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# Hughes Hubbard & Reed

## Hughes Hubbard Multi-Jurisdictional Employment Law Resource

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### Options for Workplace Closures As a Result of COVID-19

#### Sick Leave

*United States (Federal):*

**March 26, 2020** - On March 18, 2020, the government enacted the Families First Coronavirus Response Act (FFCRA) (to be put into effect by April 2, 2020 at the latest).

The Emergency Paid Sick Leave Act (also part of the FFCRA) expands the FMLA. Under this Act, all employers with fewer than 500 employees must provide paid sick leave to all employees (full-time or part-time and regardless of length of employment) when the employee is unable to work (or telework) due to a need for leave because: (1) the employee (or someone the employee has to care for) is subject to a COVID-19-related quarantine or isolation order; (2) the employee has been advised by a healthcare provider to self-quarantine due to COVID-19 concerns, or has to care for someone so advised; (3) the employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis; (4) the employee is caring for his/her child whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions; or (5) the employee is experiencing any other "substantially similar condition," as specified by the Secretary of Health and Human Services.

Full-time, eligible employees must be provided 80 hours (2 weeks) of paid sick leave. Part-time, eligible employees must be provided the average number of hours that they work over a two-week period.

During the paid sick leave above, employees are entitled to their regular rate of pay, but with caps: \$511 per day (\$5,110 in total), except for employees who are eligible for the paid sick leave (1) to care for someone as described

above, or (2) because of “substantially similar conditions;” the cap for such employees is \$200 per day (\$2,000 in total)

The Emergency Family and Medical Leave Expansion Act (also part of the FFCRA) requires that employers with fewer than 500 employees provide at least 12 weeks of job-protected leave to employees (who have been with the employer for at least 30 days), who are unable to work (or telework) due to a need to care for his/her child whose school or place of care has been closed, or whose child care provider is unavailable because of a COVID-19 emergency. Such employees are eligible for 12 weeks of job-protected leave. The first 10 days of this leave might be unpaid leave (though the employee may elect to use, for instance, accrued vacation time). For the balance of the 12 weeks, the employee is entitled to not less than two-thirds of his/her regular rate of pay, provided that it does not exceed \$200/day (\$10,000 in total).

*New York:*

Effective March 18, 2020, under a New York law passed in response to COVID-19 (the “NY Sick Leave Act”) all employers must provide sick leave to employees, who are subject to a mandatory or precautionary quarantine or isolation order (“Order”), as follows:

- Employers with 10 or fewer employees and a net income of \$1 million or less must provide unpaid sick leave to employees subject to an Order for the duration of the duration of the Order. During the quarantine/isolation period, employees shall be eligible for expanded paid family leave and disability benefits under the Workers’ Compensation Law.
- Employers with 10 or fewer employees and a net income of more than \$1 million must provide each employee subject to an Order at least 5 days of paid sick leave. After the 5 days, such employees shall be eligible for expanded paid family leave and disability benefits under the Workers’ Compensation Law. Employers with more than 10 employees but less than 100 employees are subject to the same requirements regardless of net income.
- Employers with 100 or more employees and all public employers shall provide each employee subject to an Order at least 14 days of paid sick leave during the time that the Order is in effect.

The Act expands the definitions of “disability” and “family leave” under the Workers’ Compensation Law to include an employee’s inability to work as the result of an Order and the need for an employee to take leave because the employee is subject to an Order or has to care for a dependent child who is subject to an Order.

The Sick Leave Act also provides that if the federal government mandates sick leave or employee benefits related to COVID-19 at any point while the Act is in effect, the benefits under the Act will not be available to covered employees. However, if the sick leave and/or employee benefits under the Act are greater than those mandated by the federal government, an eligible employee will be entitled to the difference.

*Florida:*

Florida does not have mandatory paid sick leave legislation, nor has it passed any such law in response to COVID-19. The FFCRA (federal law) discussed above will apply.

## **Terminations/Layoffs**

*United States (Federal):*

Employment in the U.S. is generally at-will. The employer or the employee can terminate or lay off employees for any non-discriminatory reason absent a contrary provision in an employer policy, employment contract, collective

bargaining agreement, or statute.

An employee cannot be discharged during or for taking leave under the FFCRA.

An employee returning from the 12-week leave under the FFCRA must be restored to his/her original position or an equivalent position. However, employers with fewer than 25 employees do not have to comply with this requirement if certain conditions are met, e.g., the employee's old position no longer exists due to the economic impact of the COVID-19 pandemic on the employer and the employer makes reasonable efforts, but fails, to restore the employee to an equivalent position.

*New York:*

Generally, at-will employees can be laid off for any non-discriminatory reason, as long as an agreement or statute does not provide otherwise.

However, the NY Sick Leave Act provides job protection to an employee during the period of unpaid or paid sick leave taken pursuant to the Act. Upon returning to work, each employee must be restored to the position he or she held prior to leave. No employer can discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has taken leave pursuant to the Act.

## **Mass Lay-Offs and Plant Closures**

*United States (Federal):*

The Worker Adjustment and Retraining Notification Act (WARN ACT) requires that a covered employer provide notification of a "plant closing" or "mass layoff" to affected employees (and certain government agencies) 60 days in advance of the closing/layoff.

The Act applies to employers with either 100 or more employees (excluding part-time employees), or 100 or more full-time and part-time employees who together work at least a total 4,000 hours each week (excluding overtime).

A "plant closing" is a permanent or temporary shutdown of a single employment site (or facilities or units within that site), which results generally in at least 50 employees being laid off (excluding part-time employees).

A "mass layoff" must result generally in employment loss for at least 50 full-time employees, who must be at least 33% of the workforce, or at least 500 employees.

A qualifying "employment loss" is any (1) termination of employment other than dismissal for cause, voluntary resignation, or departure, (2) a layoff that lasts more than 6 months, or (3) a greater than 50% reduction in work hours during each month of a six-month period.

There are strict rules regarding the extended time period during which employment losses must be aggregated to determine if the WARN Act notification requirements are triggered.

The 60-day notice requirement might be reduced if the employer falls under one of three exceptions: the faltering company exception for plant closings where there is a failed attempt to obtain financing; the unforeseen business circumstance exception; and the natural disaster exception. The relevant regulations define "natural disaster" as "Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature." Thus

the unforeseen business circumstance exception is likely to be most applicable to the circumstances created by COVID-19. Even where an exception applies, the employer must provide as much notice as is practicable.

#### *New York:*

Like the federal WARN Act, New York has a state-level, mini WARN Act, which also requires certain notifications in case of certain triggering events. Some key ways in which the NY Mini Warn Act differs from the federal legislation are summarized below:

- Applies to employers that employ at least 50 employees (1) within New York State (excluding part-time employees), or (2) within the state who work in the aggregate at least 2,000 hours each week in the state, including regular overtime.
- Requires 90 days' advance notice in case of a triggering event.
- Triggering events include plant closings, mass layoffs, reduction in work hours, or relocation of substantially all facility operations, as defined under the act.
- A "plant closing" is the permanent or temporary shutdown of a single employment site, or one or more facilities or operating units within that site, if the shutdown results in an employment loss during any 30-day period for at least 25 employees at the site.
- A "mass layoff" (which is not a plant closing) is a triggering event if it results, during any 30-day period, in an employment loss of more than six months for at least 250 employees (excluding part-time employees), or 25 employees if they constitute at least 33% of the workforce at that site (excluding part-time employees).
- A "relocation" occurs when an employer moves to a location at least 50 miles away, resulting in an employment loss for at least 25 employees (excluding part-time employees).
- A "reduction in hours" is a reduction of more than 50% in work hours during each month in any consecutive six-month period for at least 250 employees (excluding part-time employees), or 25 employees if they constitute at least 33% of the workforce at that site (excluding part-time employees).

The NY Mini WARN Act also has the faltering company, unforeseen business circumstance and natural disaster exceptions to the 90-day notification period.

#### *California:*

By March 17 Executive Order N-31-20, the penalty provisions of California's WARN Act (requiring, inter alia, advance notice to employees of mass layoffs and termination of employment) have been suspended effective as of March 4 and lasting until the end of the emergency. The suspension applies only to employment actions caused by COVID-19-related "business circumstances that were not reasonably foreseeable as of the time that notice would have been required." Employers must still provide as much notice "as is practicable" and must also comply with the following requirements:

1. Written notice must be given to (1) the affected employees; (2) California's Employment Development Department; (3) the local workforce investment board; and (4) the chief elected official of each city and county government where the termination, relocation or mass layoff occurs.
2. The notice must contain the information required by the federal WARN Act.
3. Employers must provide "a brief statement of the basis for reducing the notification period."
4. The notice must include the following statement: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at <https://www.labor.ca.gov/coronavirus2019/>."

#### *Florida:*

Florida does not have a state-specific or "mini" WARN Act. Employers must comply with the federal act.

## **Agreements and Employees**

*United States (Federal)*

Employees are free to enter into individual agreements with employers, if they comply with applicable federal and state laws and regulations.

## **Other**

*California:*

On March 12, Governor Newsom issued Executive Order N-25-20 which grants the Employment Development Department (EDD) the discretion to waive the one-week waiting period for (i) disability insurance applicants "who are unemployed and disabled as a result of the COVID-19" and (ii) unemployment insurance applicants "who are unemployed as a result of the COVID-19." ([http://edd.ca.gov/about\\_edd/coronavirus-2019.htm](http://edd.ca.gov/about_edd/coronavirus-2019.htm))

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