

Clarifying Wage Payments during COVID-19 Pandemic

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Many businesses are being affected by forced closures or alternative operations to stop the spread of COVID-19. This is especially true in the entertainment and dining industry. With the government directives have also come rumors of how employers must act with regard to wage payments to its employees. House Bill 6021 (which has not made it to the Senate yet) proposes some new scenarios in which paid sick and family and medical leave may become reality, but for now, we have to follow the guidance in place from the Department of Labor.

The key laws governing wage payments under federal law are the Fair Labor Standards Act (FLSA) and the Workers Adjustment and Retraining Notice Act (WARN).

The FLSA requires payment of wages to non-exempt employees for all hours actually worked. It also provides that exempt employees must be paid each workweek if they performed any work during that week – regardless of duration and location (there is an exemption for sick day wage deductions). If no work is performed because there is no work to be done (because the business is closed) then there are no wages owed. There are many nuances to the FLSA and we recommend consulting with counsel before changing pay practices.

The WARN act requires notice to be given to employees when mass layoffs or business closings will occur. Usually it is 60-day notice, but can be shorter if the employer makes the determination in less time. If no notice is given the penalty is 60-day wages owed to the employee (after a well-founded lawsuit). There are exceptions to the WARN act that require further legal analysis on a case-by-case basis.

To assist during these somewhat uncertain times, the Wage and Hour Division of the Department of Labor (DOL) has issued guidance to employers and employees in response to a number of common questions that have arisen from COVID-19 related to the pandemic's effect on wages and hours worked under the FLSA and job-protected leave under the Family and Medical Leave Act (FMLA). For example, one of the questions addressed by the DOL is whether an employer may require employees to telework (i.e., work from an alternative location such as home) as an infection control strategy. The answer: Yes, but an employer may not single out employees to telework or to continue reporting to the workplace on a basis prohibited by any of the equal employment opportunity laws.

A common question with regard to the FMLA is whether an employer must grant leave to an employee who is sick or who is caring for a family member who is sick. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family medical reasons. This may include the flu where complications arise that create a "serious health condition" as defined in the FMLA.

[Here is a link to the DOL's guidance](#) on these issues. Additionally, we link our [prior client alert regarding House Bill 6201](#).

Please reach out to a member of the firm's Labor and Employment law team if you have any questions that are not addressed in the DOL's guidance or if you have additional questions.

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