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MEMORANDUM

TO: Business Clients
RE: Employee Staffing Considerations During COVID-19 Pandemic
DATE: August 27, 2020

This memorandum is designed to provide general advice to employers responding to the global COVID-19 Pandemic. While the situation is dynamic, there are important considerations that remain constant and can help guide the staffing and payroll decisions employers must make. Each situation is unique; therefore, we ask that you contact our office to discuss your individual concerns.

REDUCING PAYROLL COSTS THROUGH FURLOUGHS

Furloughs are an appropriate and effective tool to immediately reduce payroll costs while allowing employees to pursue unemployment benefits from the State.

A. What is a Furlough?

A furlough is a voluntary or involuntary short-term program where employees are forced to take unpaid leave to reduce payroll costs but remain employed and maintain benefit eligibility.

B. How does a Furlough work?

For nonexempt employees: Nonexempt employees can be furloughed for hours, days or weeks without violating wage and hours laws. For example, a furlough program could mandate one day off per week for six weeks for nonexempt hourly employees. Weekly pay and overtime (if earned) would continue to be calculated based on actual work performed during those furlough weeks.

For exempt employees: There are special considerations for furloughing exempt employees. The same rules apply as with a reduced workweek (*i.e.* an exempt employee must be furloughed for an entire work week with no work responsibilities) before an employer can legally withhold such person's salary. Weeklong furloughs (or furloughs consisting of multiple weeks) do not jeopardize the exempt status of the employee if they span the employer's entire work week (and do not start middle of the week).

C. What about the Employee's Contract?

Employers should first review all existing written agreements or employment contracts, if any, to determine if employees are guaranteed a certain level of pay and / or are guaranteed a certain timeframe and / or format for notice of any action that might impact their employment; these contractual provisions may legally bind the employer to providing the required notice and / or to maintain certain levels of pay unless and until the existing employment contract is renegotiated.

D. Providing Benefits for Furloughed Employees

If the intent of implementing a furlough is to preserve employee benefits, employers must take care to review the details of their qualified benefit plans and fringe benefits to determine whether the length of furlough in question will jeopardize employee eligibility.

E. State Assistance Administered by the Oklahoma Employment Security Commission (OESC)

Furloughed employees should file for unemployment assistance with the Oklahoma Employment Security Commission. A furloughed employee is eligible for assistance.

According to the Oklahoma Employment Security Commission, claimants are able to immediately file for unemployment assistance and are entitled to up to \$539 per week, notwithstanding federal assistance (see Subsection F), as calculated using one twenty-third (1/23) of the highest quarter of taxable wages in the employee's base period not to exceed the maximum weekly benefit amount allowed by Oklahoma law (\$539 per week). Taxable wages are those wages during the employee's base period that are subject to unemployment tax. The base period is the first four of the last five completed calendar quarters.

Currently, unemployment assistance claimants are not required to make work searches in order to maintain their benefits. The maximum amount of time for state unemployment assistance is twenty-six (26) weeks.

F. Federal Unemployment Assistance

Section 2104 of H.R. 748, the federal CARES Act (the "CARES Act"), provides federal unemployment benefits to state claimants through each state's employment assistance agency. In addition to the amount of state unemployment assistance available to a claimant, the CARES Act provides \$600 per week in "federal pandemic unemployment compensation."

The federal pandemic unemployment compensation of \$600 per week EXPIRED on July 31, 2020.

Pandemic Emergency Unemployment Compensation (“PEUC”) – Section 2107 of the CARES ACT:

Section 2107 provides an additional 13 weeks of unemployment compensation, **through December 31, 2020**, to all individuals who otherwise would be ineligible for such compensation because they have exhausted all rights to regular unemployment compensation under applicable state or federal law with respect to this benefit year, provided they:

- (i) have no rights to regular unemployment compensation under any applicable state or federal law,
- (ii) are not receiving unemployment compensation under Canadian law, **and**
- (iii) are able, available and actively seeking work.

The amount of unemployment compensation payable to an individual under this Section is equal to the amount of unemployment benefit the individual would otherwise be entitled to under applicable federal or state law plus the amount of Federal Pandemic Unemployment Compensation (\$600).

Section 2107 mandates that states establish Pandemic Emergency Unemployment Compensation Accounts for each eligible individual who files an application for pandemic emergency unemployment compensation. Each account must be funded by an amount equal to 13 times the individual’s average weekly benefit amount, including the amount of Federal Pandemic Unemployment Compensation.

This section also provides for a regime by which states will be fully reimbursed by the Federal Treasury for all costs associated with the Pandemic Emergency Unemployment Compensation program established by Section 2107.

G. Lost Wage Assistance (LWA) Program and the Federal Emergency Management Agency (FEMA)

The United States Congress has been unable to extend CARES Act unemployment assistance for unemployed Americans. Consequently, on August 8, 2020 President Trump issued a Memorandum directing FEMA to set aside \$44 billion from the Disaster Relief Fund in order to implement the Lost Wage Assistance (LWA) Grant Program. The LWA Program will allow states and territories to provide eligible unemployment assistance claimants four hundred dollars (\$400) per week, with a three hundred dollar (\$300) federal contribution, in addition to the individual’s underlying state unemployment benefit amount (see Subsection E above).

On August 18, 2020 FEMA Administrator Pete Gaynor announced that Oklahoma’s grant application was APPROVED. FEMA’s grant funding allows Oklahoma (OESC) to provide Oklahomans unemployed due to COVID-19 three hundred dollars (\$300) per week on top of the individual’s regular state unemployment benefit.

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LWA Program Duration:

The LWA Program will be available until the sooner of:

- FEMA expends the entire \$44 billion, set aside from the federal Disaster Relief Fund, for the LWA Program; or
- The Disaster Relief Fund reaches a balance of \$25 billion; or
- Congress enacts legislation providing Federal supplement unemployment compensation for unemployed or partially employed individuals due to COVID-19; or
- The LWA Program end date of **December 27, 2020**.

LWA Eligibility:

Oklahoma may provide supplemental lost wages payments from the week of unemployment **ending August 1, 2020**, to individuals (“claimants”) currently eligible for at least \$100 per week in unemployment insurance compensation from any of the following:

- Unemployment compensation, including regular State Unemployment Compensation, Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Service members (UCX)
- Pandemic Emergency Unemployment Compensation (PEUC)
- Pandemic Unemployment Assistance (PUA)
- Extended Benefits (EB)
- Short-Time Compensation (STC)
- Trade Readjustment Allowance (TRA)
- Payments under the Self-Employment Assistance (SEA) program

Claimants will be required to self-certify that they are unemployed or partially unemployed due to disruptions caused by the COVID-19 pandemic as part of the initial unemployment insurance claims process and or required weekly recertifications.

H. The Families First Coronavirus Response Act (FFCRA)

The federal Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020 and requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19.

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

1. is subject to 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;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or childcare provider is

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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.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

The FFCRA does not speak to the scenario in which a covered employer furloughs an employee prior to the employee requesting paid sick leave to respond to COVID-19. The Department of Labor anticipates have FFCRA regulations promulgated in April 2020 which leaves these questions unresolved.

I. Other Considerations

Employers must ensure that furloughs are applied uniformly to address the issue(s) giving rise to the need for the furlough. Furloughs are not to be conditioned on employee performance or any other factor which would merit termination. When some, but not all, employees are selected for furlough, the potential for disparate impact on a protected class (age, sex, religion, disability, etc.) must be considered.

If an essential employee needs to be pulled off furlough due to unforeseen circumstances, that is permissible. However, the employee must be paid his or her full salary for that week.

The national response to COVID-19 is dynamic, making the legal obligations employers owe their employees uncertain. Contact our office if at any time you have a question.

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SAMPLE FURLOUGH LETTER FOR CORONAVIRUS (COVID-19)

DATE

Re: Notice of Furlough

Dear [employee name],

Due to unprecedented challenges our business is facing due to Coronavirus / COVID19, we will regrettably have to place you on furlough starting on **mm/dd/yy** and ending on **mm/dd/yy**.

We reserve the right to change the dates of this furlough based on our business needs.

During this period:

- You will retain your seniority with the company.
- The Company will pay for both your portion and the company's regular contribution of your health insurance. Upon your return, you may be required to reimburse the company for the catch-up contributions. **[check your benefits provider and retirement programs to determine what you can and cannot promise / do for furloughed employees]**
- You are likely eligible for state and federal unemployment benefits during the period of your furlough. We recommend visiting the Oklahoma Employment Security Commission website to apply for benefits at <https://unemployment.state.ok.us/w2.aspx>.
- **Any payment of compensation during the period of your furlough will be subject to any requirements imposed by law, as determined once interpretive regulations or other information is received by our Company.**

It is important to us that your transition into furlough and back to work goes as smoothly as possible. Therefore, if you have any questions or concerns regarding these transitions, contact **[insert name]**.

We very much appreciate your contributions to the organization this year. We wish you all the best during this unprecedented time and are looking forward to your return to work following this furlough period.

Best regards,

[A management individual responsible for managing the layoff]