

On the first day of FFCRA a lawyer gave to me...

Hosted by:

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April 1, 2020

Today's Presenters



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Jim serves as Chair of the firm's Labor & Employment Team offering over 35 years of experience assisting clients in collective bargaining issues and employment law matters. Jim's background as an HR director gives him unique, practical insight in personnel issues from drafting policies to conducting investigations to reorganization studies and strategies.



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Abby primarily focuses on counseling education clients in school law and labor and employment issues. She has worked with many districts in the area of special education in particular. Prior to joining the firm, she worked as a law clerk for the Department of Public Instruction, where she conducted extensive legal research on educational law issues and assisted the legal department in representing the state superintendent in cases regarding open enrollment, expulsion appeals, the school choice program, and the food and nutrition programs.



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Tony proactively and reactively assists employers in wading through the various HR-related issues that arise in today's employment world. Proactively, Tony helps with issues such as hiring/firing, disability and ADA issues, FMLA and other leave matters, sensitive personnel matters and investigations, wage and hour issues, and labor negotiations. He also provides schools, both primary/secondary and post-secondary, with the gamut of counsel unique to those clients including special education and pupil services.



Jim Kalny



Abby Busler



Tony Steffek

Discussion Agenda

- Family First Coronavirus Response Act (FFCRA)
 - Relationship to Executive Order 12 Safer At Home (SAH)
 - Paid Sick Leave.
 - Emergency FMLA.
 - Emergency Responders.
- Emergency Declaration Orders and Related issues.
- Compensation Options during the Emergency
- Open meetings issues
- Elections.

FFCRA and Stay at Home

- FFCRA provides for new paid leave benefits.
 - Tax credit reimbursement-expressly not applicable to the public sector.
 - It appears that the payment for these benefits is not to be subject to FICA and withholding- but that does not seem consistent with the rest of the law.
- SAH declares Essential Governmental Functions during the COVID-19 emergency.
 - Restricts/conditions movement during the emergency
 - Provides for sanctions for violations.
- They both address the emergency caused by the virus.

FFCRA: Covered Employers

- FFCRA provides for 2 paid benefits.
- Emergency Paid Sick Leave Act (EPSLA):
 - in the case of a public agency or any other entity that is not a private entity or individual, employs 1 or more employees.
- Emergency Family and Medical Leave Expansion Act (EFMLEA):
 - Private Sector: Employer with 500 or less employees.
 - Public sector: Any public agency.
 - The definition of "employer" under the FMLA has 4 subparts, (i)-(iv) (see below), one of which makes any "public agency" an "employer" under the FMLA. The EFMLEA only revises the part defining persons employing 50 or more persons, it does not revise the part making a "public agency" an employer.
 - (iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

EPSLA Benefits:

- 2 Categories

- Two weeks (up to 80 hours) of paid sick leave at the **employee's regular rate of pay** where the employee is unable to work or telework because the employee:
 - Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - Has been advised by a health care provider to self-quarantine related to COVID-19;
 - And/or is experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Benefit is up to \$511 per day up to a max of \$5110 aggregate

EPSLA:

- Two weeks (up to 80 hours) of paid sick leave at **two-thirds the employee's regular rate** of pay because the employee is unable to work or telework because the employee:
 - Is caring for an individual subject to a Federal, State, or local government quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine;
 - Is caring for a child whose school or place of care is closed for reasons related to COVID-19;
 - Or is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services.
- Benefit is \$200 per day, and \$2,000 in aggregate

Pay for Part-Time Employees

- A part-time employee is entitled to leave for his or her average number of work hours in a two-week period.
 - Use the number of hours the employee is normally scheduled to work;
 - Or if the employee's schedule varies, use a six-month average to calculate the average daily hours.

What is “Quarantine” or “Isolation”?

- Under the FFCRA, “quarantine” or “isolation” means that the specific individual is compelled by a government entity to remain at home either because they are known to be sick or suspected to be sick.
- This is different from a “shelter-in-place” or “safer-at-home” mandate, which is typically prophylactic and general in nature.
- In other words- it does not appear the SAH made the EPSLA benefit automatically available.
- DOL Guidance:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

ESPLA Comments

- While the category of benefit may be mixed- only 2 weeks total benefit
- The Care leave can and does dovetail with the EFMLEA
- ESPLA allows for care of an individual
- DOL rules state that documentation for these leaves should be sought if tax credits are sought
- The President suggested that local governments should keep records of their expenses as well.

EFMLEA

- An employee who cannot work because the employee is caring for a child whose school or place of care is closed or child care provider is unavailable may be entitled to up to twelve weeks of paid leave.
 - Initial 2 weeks of paid leave provided under the EPSLA;
 - an additional 10 weeks under the EFMLEA at two-thirds of the employee's regular rate of pay.

What qualifies as telework?

- An employee may telework when an employer permits or allows an employee to perform work from home or at a location other than the normal workplace.
- Normal wages must be paid for telework.
- Telework is not compensated under the paid leave provisions of the FFCRA.

Telework Issues

- If an employee can telework—whether that employee is exempt or nonexempt—he or she must be compensated for the work performed.
- State law requires that non-exempt employees precisely track their work start and end times, as well as meal and other unpaid breaks, just as if they were at work.
- Non-exempt employees must be paid overtime for hours worked over 40 in a workweek, so employers must be explicit in their instructions to such workers about when they are and are not expected to work.

Documentation

- IRS requires before EPSL or EFMLA leave starts:
 - Employee must file a written request for leave
 - Employee name
 - Dates of leave
 - Written statement giving the COVID-19 related reason for the leave
 - A statement why the employee cannot work (including telework)
 - If leave based on self-quarantine:
 - Name of the entity or health care provider ordering or advising the self-quarantine
 - If not the employee who is quarantined the name and relationship of the person being cared for

Emergency Responders (FFCRA)

- The DOL set forth the definition of emergency responders as follows: *"an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19."*
- Such employees may be exempt from the operation of the FFCRA.

Emergency Responder Examples

● *Examples include:*

- *Military or national guard;*
- *Law enforcement officers;*
- *Correctional institution personnel;*
- *Fire fighters;*
- *Emergency medical services personnel;*
- *Physicians;*
- *Nurses;*
- *Public health personnel;*
- *Emergency medical technicians;*
- *911 operators;*
- *Public works personnel;*
- *Person with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency; and*
- *Individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.*

Exempt workers Stay At Home Order (SAH)

- Paid or volunteer first responders including law enforcement, EMS, and firefighters; first responder training academies; building inspectors; emergency management personnel; emergency dispatchers; court personnel, jurors and grand jurors; corrections personnel; hazardous materials responders; child protection and child welfare personnel; housing and shelter personnel; National Guard and military; and
- others working for or to support Essential Businesses and Operations
- Minimum Basic Operations. The minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions, including where these functions are outsourced to other entities.
 - The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences are categorically exempt from this Order.
 - While performing MBO must comply with social distancing

Essential Governmental Functions

- SAH provides:
 - Essential Governmental Functions means all services provided by the State, tribal, or local governments needed to ensure the continuing operation of the government body and provide and support the health, safety, and welfare of the public.
 - Each government body shall determine its Essential Government Functions, if any, and identify employees and contractors necessary to the performance of those functions.

Essential, but Infected!

- What are your options if one of your “essential” employees not covered by FFCRA contracts the virus?
 - Regular sick leave/PTO/other paid leave
 - Regular FMLA (unpaid)
 - Separate, temporary “Paid Sick Leave Policy”
 - Just for the period of the outbreak
 - Eligibility has same basis as eligibility for FFCRA leave
 - Can be used in addition to other leave available
 - Careful in defining to whom it is available

Non-Essential Employees

- Certain employees may be deemed non-essential under the Safer at Home Order
- What can you do with them during this period?
 - Telework/work remotely (not always an option)
 - Temporarily cease their employment until non-essential ban is lifted
 - Options include layoffs and furloughs

Compensation during the Emergency

- If COVID-19 “caused” the absence from work and the person is not eligible for FFCRA Protection:
 - High risk
 - Not essential- no current work
- Options
 - Allow access to sick leave banks
 - Create a Supplemental leave bank
 - Continue to pay them during the emergency
 - Lay off/furlough

Layoffs

- Layoff is a softer way of saying termination – the employment relationship formally ends.
- Even if you call it a layoff, there is no legal obligation to reinstate or rehire the employee
- Positives – employee can collect unemployment, obligation to continue providing insurance benefits ends
- Negatives – no control over the individual, can be tricky in times of need (snowstorms, etc.)

Furloughs

- Includes sending employees home or reducing their hours – basically, forced unpaid leave
- Non-exempt employees paid by the hour, but only for time worked – employer can control the hours
- Exempt employees who work any portion of a week must be paid for that entire workweek, absent certain exceptions.
- Pros – employee can still seek partial unemployment; you still have control over employee (on-call, etc.)
- Cons – have to maintain employee/beneficiaries on your insurance plans (still technically an employee)

Unemployment Compensation under CARES Act

- Expanded Unemployment Compensation Provisions:
 - Maximum 39 week coverage, including weeks of regularly covered unemployment benefits under Federal and State law.
 - The amount of benefit provided to a covered individual under the Program is equal to the amount of unemployment benefit the covered individual would otherwise be entitled to under Federal or State law plus an additional amount referred to as Federal Pandemic Unemployment Compensation in the amount of \$600 per week.
 - Receive normal amounts of unemployment plus an extra \$600 a week.
 - The Program removes any waiting periods established by state unemployment laws.
- WI Unemployment Insurance still working to coordinate its system with new law.

Emergency Declaration Order

- Wis. Stat. 323.11
 - Declaration by local government. The governing body of any local unit of government may declare, by ordinance or resolution, an emergency existing within the local unit of government whenever conditions arise by reason of a riot or civil commotion, a disaster, or an imminent threat of a disaster, that impairs transportation, food or fuel supplies, medical care, fire, health or police protection, or other critical systems of the local unit of government. The period of the emergency shall be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist.

Emergency Declaration Contents:

- State the cause for Emergency: COVID-19.
 - Federal Emergency;
 - State Emergency;
 - Local Government Emergency.
- Declare Emergency and the response team to carry out orders of the municipality.
- List Board Rules that are suspended.
- List the specific timeline for emergency period.
- Fine for violation.

Scope and Extent of Emergency Declarations

- Executive action.
 - Because of emergency, governing body can't meet promptly.
 - subject to ratification, alteration, modification, or repeal by the governing body as soon as that body can meet,
 - but the subsequent action taken by the governing body shall not affect the prior validity of the proclamation.
- Nexus to emergency.
- All acts of such body and officers shall be as valid and binding as if performed within the territorial limits of their municipality. Wis. Stat. 323.52.

Remote Meetings.

- Ability to meet remotely.
 - The open meetings law “does not require that all meetings be held in publicly owned places but rather in places ‘reasonably accessible to members of the public.’” 69 Op. Att’y Gen. 143, 144 (1980) (quoting 47 Op. Att’y Gen. 126 (1978)). As such, DOJ’s longstanding advice is that a telephone conference call can be an acceptable method of convening a meeting of a governmental body. Id. at 146. More recently, DOJ guidance deemed video conference calls acceptable as well. Wis. Dep’t of Justice, Wisconsin Open Meetings Law Compliance Guide 11 (May 2019).
 - When an open meeting is held by teleconference or video conference, the public must have a means of monitoring the meeting.

Remote Meetings

- Specifically mentioned in SAH
 - March 16 AG advisory https://www.doj.state.wi.us/sites/default/files/news-media/3_16_20_OOG%20Advisory_COVID-19_and_Open_Meetings.pdf
 - March 20 AG Advisory https://www.doj.state.wi.us/sites/default/files/news-media/3.20.20_OOG_Final.pdf
- Central meeting place and access for the public
 - “be mindful of the possibility that it may be particularly burdensome or even infeasible for one or more individuals who would like to observe a meeting to do so remotely—for example, for people without telephone or internet access or who are deaf or hard of hearing—and appropriate accommodations should be made to facilitate reasonable access to the meeting for such individuals.”

Remote Meetings

- Further, the type of access that constitutes reasonable access in the present circumstances, in which health officials are encouraging social distancing (including avoiding large public gatherings) in order to mitigate the impact of COVID-19, may be different from the type of access required in other circumstances. Ultimately, whether a meeting is “reasonably accessible” is a factual question that must be determined on a case-by-case basis.

Mass Gatherings at Meetings

- Emergency Order #5 Prohibits Mass Gatherings of 10 or more individuals.
 - Governments are specifically exempted.
 - Allows municipalities to continue meetings in person, while practicing social distancing.
 - Must continue practicing social distancing within the building, including the 6 ft requirements.

The Election

- Election is April 7, 2020. Wisconsin Election Commission issued public health guidance for elections.
 - Nearly 60% of municipalities are experiencing a shortage of poll workers.

Public Health Guidance

- Poll Workers: It is recommended those over the age of 65 and those with underlying conditions are at more risk should not work at the poll.
- Screen workers with the following questions:
 - Have you come in contact with a person known or suspected to have COVID-19?
 - Have you had a fever in the last 24 hours?
 - Have you had a cough in the last 24 hours?
 - Have you had any difficulty breathing in the last 24 hours?
 - Have you had any unexplained body aches in the last 24 hours?
 - Have you taken any medications that would reduce a fever? (Tylenol, Ibuprofen, Acetaminophen)
 - If they answer 'Yes' to any of the six questions they should not be allowed to work on election

Public Health Guidance

- Poll Site Considerations:
 - Signage should be posted outside of building or prominently displayed on a window that reads,
 - “HEALTH ALERT! Do not enter this building if you are experiencing any of these symptoms or have been in contact with anyone with these symptoms: shortness of breath, sore throat, achiness, fever (100.4F), nasal congestion, or cough.” Voters who are unable to enter can be offered curbside voting, see protocols for safe curbside protocol.”
 - Proper handwashing and sanitation.
 - Social Distancing.

Practical Advice for Polling Center

- Practice Social Distancing.
 - Shields for workers;
 - Tape measuring 6 feet between individuals;
 - Control voting lines.
- Cleaning:
 - Multiple use of pens;
 - Disinfectant for workers handling IDs;
 - gloves for workers;
 - Enforce proper handwashing/ sanitizer;
 - Clean equipment after each voter.
 - <https://elections.wi.gov/node/6787>

Curbside Voting – Option

- The Commission's Election Day Manual provides recommended procedures for conducting curbside voting which are consistent with Wis. Stat. § 6.82(1). A voter who, as a result of a disability, is unable to enter the polling place may elect to receive a ballot at the entrance of the polling place.
 - Election inspectors confirm with the voter that they are unable to enter the polling location and then accommodate the voter by observing the photo ID, having the voter complete a voter registration form and showing proof of residence (if necessary), and vote the ballot while still in the vehicle.

Curbside Voting

- Voter is exempt from signing the pollbook.
- Curbside voting cannot be the only voting option.
- Extra safety considerations for poll workers.
- Drive-through voting is an option, but consider:
 - Publicize changes;
 - Confirm name and address;
 - Photo ID requirements;
 - Election Day Registration;
 - Pollbook;
 - Confidentiality.

Practical Election Issues

- What happens if municipality lacks enough poll workers?
 - Who is eligible to work as a poll worker?
 - literate qualified elector with strong clerical skills, the ability to communicate and solve problems
 - NOT a candidate
 - Public employees?
 - Volunteer or community minded organizations?
- How do we keep our employees safe?
 - <https://www.osha.gov/Publications/OSHA3990.pdf>

Questions/Comments?

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