any week in which they perform any work, so rotating furloughs beginning with a new workweek are ideal. The upsides to a rotating furlough may include employee morale and a distribution of the compensation loss across the entire department instead of centralizing it in a select few of the department's employees.

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LEGAL CONSIDERATIONS

Legal Considerations: Example: Will the employer be required to provide advanced notice as required by WARN Act?

- **THE WARN ACT-** A **covered employer** is an employer with 100 or more employees (generally not counting those who have worked less than six months in the last 12 months and those who work an average of less than 20 hours a week). So, if you are an organization that has less than 100 full-time employees (FTEs), you do not have to comply with the WARN Act.
  - A **plant closure** requires employers to provide at least 60 calendar days advance written notice of a plant closing affecting 50 or more employees at a single site of employment.
  - A **mass layoff** requires employers to provide at least 60 calendar days advance written notice when there is employment loss at a single site of employment during any 30-day period for (a) at least 33% of the employees and at least 50 employees (excluding part-time employees) or (b) at least 500 employees, excluding part-time employees.
    - Employment loss is defined as 1) employment termination (other than discharge for cause, voluntary resignation, or retirement); 2) **layoff exceeding 6 months**; or 3) **reduction in hours of work of more than 50% during each month of any 6 month period**

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FURLOUGH – LEGAL CONSIDERATIONS

- There is an exception in the federal WARN Act for layoffs or furloughs due to business circumstances that were not reasonably foreseeable at the time the notice would have been required. In these situations, the employer is only required to provide as much notice as is practicable.

- Many states have implemented their own version of the WARN Act, with some states having stricter requirements (ex: California, Iowa, etc.). However, a lot of states have also relaxed their requirements due to COVID-19.

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FURLOUGH – LEGAL CONSIDERATIONS

- Employers should have proper methodology for selecting furloughed employees in order to avoid discrimination claims.

Other types of notice may also be required:

- If you are employing union workers, you have to provide notice to the union bargaining representative.
- Companies must also consider if they have to perform additional steps for the state unemployment insurance programs such as providing notice to employees about their eligibility.

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FURLOUGH – LEGAL CONSIDERATIONS

- What happens to employee benefits when an employee is furloughed?

  - ✓ Generally, furloughed employees can be viewed as employees on an unpaid leave. Employers will need to review their company policy with regards to employees on leaves of absences to determine whether they will continue employee benefits (such as health insurance).
  - ✓ If the employer wishes to continue to provide insurance coverage to employees, it will need to review its insurance policy with its carrier to determine whether its insurance plan allows for coverage for employees that are performing no services and receiving no pay.
  - ✓ If employee's insurance coverage will be terminated, employer will have to provide COBRA notice to employee.
  - ✓ Employers should also review their state's regulations on whether furloughs will be considered a termination of employment, which may trigger various obligations for final pay provisions (such as final wages, accrued vacation, etc.)

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FURLOUGH – LEGAL CONSIDERATIONS

- The employer's plan document must first be reviewed to see how furloughed employees are to be treated. If there is no provision in the plan document or summary plan description that clearly deals with this issue or if these documents are silent on the matter, or if the documents do not provide for the desired level of coverage, the employer should take the following actions prior to extending coverage to furloughed employees:
  - ✓ Amend the plan to provide for the desired coverage.
  - ✓ Procure from the insurer (or stop-loss carrier if the plan is self-insured) written permission to provide this coverage to furloughed employees. Failure to procure written permission could result in an insurer disclaiming coverage.
  - ✓ Note- A key component to determining if those on a furlough are covered by a plan is the manner in which full-time employees are determined under the Affordable Care Act employer mandate.

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FURLOUGH – LABOR LAW CONSIDERATIONS

- What about contributions to retirement plans?
- ➢ The ability to suspend matching contributions mid-year may be subject to a variety of factors. These include:
  - If the plan is a "safe harbor" plan, the safe harbor notice that was distributed to employees before the beginning of the plan year must be examined as it may permit the plan to be amended to reduce matching contributions mid-year.
  - A safe harbor plan also may be amended mid-year if the employer is experiencing an "economic loss."
  - The determination of whether a non-safe harbor plan can be amended depends upon a number of factors, including:
  - Whether contributions are allocated periodically or annually.
  - Whether the plan has a "last day" or 1,000-hour rule as an eligibility condition for a matching contribution.
  - Depending upon plan language and communications made to employees, some 2019 discretionary non-elective and matching contributions need not be made in 2020.
  - Certain contributions that employers have committed to make may be deferred until the employer's tax filing deadline.

FURLOUGH – LABOR LAW CONSIDERATIONS

Employers should be careful in avoiding wage and hour violations for furloughed employees.

01

Employees must be paid for any work performed, including checking work messages, work WeChat threads, and emails.

02

Furloughed employees should be given clear instructions not to perform any work that will benefit the employer during furlough.

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LAYOFFS

II. Layoffs. A layoff is a loss of employment on a temporary or permanent basis. Layoffs usually make people feel unvalued and rejected. As such, it is more unlikely for an employee laid off to want to return verses an employee who is furloughed.

- **Legal Considerations**: Can I lay anyone off I want to?
  - When determining which employees will be terminated and/or laid off, an employer must ensure that the criteria used is non-discriminatory and does not create a disparate impact on a protected class. Employers often mistakenly use compensation as the sole criteria for determining which employees will be terminated. This approach is problematic because employees with the highest wages and in higher positions tend to be older with salaries that have increased over time. Discrimination issues are prevalent in these situations, particularly under the ADEA or state employment laws. To prevent age-related discrimination claims in workforce reduction situations, employers should ensure they are using objective, legitimate business criteria to make their selections.
  - **Certain laws apply only if your business meets the threshold number of employees**. Companies that employ 15 or more workers are required to adhere to Title VII and the ADA. The ADEA applies to employers with at least 20 employees. FMLA applies to businesses that employ at least 50 workers.

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REDUCING HOURS AND/OR COMPENSATION

01

III. Reducing hours and/or compensation.

Non-exempt employee- straightforward as said employee must only be paid for the number of hours actually worked.

02

Exempt employee- Most exempt employees paid on a “salary basis” means he/she is paid the same salary amount regardless of the number of hours worked or the amount of work available each week. A fluctuating reduction in salary that varies from week to week will be seen as an attempt to circumvent the salary basis requirement. However, reducing the amount of salary paid to an exempt employee is acceptable if it is for an extended (even if temporary) time period (such as six months) without variation. Employers must be mindful that an exempt employee must earn at least $684 per week to maintain his/her applicable exemption under the Fair Labor Standards Act (FLSA). A salary reduction of an exempt employee during a business or economic downturn must be prospective, meaning the change cannot occur after the employee has already earned the salary, and changes must be clearly communicated to employees to avoid wage payment claims.

03

When cutting the hours of full-time employees, employers should be mindful of whether the cut will render the employee ineligible for benefits.

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REDUCING HOURS AND/OR COMPENSATION

- Companies may also consider seeking volunteers to take an unpaid leave of absence or reduction in pay. Some companies have found their executive team amenable to reduced pay for a specified amount of time to assist with the company's cash flow. For those executives under an employment agreement, employers should enter into a written amendment to the employment agreement memorializing the temporary reduction in pay and acknowledging that such reduction is voluntary and does not constitute a breach of the employment agreement or good reason to terminate the employment agreement.
- Some companies have also found that there are employees in the workplace willing to volunteer to take an unpaid leave of absence to avoid potential COVID-19 exposure. Before resorting to mandatory cuts, those companies have taken advantage of reduced human capital costs provided by employees who have responded to calls for volunteers to take an unpaid leave.
- When cutting the hours of full-time employees, employers should be mindful of whether the cut will render the employee ineligible for benefits.

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APPLY FOR STATE-SPONSORED WORK-SHARE PROGRAMS

- In the event employers decide to reduce employee hours as opposed to headcount (e.g., instead of laying off 20% of the workforce, an employer reduces hours for all employees by 20%), the employer may be able to provide relief to the impacted employees by applying for state-sponsored work-share programs. Work-share programs, also referred to as short-term compensation programs, allow employees to collect a reduced amount of unemployment income when their hours are reduced.
- Currently, approximately half of the states in the U.S. sponsor a work-share program (including California, New York, Florida, and Texas).
- When cutting the hours of full-time employees, employers should be mindful of whether the cut will render the employee ineligible for benefits.

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NOTE

03

To the extent employers use independent contractors or leased employees, the employer may be able to terminate an existing arrangement. However, employers should carefully review the contracts to ensure they understand the termination requirements and procedures and the consequences of such a termination.

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UNEMPLOYMENT INSURANCE CONSIDERATIONS

- A worker doesn't have to be totally without a job to be eligible for Texas unemployment benefits. Even workers who had hours or wages cut due to recently enacted coronavirus-related measures at the state and federal levels may qualify for unemployment payments.
- The TWC has stated: "As long as you are unemployed, or working reduced hours due to coronavirus, we would advise you to apply."
- Unemployment claims are based on the current income reduction compared to a calculation tied to a worker's wages over a previous, 12-month period.

Does this impact the Employer?

- It can if the form of Unemployment benefit chargebacks. Chargebacks are amounts of paid unemployment benefits charged to an employer's tax account for use in calculating the employer's unemployment tax rate which results in increased state tax rates. A chargeback is the total amount of regular unemployment benefits (plus 50 percent of extended benefits, if applicable) paid to a claimant and charged to the base-period employers' tax accounts. If there are multiple base period employers, the amount of each employer's chargeback is based on the base period wages it paid.

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UNEMPLOYMENT INSURANCE CONSIDERATIONS

- An employer may be eligible for protection from chargebacks from UI benefits if the evidence shows that the work separation was for medical reasons. However, if the reason for the work separation was merely a cautionary period of time off to minimize potential exposure of others to someone who might be infected, but might not be, chargeback protection would most likely not be extended to the employer. To minimize the chance of unemployment claims being filed, the employer can encourage employees to work from home if the job is such that remote work is possible. Proper recording of work time is necessary, and the employer would need to work with the employees to set up a timekeeping system that functions well and takes all time worked into account.
- If a business shuts down due to a closure order from a governmental entity, Section 204.022(a)(1-2) (see https://statutes.capitol.texas.gov/Docs/LA/htm/LA.204.htm#204.022) of the Texas Labor Code may allow an employer to ask for chargeback protection. If that were to happen, you should include a copy of the shutdown order with your response to the unemployment claim and argue that the closure was mandated by a local or state order.

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IN SUMMARY

Unfortunately, for some employers, the steps above will either be unavailable or insufficient to avoid a mass layoff. If a mass layoff is inevitable, employers should carefully consider how to select the employees who will be laid off and document their business reasons for the decisions, as well as the criteria used to determine who (or what categories of employees) will be included in the layoff. They should also be careful to limit future litigation risks. For example, employers can reduce the risk of discrimination and retaliation claims by conducting a disparate impact analysis, which assesses the proposed class of employees included in a layoff to determine whether there are a disproportionate number of individuals from a protected class or who have engaged in protected activity. Employers should be cognizant of any severance obligations in the event of layoffs, and should review any applicable collective bargaining agreements or other contracts that may be relevant. Employers should also evaluate whether their layoff invokes the federal WARN Act or any state WARN Acts. In addition to covering legal risks, employers should also consider ways to preserve the goodwill that they have built with their employees. Employers can consider assisting terminated employees in applying for unemployment income benefits or helping cover certain outplacement costs. While a layoff is never ideal, through careful consideration of their options and consultation with legal counsel, employers can navigate this difficult time.

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IMPLICATIONS OF REOPENING THE ECONOMY AND POTENTIAL LIABILITIES FOR EMPLOYERS

01

OSHA-Develop an Infectious Disease Preparedness and Response Plan. If one does not already exist, develop an infectious disease preparedness and response plan that can help guide protective actions against COVID-19. This guidance is advisory in nature and informational in content. It is not a standard or a regulation, and it neither creates new legal obligations nor alters existing obligations created by OSHA standards or the Occupational Safety and Health Act (OSH Act).

02

Worker risk of occupational exposure to SARS-CoV-2, the virus that causes COVID-19, during an outbreak may vary from very high to high, medium, or lower (caution) risk. The level of risk depends in part on the industry type, need for contact within 6 feet of people known to be, or suspected of being, infected with SARS-CoV-2, or requirement for repeated or extended contact with persons known to be, or suspected of being, infected with SARS-CoV-2.

03

Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks.

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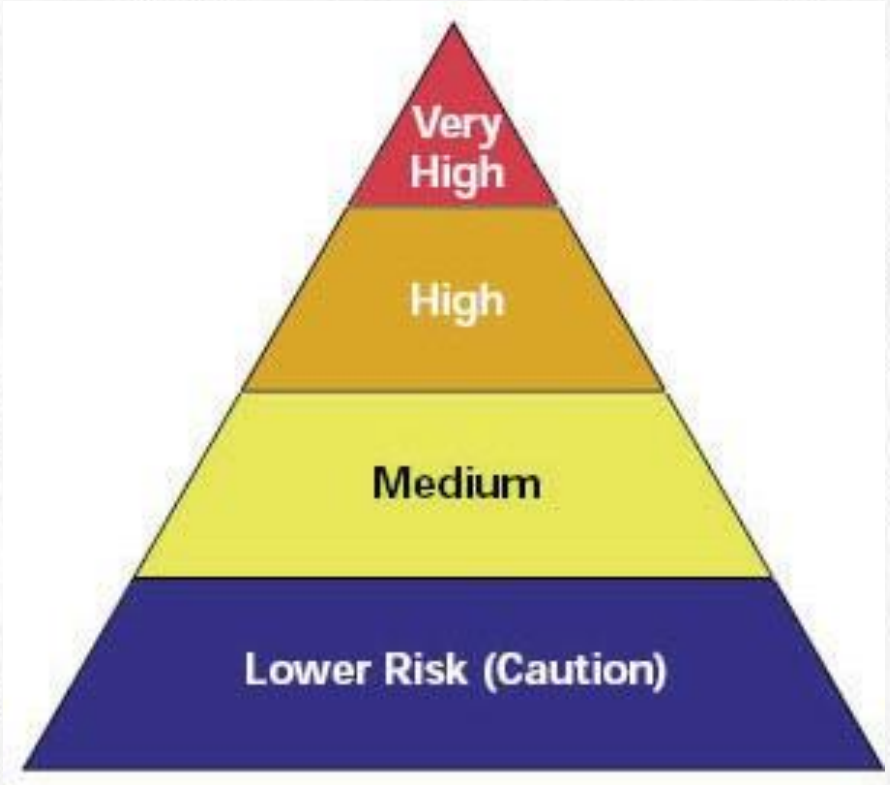
Burning Questions

- HOW MANY HOURS IS AN EMPLOYER OBLIGATED TO PAY AN HOURLY-PAID EMPLOYEE WHO WORKS A PARTIAL WEEK BECAUSE THE EMPLOYER'S BUSINESS CLOSED?
- DO EMPLOYERS HAVE TO PAY EMPLOYEES THEIR SAME HOURLY RATE OR SALARY IF THEY WORK AT HOME?
- MAY AN EMPLOYER REQUIRE AN EMPLOYEE WHO IS OUT SICK WITH COVID19 TO PROVIDE A DOCTOR'S NOTE, SUBMIT TO A MEDICAL EXAM, OR REMAIN SYMPTOM-FREE FOR A SPECIFIED AMOUNT OF TIME BEFORE RETURNING TO WORK?
- WHAT SHOULD AN EMPLOYER DO IF AN EMPLOYEE REFUSES TO COME TO WORK THOUGH THEY ARE NOT ILL AND HAVE NOT BEEN EXPOSED?
- CAN EMPLOYERS REQUIRE EMPLOYEES TO SELF-REPORT IF THEY HAVE COVID-19?

OSHA

Occupational Risk Pyramid for COVID-19



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OSHA

- **Very High Exposure Risk.** These are jobs those with high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures. Workers in this category include: Healthcare workers (e.g., doctors, nurses, dentists, paramedics, emergency medical technicians) performing aerosol-generating procedures (e.g., intubation, cough induction procedures, bronchoscopies, some dental procedures and exams, or invasive specimen collection) on known or suspected COVID-19 patients. Healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients (e.g., manipulating cultures from known or suspected COVID-19 patients). Morgue workers performing autopsies, which generally involve aerosol-generating procedures, on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death.
- **High Exposure Risk.** These jobs are those with high potential for exposure to known or suspected sources of COVID-19. Workers in this category include: Healthcare delivery and support staff (e.g., doctors, nurses, and other hospital staff who must enter patients' rooms) exposed to known or suspected COVID-19 patients. (Note: when such workers perform aerosol-generating procedures, their exposure risk level becomes *very high*.) Medical transport workers (e.g., ambulance vehicle operators) moving known or suspected COVID-19 patients in enclosed vehicles. Mortuary workers involved in preparing (e.g., for burial or cremation) the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death.

OSHA

- **Medium Exposure Risk.** These jobs include those that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with SARS-CoV-2, but who are not known or suspected COVID-19 patients. In areas without ongoing community transmission, workers in this risk group may have frequent contact with travelers who may return from international locations with widespread COVID-19 transmission. In areas where there *is* ongoing community transmission, workers in this category may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings).
- **Lower Exposure Risk (Caution).** These jobs are those that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor frequent close contact with (i.e., within 6 feet of) the general public. Workers in this category have minimal occupational contact with the public and other coworkers.

CIVIL LIABILITY

- Negligence.
- Intentional or negligent infliction of emotional distress.
- Gross negligence.
- HYPO- Recently, a lawsuit was filed against Princess Cruise lines for gross negligence in allowing passengers to be exposed to COVID-19 on a cruise ship. The lawsuit alleges that the cruise ship was allowed to go out to sea knowing that it was infected from two previous passengers who came down with symptoms of COVID-19. It further claims that the passengers were not warned of the potential exposure either before or after they boarded the ship.

CIVIL LIABILITY

- Argument- business owners have a duty to take reasonable measures to limit customers' exposure to dangerous conditions. A business owner must take reasonable or due care to provide a safe environment to their customers. This duty of care generally requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in a safe condition and to avoid creating the conditions that would render the premises unsafe.
- However, there is currently no specific heightened or enhanced duty for a company to follow the Centers for Disease Control and Prevention's (CDC) guidelines. However, it may be best practice for businesses to follow CDC guidelines to avoid potential third-party liability claims given the abundance of information and guidance available to the public regarding social distancing and other preventative measures.
- Causation issue- Mere exposure does not equal causation. How to prove when and where the disease was obtained. The technology regarding contact tracing is in its infancy and when it is more developed it will allow Plaintiffs an easier scientific path to proving causation.

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BEST PRACTICES

- Businesses should take reasonable precautions to limit their customers' exposure to COVID-19 while at their premises. Businesses can follow the CDC guidelines by using reasonable mitigation strategies which include, but are not limited to:
- separating sick employees;
- educating employees about how they can reduce the spread;
- using proper building ventilation, filtration and humidity control;
- practicing proper hand hygiene (*e.*, providing sufficient hand sanitizer and soap);
- practicing proper respiratory hygiene (*e.*, providing tissues and places to properly dispose of tissues);
- encouraging customers to stay at least six feet apart while at the company's premises;
- discouraging handshaking; and
- routine cleaning and disinfection (*e.*, high contact surfaces, dust, removing trash, cleaning restrooms).
- As a practical matter, it will be difficult for a customer to prove causation given the nature of the virus and the ongoing inability to pinpoint where and when people have contracted the virus.

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QUESTIONS AND ANSWERS

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Thank you for your attention!

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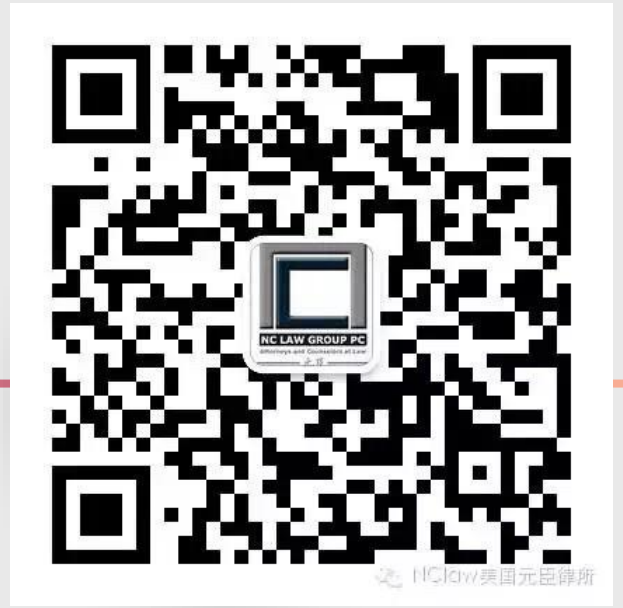

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