



Morgan Lewis

OPEN OR CLOSED FOR BUSINESS?

EMPLOYMENT LAW ISSUES FOR SMALL BUSINESSES AND NON-PROFITS DURING THE PANDEMIC

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April 23, 2020

Agenda

1. Temporary furloughs vs. indefinite layoffs and related issues

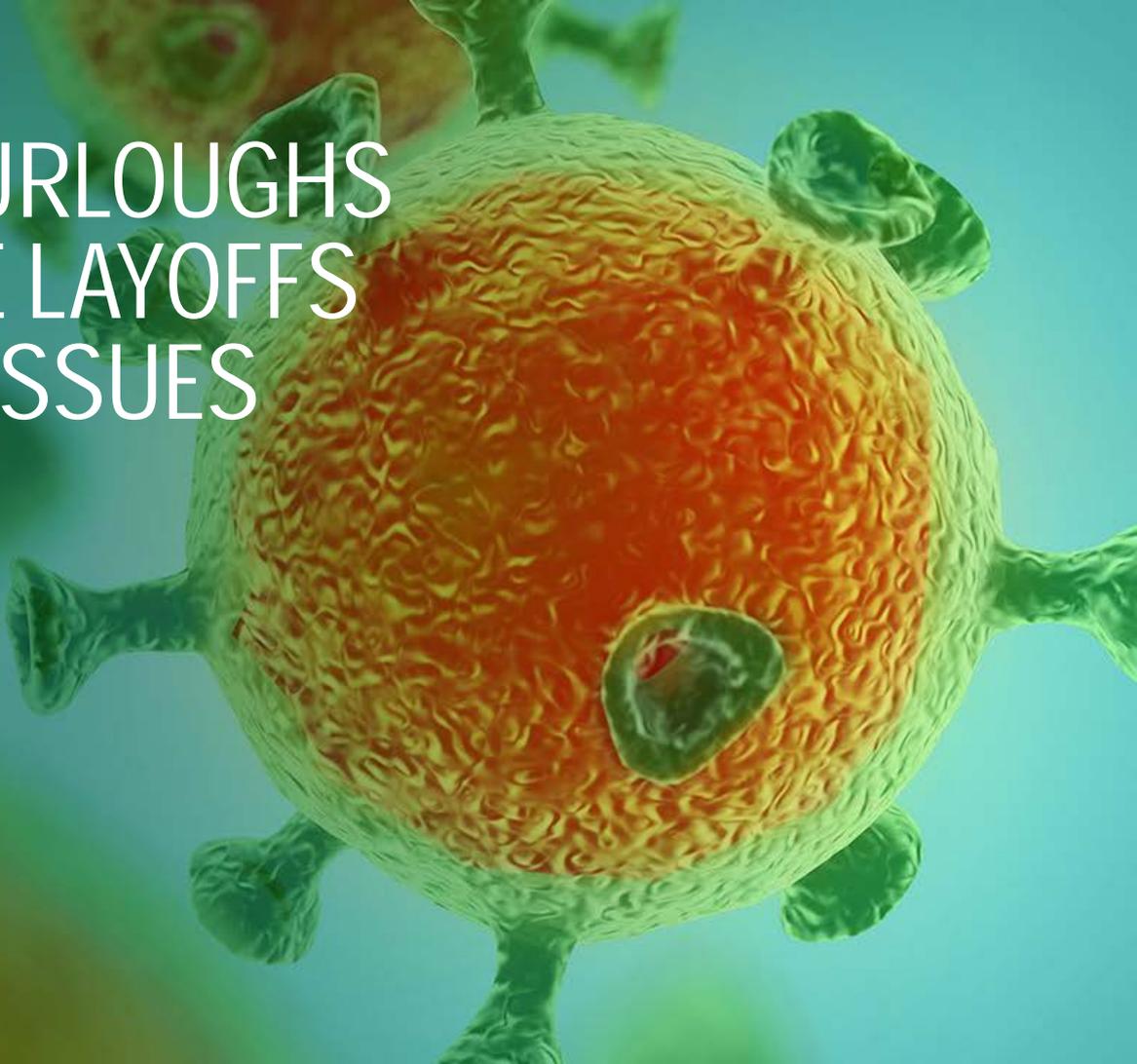
2. Paycheck Protection Program (PPP) loans and other federal stimulus programs

3. Federal and local (DC and MD) paid leave programs

4. Unemployment compensation benefits, including new provisions re: independent contractor entitlement

5. "Reopening" considerations

1. TEMPORARY FURLONGHS VS. INDEFINITE LAYOFFS AND RELATED ISSUES



Methods to Adjust Staffing Levels

Reducing Hours

Full-time to part-time.

Indefinite Reductions

Reduce hours to zero indefinitely, with but possibility of future recall.

Changing Hours

Different shifts/hours.

Terminations

Discharge/terminate employment relationship.

Temporary Reductions

Reduce hours to zero for specified period.

Outside Contractors

Alter existing relationships with outside contractors.

Workforce change alternatives

- **Temporary furloughs** with a **definite** return date
 - Employees remain “employed” but without pay (no hours of work)
 - Employer provides a definite return-to-work date generally within six months
 - Potential continuation of Company-paid benefits or other programs
 - Can alter terms and conditions of employment after furlough ends
- **Indefinite furloughs/layoffs**
 - Employees do not work and are not paid
 - The time period of the furlough is unclear and not defined
 - In general, indefinite furloughs with no pay are considered analogous to an employment separation or termination event

Temporary furloughs (continuing “employment”)

- Requirement to **pay out final wages and/or accrued vacation/PTO**
 - Depends on state and policy
 - Check state requirements
 - Washington, DC: payout of final wages does not occur until the employment relationship is formally severed.
 - Maryland: payout of final wages does not occur until the employment relationship is formally severed.
 - Virginia: employers may or may not establish a policy regarding payout of such benefits.

Indefinite furloughs/layoffs

- Provides no definite return date and no pay. An indefinite furlough is a layoff.
- Employers must provide necessary state notices upon termination.
 - Washington, DC: Final wages must be provided “not later than the working day following such discharge.”
 - Maryland: If an employer conducts layoffs, final wages must be paid by the pay date following the termination.
 - Virginia: Virginia’s wage payment law requires that employees be paid their final “wages or salaries due [them]” on or before the date when they would have been paid if still employed, *i.e.*, by the next regular payday.

Steps to Reduce Headcount



Step 1

Put into writing the rationale for temporary furloughs, indefinite layoffs or separations.

Step 2

Communicate with employees about the employer's decisions and how they impact employees.

Step 3

Ensure that decisions made are adequately labeled in payroll and personnel systems. For instance, a temporary furlough should not be deemed a "termination."

Step 4

Update employees and the government as needed about headcount changes and future plans, especially as key events or milestones approach.

Leave rights as related to furloughs and layoffs

- **What about new paid and unpaid leave programs and “separations”?**

- DOL Guidance Q: 26 and 27 <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#27>

26. If my employer is open, but furloughs me on or after April 1, 2020 (the effective date of the FFCRA), can I receive paid sick leave or expanded family and medical leave?

No. If your employer furloughs you because it does not have enough work or business for you, you are not entitled to then take paid sick leave or expanded family and medical leave.

27. If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but tells me that it will reopen at some time in the future, can I receive paid sick leave or expanded family and medical leave?

No, not while your worksite is closed. If your employer closes your worksite, even for a short period of time, you are not entitled to take paid sick leave or expanded family and medical leave.

Contractor Relationships

- Avoid terms like furlough, layoff, or termination with independent contractors or vendors that support the operations
- Check existing contractual agreements with contractors or vendors for language regarding a reduction or cessation of services, whether temporary or indefinite
- Consider potential “Act of God” or “force majeure” exceptions
- Maintain relationships, however, for potential future resumption of services, perhaps on short notice

2. PAYCHECK PROTECTION PROGRAM AND FEDERAL STIMULUS



The CARES Act provides \$2 trillion economic stimulus and makes a number of benefits explicitly available to small businesses and non-profits

Specifically, these benefits include:

Paycheck Protection Program

Economic Injury Disaster Loans

Employee Retention Payroll Tax Credit

Payroll Tax Deferral

SUMMARY

PAYCHECK PROTECTION PROGRAM (PPP)

\$349 MILLION LOAN FUNDING – EXPANDED?

- Offers partially or fully forgivable loans of up to \$10 million through the Small Business Administration (SBA) to help keep their workers employed
- Focuses on payroll, mortgage interest, rent, and utilities costs
- Organizations that qualify for loan forgiveness under PPP are not eligible for EIDL, the Employee Retention Payroll Tax Credit, or payroll tax deferral.

DETAILS

- Fewer than 500 employees.
- Good faith certification by borrower:
 1. the loan is necessary to support ongoing operations due to the uncertainty of current economic conditions;
 2. the organization will use the funds to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; and
 3. the organization is not applying for or already receiving duplicative funds from another SBA program.
- Maximum amount of loan. The maximum amount of the loan will be the lesser of \$10 million or 2.5 times the organization's average monthly payroll for the past 12 months (excluding compensation over \$100,000). Special calculation rules apply for borrowers with a seasonal workforce.
- 75% or greater goes to payroll costs during 8-week period; loans forgiven if certain requirements met.

SUMMARY

ECONOMIC INJURY DISASTER LOANS ("EIDL")

- EIDL loans of up to \$2 million are available to "private nonprofit organizations" (a more expansive category of organizations than PPP eligibility) that have suffered a substantial economic injury as a result of the COVID-19.

DETAILS

- Unlike the PPP loans, EIDL loans are available to any non-governmental agency or entity that currently has:
 1. a determination letter recognizing it as an organization described in sections 501(c), (d) or (e), OR
 2. evidence from a state of organization, or doing business as, as a non-profit organization.
- For organizations that are not required to apply for recognition of exemption, such as social welfare organizations or trade associations, or organizations that have not yet received their determination letter, articles of incorporation providing that the organization is organized as a nonprofit corporation under state law should meet these requirements.
- Organizations that meet the same size standards and affiliation rules described above for PPP can request an advance of up to \$10,000 that can be used to provide paid sick leave to employees unable to work due to COVID-19, maintain payroll and retain employees, meet increased costs due to interrupted supply chains, make rent or mortgage payments, and repay other obligations.

SUMMARY

EMPLOYEE RETENTION PAYROLL TAX CREDIT

- The CARES Act provides up to \$5,000 in refundable tax credits per employee as relief from the employment tax burden.

DETAILS

- Eligible employers may claim a refundable credit against the employer share of Old-Age, Survivors, and Disability Insurance (i.e., Social Security) taxes imposed on FICA wages paid to employees as a result of COVID-19-related shutdowns and slowdowns.
- Any credit must first be reduced by any credits received for qualified sick or family medical leave paid under the Families First Coronavirus Response Act (FFRCA).
 - Organizations may file IRS Form 7200 to request an advance payment of the credit.
 - **Eligible Employers: An exempt organization is an “eligible employer” if:**
 - Its operations fully or partially shut down due to COVID-19-related government orders
 - OR**
 - It experienced more than 50% decline in gross receipts as compared to the corresponding calendar quarter in 2019.
- Credit applies to 50% of the “qualified wages” up to \$10,000 paid to each employee between March 13, 2020 and December 31, 2020, thus limiting the maximum potential credit to \$5,000 per employee.

SUMMARY

PAYROLL TAX DEFERRAL

SPECIAL NON-PROFIT EMPLOYER PROGRAM

- Nonprofit employers' Social Security tax payments otherwise due between enactment of the CARES Act on March 27, 2020, and December 31, 2020 may be delayed.

DETAILS

- The deadline for paying the first half of the deferred taxes is December 31, 2021, and the deadline for paying the remaining 50% of taxes is delayed until December 31, 2022.
- These delay relief provisions are available regardless of workforce size, unlike similar relief provided under the FFCRA.
 - In the event that an IRC 3504 agent or an IRC 3511 certified professional employer organization is directed to defer payment of deferrable Social Security taxes under the CARES Act by a common law employer (a/k/a "customer"), the CARES Act places sole liability for any deferred taxes on the customer. The CARES Act is silent as to tax liability in situations involving an IRC 3401(d)(1) statutory employer arrangement.

Montgomery County, Maryland Emergency Relief for Local Employers

- On March 31, 2020, the Montgomery County Council enacted a Public Health Emergency Grant Program that provides up to a \$75,000 grant for eligible small businesses or nonprofits that have been impacted by the COVID-19 crisis.
- **Eligibility:**
 - Must demonstrate financial distress as a result of the mandated closures that the state of Maryland and Montgomery County have put in place to help stop the spread of COVID-19.
 - Businesses and nonprofits qualify if they maintain their principal place of business in Montgomery County, and have 100 or fewer full-time-equivalent employees.
- Recipients of the grant are entitled to use the funds for employee wages and benefits, taxes, debt, rent or other operating losses during the public health emergency.

3. FEDERAL AND LOCAL PAID LEAVE PROGRAMS



The Emergency Paid Sick Leave Act and the Emergency Family & Medical Leave Expansion Act

- Two new federal laws enacted as part of the Families First Coronavirus Response Act (FFCRA).
- **Covered Employers:** The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees.
- Both laws became effective on **April 1, 2020**.
- But employers may provide paid sick leave prior to April 1 and receive a tax credit for those costs. These provisions will apply from the effective date through **December 31, 2020**.

The Emergency Paid Sick Leave Act and the Emergency Family & Medical Leave Expansion Act

Emergency Paid Sick Leave Act:

A free-standing law creating a new federal mandate for 10 paid sick days (up to 80 hours) for specific needs arising from the COVID-19 public health emergency.

Emergency Family & Medical Leave Expansion Act:

An amendment to the Family and Medical Leave Act ("FMLA") creating a right to 12 job-protected weeks (of which 10 must be paid) for one limited COVID-19 reason.

The Paid Sick Leave Mandate – Up to Two Weeks

All full-time and part-time employees are eligible for paid sick leave, regardless of when the employee started working.

Full-time employees must be provided with **80 hours (10 days)** of paid sick leave for certain conditions. Part-time employees receive **prorated hours**, based on the average hours worked over a two-week period.

For an **employee's own needs**, the employer must pay the employee's **full regular wage** (up to the cap below). If the employee needs leave **to care for someone else**, the employer must pay **two-thirds of the employee's wage** (up to the cap below).

The cap: maximum payments will be \$511/day (\$5,110 in aggregate) for an employee's own needs and \$200/day (\$2,000 in the aggregate) for an employee's caregiving needs.

Reasons Paid Leave May Be Taken (Six COVID-19 Reasons)

- Under the FFCRA, an employee qualifies for the paid leave if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

2. has been advised by a health care provider to self-quarantine related to COVID-19;

3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

Reasons Paid Leave May Be Taken (Six COVID-19 Reasons) *(cont.)*

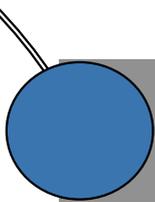
- Under the FFCRA, an employee qualifies for the paid leave if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

4. is caring for an individual subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or someone who has **been advised** by a health care provider to **self-quarantine** related to COVID-19;

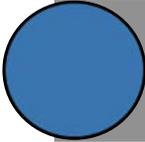
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or

6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

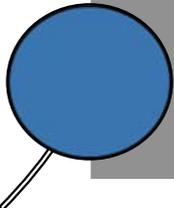
The Expanded FMLA Leave – Eligibility



Available to **full-time and part-time employees** who have worked for the employer **for 30 days**.

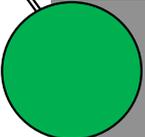


Available for **one limited reason**: if an employee cannot work (or telework) **in order to care for a child** if the child's school or care location has been closed, or if the child's care provider is unavailable due to COVID-19.

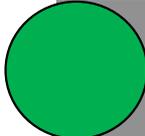


Small businesses with **fewer than 50 employees** **may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability** if the leave requirements would jeopardize the viability of the business as a going concern.

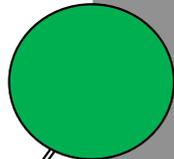
The Expanded FMLA Leave – Benefits



Payment is **two-thirds** of the employee's wage but is **capped** at \$200/day and \$10,000 in the aggregate.



The law is not explicit on how the new leave interacts with the existing 12 weeks of job-protected, unpaid FMLA leave (if employer was required to provide).



Provides 12 weeks of job-protected leave. The first two weeks may be unpaid (payment for the first two weeks will be covered by the federal paid sick time law though) and the following **10 weeks must be paid.**

Recouping Costs of Paid Leave Under Both Programs

- Employers will receive a **tax credit** in an amount **directly equivalent to the maximum leave amount they have paid out.**
- **Non-profit organizations** get the same tax credit against their payroll taxes.
- Employers may **retain (i.e., not send to the IRS) taxes they would have paid** for the employee and the employer share (for **all** employees) of **Social Security and Medicare** taxes, as well as **withholding for federal income taxes.**

Recouping Costs of Paid Leave Under Both Programs

- If the amount the employer retains is **not sufficient** to cover the amounts it is paying out for leave, the employer may seek an **expedited advance** from the IRS.
- Available guidance from the [IRS](#).

Notices and Enforcement

- An employer must post a **notice** for employees about the requirements of the law. The Department of Labor issued a model notice. See [here](#) for notice and on the right.
- An employer may **not discriminate** against an employee for using paid sick leave or filing a complaint and may not retaliate against an employee for taking the FMLA leave.



The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▶ ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

▶ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

- | | |
|---|---|
| 1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; | 5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or |
| 2. has been advised by a health care provider to self-quarantine related to COVID-19; | 6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
| 3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis; | |
| 4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); | |

▶ ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:
1-866-487-9243
TTY: 1-877-880-5627



District of Columbia – Two New Leave Laws

- **Declaration of Emergency (DOE) Paid Leave (§ 32-531.02a):**
 - Amends DC's Accrued Sick and Safe Leave Act to create new category of paid leave for any reason allowed under federal FFCRA
 - Effective immediately, remains in place through July 9, 2020
 - Applies to employers with 50-499 employees; employee must have been employed 15 days to be eligible for DOE Paid Leave
 - Employee is entitled to 80 hours of paid leave at regular rate (prorated for PT employees)
 - Unlike FFCRA, no cap or limit on payment, no tax credit
 - DOE Paid Leave is in addition to any leave which employee may have under FFCRA, federal/District law, or employer policies
 - Employer may require that employees first exhaust any available leave before taking DOE Paid Leave

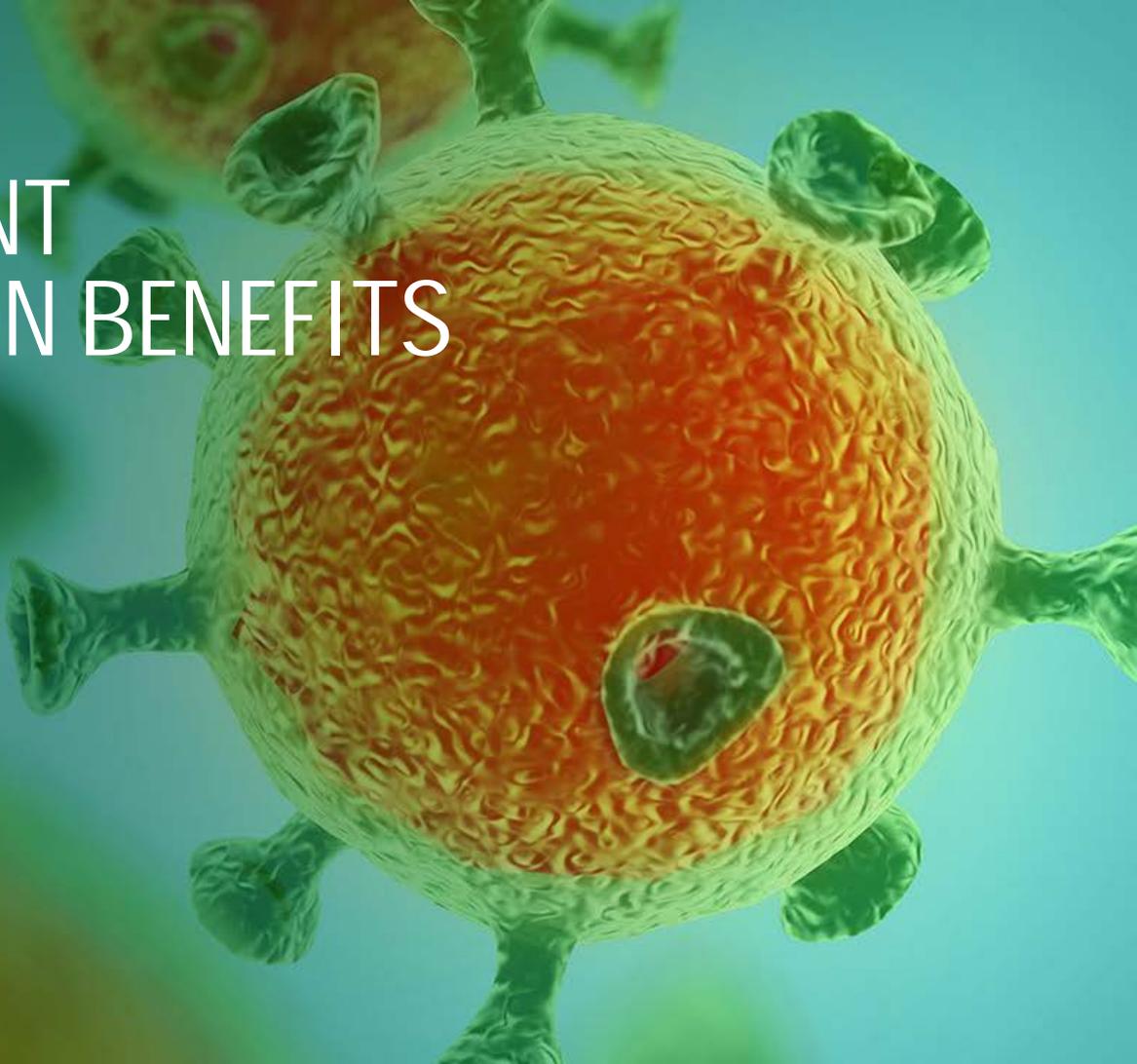
District of Columbia – Two New Leave Laws

- **Expansion of DC FMLA for Public Health Emergencies (§ 32-502.01):**
 - Amends DC FMLA to provide unpaid leave to employees who are unable to work as a result of a public health emergency declared by the Mayor
 - Effective immediately; no sunset date
 - Applies to all employers regardless of number of employees
 - Employee is entitled to unpaid leave for the duration of the public health emergency
 - No medical certification required; Mayor's order serves as certification of need for leave
 - DC FMLA's one-year/1000 hour requirement does not apply to this leave

Maryland – Paid Sick and Safe Leave

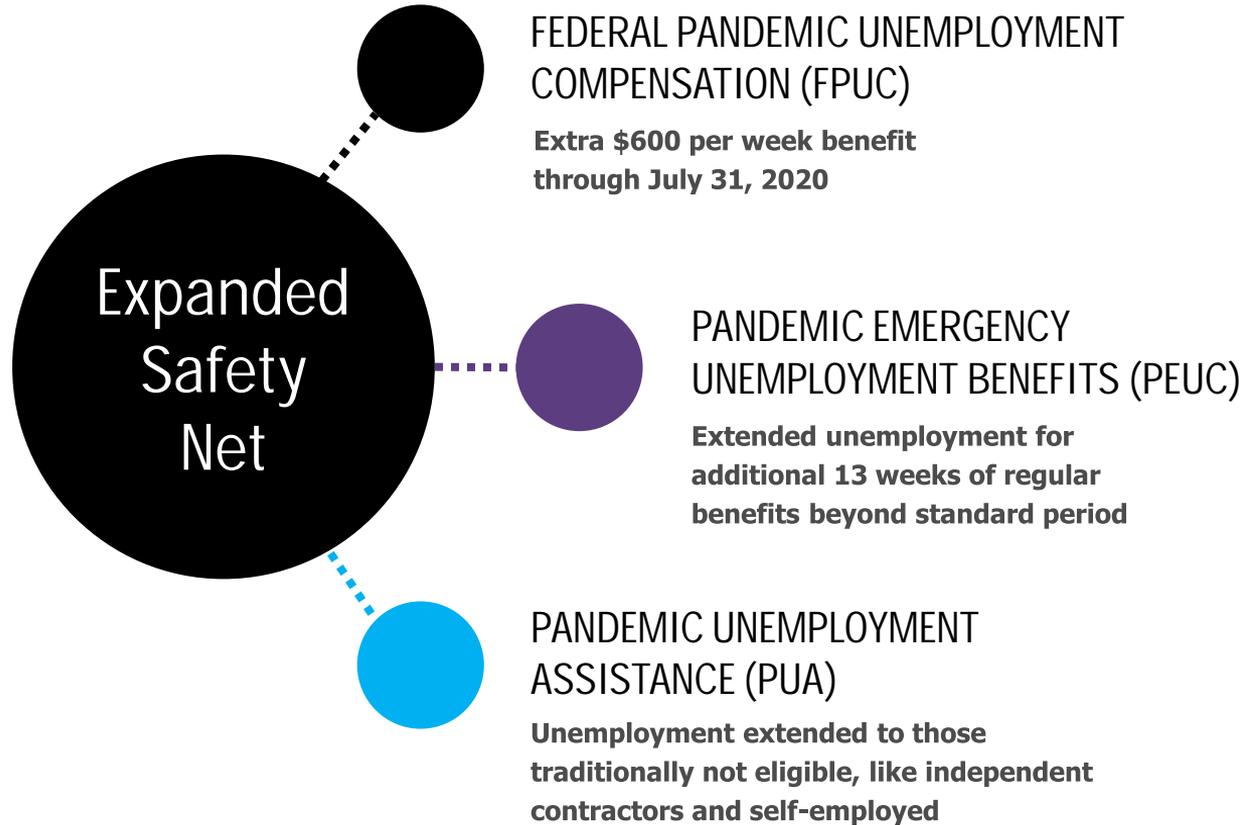
- Paid sick leave provided under **Maryland Healthy Working Families Act (MHWFA)** and **Maryland Flexible Leave Act (MFLA)** may be used for COVID-19 related reasons
- **COVID-19 Public Health Emergency Protection Act of 2020**, signed into law on March 19, 2020, protects employees from termination during the state of emergency due to employee's need to isolate or quarantine, or because employee leaves work due to risk of exposure or to care for family member affected by COVID-19
- **Montgomery County** imposes additional paid sick and safe leave requirements. Depending on the reason for leave, COVID-19 related absences may be covered.

4. UNEMPLOYMENT COMPENSATION BENEFITS



Unemployment Compensation Expansion

Massive changes to unemployment compensation system under federal CARES Act



Pandemic Unemployment Assistance (“PUA”)

Available to individuals who would otherwise *not be eligible* for state or federal unemployment benefits, including individuals lacking sufficient work history, independent contractors, and those who are self-employed.

Also covers individuals *who have exhausted* all rights to state or federal unemployment benefits and PEUC benefits.

PUA benefits are available for up to 39 weeks (which may be extended) beginning January 27, 2020, and ending December 31, 2020.

- 39-week limitation on PUA counts weeks of regular unemployment (including extended benefits) but not weeks of PEUC.

PUA Eligibility

Individual must self-certify that they are able to work and available to work under applicable state law but that they are unemployed, partially employed, or unable to work because of at least one of these COVID-19–related reasons:

(1) They are diagnosed with COVID-19 or have symptoms of COVID-19 for which they seek a medical diagnosis

(2) A member of their household has been diagnosed with COVID-19

- DOL example: household member has been diagnosed with COVID-19 or tested positive and individual is unable to work as a result

PUA Eligibility

(3) They are providing care for a family member or household member who has been diagnosed with COVID-19

- DOL example: individual providing care if care requires “such ongoing and constant attention” that the individual’s ability to work is “severely limited,” and family member cannot care for themselves

(4) A child or other person in the household for which they have primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency, and having that school or facility care available for the household member is required for the individual to work

- DOL example: individual has “primary caregiving responsibility” if they are required to remain at home to provide care. Includes individual whose job allows for telework but for whom the provision of care requires “such ongoing and constant attention” that it is not possible for individual to work from home

PUA Eligibility

(5) They are unable to reach their place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency

- DOL example: individual cannot reach job because doing so would violate state or municipal order restricting travel.

(6) They cannot reach their place of employment because a healthcare provider has told them to self-quarantine due to concerns related to COVID-19

- DOL example: individual advised by healthcare provider to self-quarantine because they may have COVID-19 (e.g., because individual was in direct contact with someone with COVID-19)
- DOL example: individual is immunocompromised by virtue of a serious health condition and advised by healthcare provider to self-quarantine

PUA Eligibility

(7) They were scheduled to start employment and do not have a job or are unable to reach the job as a direct result of the COVID-19 public health emergency

- DOL example: individual cannot reach job because doing so would violate state or municipal order restricting travel or employer has closed place of employment
- DOL example: individual does not have a job because an employer withdrew the job offer as a direct result of the COVID-19 public health emergency

(8) They have become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19

PUA Eligibility

(9) They had to quit their job as a direct result of COVID-19

- DOL example: individual was diagnosed with COVID-19 and no longer has COVID-19, but resulting health complications render the individual unable to perform essential job functions, with or without a reasonable accommodation

(10) Their place of employment is closed as a direct result of the COVID-19 public health emergency

- DOL example: if a business is shut down due to an emergency declaration or due to necessary social distancing protocols, the unemployment of those individuals would be a direct result of COVID-19

PUA Eligibility

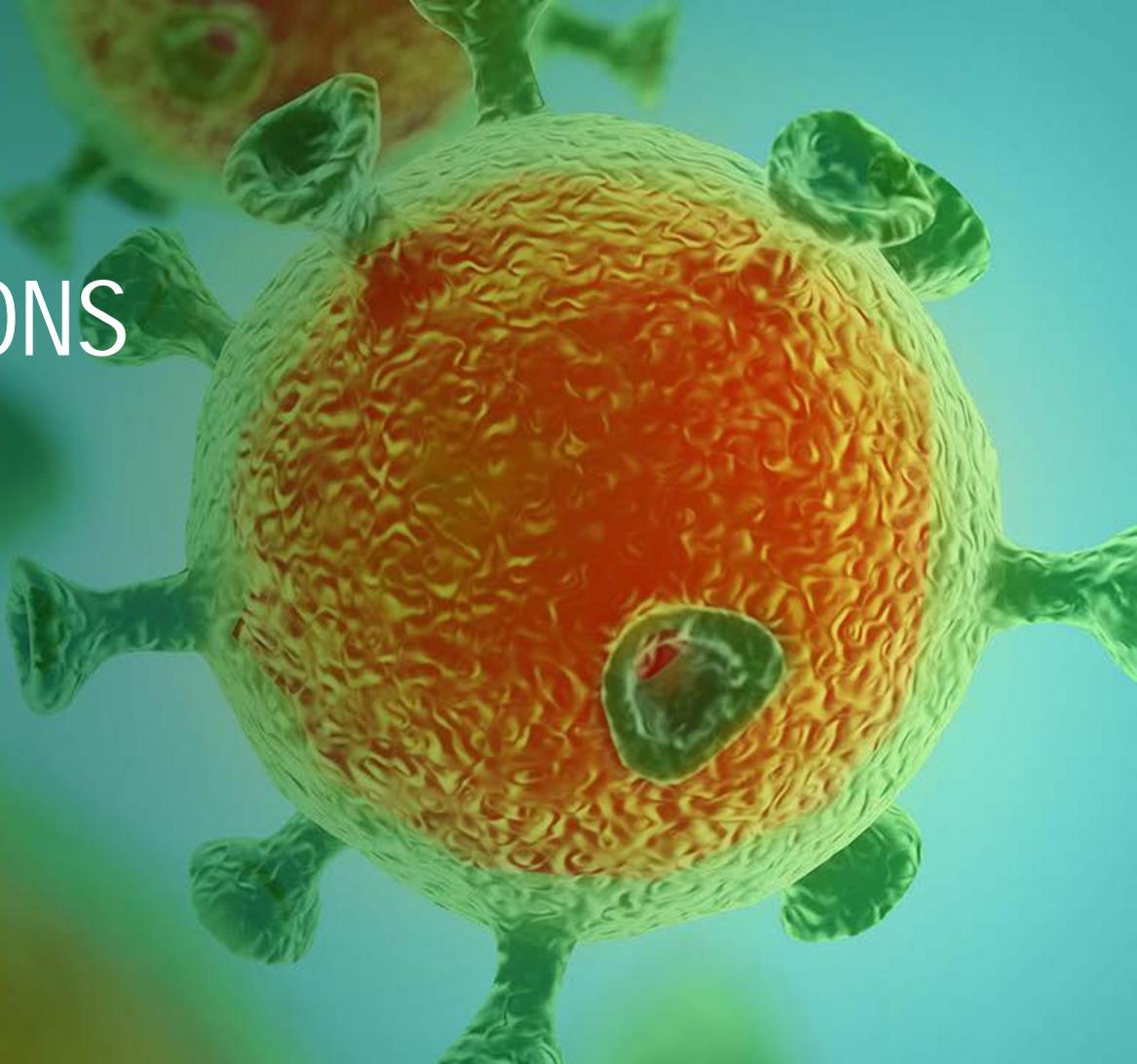
(11) The individual meets any additional criteria established by the Secretary of Labor.

- DOL guidance provides one additional situation:
 - An independent contractor may qualify for PUA if they are unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited their ability to continue performing their customary work activities, and has thereby forced the individual to suspend those work activities
 - Under regular criteria: rideshare driver who receives Form 1099 will not have “place of employment” and thus cannot claim place of employment has closed
 - Under this additional criteria: driver may qualify if forced to suspend operations because an emergency order restricting movement makes the driver’s continued operations unsustainable

Unemployment Alternative – Work or Job Sharing

- Involves compensation support through the UC benefits system for employers that combine jobs rather than layoff/terminate employees altogether.
- Eligibility
 - To be eligible for the Shared Work Program, an employer must certify that the implementation of a shared work plan would be in the place of layoffs/terminations that would affect at least 10% of the employees in an affected unit.
 - Employers must also certify that they plan to reduce work hours by no less than 20% and no more than 40% for workers in an affected unit. Employers must intend to show that all employees in an affected unit are treated equally.
- Submitting an Application
 - The Shared Work Plan application is a fillable PDF document and can be downloaded from the DOES Shared Work Program website at <http://does.dc.gov/page/dc-shared-work-plan-application>.

5. (RE)OPENING CONSIDERATIONS



5. (Re)opening Considerations

- Reopening will be jurisdiction-specific, subject to compliance with all **state and local directives** as well as any **industry-specific requirements**.
- Updates to **employee scheduling and staffing levels**.
 - Return to work furlough or laid off employees versus “new hires.”
 - Ending paid and unpaid leaves (in compliance with law).
 - Staggered shifts, alternating teams, and/or continued telework.
 - Alignment with business and operational needs.
- Employers should consider whether they will require **personal protective equipment (PPE)**.
- **Cleaning and disinfecting** may require additional steps (including reviewing and renegotiating contracts with vendors that provide these services).

Social Distancing Plans



Physical Space Changes

- Separating desks and work stations;
- Modifying open floor plans by, for example, adding partitions;
- Making only certain workstations available (i.e., every other or every third workstation, or every other cubicle area);
- Closing or modifying common/conference rooms and break rooms/cafeterias;
- Displaying markings or signs reminding customers and employees



Limiting In-Person Interactions

- Holding fewer in-person meetings and using increased conference calls or video conferences;
- Limiting the size of in-person gatherings/social events (e.g., less than ten people);
- Developing or revising a crowd control plan that changes security processes and procedures, such as setting a maximum number of employees and members of the public on company premises;
- Setting staggered or spaced meal schedules



Training and Protocols

- Managers may need additional training to understand responsibilities;
- Individuals should be designated as responsible contacts for overseeing and ensuring implementation;
- Employers should consider how to track compliance and consistently respond to employees for failure to follow protocols

Presenters



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