

April 3, 2020

Summary of Key Issues for Hospitals and Health Systems as Employers Under COVID-19 Federal Legislation and Federal Labor and Employment Laws

The AHA engaged the law firm Jones Day to provide more in-depth information to hospitals and health systems on a number of the key issues they currently face as employers. Recently enacted federal legislation and its implementation by federal agencies in response to the COVID-19 virus has raised a number of these employer-related questions for hospitals and health systems. These new provisions add to the existing laws and various requirements that remain in effect during the crisis.

Please review the attached Jones Day document, which addresses a number of those questions. The document may be updated as more information becomes available or circumstances change as the nation continues to confront the virus.

For questions, please contact AHA at 800-424-4301.



**GUIDANCE ON KEY ISSUES FOR HOSPITALS AS EMPLOYERS UNDER COVID-19
FEDERAL LEGISLATION AND OTHER FEDERAL LABOR AND EMPLOYMENT
LAWS**

April 3, 2020

The American Hospital Association (“AHA”) engaged Jones Day to provide guidance to hospitals and health systems on a number of the key issues they currently face as employers.¹ Recently enacted federal legislation and its implementation by federal agencies in response to the COVID-19 virus has raised a number of these employer-related questions for hospitals and health systems. These new provisions add to the existing laws various requirements that remain in effect during the crisis. This advisory will address a number of those questions and will be updated as more information becomes available or circumstances change as the nation continues to confront the virus. If you would like more information on collective bargaining requirements, AHA members can contact AHA at 800-424-4301.

The following issues are covered in the Advisory in more detail:

Families First Coronavirus Response Act (“FFCRA”). This legislation provides paid sick leave and paid emergency family and medical leave to employees of private companies with fewer than 500 employees, and employees of public companies regardless of size. At the employer’s option, it exempts “health care providers,” and, as interpreted by the Department of Labor, hospitals, whether public or private, do not have to comply with its provisions. A summary of those provisions is included for those hospitals that are covered by the FFCRA and wish to comply or who have other affiliated businesses that may be required to do so.

Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”). The CARES Act provides approximately \$2 trillion in stimulus and support for individuals and families, businesses and the health care sector. Among its provisions are several relevant specifically to employers and employees, including a deferral of certain payroll taxes, a payroll retention tax credit, the opportunity for employers to offer employees tax-free assistance with educational loans, and expanded unemployment insurance benefits.

Safety and Health Issues; Declining to Work. The Occupational Safety and Health Administration has modified some requirements for hospitals as they respond to COVID-19, whereas other requirements remain unmodified. OSHA also may protect hospital employees who decline to work on the basis that COVID-19 has created conditions that are unsafe or abnormally dangerous. Please note that while this provides a summary of the current guidance

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from federal OSHA, there may be some inconsistencies between OSHA’s guidance and that of the U.S. Centers for Disease Control and Prevention, which AHA has addressed previously. For more information on the most current guidelines developed by the U.S. Centers for Disease Control and Prevention, please go to <https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html>.

Wage & Hour Considerations Related to Changed Work Hours. Wage & hour considerations for those hospitals which have had to change or reduce work hours in response to COVID-19 for certain categories of employees remain in effect.

Considerations Related to Employee Furloughs and Layoffs. There are practical considerations for hospitals which may be forced to consider employee furloughs or layoffs as a result of financial stress related to the nation’s response to COVID-19.

I. Families First Coronavirus Response Act (FFCRA)

Enacted on March 18, 2020, the FFCRA provides emergency paid sick leave and emergency family and medical leave to certain individuals working for private employers with *fewer than 500* employees; the FFCRA also provides emergency paid sick and emergency family and medical leave to individuals working for public employers regardless of size. The FFCRA explicitly exempts “health care providers” from these provisions.

Health Care Provider Exemption. FFCRA exempts “Health Care Providers or Emergency Responders . . . from eligibility for the leave provided under the Act.” The Department of Labor (“DOL”) has issued guidance that broadly defines these terms to include anyone employed by a hospital or other facility providing medical care, anyone employed by an organization that contracts with a hospital to provide services, products, or equipment to a hospital, and anyone employed by an organization that contracts with a hospital to maintain the facility. Based on DOL guidance, virtually all employees of hospitals and health systems should be exempt from the leave provisions of the FFCRA. DOL’s “Emergency Responder” definition is similarly broad. The DOL guidance also allows a State or the District of Columbia to deem particular workers exempt from the FFCRA’s paid leave requirements because they are necessary to the State’s response to COVID-19. DOL suggests that employers “be judicious” when exempting particular employees from the FFCRA’s paid leave requirements.

Application Limited to Private Hospitals with Fewer than 500 Employees, but Public Hospitals Covered Regardless of Number of Employees. As briefly noted above, the FFCRA applies to public hospitals regardless of size, but applies to private hospitals only if they have fewer than 500 employees. To determine whether a hospital has 500 or more employees, the hospital should count both full- and part-time U.S. workers, employees on leave, temporary employees who are jointly employed with another employer (even if the jointly-employed employees are maintained on the other employer’s payroll), and day laborers supplied by a temporary agency. One need not include independent contractors. To decide whether particular facilities should be considered a single entity for purposes of the 500-employee threshold, the hospital should apply: (i) the same standards it applies under the Fair Labor Standards Act to assess whether two related entities are engaged in joint employment; and (ii) the same standards it applies under the Family and Medical Leave Act to determine whether two related entities are an

integrated employer. The DOL has confirmed that it will utilize these same legal tests for all three of the statutes. The tests evaluate whether two related entities are engaged in joint employment or form a single integrated employer.

Substantive Requirements. The FFCRA contains two paid leave requirements.

First, the Emergency Family And Medical Leave Expansion Act requires private employers with fewer than 500 employees to provide two weeks of unpaid leave, and thereafter ten weeks of paid leave, to an employee who takes leave due to “a qualifying need related to a public health emergency.” A “qualifying need related to a public health emergency” exists where a federal, state, or local authority has declared an emergency with respect to COVID-19, and the employee “is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” Once triggered, paid leave must be at least 2/3 the employee’s regular rate of pay, but this figure is capped at \$200 per day and \$10,000 in total. An employee is eligible for this benefit if the employee has been employed by the employer for at least 30 calendar days at the time of the leave. This provision sunsets on December 31, 2020.

Second, the Emergency Paid Sick Leave Act directs that private employers with fewer than 500 employees “shall provide to each employee . . . paid sick time” where the employee needs 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 due to concerns related to COVID-19;
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. Is caring for an individual in categories 1 or 2;
5. Is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19; or
6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with Treasury and Labor.

Coordination of Benefits. With regard to the coordination of benefits under the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, the employee can elect to take the paid leave under the Emergency Paid Sick Leave Act during the initial two weeks of unpaid leave provided by the Emergency FMLA Expansion Act. With regard to the relationship between these two acts and an employer’s own PTO/Leave policies, benefits under the Emergency Paid Sick Leave Act must be provided in addition to paid leave under the employer’s existing policies. Moreover, the employee may choose to use existing paid vacation or personal leave from an employer’s PTO/Leave policy to supplement the amount the employee receives from the Emergency Family Medical Leave Expansion Act, up to the employee’s normal earnings.

Payroll Tax Credit. An employer required to pay for emergency paid sick leave or emergency family medical leave under this law may claim a refundable tax credit equal to the amount of paid leave it is required to provide. The credit is applied against the employer’s share

of Social Security taxes (i.e., 6.2%). The paid leave required under the FFCRA is not subject to the employer's share of Social Security tax, and an additional credit is provided to offset the Medicare taxes (i.e., 1.45%) owed with respect to the paid leave. To the extent the credit exceeds the employer's liability for Social Security taxes, the employer may receive a cash refund or apply the excess against payroll taxes owed for the next calendar quarter. Therefore, the credit allows an employer who is required to pay for leave under the FFCRA to recoup the entire amount it must pay (including the employer portion of Social Security and Medicare taxes attributable to the leave payments) through the tax credit.

FFCRA Anti-Retaliation Provisions. The job-restoration provision of the Emergency Family and Medical Leave Expansion Act and anti-retaliation provision of the Emergency Paid Sick Leave Act protect employees from retaliation if they use the paid sick leave and family leave benefits provided for under the Acts. These provisions do not preclude legitimate layoffs or furloughs, however, so long as (1) those selected for layoff or furlough are not chosen because they qualified for and took COVID-19-related leave, or (2) those on leave are not otherwise disproportionately affected by the layoff or furlough.

II. Coronavirus Aid, Relief and Economic Security (CARES) Act

Enacted on March 27, 2020, the CARES Act includes substantial funding for individuals and families, businesses and the health care sector. It also includes several provisions specific to employers and their employees.

A. Deferral of Employer Share of Payroll Tax

The CARES Act allows a nonprofit, for-profit or public employer, including a hospital or health system, to defer paying the employer's share of Social Security taxes (i.e., 6.2%)² incurred with respect to wages paid between March 27, 2020 and December 31, 2020. The only employer not allowed to take advantage of this deferral is an employer with fewer than 500 employees that receives a loan under the Small Business Administration's Paycheck Protection Program and then has that loan partially forgiven. Instead of making deposits of the employer's share of Social Security taxes for the March 27 through December 31, 2020 period according to the employer's regular deposit schedule for the rest of 2020, the employer has until December 31, 2021 to pay 50% of the deferred Social Security amount and until December 31, 2022 to pay the remaining 50%. As long as the employer makes the payments by these extended due dates, it will not be

² Federal payroll taxes include taxes imposed under the Federal Insurance Contributions Act ("FICA"). FICA taxes are comprised of two components: Old-Age, Survivors, and Disability Insurance ("OASDI") and Hospital Insurance ("Medicare"). With respect to OASDI taxes, the current rate is 12.4% up to the OASDI wage base (\$137,700 in 2020), which is split equally between the employer and the employee. With respect to Medicare tax, the current rate is 2.9%, which is also split equally between the employer and the employee, and there is an additional .9% Medicare tax on employees with wages in excess of certain thresholds. The employer withholds the employee's portion of FICA from the employee's pay. The employer pays its share over and above what it pays the employee in wages.

The employer must deposit payroll taxes on a monthly or semiweekly basis depending largely on what has been the employer's total payroll tax liability for a prior lookback period. If the employer accumulates \$100,000 or more in employment taxes, it is subject to a next-day deposit requirement. The employer's deposit schedule is set at the beginning of the calendar year. The employer then files quarterly payroll tax returns (Form 941) to report its liability for payroll tax and reconcile what it owes with what it has deposited.

subject to deposit penalties nor will the employer owe any interest to compensate for the delay in payment.

B. Employee Payroll Retention Credit

Payroll Retention Tax Credit Added by CARES Act: The CARES Act creates a payroll retention tax credit (separate and apart from the payroll tax credit created under the FFCRA). This credit is also a refundable payroll tax credit and is equal to 50% of the amount of wages and qualified health plan expenses that are paid by the employer between March 13, 2020 and December 31, 2020. The credit is available to private sector employers (whether nonprofit or for-profit) who are either (a) subject to a partial or full suspension of operations because of a government order or (b) experiencing a more than 50% drop in gross receipts for a calendar quarter in 2020 compared to the same quarter in 2019. Many hospitals will not fall into either category. Hospitals are exempted from state orders suspending operations for non-essential businesses, and while gross receipts may have dropped for the first quarter of 2020, they may not have dropped by more than 50% year on year. It is possible that a hospital will experience such a drop in the second quarter of 2020, in which case the credit would be available to that hospital from April 1, 2020 through December 31, 2020 for wages paid to employees who are not performing services but the hospital nonetheless retains as employees. It is possible that a hospital will experience such a drop in the second quarter of 2020, in which case the credit would be available to that hospital for wages paid from April 1, 2020 through either September 30, 2020 or December 31, 2020 to employees who are not performing services but the hospital nonetheless retains as employees.

Requirements for Receiving the Credit. For employers with more than 100 full-time employees, the credit is available only for wages and qualified health benefits paid to employees who are *not* providing services to the employer. The statute is fairly read to provide a payroll retention tax credit for the amount paid for health benefits with respect to furloughed employees if the employer stops paying wages to them but continues to pay for health benefits. Definitive confirmation of this reading will require further guidance from the IRS.

The amount of the payroll retention tax credit is limited to \$5,000 per employee. For employers with more than 100 full-time employees, there is an additional per-employee limit. The law says the amount of “qualified wages,” that is wages for which the credit may be claimed, may not exceed the amount the employee would have been paid for working “an equivalent duration” during the 30 days immediately preceding the period in which the employee must stop working due to the more than 50% drop in gross receipts. It is not entirely clear what an “equivalent duration” means, particularly if the employee worked a variable schedule. A reasonable interpretation of this would be that the employee could be paid no more than what they would have been paid over 30 days if they worked the same schedule they were working before the employee was furloughed; but it is not clear how the IRS will interpret what the exact limit should be where people work variable schedules. For salaried employees who are more highly compensated, the 30 day limit probably matters less as they would more likely reach the \$10,000 cap based on wages and health benefits in 30 days.

Claiming the Credit: The payroll retention tax credit is applied against payroll taxes rather than income taxes, specifically against the 6.2% Social Security tax imposed on the

employer with respect to wage payments. It is refundable. The employer will be allowed to reduce the amount of its payroll tax deposits in anticipation of the credit. To the extent the credit exceeds the taxes due, the employer will be entitled to a refund that can be received in cash or applied against the next quarter's payroll tax liability. The IRS will need to create modified forms and a process for claiming the credit. The IRS has issued a new Form 7200 for requesting advance payments of the credit and is working to revise the quarterly employment tax return (Form 941) to take account of the credit. Amounts that an employer pays to an employee as emergency paid sick leave or emergency family medical leave may not be taken into account as wages paid for purposes of computing and claiming a payroll retention tax credit.

Employer Size – More than 100 Full-Time Employees For purposes of determining whether an employer has more than 100 full-time employees, aggregation rules apply. These aggregation rules are different than the rules used for purposes of determining whether the company has fewer than 500 employees for purposes of the Emergency Paid Sick Leave and Emergency Family and Medical Leave Expansion Acts. Rather, the aggregation rules for the payroll retention tax credit track the rules used for purposes of determining which businesses are limited in their ability to deduct interest for federal income tax purposes. For now, the reasonable assumption would be that hospitals in a system that has a common parent should be aggregated, meaning that each one would need to follow the rules applicable to an employer with more than 100 full-time employees even if the individual hospital has fewer than 100 employees.

There are some additional special rules that limit or eliminate the credit if the employer receives a loan from SBA under a program made available under the CARES Act or if the employer is claiming the work opportunity tax credit or certain other reasonably uncommon tax credits with respect to the wages it pays employees.

C. Employer Assistance with Employee Student Loans

Before the CARES Act, employers were already permitted under federal tax law to provide employees with tax-free reimbursements for up to \$5,250 per year for tuition, books and certain supplies as long as the employer adopted a written educational assistance plan. The CARES Act expanded the expenses that an employer, including a hospital employer, may reimburse on a tax-free basis under an educational assistance plan to include qualified educational loan repayments. Qualified educational loan repayments are for loan indebtedness incurred by the employee solely to pay qualified higher education expenses. The amount that may be reimbursed tax free remains \$5,250 per employee for the year. Employees may not be given a choice between tax-free educational assistance and cash compensation (or other benefits includible in gross income). Therefore, only employees who have expenses for qualified educational loan payments or tuition and books would be able to receive the value of this benefit. Employers who want to take advantage of the opportunity to offer this benefit to employees must amend their existing written educational assistance plans or adopt such a plan if they do not currently have one. Also, reasonable notification of the availability and terms of the program must be provided to eligible employees. The plan also must be able to meet certain regulatory requirements to demonstrate that it does not discriminate in favor of highly compensated employees. Employees who receive tax-free reimbursements from their employer for their educational loan payments may not claim a federal tax credit with respect to the same loan payments.

D. Unemployment Insurance

Nearly all states have issued guidance expanding unemployment assistance to workers who are laid off as a result of the COVID-19 outbreak. Moreover, CARES Act funding provides eligible workers with an additional \$600 per week in unemployment compensation through July 31, 2020. Workers can qualify for an additional 13 weeks of benefits on top of the maximum time permitted by the resident state's unemployment system; for instance, in Texas, a worker is entitled to benefits for up to 26 weeks. Under the CARES Act, they are eligible for up to 39 weeks of unemployment compensation. As discussed in more detail below, employees will typically be eligible for these unemployment insurance benefits if they are laid off or have their hours reduced (in states that have "work-sharing programs") as a result of COVID-19. Individuals working reduced hours may be ineligible for unemployment insurance benefits in weeks in which their weekly earnings (in some states adjusted weekly earnings) surpass what would be their weekly unemployment benefit. Additionally, workers who are quarantined as a result of COVID-19 or have caregiving responsibilities related to COVID-19 may be eligible for benefits even if not permanently laid off. Whether a hospital's employees will be eligible for these expanded unemployment benefits will depend on the laws of the state in which they work: For example, certain hospital employees such as residents and interns may not be eligible for benefits under the laws of some states; these circumstances should be addressed on an employer-by-employer and state-by-state basis.

Below is a summary of the CARES Act unemployment provisions:

- The CARES Act expands unemployment insurance through the creation of a temporary Pandemic Unemployment Assistance program for people who otherwise would be ineligible for unemployment benefits such as those who are self-employed, are seeking part-time employment, have insufficient work history, or who otherwise would not qualify for regular unemployment. (Section 2102)
- Pays \$600 per week above the unemployment benefits otherwise available under state formulas to each individual receiving unemployment insurance or Pandemic Unemployment Assistance through July 31, 2020. (Section 2104)
- Extends unemployment benefits for an additional 13 weeks for those who remain unemployed after state unemployment resources are unavailable. These benefits will be available through December 31, 2020. Regular terms and conditions of state unemployment compensation apply to claims under this section. (Section 2107)
- Provides additional funding for states that have, or that establish, "short-time" compensation programs to provide benefits to workers whose hours are reduced but who have not been laid off. (Sections 2108, 2109, 2110, 2111)
- Eliminates the regular one-week waiting period for benefits eligibility and reimburses states that pay unemployment benefits to individuals immediately upon unemployment. (Section 2105)
- Allows states flexibility in interpreting unemployment compensation laws when reimbursing employers regarding timely payment and assessment of penalties and interest.

- Allows states to reimburse nonprofits and governments for one half of the costs they incur through December 31, 2020 to pay unemployment benefits. (Sections 2103, 2106)
- Authorizes the Department of Labor to issue appropriate guidance, and the Department of Labor’s Inspector General to carry out audits and oversight. (Sections 2115, 2116)

III. Safety and Health Issues, Including Allegedly Unsafe Work

A. Substantive Health and Safety Standards Applicable to COVID-19

The Occupational Safety and Health Act of 1970 sets federal standards for workplace safety issues, but also permits states to opt out of federal enforcement. About half of the states, including California, have done so. The discussion below focuses on applicable federal standards. In assessing compliance obligations and risk, state standards should be consulted. Please also note that state-owned and operated hospitals will in most instances be governed by state (rather than federal) standards, regardless of where they are located.

Federal General Duty Clause. OSHA does not have a federal standard specifically addressing disease exposures like COVID-19. Nonetheless, employers (including private hospitals) remain bound by the OSH Act’s General Duty Clause, which requires employers to maintain a place of employment “free from recognized hazards” that are or may cause death or serious physical harm. At this stage, hospitals should assume that COVID-19 qualifies as such a hazard.

OSHA guidance for employers specifies that hospitals should take the following steps to protect employees classified as high risk or very high risk, which include all employees who deliver health care services:

- (1) develop an exposure response plan;
- (2) continue hygiene protocols and practices;
- (3) continue housekeeping protocols and practices;
- (4) encourage employees who are ill to report their illness, and stay at home to self-quarantine;
- (5) ensure appropriate air-handling systems are installed and maintained;
- (6) place patients with known or suspected COVID-19 in an airborne infection isolation room, if available;
- (7) use isolation rooms, if available, when performing aerosol-generating procedures (e.g., intubation) on individuals with known or suspected COVID-19;
- (8) use special precautions (Biosafety Level 3) when handling specimens from known or suspected COVID-19 cases;

(9) group COVID-19 cases when possible;

(10) post signs requiring patients and family members to immediately report symptoms of respiratory illness, and/or limit access to visitors who display symptoms of respiratory illness;

(11) provide employees with job specific training regarding COVID-19;

(12) provide essential personnel working away from the hospital with alcohol-based hand rubs for decontamination; and

(13) as discussed further below, provide employees with appropriate personal protective equipment consistent with OSHA's personal protective equipment standard, to include gloves, a gown, a face shield or goggles, and either a face mask or respirator, depending upon job tasks. Those in close contact with COVID-19 patients should be provided respirators, such as N95s.

Respiratory Protection Standard. Consistent with OSHA guidance, many hospital employees will require respiratory protection in order to safely perform their job functions. For those employees, hospitals must comply with OSHA's respiratory protection standard. However, OSHA has issued temporary guidance suspending the annual fit-testing requirement of that standard due to the current shortage of respirators. The OSHA guidance, which was effective on March 14, 2020, specifies that OSHA will not enforce the annual fit testing requirement so long as the following requirements are met:

(1) the hospital is making a good faith effort to comply with OSHA's respiratory protection standard;

(2) the hospital is using only NIOSH-certified respirators;

(3) the hospital follows CDC and OSHA strategies for maximizing respirator supply;

(4) the hospital performs appropriate initial fit testing;

(5) the hospital explains to employees why the annual fit testing requirement has been temporarily suspended (due to respirator supply);

(6) the hospital explains to employees the importance of conducting a seal check on the respirator;

(7) the hospital conducts a fit test if the employee undergoes physical changes that could impact the fit of the respirator; and

(8) the hospital requires employees to report to a supervisor if the respirator's fit has been compromised.

Potential Defenses. There are two generally applicable defenses to OSHA citations that may be relevant here. These may apply to OSHA citations regardless of which enforcing entity (federal OSHA or a State Plan) issues the citations. The first is known as "greater hazard," and the second is "infeasibility."

The “greater hazard” defense has three elements: (1) compliance with the standard would create greater hazards than non-compliance; (2) alternative protective measures were used, or were not available; and (3) a variance application is not appropriate. In the case of COVID-19 response, complying with certain aspects of OSHA rules (such as, e.g., certain fit testing requirements that may utilize scarce respirators) may create a greater hazard than suspending compliance for a period of time. Applying for and obtaining a variance is not possible because of the exigent circumstances; it is also arguably inappropriate, because these measures are expected to be temporary, rather than permanent. And hospitals are taking other available measures to protect health care workers. Therefore, depending upon the facts and circumstances, this may be a viable defense to OSHA enforcement of certain requirements.

The “infeasibility” defense requires a showing that (1) compliance with the particular standard is not feasible, either technologically or economically; and (2) there was no feasible alternative means of protection (or that all feasible means were used). The most obvious place that infeasibility may come in to play in the COVID-19 situation relates to provision of personal protective equipment. Nationwide shortages of such equipment may make it temporarily infeasible to fully comply with all relevant standards. Hospitals should take all possible steps to obtain proper equipment, but in the event that those efforts fail and OSHA issues citations, the hospital may have an infeasibility defense to the citation.

Recordkeeping. OSHA has specified that employee cases of COVID-19 are recordable under OSHA’s recordkeeping rules if they are (a) confirmed as COVID-19 by an appropriate test; (b) work-related; and (c) result in any of the usual reporting criteria, including days away from work. Almost all COVID-19 cases will result in, at a minimum, days away from work; many will also result in medical treatment beyond first aid. The more difficult question is whether the COVID-19 case is work-related. Cases among hospital employees treating COVID-19 patients are more likely to be deemed work-related than cases in most other industries. The hospital should evaluate all available information to determine whether or not the case is work-related, and make a good faith judgment as to whether it is more likely than not that the employee contracted the case at work. If the case satisfies the recording criteria, then it must be reported on the OSHA 300 log. Cases involving hospitalization for treatment or the death of an employee must also be reported to OSHA promptly; although the time frame for reporting varies based on the state, we recommend a report within 8 hours, which is the shortest applicable time.

B. Employees Who Decline to Work, Citing COVID-19 Risks

The federal Occupational Safety and Health Act also may provide some protection for employees who decline to work due to the COVID-19 virus. As with other protective legislation, state laws should also be considered in any particular situation.

Section 11(c) of the OSH Act protects employees from retaliation if they exercise “any right afforded by” the Act. Pursuant to this provision, OSHA has promulgated regulations prohibiting retaliation against employees for various activities. OSHA’s regulations specify that, “as a general matter, there is no right afforded by the Act” entitling employees to “walk off the job because of potential unsafe conditions in the workplace.” Ordinarily, such conditions should be corrected by reporting them to the employer, and/or requesting an inspection from

OSHA. Therefore, in general, disciplining an employee for refusing to work is not unlawful discrimination.

There is a narrow exception to this rule, however, contained in the federal regulation. These are situations where an employee is faced with a choice between not performing assigned work or subjecting himself to “serious injury or death resulting from a hazardous condition at the workplace.” An employee who refuses in good faith, with no reasonable alternative, to expose himself to a dangerous condition is protected from discrimination where the following requirements are met:

(1) the condition is such that a reasonable person under the circumstances would conclude that there is a “real danger” of death or serious physical harm;

(2) a reasonable person would conclude that there is insufficient time, due to the urgency of the situation, to eliminate the danger by resorting to regular statutory enforcement options;

(3) the employee has asked the employer to correct the dangerous condition; and

(4) the employer has not done so.

On its face, this regulation applies when there is not sufficient time to notify OSHA of the alleged hazards and seek an inspection. It should not apply to day-to-day working conditions that could be reported and corrected. Moreover, and importantly, while the federal law prohibits discrimination or retaliation against an employee who declines to perform work while citing safety hazards, it does not prevent the employer from refusing to pay the employee for the time during which she declines to work.

IV. Wage & Hour Considerations Associated with Reductions in Work Hours

Where an employer needs to reduce the hours of work or wages of employees due to the financial stress related to the COVID-19 virus, it must comply with the wage-hour laws in doing so. There are several relevant considerations.

First, the Fair Labor Standards Act and other state wage-hour laws generally require that salaried exempt employees receive their full weekly salary for any week in which any work is performed. Employers should clearly communicate to exempt employees that they are prohibited from performing any work—including occasionally checking emails—during the furlough period.

A potential reduction in salary for exempt employees should reflect a bona fide business change reflecting long-term business needs. Under federal regulations, a salaried employee is one whose salary is not reduced because of either the quality or quantity of the employee’s work. Under certain circumstances, reducing an employee’s salary because of a corresponding reduction in quantity of work caused by COVID-19 might violate this principle and jeopardize the employee’s exemption. That could expose the hospital to damages for unpaid overtime wages and liquidated damages for hours the salaried employee worked over 40 per week under federal law, in addition to various other legal violations under state law, particularly in California.

The DOL issued opinion letters in the wake of the 2008 financial crisis that approved a reduction in salary based on a reduced schedule when the reduction lasts for a multi-week or multi-month period due to economic conditions. This opinion is generally consistent with courts that have held that, if a proportional salary reduction is a bona fide change reflecting long-term business needs, it does not jeopardize the exemption. Regardless, the employer should bear in mind that the employee's salary must remain above the threshold for exempt employees in order to maintain the exemption. Currently, the salary exemption is \$35,568 annually under federal law, and varying amounts under state law, such as \$54,080 annually in California.

In some states, employers must provide advance notice of any wage reductions. South Carolina, for example, requires seven days' advance notice in writing to an employee whenever the pay rate is reduced. And Missouri requires 30-day advance written notice of a reduction in wages. Various penalties may be assessed for violations of the wage notice requirements, depending on the state.

Non-exempt employees (who are usually paid on an hourly basis) are only paid for time worked, and thus, unlike exempt employees, are not entitled to a weekly salary when they work less than a full week. Nonexempt employees can be furloughed for full or partial workweeks, so long as they are paid for any time actually worked. For non-exempt employees who may be working remotely on a reduced schedule, the employer needs to ensure they are accurately tracking and reporting their time to avoid possible claims. Additionally, regardless of whether an employee is working remotely or from the workplace, the employer still must account for state and local laws that apply, such as meal and rest break laws, expense reimbursement laws, and predictive scheduling ordinances.

V. Considerations Impacting the Decision to Furlough or Terminate Employees

Although most hospitals are struggling to maintain appropriate staffing levels, some may need to consider whether to furlough or to terminate non-essential employees, in light of the COVID-19 crisis. The decision whether to furlough employees temporarily (anticipating that they will be recalled within six months) or to terminate employees but make them eligible for later rehire is a complicated, multi-faceted one. While the summary below is not exhaustive, it is intended to outline some of the central issues presented by each scenario that may affect hospitals' decisions regarding reductions in force.

A. Furlough

In a furlough scenario, the employee would remain employed (albeit inactive and without pay), while continuing to receive group benefits such as health, vision and dental (if available under the terms of the respective plans) until they are recalled to active work. A brief summary of the potential issues in this scenario include:

- **No federal WARN Act Notice Obligations:** A temporary furlough does not immediately trigger federal WARN Act notice obligations because the layoff is expected to be less than six months. Because no employees are being terminated from employment, and because the furlough is expected to be temporary, no notice

obligation is triggered. Relevant state-specific WARN laws, which exist in slightly less than half the states, must also be assessed for unique triggers.

- **Unlikely Severance Obligations:** It is unlikely that furloughed employees would be eligible for benefits under a severance plan when they are temporarily furloughed with an expectation of recall. But, an employer must review and, if necessary, amend any applicable severance plan to make clear that such employees are not eligible for severance. Amendments can generally be made without advance notice.
- **Possible Collective Bargaining Agreement Obligations:** Specific contract language will control the employer's rights to temporarily furlough represented employees covered by CBAs. Most CBAs include provisions requiring that reductions in the workforce be implemented based upon seniority. Many such provisions require a minimum amount of notice (up to two weeks, typically) and sometimes require the employer to provide certain benefits (such as employer-subsidized continuation of welfare benefits or supplemental unemployment compensation). Furloughed employees generally have recall rights, at least during the period of their short term reduction and sometimes for a period of years.
- **Possible Employment Agreement Obligations:** Employer rights under employment agreements will be based upon the terms of the respective agreements and applicable state laws. Force majeure provisions, if they exist, should be reviewed to determine if they apply to the current circumstances. If there is no force majeure provision, there are limited circumstances where an employer may be able to suspend performance.
- **Unlikely Obligations to Make Payment of Unused PTO:** Absent unique state-specific requirements and subject to the language in existing policies, employers are not required to make full payment at the time of furlough for benefits such as accrued but unused vacation, sick days, personal days or other forms of paid time off. This eliminates the need for an immediate cash outlay for this purpose.
- **Employee Benefits:** Employers who pursue a furlough path will need to assess the language of group benefit plans to determine whether it aligns with the desired continuation of (or termination of) active benefits, and, where possible, should amend the plan as appropriate. In particular, the plan might currently provide that eligibility for coverage is lost mid-furlough, such as after 30 days of no hours worked by plan participants, or could be ambiguous as to whether eligibility continues during the furlough or not. This is especially important for medical benefits, life insurance, and disability benefits that employers want to continue in place and employees may need during the furlough period.
- **No COBRA Notice and Administration Obligations:** Because the employer is not severing the employment relationship, and assuming group benefits would continue for furloughed employees, the employer will not incur the administrative burden and cost of distributing COBRA notices and the related disruptions of administration of benefits.
- **No Rehire Onboarding Administrative Burden:** The employees would return without a break in service, eliminating the need for formal reorientation and other onboarding procedures when normal operations resume.

- **Employees Eligible for Unemployment:** Even though temporarily furloughed, it is likely that employees would be eligible to collect unemployment compensation benefits. While it is a state-specific inquiry, the federal Department of Labor's guidance to the states (which administer unemployment insurance programs) is that unemployment claimants are eligible for benefits if an employer temporarily ceases operations due to COVID-19, thereby preventing employees from coming to work.

B. Termination

If termination is necessary due to the financial stress created by the COVID-19 crisis, the employee would separate from the payroll and cease to be employed, while being deemed to be eligible for rehire later. Potential issues include:

- **WARN Act Notice Obligations:** Assuming that the various statutory triggers have been met, because employees would suffer an immediate employment loss, the employer likely will be obligated to provide 60-days' notice under federal WARN, although the notice obligation may be reduced to the earliest most practicable notice due to unforeseen business circumstances. State-specific WARN laws will need to be assessed for unique triggers.
- **Triggered Severance Obligations:** Terminated employees would ordinarily be eligible for benefits under any severance plan when they are dismissed and severed from the payroll. However, the employer could consider whether it is possible to terminate the severance plan prior to the severance.
- **Triggered Collective Bargaining Agreement Obligations:** Most collective bargaining agreements do not authorize an employer to terminate the employment of bargaining unit employees without cause based upon a change in business conditions. Instead, collective bargaining agreements typically include provisions requiring layoff by seniority with recall rights for a period of time (up to two years). Some collective bargaining agreements include language that obligates the employer to continue benefits for employees on layoff or provide supplemental unemployment compensation. Many collective bargaining agreements also include provisions for payment of severance to affected workers. Employers may also have an obligation to bargain at least about the effects of the reduction in force upon the request of the union.
- **Triggered Employment Agreement Obligations:** Employer rights under individual employment agreements will be based upon the terms of the agreements. If employment agreements contain force majeure provisions, the language must be reviewed to determine if the force majeure provisions apply under the current circumstances. Employment agreements with high-level managers may have provisions that require payment of specific severance benefits if the signatory employee is terminated without cause.
- **Likely Obligations to Make Payment for Unused PTO:** In many states, employers will be required to make full payment on the last day of employment (or the first regular payday immediately thereafter) for accrued but unused vacation, sick days, personal days or other forms of paid time off.

- **Employee Benefit Obligations:** Employers will realize reduced group-benefit costs with a decline in eligible participants, but COBRA obligations exist.
- **COBRA Notice and Administration Obligations:** Because the employer is severing the employment relationship, dismissed employees generally would be ineligible to participate in group benefit plans, except via COBRA continuation. The employer will be required to provide notice of continuation rights to all participants losing coverage and administer benefits to those who avail themselves of their COBRA rights.
- **Onboarding Administrative Burden:** Once employees return, they would have to recertify work eligibility as would any new hire, along with other administrative requirements tied to the hiring process.

C. The Technical Aspects of Furloughing or Terminating Employees

Each of the above items raises a number of technical issues that should be addressed to ensure legal compliance. Because every situation is different, we recommend that any hospital considering furloughs or terminations consult legal counsel with regard to each of the issues noted above.