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COVID-19 Outbreak: Information on Compensation and Benefits for WANADA Dealers

March 31, 2020

This informational summary discusses how temporary layoffs or furloughs by dealers due to a reduction of business during the ongoing COVID-19 outbreak could affect employee compensation and benefits.

This summary is being provided for informational purposes only and does not constitute legal advice. Furthermore, the information described below may not apply to individual circumstances – consult your legal advisor for specific guidance.

Please note that the laws discussed below are current as of March 31, 2020, and are subject to change based on state and federal laws that are changing constantly due to the ongoing COVID-19 outbreak.

This informational summary discusses:

1. **Unemployment insurance**
2. **Continuing to pay healthcare premiums**
3. **FSAs**
4. **COBRA**
5. **Health coverage for employees who were on PTO prior to temporary layoff or furlough**
6. **Health coverage for employees who were on FMLA prior to temporary layoff or furlough**
7. **FMLA: The Families First Coronavirus Response Act ("FFRCA") (Emergency FMLA Leave)**
8. **FMLA: Interaction between Regular FMLA and Emergency FMLA Leave**
9. **Emergency sick leave under the Coronavirus Act**
10. **Private or employer-provided disability insurance**
11. **State-Mandated and/or Private Sick Leave**
12. **Wage and Hour Requirements for Furloughed Employees**

1. **Unemployment insurance**
   - ***Q: Is unemployment the first resource for a healthy employee with no childcare needs due to the COVID-19 outbreak or FMLA eligibility who goes on temporary layoff or furlough?***
   - ***A:*** Most likely yes. Based on regulations as of March 30, 2020, if an employee goes on temporary layoff or furlough, the employee should immediately confirm whether he/she is eligible for unemployment insurance in his state (here, MD or VA) because both MD and VA have expanded the eligibility requirements and/or availability of unemployment insurance to cover workers on temporary layoff or furlough due to the COVID-19 outbreak.

   - **MD unemployment insurance:**
     - **An employee who works in MD who is on temporary layoff or furlough should be eligible to receive unemployment insurance if he:**
       - (i) Earned at least $1,176 in wages in one quarter prior to becoming unemployment, with the total amount earned for the base period (the earliest four of the five complete calendar quarters before filing a benefits claim) equaling at least 1.5 times the earnings of the highest paid quarter (at least $1,764);

- (ii) Is willing and able and available to work; and
- (iii) Is actively looking for work. Effective March 20, 2020, MD has ordered a temporary exemption from the work search requirement for 10 weeks, beginning the week ending on March 21, 2020.
    - However, MD unemployment claimants who are selected to participate in a federally required reemployment workshop during this 10-week period will be required to complete a one-on-one telephone session with a reemployment facilitator, but claimants will not be required to complete the activities in their Individual Reemployment Plan (IRP) until the 10-week period ends.

- **A MD employee whose hours are reduced from full time to part time due to the COVID-19 outbreak may be eligible for partial benefits from unemployment insurance and should apply for unemployment to confirm.**
- Additional details:
    - The maximum weekly benefit amount is $430, including any dependents' allowance
        - Dependents' allowance is $8 per dependent, for up to 5 dependent children, up to 26 weeks during any one year period
            - A dependent is a son, daughter, stepson, stepdaughter or legally adopted child (not grandchild or foster child)
            - Only one parent may claim a dependent during any one-year period
    - The CARES Act will provide for an extra $600 per week until 7/31/20 (Payments begin 4/5/20)
    - Benefit duration is generally maximum 26 weeks, if employees remain totally unemployed and otherwise eligible
    - See https://www.dllr.state.md.us/employment/uicovidfaqs.shtml for general FAQs
    - Check https://www.dllr.state.md.us/employment/uicovidfaqs.shtml https://www.dllr.state.md.us/employment/uicovidfaqs.shtmlfor COVID-19 specific FAQs; site is updated frequently
    - Apply for MD unemployment insurance at https://secure-2.dllr.state.md.us/NetClaims/Welcome.aspx

- ***Q: Am I eligible for benefits during a temporary layoff or furlough from my job?***
  A: Yes, providing other requirements are met. Effective March 20, 2020, MD has ordered a temporary exemption from the work search requirement for 10 weeks, beginning the week ending on March 21, 2020. However, MD unemployment claimants who are selected to participate in a federally required reemployment workshop during this 10-week period will be required to complete a one-on-one telephone session with a reemployment facilitator, but claimants will not be required to complete the activities in their Individual Reemployment Plan (IRP) until the 10-week period ends.

- ***Q: What if I work part-time?***
  A: If you earn less than your weekly benefit amount plus any dependents' allowance, you may be eligible for partial benefits.

- ***Q: Does receiving workers' compensation affect my benefits?***
  A: Yes—you cannot receive unemployment insurance if you are receiving workers' compensation, because in addition to fulfilling other requirements for unemployment insurance, you must be able to work.

- ***Q: Can I collect unemployment insurance while on Paid Family Leave?***
  A: This answer varies, depending on the circumstances of each case.

- ***Q: If I receive dismissal or severance pay, will it affect my benefits?***
  A: The MD Division of Unemployment may issue a determination based on information provided by you and your employer concerning the effect of severance pay on your weekly benefit amount.

- ***Q: How much can I earn and still receive benefits?***
  A: You must report any gross wages during the week they are earned. If the gross wages you earn are less than your weekly benefit amount plus any dependents' allowance, you may receive unemployment benefits.

- ***Q: May I use wages earned in other states to establish a claim?***
  A: Yes. Your combined wage claim may be filed in any state in which you have employment and wages in the base period of the state and you qualify based on combining your wages. **These claims cannot be filed using the Maryland Unemployment Insurance Internet Website—**call Maryland Claim Center (Claim Center Telephone Numbers) or contact the states in which you worked via State's Unemployment Insurance Contact Information.

- **VA unemployment insurance**
  - **An employee who works in VA who is on temporary layoff or furlough should be eligible to receive unemployment insurance if he:**
    - (i) Earned at least $2700 in two quarters of the base period (the earliest four of the five complete calendar quarters before filing a benefits claim) (*see below if that is not the case); and
    - (ii) Is able and available to work
    - *If employees have not earned enough in two quarters of the base period, they may qualify under the alternate base period consisting of the last four completed quarters; the alternate is used only if they cannot qualify with the standard base period
  - As of March 15, 2020, the one-week waiting period and weekly job search requirement for receiving unemployment insurance have been suspended for the time being in light of the COVID-19 outbreak
  - **A VA employee whose hours are reduced from full time to part time due to the COVID-19 outbreak may be eligible for partial benefits if his earnings are less than his weekly benefit amount (current maximum weekly benefit amount is $378).**
    - VA considers a partially unemployed person one who, during a calendar week, was employed by a regular employer and had earnings that were less than his or her weekly benefit amount, and who worked less than his normal customary full-time hours because of lack of work. Claimants

can file for unemployment insurance due to a reduction in hours, if gross earnings are less than the weekly benefit amount. The maximum weekly benefit amount in Virginia is $378.
- If an employee is a partial claimant, he/she is required to work all hours offered by the employer
- The employer will be sent a notice that the employee filed a claim for partial benefits and **must** provide the employee a Statement of Partial Unemployment during any week in which the employee earns less than his weekly benefit amount

- Additional details
  - The maximum weekly benefit amount is $378
    - The CARES Act provides for an extra $600 per week until 7/31/20 (Payments begin 4/5/20)
  - Benefit duration ranges from 12 to 26 weeks, depending on wages earned in the base period
    - However, if VA experiences an increase in unemployment compensation claims of at least 10 percent year over year, VA could provide up to an additional 26 weeks (i.e., up to a total 52 weeks of unemployment benefits total) through federal FFRCA funding
  - See http://www.vec.virginia.gov/unemployed
  - For FAQs http://www.vec.virginia.gov/faqs/general-unemployment-insurance-questions
  - Apply at http://www.vec.virginia.gov/unemployed/online-services/apply-for-unemployment-benefits

- ***Q: Am I eligible for benefits during a temporary layoff or furlough from my job?***
  A: Yes, providing other requirements are met. VA has suspended the requirement for weekly job search at this time.

- ***Q: What if I work part-time?***
  A: If you earn more than your weekly benefit amount, you are considered employed for unemployment insurance purposes.

- ***Q: Does receiving workers' compensation affect my benefits?***
  A: Benefits may be reduced by the weekly amount of any workers' compensation or similar periodic payment that you receive from your most recent employer of 30 days or 240 hours or more, or from any employer in the base period of your claim.

- ***Q: Can I collect unemployment insurance while on Paid Family Leave?***
  A: This answer varies, depending on the circumstances of each case.

- ***Q: If I receive dismissal or severance pay, will it affect my benefits?***
  A: The deputy or hearing officer may issue a determination based on information provided by you and your employer concerning the effect of severance pay on your weekly benefit amount.

- ***Q: How much can I earn and still receive benefits?***
  A: You must report any gross wages during the week they are earned. If the gross wages you earn are less than your weekly benefit amount, you may receive unemployment benefits. However, the amount of gross wages that are more than $50.00 will be deducted from your weekly benefit amount. If your gross weekly wages are equal to or more than your weekly benefit amount, you will not be paid benefits for that week.

- ***Q: May I use wages earned in other states to establish a claim?***
  A: Yes. Wages earned in other states can be used to establish a claim in one of two ways:
  - You file a claim against the other state if you have earned enough wages in that state to qualify for benefits. This is called an Interstate Claim; or
  - You request that the wages earned in other states be transferred to VA and "combined" with your VA wages to qualify for benefits. Be sure to tell the Workforce Services Specialist if you worked in another state. Only those out-of-state wages that have not been used on a prior claim will transfer to VA. Wages earned overseas also may be used if you worked for a U.S. company. The state where the company is headquartered is the state to which wages are reported.

2. <u>Continuing to pay healthcare premiums</u>

- If employees are temporarily laid off or furloughed (on unpaid, temporary leaves of absence, where there has been a communication that the leave is temporary and not a permanent termination of employment):
  - **An employer can charge employees the cost of employee premiums during the temporary layoff or furlough,** by allowing the employee to prepay, billing the employees directly for employee premiums (pay as you go), or covering the premiums and recouping the amount paid when the employee returns from the temporary layoff or furlough. The FMLA generally requires that the options provided for FMLA leave be at least as favorable as the options under non-FMLA leave so coordination with FMLA leave, will be important. (See more below.) Furthermore, appropriate documentation and administrative procedures will need to be established.

3. <u>FSAs</u>

- **Employers may allow an employee to fund health flexible savings accounts ("FSAs") during the temporary layoff or furlough.**
  - Funding approaches should be the same as those described for employee premiums under FMLA leave, including consideration of cafeteria plan and nondiscrimination requirements
  - Please note legislative and regulatory proposals are being put forward to expand flexibility of health FSAs during this national emergency
- ***Q: Can a Health FSA Reimburse Expenses After Coverage Terminates?***
  A: There are three type of expenses that may be reimbursed by a health FSA after an employee's coverage terminates:
  - (i) Claims for expenses incurred before the employee's coverage terminates that are presented prior to the end of the plan *"run-out period"* (see below);
  - (ii) If the participant elects COBRA, claims for expenses incurred during the COBRA period and presented before the end of the run out period for such claims may be reimbursed under the health FSA; and

- (iii) Claims incurred during a *grace period* (see below) under the plan, if the employee is entitled to submit such expenses
- The "*runout period"* is the period of time that a health FSA may provide after the end of the plan year in which claims may be submitted. It simply provides additional time to submit already-incurred claims and does not allow for the reimbursement of claims incurred after coverage terminates.
- The *"grace period"* is the period of time that a cafeteria plan may provide plan participants to access unused amounts remaining at the end of a plan year to pay or reimburse health FSA expenses incurred during the grace period. The grace period should be no longer than 2 ½ months (two months and 15 days) after the end of the plan year. Under the grace period, an employee whose health FSA coverage has terminated may be entitled to reimbursement incurred during the grace period if he/she or she was a participant in the health FSA on the last day of the plan year to which the grace period relates, or has COBRA coverage on that date.

- ***Q: What would happen to healthcare claims incurred prior to termination of coverage?***
  - *A:* Health FSA: For example, the employer maintains a cafeteria plan with a calendar year plan year. The cafeteria plan provides that participation terminates if an employee is no longer an employee of the employer, unless the former employee elects to continue participation in the health FSA under COBRA. Employee X elects to reduce his salary by $1,200 to participate in the health FSA plan for the 2019 plan year. As of June 30, 2019, Employee X has contributed $600 toward his health FSA but has not incurred any medical expenses. Employee X terminated employment on June 30, 2019 and does not elect to continue participation under COBRA. On July 15, X incurred a medical expense of $500. The $500 medical expenses should not be reimbursed by the health FSA because at the time the medical expenses is incurred, X is not a participant in the cafeteria plan
  - A: COBRA: In general, claims incurred after termination of coverage may be reimbursed only if the COBRA election is applicable and properly made. For example, same facts as above, except X is terminated on July 1st and elects COBRA. By electing COBRA and paying the COBRA monthly premium, X may be reimbursed up to $1,200 for expenses incurred through the end of the plan year (or any grace period allowed under the plan if X is receiving COBRA coverage on December 31). In such an instance, X may be reimbursed for expenses incurred prior to and after termination of employment as long as medical care was provided during the plan year (or any applicable grace period). However, if X does not elect COBRA, X will lose the entire $600 under the use it or lose it rule.
  - Grace period: As stated above, cafeteria plans may allow participants to access FSA funds.

4. COBRA

- **An employee would be eligible for federal COBRA election if the temporary layoff or furlough results in both a reduction in hours and a loss of healthcare coverage,** which is a COBRA qualifying event subject to federal COBRA.
  - Employers should be subject to federal COBRA if they have 20 or more employees
  - MD and VA also have mini-COBRA rules that should apply to employers with less than 20 employees

- **If the group health plan permits laid off or furloughed employees to continue participation in the group health plan for a period of time (as discussed below), there should be no COBRA qualifying event because the loss of coverage has not yet occurred.**
  - If, after a period of time during the leave or furlough, active coverage is no longer extended to the laid off or furloughed worker, the COBRA qualifying event should occur at that future point in time if the loss of coverage still results from the reduction in hours

- ***Q: Will the federal government revive the COBRA subsidies available following the 2008 financial crisis or offer a special enrollment period in the federal healthcare exchange?***
  A: Maybe. It is unclear at this time whether the federal government will be offering COBRA subsidies to terminated employees similar to those that it provided under the American Recovery and Reinvestment Act of 2009 ("ARRA") following the aftermath of the 2008 financial crisis. ARRA was passed before the enactment of the ACA. It is possible that the federal government will offer greater relief, such as premium assistance and additional enrollment rights, in the Exchange. Several states (including MD) have reopened their marketplaces, or extended the availability thereof for several more months, in light of COVID-19. There have been reports that the Trump Administration is considering providing for a special enrollment period on the federal exchange in light of COVID-19, but no official decision or announcement has been made by the Trump Administration.

- **There are special rules regarding COBRA and FMLA**
  - Leave taken under FMLA does not constitute a qualifying event under COBRA rules—a qualifying event under COBRA occurs when:
    - An employee is covered under the group health plan on the day before the first day of the FMLA leave (or becomes covered during the FMLA leave period);
    - The employee fails to return to employment at the end of the FMLA leave period; and
    - The employee would, in the absence of COBRA coverage, lose coverage under the group health plan
  - Thus, generally, the COBRA qualifying event should begin on the last day of FMLA leave

- **There may or may not be eligibility for COBRA due to a reduction of hours event.**
  - A reduction of hours may occur when an employee goes from full-time to part-time or the employee is temporarily laid off or furloughed
  - The IRS COBRA regulations provide that a reduction of hours may occur when there is a decrease in the hours that a covered employee is required to work or actually works, but the decrease is not followed by an immediate termination of employment
  - If group health plan eligibility depends on the number of hours worked in a given period, failure by an employee to work the required hours is a reduction of hours event. The reduction in hours should cause a loss in coverage in order for a COBRA qualifying event to occur

  Example: Employee X is a participant in the XYZ group health plan. To be eligible for participation in any given month, employees must work at least 30 hours per week in that month. During the winter, the company closes for three months and employees are placed

on temporary unpaid leaves of absence. X is furloughed in November and works less than 120 hours per week and thus loses coverage under the group health plan. The furlough continues for December and January and so is not covered under the plan for those months.

- Once X begins working again in February and has worked sufficient hours, coverage is reinstated. COBRA should be offered as a result of the November reduction of hours which results in loss of coverage.
- However, if an employer uses a *look-back measurement method* to determine eligibility and an employee changes from full-time to part-time status due to a reduction in hours, a COBRA qualifying event may or may not occur depending on whether the employee continues to be eligible under the terms of the group health plan
    - Employers subject to the employer shared responsibility penalties that limit eligibility to full-time employees may choose to (i) define full-time employees traditionally, based on a minimum number of hours worked per week or month, or (ii) design their plan to define full-time as determined under the look-back measurement method
    - If an employer uses the look-back measurement method to determine full-time status, this may affect COBRA administration since the individual who experiences a reduction in hours may still be considered full-time during the duration of his or her stability period and will not experience the COBRA qualifying event until the end of the stability period

5. **<u>Health coverage for employees who were on PTO prior to temporary layoff or furlough</u>**
    - Employees who are laid off or furloughed while on PTO (paid-time off) will be subject to the employer policies and procedures applicable to health coverage
        - Typically, employees will be entitled to coverage during the period they are on paid time off

6. **<u>Health coverage for employees who were on FMLA prior to temporary layoff or furlough</u>**
    - If employees are on FMLA leave or paid-time off during a temporary layoff or furlough, they are entitled to unpaid regular FMLA health coverage continuation requirement
    - Generally, employees on FMLA leave are entitled to group health plan benefits on the same terms and conditions as if the employee had continued to work

7. **<u>FMLA: Emergency FMLA under the Families First Coronavirus Response Act (the "FFCRA")</u>**
    - The FFCRA takes effect April 1, 2020 through December 31, 2020, and provides paid emergency FMLA leave ("Emergency FMLA Leave") to eligible employees.
    - **Private employers with less than 500 employees are subject to Emergency FMLA Leave**
        - According to FAQs issued by the Department of Labor ("DOL") on March 24, 2020, you should include full-time employees; part-time employees; employees on leave; temporary employees who are jointly employed by you and another employer; and day laborers supplied by a temporary agency. Workers who are independent contractors under the Fair Labor Standards Act ("FLSA"), rather than employees, are not considered employees for purposes of the 500-employee threshold.
        - Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold.

        - According to the same FAQs, the DOL has adopted the concepts from existing FMLA regulations, which say that, in general, two or more entities are separate employers unless they meet the integrated employer test.
            - The factors analyzed under the test include (1) whether there is common management, (2) interrelation between operations, (3) centralized control of labor relations and (4) the degree of common ownership/financial control. While no single factor is decisive, centralized control of labor relations, which looks at whether entities share hiring, firing and training policies, is often critical to determination
            - This determination may be subject to potential litigation, particularly if an employer uses the integrated employer test to avoid application of the FFCRA
    - The FFCRA exempts employers with fewer than 25 employees from providing job protection under the Emergency FMLA Leave, provided that certain conditions are met, such as the elimination of the employee's position while on leave due to "economic conditions" or the making of changes due to the COVID-19 outbreak that affect the employer's operations
    - The Secretary of Labor can also exempt employers with fewer than 50 employees from the emergency FMLA leave requirement, "when the imposition of such requirements would jeopardize the viability of the business as a going concern." If your business falls into this category, you should document why your business meets this criteria.
    - **Covered employers must post a notice on the FFCRA by April 1.** The DOL has released a model notice on FFCRA, along with Frequently Asked Questions regarding the notice requirements. The notice is attached and you can access the FAQs at the following link: https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions.
    - ***Q: Is FFCRA Emergency FMLA Leave available to only employees with children they need to care for because of the COVID-19 outbreak?***
    - ***A: Yes.*** Emergency FMLA Leave is available to employees who need to take a leave of work to care for a minor child because (i) the child's school or care center has closed; or (ii) the child's caregiver is unavailable due to the COVID-19 outbreak

    - **Eligibility for Emergency FMLA Leave**
        - Employee has been employed by the employer for at least 30 days (before the first day of leave); and
        - Is unable to work or telework due to a need to care for a minor child because (i) the child's school or care center has closed; or (ii) the child's caregiver is unavailable due to the COVID-19 outbreak

    - **Provisions of Emergency FMLA Leave**
        - 12 weeks of job-protected leave
        - The first 10 days of Emergency FMLA Leave may be unpaid leave
        - Subsequent days of leave are paid leave
            - Based on the regular number of hours worked
            - No less than 2/3 the employee's regular rate of pay
            - Up to a maximum of $200/day and $10,000 total

    - **Payroll tax relief for employers**
        - **The FFCRA provides employers with payroll tax relief for employers whose employees take Emergency FMLA Leave**

- Under Internal Revenue Service ("IRS") guidance that is coming out, eligible employers will be able to retain an amount of payroll taxes (withheld federal income taxes, employee and employer share of Social Security and Medicare taxes) from paid Emergency FMLA Leave, rather than depositing them with the IRS and filing quarterly payroll tax returns (Form 941 series) for such taxes
- If there are not sufficient payroll taxes to cover the cost of qualified Emergency FMLA Leave, eligible employers will be able to file a request for accelerated payment from the IRS, which the IRS expects to process within two weeks or less following receipt of request
- Under the FFCRA, employer payroll tax relief is not available for any employers who are already receiving payroll tax credit for paid family leave under the Tax Cuts and Jobs Act of 2017

8. <u>Interaction between Regular FMLA and Emergency FMLA</u>

- ***Q: Is the Emergency FMLA leave in addition to regular FMLA leave, or is an employee entitled to 12 weeks total of combined regular and Emergency FMLA leave?***
- ***A****:* As drafted, the FFCRA appears to indicate that employees are entitled to a total of 12 weeks of combined regular FMLA leave and Emergency FMLA leave. The FFCRA, however, is silent on this issue, and the DOL may address the issue further in regulations that are expected to be issued in April 2020
    - However, as the above discussion of the Take Responsibility for Workers and Families Act suggests, there may be reiterated guidance that an employee who takes paid Emergency FMLA Leave can, if otherwise eligible, take an additional 12 weeks of unpaid regular FMLA leave
- Unpaid regular FMLA leave:
    - Applies to private-sector employers with 50 or more employees (either full time or part time) in 20 or more workweeks in the current or preceding calendar year within a 75-mile radius of the employees workplace;
    - Available to employees who:
        - Have worked for the employer for at least a year; and
        - Have worked at least 1,250 hours during the previous year
    - Provides employees with up to 12 weeks of unpaid job-protected leave for:
        - Birth
        - Adoption/foster placement
        - Own serious health condition
        - Care of spouse, child or parent with serious health condition

9. <u>Paid Emergency Sick Leave under the FFCRA</u>

- Applies to employers with fewer than 500 employees (the same definition and caveats apply as for Emergency FMLA Leave)
- Available to employees who are
    - (1) Subject to a federal, state or local quarantine or isolation order related to COVID-19;
    - (2) Advised by a healthcare provider to self-quarantine;
    - (3) Experiencing COVID-19 symptoms and seeking medical diagnosis;
    - (4) Caring for an individual (i) subject to federal, state or local quarantine or isolation order related to COVID-19 or (ii) advised to self quarantine;

        - (5) Caring for a minor child due to the school closure or unavailable child care provider for reasons related to COVID-19; or
        - (6) Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and Secretary of Labor
    - Amount of leave provided:
        - Up to 80 hours of paid sick leave to full-time employees
        - A prorated amount of paid sick leave to part-time employees:
            - Equal to number of hours worked on average over a two-week period
            - If a part-time employee's hours vary, the employer may compute the number of hours paid by (i) the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which the leave begins, including hours for any type of leave; or (ii) if the employee worked less than six months, the expected number of hours to be scheduled per day at the time of hire
    - Rate of pay
        - Rate of pay is based on the employee's regular rate of pay or the federal, state, or local minimum wage, whichever is greater
        - Payment is capped
            - At the employee's regular rate (up to $511 per day); or
            - At 2/3 the employee's regular rate (up to $200 per day) if sick leave due to reasons (4), (5), (6) above
    - Payroll tax relief for employers
        - As with Emergency FMLA Leave discussed above, the FFCRA provides employers with payroll tax relief for employees take emergency sick leave
        - Under IRS guidance that is coming out this week, eligible employers will be able to retain an amount of payroll taxes (withheld federal income taxes, employee and employer share of Social Security and Medicare taxes) from paid sick leave, rather than depositing them with the IRS and filing quarterly payroll tax returns (Form 941 series) for such taxes
        - If there are not sufficient payroll taxes to cover the cost of qualified paid sick leave, eligible employers will be able to file a request for accelerated payment from the IRS, which the IRS expects to process within two weeks or less following receipt of request
        - Under the Coronavirus Act, employer payroll tax relief is not available for any employers who are already receiving payroll tax credit for paid family leave under the Tax Cuts and Jobs Act of 2017
    - Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements
        - A model notice has been posted on the DOL Wage and Hour Division website
        - Employers can satisfy the posting requirement by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website (e.g., intranet)
        - The notice does not need to be posted in multiple languages, but the DOL is working to translate it into other languages
    - *As with Emergency FMLA Leave, law is subject to change, subject to new legislation*

10. Private or Employer-Provided Disability Insurance

- If an employee have private or employer-provided disability insurance, and are unable to work because of medical quarantine or illness due to COVID-19 as certified by a medical professional, disability insurance would reimburse covered wages, medical care and other expenses incurred while unable to work
    - Disability policies may follow FMLA criteria for coverage

11. State-Mandated and/or Private Sick Leave

- The FFCRA does not interfere with state-mandated sick leave requirements (such as those under the MD Healthy Working Families Act or the Montgomery County Earned Sick and Safe Law) or an employer's private paid sick leave policy

- ***Q: Can an employer change its paid sick leave policy if a large number of employees are out sick and it cannot afford to pay them all?***
  A: Federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if done in a manner that does not discriminate between employees based on a protected category; state and local sick leave laws should be reviewed before any changes are made
  Employers with a workforce represented by a labor union should consider if the collective bargaining agreement covers sick leave policies, and if so, employers may be limited in the manner in which they can change the policy. In workplaces without a collective bargaining agreement, employees may have a contractual right to any accrued sick leave, but not future leave.

12. Wage and Hour Requirements for Furloughed Employees

- ***Q: Do employees have to be paid if they are furloughed or if their hours are reduced due to lack of work?***

  A: With respect to non-exempt employees, the FLSA generally does not require employers who are unable to provide work to non-exempt employees to pay them for hours the employees would otherwise have worked. In other words, employers need not guarantee the normal work schedule for hourly, non-exempt employees, and only have to pay them for hours actually worked.

  Exempt employees must be paid their full salary for any workweek in which they work more than a *de minimis* portion of the workweek. In other words, if exempt, salaried employees work part of the workweek, they must be paid for the entire week. If they do not work at all during the week, they do not have to be paid their salary for that workweek.

- ***Q: May an employer direct salaried, exempt employees to take vacation (or debit a leave bank account) or take leave without pay during a business closure due to the COVID-19 outbreak or other public health emergency, without impacting employees' exempt status?***

  A: Yes, with a caveat. Exempt, salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. They need not be paid their salary in any week in which they perform no work.

As the FLSA does not require employer-provided vacation time, an employer may direct exempt staff to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive payment in an amount equal to their guaranteed salary. An exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, still must receive the employee's guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt.

- ***Q: Can an employer reduce employees' pay or schedules in an effort to cut costs in the wake of COVID-19?***

  A: Yes. Employers may reduce hourly rates and hours worked for non-exempt employees, and may reduce salary levels for exempt employees. These reductions must be prospective and comply with state-specific notice requirements. In MD, an employer must give an employee notice of any change in payday or wage at least one payday in advance. VA does not have a notice requirement.

  For non-exempt employees, hourly rates should not dip below applicable federal (or state, if higher) required minimums. The number of hours worked per week can also be reduced.

  For exempt employees, salary rates should not dip below applicable federal (or state, if higher) required minimums. Employers can also consider reducing the workweek with a commensurate reduction in salary rate -- e.g., reducing the workweek from 5 workdays to 4 workdays, with a commensurate reduction in salary rate). Such reductions must be prospective and comply with DOL guidance; legal counsel should be consulted.

  As an alternative cost saving measure, employers may consider requiring employees to take one day of vacation / PTO on specific days (e.g., days the office is closed due to COVID-19 quarantine).

- ***Q: Can an employer furlough its employees, or require employees to take an unpaid sabbatical due to COVID-19?***

  A: Yes. Employers may furlough their employees. Employers may opt to provide employees with a stipend during the furlough period (such as 50% of the employee's salary). Note that the stipend likely will impact the amount of unemployment benefits to which furloughed employees may be entitled.

  Another option is to implement an unpaid sabbatical policy, or if one already exists, to encourage to utilize the policy to take a sabbatical. Employers must strictly prohibit all work during an unpaid leave of absence, as all work is compensable.

- ***Q: Does the Worker Adjustment and Retraining Notification ("WARN") Act apply to furloughs?***

  A: It depends. The federal WARN Act, which generally requires covered employers (those with 100 or more full-time employees) to provide 60 days' advance written notice of an employment loss in certain situations, may be implicated for furloughs lasting six months or more. Employers should consult with counsel.

- ***Q: Can an employer reduce its workforce due to the COVID-19 outbreak?***

  A: Yes. If contemplating a RIF, employers must ensure fair and equal treatment with regard to employees in protected classes (age, race, sex, etc.). A RIF must also comply with requirements set forth in the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA") in order to obtain a knowing and voluntary enforceable release of federal age discrimination claims. Of course, employers must also ensure compliance with state and local laws when seeking an employee to release his or her potential claims. Employers must also consider the applicability of the WARN Act (see above).

This is not legal advice. Consult your attorney for advice that reflects your specific circumstances.