



LIFE DURING COVID-19 SHUT DOWN: WHAT REAL KENTUCKY COMPANIES ARE FACING



HANNA RESOURCE GROUP

INTRODUCTIONS



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UNEMPLOYMENT UPDATE



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UPDATES FROM
TEAM KENTUCKY
HR

TEAM 
KENTUCKY

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UPDATES FROM TEAM KENTUCKY
HR

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Jon Caldwell - Valvoline's COVID19 Response

- Employees working from home
- Technology
 - #preparetowin
- Essential Employees
- Safety Precautions
- Premium Pay
- Crisis Communication Plans
- Daily/Weekly Communication
- Time Away & Pay Balances
- Incentive Plans

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UPDATES FROM TEAM KENTUCKY
HR

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EMPLOYMENT LAW UPDATE

Paid Sick Leave Under the FFCRA: What Is “Unable To Work Due To A Quarantine or Isolation Order?”

Benefit Considerations in COVID-19 Employee Decisions

Furloughs, layoffs, and reductions in pay for H-1B workers

OSHA Updated Guidance on Respiratory Protection

Sick Leave Under the FFCRA: What Is Unable To Work Due To An Isolation Order?

- New regulations include “quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order.”
- Also includes circumstances in which a “government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to ... quarantine, causing these categories of Employees to be unable to work even though their Employers have work for them.”
- The regulations make clear that an employee subject to a quarantine or isolation order may ***not*** take paid sick leave where the employer does not have work for the employee as a result of an order.
- Despite the broad definition of “quarantine or isolation orders,” ***only a relatively small subset of employees subject to quarantine are likely to be entitled to paid sick leave under the FFCRA.***

Benefit Considerations in COVID-19 Employee Decisions

- When considering to reduce hours, lay off, or terminate employees, a benefits analysis must be done
- Benefit plan documents control in determining eligibility, coverage ends, and when/how benefits are paid
- Employees are eligible for benefits if they work at least 30 hours per week and are active or on FMLA/FMLEA
- Employers who cover individuals who are not eligible for benefits could be breaching their fiduciary duty
 - Employers must confirm that the proposed changes do not create coverage issues
 - Severance plans may cause employees to be eligible for benefits as part of their termination
- Verify plan document compliance and impact for Health Benefits/Retirement Benefits/Life Insurance
 - COBRA Benefits and notification are required. Subsidizing can cause problems, because the employee will be forced to continue benefits beyond the subsidizing, once they opt for COBRA Benefits, until open enrollment. This means that if the employer provides coverage for one month, the employee will be responsible for the full premium once the subsidy ends until the open enrollment commences.

Benefit Considerations in COVID-19 Employee Decisions

- Affordable Care Act
 - If you reduce hours, or put employees on a leave of absence, you still must follow the requirements of the Affordable Care Act to determine whether an employee is full time for the purposes of health care coverage.
 - ACA requires that employers establish a method for measuring hours of service. Employers may choose a monthly measurement period (basically, determining full-time status on a monthly basis) or a look-back method.
 - Under the look-back measurement method, the employer chooses a period of three to twelve months over which the employee's hours are averaged to determine their full-time status. If the employee works 30 hours or more per week on average during the measurement period, then the employee is treated as a full-time employee for the purposes of health care coverage during the following "stability period," even if the employee's hours fluctuate during that time. The stability period is generally the same length of time as the measurement period.
- As a result, if using a look-back measurement method, then a reduction in hours may not cause employees to lose health care coverage immediately, and you may be required to continue coverage for those employees for the stability period.

Risky business: Furloughs, layoffs, and reductions in pay for H-1B workers

Does the law provide a path to unpaid furlough or temp. leave of H1-B workers?

- No. Employers who place H-1B workers in unpaid furlough or involuntary unpaid leave status could be exposed to fines, back wages and penalties, and receive at least the prevailing wage rate. ***This is irrespective of the fact that the employer may not be paying similarly situated U.S. workers.*** This could cause potential discrimination claims through the DOJ.

What is the best way to minimize risk if an H-1B employer elects the furlough option?

- Employers may end its obligation to pay the required wage to an H-1B worker in non-productive status is by termination, including notifying the USCIS and an offer to pay return transportation costs.
 - The benefits of termination are that you eliminate the risk of future wage payment liability for the affected worker, and lessen the risk that you will get a discrimination claim from a U.S. worker. Detriments are the inability to return the H-1B workers promptly, especially if you wait more than the 60-day grace period. The USCIS has suspended processing until further notice, and requires a *de novo* review.

Risky business: Furloughs, layoffs, and reductions in pay for H-1B workers

Given the current uncertainty, what should an employer do?

- Absent guidance from the DOL and the USCIS, employers are left to demonstrate “substantial good faith”
 - Either keep the H-1B employee at full pay, or effect a termination
 - For those that are willing to take some level of risk, 20 CFR 544.731(c)(7)(ii) provides that wages need not be paid “if an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment ... render the nonimmigrant unable to work [], then the employer shall not be obligated to pay the required wage rate during that period.” The employer may be able to argue that stay-at-home orders, as well as the economic impact of the government-ordered shut-down has caused a “period of nonproductive status due to conditions unrelated to employment....”

OSHA Updated Guidance on Respiratory Protection

On April 7, 2020, OSHA provided an Interim Guidance Memorandum

- Permits extended use and re-use of respirators in all industries, including those beyond recommended shelf life
 - A worker can continue to use the N95 Respirator “as long as the respirator maintains its structural and functional integrity and the filter material is not physically damaged, soiled, or contaminated.” Employers are required to address “the circumstances under which a disposable respirator will be considered contaminated and not available for extended use or reuse.” Healthcare workers cannot perform surgical procedures or procedures expected to generate aerosols, on patients infected with, or potentially infected with COVID-19
 - Does not go as far as CDC in allowing use of facemasks as “an acceptable alternative”
 - Expired respirators can be used if the employer has made a good faith effort to acquire in-date respirators and cannot acquire any. They must be visually inspected and cannot be comingled with in-date respirators
- Employers still must comply with all other requirements of the Respiratory Protection Standard
- Employers should “reassess their engineering controls, work practices, and administrative controls to ... decrease the need for N95 respirators – including “to temporarily suspend certain non-essential operations”

On April 3, 2020, OSHA also allowed use of other countries’ respirators

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HR RIGHT NOW: THE THREE Cs Communication, Cost-Cutting, Challenges

Communication

- Management memo – positivity!
- FAQ Sheet (Why are we still open? What is being done to protect employees? What are an employee's options in times when work is slow/not available? What will happen with health insurance?)
- Communicating business steps taken

Cost-Cutting

- Pay cuts (across the board, leadership, etc.)
- Retirement/Benefit reductions
- Suspend merit/performance
- Stagger schedules

Challenges

- Managing employees at high risk
- Paid time off
- Healthcare renewals and potential cost increases

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Questions and Answers





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