

## Termination Issues Arising Out of COVID-19 Pandemic

As a result of emergency shut down orders implemented by federal, state and local governments in response to the COVID-19 pandemic, many restaurants have been forced to reduce hours and, in some cases, let employees go. There are several considerations restaurateurs should undergo before proceeding with such terminations.

First, if an employee is unable to work due to COVID-19 related reasons, employers should consider whether the employee may be entitled to a statutory leave of absence before proceeding with a termination. The federal government recently passed the Families First Coronavirus Response Act (“FFCRA”), effective April 1, 2020, in an effort to provide such statutorily protected leaves. The FFCRA provides up to two weeks of paid sick leave for any workers who are unable to work for one of the following reasons:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who is subject to a quarantine or isolation order related to COVID-19;
- The employee is caring for a son or daughter because the child care provider or school is unavailable due to COVID-19 precautions; or
- The employee is experiencing any other substantially similar condition.

The FFCRA paid sick leave entitles employees to their full regular pay, subject to a cap of \$511 per day or \$5,110 in total if the employee is taking leave due to their own condition. If the employee is taking leave to care for others, the employee is entitled to 2/3rds their regular rate of pay subject to a cap of \$200 per day or \$2,000 total. Full-time employees are entitled to take 80 hours of paid sick time, whereas part-time employees are entitled to paid sick time equaling the average number of hours they work over a two-week period. For employees whose schedules vary week to week, employers should look back over a 6-month period to determine how many hours per week the employee works on average. This paid sick leave is in addition to the state law paid sick leave that employees may have available to them.

In addition to the paid sick leave, the FFCRA also entitles employees to take up to 12 weeks of Emergency Family and Medical Leave (“E-FMLA”) if the employee must miss work to due to a need to care for the employee’s minor son or daughter if the child’s school or place of care has been closed or the child care provider of the employee’s child is unavailable due to the COVID-19 pandemic. The first two weeks of this E-FMLA is unpaid, but the employee may elect to utilize the paid sick leave described above or any other vacation or paid sick leave available. After the first two weeks, the remaining 10 weeks of E-FMLA is paid at 2/3rds the employee’s regular rate of pay, subject to a cap of \$200 per day

and \$10,000 in the aggregate. Employees are only eligible for E-FMLA if they have worked for the employer for at least 30 days.

The FFCRA only applies to businesses with less than 500 employees. However, on April 16, 2020, Governor Newsome issued an Executive Order that effectively applied the FFCRA paid sick leave requirements to employers in the food supply sector who work for employers with more than 500 employees. As a result, virtually all restaurant employees will now be entitled to the two weeks of paid sick leave. Employers must pay for both the E-PSL and E-FMLA benefits described above, but will be entitled to a dollar for dollar tax credit for any paid leave doled out to employees under these acts. Employers should review the IRS website for further guidance on receiving such tax credits.

Second, with regard to layoffs otherwise covered by the WARN and Cal-WARN Acts discussed above, employers will not have to provide the 60 days advance notice before proceeding with such layoffs. The federal WARN Act has an express exception when the closure or mass layoff results from “unforeseeable business circumstances” outside of the employer’s control. A global health pandemic, such as COVID-19, presents such an unforeseeable circumstance. While the Cal-WARN Act does not contain an “unforeseeable business circumstances” exception, California has temporarily created one. On March 17, 2020, Governor Newsom issued an Executive Order temporarily suspending the 60-day advance notice requirement. Instead, employers conducting closures or mass layoffs will only need to provide as much advance notice as is practicable. Employers must still comply with the remaining requirements of Cal-WARN, including the need to provide written notice of the layoff and reasons for it to both impacted employees and the applicable government officials and agencies. Finally, the Executive Order only covers closures and mass layoffs that result from the COVID-19 pandemic.

Next, to the extent a business is not laying off its entire workforce, the business should have legitimate business reasons for selecting which employees are laid off versus which ones are allowed to remain working. Examples of legitimate business reasons would include seniority, merit, and necessity of the job position. Employers should avoid using an employee’s membership in a protected class, such as age, race, or disability status when making such layoff decisions.

### Still have questions?

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