Glen Drouin had a 13-year career with his family-owned business followed up by a 20-year career in Human Resources with a national company before starting his own HR consulting firm Harbor HR. Glen’s extensive knowledge and skillset has assisted numerous businesses throughout his 20-year career in Human Resources, employee and management development, and company culture shaping.
Navigating the Coronavirus in the Workplace

Presented by Harbor HR
Today’s Topics

- Operating Under State and Local Stay at Home Orders
- Managing Telecommuting Employees
- Analyzing What Businesses are Essential
- Families First Coronavirus Response Act
- Employer Tax Credits
- Layoffs v. Furloughs
- Exempt v. Non-Exempt and how to make adjustments during the crisis.
- Managing employees who decline available essential work due to fear of the virus
- CARES Act
- Bonus Material
California COVID-19 Information

- Executive Order signed by Governor Newsom on March 19th and is still in effect.
- 58 counties had a variety of declarations, some expired and some still in place.
- Be aware of your specific county regulations, some require masks others do not.
- LA County just renewed their Stay at Home order and doesn’t have an expiration date.
- Fortunately, landscaper contractors are considered essential businesses.
California Resilience Roadmap

STAGE 1: Safety and preparedness
Make workplaces safe for our essential workers.

STAGE 2: Lower-risk workplaces
Gradually reopen retail (curbside only), manufacturing & logistics. Later, relax retail restrictions, adapt & reopen schools, child care, offices & limited hospitality, personal services.

STAGE 3: Higher-risk workplaces
Adapt and reopen movie theaters, religious services, & more personal & hospitality services.

STAGE 4: End of Stay Home Order
Reopen areas of highest risk: e.g. Concerts, conventions, sports arenas.
Operating Under State and Local Stay at Home Orders

• California Executive Order N-31-20 signed March 17th.
• 23 continues have now been allowed to move to end of Stage 2.
• Many counties orders still in effect.
  ▪ Social distancing requirements.
  ▪ Individuals ordered to stay home. Exceptions to stay at home order include operating Essential Businesses.
Managing Telecommuting Employees

• Employer may encourage or require employees to telecommute.
• Employers may want to institute a policy on telecommuting during the COVID-19 emergency if employer does not want telecommuting to continue as an ongoing policy.
• Monitor productivity of telecommuting employees.
• Telecommuting Agreement with Employee
  • Set schedule, confirm safety practices at home, confirm receipt of all equipment needed, confirm security of company information, identify for non-exempt employees that schedule must be kept, prior approval for overtime, employee must be available during work hours, time and attendance recorded as if employee was at regular site of employment, limitation on after hours work.
Managing Telecommuting Employees - Continued

• Ask employee to select a designated work area;
• Consider asking for video tour of work area to confirm it is safe for work
• Ask employee to limit distractions
• Require non-exempt employees to take and document required breaks.
• An employer is required to compensate employees who telework for all hours actually worked, including overtime, but is not required to pay teleworkers for unreported hours unless the employer knew or should have known about such telework.
  • Employer aware employee is texting/emailing for work-related reasons during non-work hours?
Analyzing What Businesses Are Essential

- Essential Businesses – 21 businesses defined in Section 10 of Sacramento Order as “Essential Businesses.”
- Vague definitions; for example, “businesses that supply other essential businesses with support or supplies necessary to operate”; “businesses that supply products needed for people to work from home.”
- Risks of misidentifying your business as an Essential Business
  - Operating in violation of state of local stay at home order.
  - Ordering or permitting employees to work in violation of Orders.
  - Failing to offer employees benefits available to employees who are “unable” to work, e.g. emergency paid sick leave, expanded emergency FMLA.
Businesses that are essential should establish COVID-19 Worksite Best Practices

Employee Education

• Educate employees regarding COVID-19 symptoms and preventative measures.
  • Reference/distribute CDC’s “How to Protect Yourself” Guidance.
• Inform employees to stay home if sick and not to return to work until 72 hours after symptoms have subsided without use of medicine (or per CDC guidelines).
  • Reference/distribute CDC’s “What to do if You are Sick” Guidance
COVID 19 Worksite Best Practices - continued

• Consult CDC’s Interim Guidance for Businesses and Employers (watch for periodic updates).
• Provide hand washing station (e.g. if worksite is outside or temporary), hand sanitizer, tissues, task appropriate safety equipment e.g. gloves, eye protection if warranted by nature of work.
• Disinfect regularly touched items/surfaces.
• Regularly clean work areas, offices, bathrooms.
COVID-19 Worksite Best Practices - continued

• Provide meal/rest breaks in shifts to avoid large gatherings of people.
• Prohibit communal food (doughnuts, pizza, etc.).
• Limit in-person meetings and maintain 6’ separation.
• Avoid sharing pens or other work implements.
• Discourage shaking hands (the long distance high five works great).
COVID 19 Worksite Best Practices – Other Resources

• Federal OSHA – Guidance on Preparing Workplaces for COVID-19
  • https://www.osha.gov/Publications/OSHA3990.pdf

• CAL OSHA
  • https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html
HR 6201: Families First Coronavirus Response Act

- **Two Primary Provisions:**
  - Emergency Paid Sick Leave
  - Emergency Paid Family Medical Leave
- **Common Provisions:**
  - Effective 4/1/2020-12/31/2020
  - Leave requirements apply to private employers with less than 500 employees.
    - Potential hardship exemption for small businesses.
  - Requirement to post/disseminate Notice
  - Tax credits available
  - Employer-provided health insurance must continue during leave on same terms as if work continued.
  - The DOL will not bring enforcement actions against any employer for violations of the Act occurring within 30 days of the enactment of the FFCRA (April 1 – April 30, 2020).
  - Employer must make reasonable, good faith efforts to comply with the Act.
HR 6201: Families First Coronavirus Response Act

https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf
Potential Small Business Hardship Exemption

- Applies only to expanded FMLA leave and sick leave taken due to employee’s child’s school/day care closure.
- Employer with less than 50 employees may claim exemption if providing leave would jeopardize the viability of the business as an ongoing concern.
Hardship Exemption Available If:

- Provision of leave would result in businesses expenses and financial obligations exceeding available business revenues and cause business to cease operating at a minimal capacity;
- Absence of employee(s) requesting leave would entail a substantial risk to the business's financial health or operational capabilities because of the employee's specialized skills, knowledge or business or responsibilities; or
- There are not sufficient workers who are able, willing and qualified who will be available to perform labor/services provided by employee(s) requesting leave and such labor/services are needed for business to operate at minimal capacity.
HR 6201: Families First Coronavirus Response Act - Continued

Notice Requirements

- FFCRA requires Notice be provided to current employees by 4/1/2020
- Must post in a conspicuous place easily visible to employees
  - Post at worksite if employees do not report to mail office
  - Placement in binder not sufficient
- For teleworking employees, email, direct mail, or post on internal/external employee website.
- DOL working on translated notices
  - Spanish version available
  - Currently no requirement to post in multiple languages
HR 6201: Families First Coronavirus Response Act – Continued – Notice Requirement

EMPLOYEE RIGHTS
PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

**PAID LEAVE ENTITLEMENTS**

Generally, employers covered under the Act must provide employees:

- Up to two weeks (32 hours, or a part-time employee’s two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:
  - 100% for qualifying reasons #1-3 below, up to $651 daily and $5,610 total,
  - 67% for qualifying reasons #4 and #6 below, up to $200 daily and $2,600 total, and
  - Up to 12 weeks of paid sick leave and expanded family and medical leave paid at 2/3 for qualifying reason #6 below for up to $200 daily and $2,600 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

**ELIGIBLE EMPLOYEES**

In general, employers of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19-related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #6 below.

**QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, 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 his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons;
6. Is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.

**ENFORCEMENT**

The U.S. Department of Labor’s Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid leave or expanded family and medical leave under the FFCRA. A complaint, or initiate a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

For additional information or to file a complaint:

1-866-487-9243
TTY: 1-877-864-9277
dol.gov/whd/ffcca
Emergency Paid Sick Leave Act

Qualifying reasons for Paid Sick Leave

Available to all employees (no length of service requirement) unable to work/telework because of the employee:

1. Is subject to a federal, state of local quarantine/isolation order.
2. Has been advised by a health care provider to self-quarantine for COVID-19 related concerns.
3. Is experiencing symptoms and seeking diagnosis.
4. Is caring for someone else subject to (1) or (2).
5. Is caring for a child whose school/care provider has closed/is unavailable due to COVID-19.
6. Is experiencing any other condition substantially similar to COVID-19 as specified by Department of Health and Human Services.
Amount of Emergency Paid Sick Leave Available

- Full time employees entitled to up to 80 hours paid sick time.
- Part time employees entitled to leave for average number of hours typically worked.
- Employees with unknown/varying schedules entitled to leave for average number of hours worked over prior six-month period.
  - If six-month history is not applicable, average is based on number of hours agreed to at time of hire or average number of hours worked over entire length of employment.
Emergency Paid Sick Leave Wage Amount

- Employees are entitled to regular rate of pay for leave related to employee’s own needs (i.e. reasons 1, 2, or 3)
  - Sick leave pay capped at $511 per day/$5,110 aggregate.
- Employees are entitled to two-thirds regular rate of pay for sick leave related to others’ needs (i.e. reasons 4, 5, 6)
  - Sick leave pay capped at $200 per day/$2,000 aggregate.
Other Emergency Paid Sick Leave Issues

• Unused paid sick leave is not paid out upon separation of employment and does not carry over from year to year.
• After first day of paid sick leave taken, “reasonable notice procedures” can be required.
• Unlawful to discriminate against an employee who takes paid sick leave.
• FLSA remedies apply to breach of paid sick leave provisions of FFCRA.
• Current paid sick leave balances are not impacted, FFCRA emergency paid sick leave is an additional amount.
• Cannot require employee to use existing paid sick leave before using FFCRA paid sick leave.
Emergency Family and Medical Leave Expansion Act

- **Eligibility:** FMLA provisions apply to employees who have worked at least 30 days prior to leave.

- **Limited Application:** To qualify, eligible employee must be unable to work/telework due to a need to care for a child (under 18) if child’s school/place of care/childcare provider is closed or unavailable due to a public health emergency; fewer bases for eligibility for FMLA than for PSL.
Emergency FMLA Leave Details

- Eligible employees may take up to 12 weeks of job protected leave.
- First 10 days (two workweeks) of leave may be unpaid.
  - Employee may elect to substitute accrued vacation, personal leave, medical or paid sick leave (including paid sick leave under FFCRA).
- After 10-day period, employee entitled to compensation at no less than two-thirds regular rate of pay.
  - Capped at $200 per day/$10,000 aggregate (10 weeks = 50 days x $200 per day = $10,000)
- Non-COVID-19 related FMLA leaves remain unpaid
Unable To Work

As to both paid sick leave and expanded FMLA:

• “Unable to Work” means the employer has work for an employee but one of the COVID-19 qualifying reasons prevents the employee from being able to work, either at normal worksite or by means of telework.
Unable v. Unwilling to Work

- “Unable to work” means the employer has work for an employee but one of the COVID-19 qualifying reasons prevents the employee from being able to work, either at normal worksite or by means of telework.

- Employee who has work available e.g. works for an Essential Business but chooses not to come to work may be unwilling but not unable to work and therefore not eligible for paid sick leave or expanded FMLA.

- However, employee may be “unable to work” if the employer has work for employee but the employee is in imminent danger or is sick, caring for a family member who is sick, obeying a quarantine order, or absent due to some other legally protected reason, such as a medical condition protected by the Americans with Disabilities Act.

  - “imminent danger” — Occupational Safety and Health Act defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm . . .”
  - employees whose job requires close contact with the public or other employees and who contends employer does not provide protection may argue they are in imminent danger
Managing employees who decline available essential work

• Potential responses when employee who has work available and is not sick or otherwise prevented from working informs employer he/she does not feel safe coming to work and stops coming to work
• Treat as:
  • Voluntary resignation
  • Request for leave
  • Change to temporary unpaid status
DOL – No Entitlement to Leave

As to both PSL and expanded FMLA, employees are not entitled to leave if the employer:

- Closes worksite before April 1\textsuperscript{st}, 2020
- Closes worksite on/after April 1\textsuperscript{st}, 2020
- Closes worksite while employee is on leave (However, the employer must pay for any paid leave used before closure).
- Furloughs employee on/after April 1\textsuperscript{st}, 2020.
- Closes worksite on/after April 1\textsuperscript{st}, 2020 but tells employees it will reopen at some point in the future.
- Reduces work hours because it does not have work for employee to perform (leave cannot be used for hours employee is no longer scheduled to work.)
HR 6201: Families First Coronavirus Response Act - Continued

Right to Return to Work

Per DOL Guidance:

- Employee entitled to be restored to same or equivalent position upon return from leave.
- However, employees are not protected from employment actions, such as layoffs, that would have affected employee regardless of whether leave taken.
  - Employer must be able to demonstrate employee would have been laid off even if she/he did not take leave.
- Note: Additional requirements apply to small employers (less than 25 employees) under expanded FMLA.
Small Employer Job Restoration Exception

If employer has less than 25 employees, it may refuse to return employee to work if all of the following conditions exist:

1. Position no longer exists due to COVID-19 related economic/operating conditions.
2. Employer made reasonable efforts to restore employee to same/comparable position.
3. Employer makes reasonable efforts to contact employee if equivalent position becomes available.
4. Employer continues to make reasonable contact efforts for one year from earlier of (a) date leave concludes or (b) 12 weeks after leave began.
HR 6201: Families First Coronavirus Response Act - Continued

U.S. Department of Labor Resources

https://www.dol.gov/agencies/whd/pandemic

Contains:
1. Fact Sheets
2. Detailed Q&A
3. Posters
4. Field Assistance Bulletin
Employer Tax Credits

• Covered employers qualify for dollar-for-dollar reimburse through tax credits for all qualifying wages paid under FFCRA.
  • Qualifying wages = wages paid to an employee taking leave under FFCRA for qualifying reason, up to appropriate per diem and aggregate payment caps.
• Tax credits also extend to amounts incurred to maintain health insurance coverage.
• DOL Guidance: Employers are not required to provide leave if materials sufficient to support tax credit have not been provided.
  • DOL advises employers to consult IRS forms, instructions, etc. for appropriate documentation.
Employer Tax Credits

Tax Credit Examples

Example #1:

- Employer payroll is $50,000. FICA 941 tax liability is $7,650. Emergency paid sick leave is $10,220. Payroll tax liability for that pay period is zero and business can apply for expedited or accelerated refund from IRS.

Example #2:

- Employer payroll is $90,000. FICA 941 tax liability is $13,770. Emergency FMLA is $8,000. Payroll tax liability for that pay period is $5,770.

- FUTA (940), SUI (ETT), and workers compensation will still be applicable tax liabilities on these FFCRA wages.

- Equivalent amounts are available to self employed individuals.
  - Credits will be claimed on their income tax returns and will reduce estimated tax payments.
Employer Tax Credits

IRS Guidance Re: Tax Credits

Furlough – no accepted definition but generally described as a temporary unpaid leave of absence; the employee remains employed but hours are reduced or eliminated.

Layoff – generally means a termination of employment through no fault of the employee; in Union workforce “layoff” frequently implies termination with possibility of recall.

Reduction in Force – layoff resulting from employer deciding to permanently reduce headcount.

Note: Labor Commissioner may treat a “furlough” where employer reduces an employee’s scheduled work hours to zero and does not reschedule that employee within the same pay period or some other defined short-term period a layoff of the employee, and employer must pay final wages due at termination.
Layoffs Best/Required Practices

- Payment of final wages upon termination
- Payment of unused accrued PTO/Vacation
- Notice of right to Unemployment benefits (DE2320)
- Notice to terminating employee (HIPP)
- Notice to change in employment relationship
Exempt v. Non-Exempt and how to make adjustments during the crisis

- Exempt employees are exempt from overtime and generally must satisfy a salary test and a duties test.
- Issues related to Reducing an Exempt Employee’s Pay during COVID-19
  - Reducing salary below minimum required to meet the salary test will destroy the exemption and transform the employee from exempt to non-exempt.
Bonus Material – CARES Act

• Can receive up to $1,200 for single filers and $2,400 for married filers. Single filers exceeding $99k annually and $198k annually for joint filers with no kids are not eligible. Additional $500 per child.
• $600 weekly additional unemployment for up to 39 weeks.
• Unemployment now available for self employment, gig workers, 1099 contractors, and workers with limited work history.
• SBA loans are available for all business and personal emergency funding needs.
• Paycheck Protection Program (PPP) – directly funded by qualified banks.
• Economic Injury Disaster Loans & Emergency Economic Injury Grants.
• Small Business Tax Credits.
• Delay of payment of employer payroll taxes.
• Retirement Fund Access – Hardship or loan options expanded.
Bonus Material – Easing Employee Stress

• Communicate with the employees often and share business changes.
• Be empathetic in your communication and in dealing with your employees.
• Acknowledge employee fears surrounding their jobs, the company and the COVID-19 virus.
• Be open with employees about management decisions.
• Provide updated information from DOL, CDC and other sites that can reassure them.
• Encourage employees to take advantage of any telemental health services.
COVID-19 Infection Prevention is important in the workplace, take the necessary steps below to mitigate exposure potential.

- Frequent washing of hands.
- Do not allow employees to shake hands or hug.
- Keep 6 feet of social distancing at all times.
- Adjust on-site meetings to ensure physical distancing.
- Limit the number of workers on the jobsite.
- Stagger employee breaks.
- Avoid congested areas at lunch.
- Encourage workers to drive to job sites separately.
- Discourage sharing of food & water.
- Provide single use water bottles.
Final Thoughts

We are definitely all in this together and we need to pull together to help each other. This moment will be one we will remember forever, and we need to do all we can to guide each other through this crisis.

Stay safe and be healthy everyone. We look forward to shaking hands with all of you in the not so distant future.
CDC (Center for Disease Control) Posters

THANKS EVERYONE! Take care and be safe.