



**LOCKABY**

— PLLC —

# COVID-19 and Employment Law: Considerations for Audiology Practice Owners and Managers

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# COVID-19 and Employment Law

## ▶ Agenda

- ▶ Families First Coronavirus Response Act (Public Law 116-127 (2020))
  - ▶ Emergency Paid Sick Leave and Paid FMLA Leave Requirements
  - ▶ “Health Care Provider” Exemption
- ▶ Return-to-Work Guidelines
  - ▶ Social Distancing
  - ▶ Cleaning, Protection, and Hygiene
  - ▶ Employee and Visitor Screening
- ▶ HR Policies and Procedures

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ Families First Coronavirus Response Act, P.L. 116-127 (2020)
  - ▶ Enacted on March 18, 2020, with the intention of helping the United States combat the economic impacts caused by COVID-19, the respiratory disease caused by the coronavirus
  - ▶ With some exceptions, the Act applies to businesses with fewer than 500 employees
  - ▶ Two primary provisions: emergency paid sick leave and emergency paid FMLA leave
  - ▶ Takes effect on April 2, 2020; Expires on December 31, 2020

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

### ▶ Paid Sick Leave

- ▶ Unless exempted, employers must provide 80 hours of paid sick leave if an employee:
  - ▶ (1) Has been ordered by the government to quarantine or isolate because of COVID-19
  - ▶ (2) Has been advised by a healthcare provider to self-quarantine because of COVID-19
  - ▶ (3) Has symptoms of COVID-19 and is seeking a medical diagnosis;
  - ▶ (4) Is caring for someone who is subject to a government quarantine or isolation order or has been advised by a healthcare provider to self-quarantine
  - ▶ (5) Needs to care for a son or daughter whose school or child-care service is closed due to COVID-19 precautions
  - ▶ (6) Is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ Paid sick leave must be paid at the following rates:
  - ▶ For (1) through (3) -- at the employee's "regular rate" of pay
  - ▶ For (4) through (6) -- at two-thirds of the employee's "regular rate" of pay or minimum wage (\$7.25/hour), whichever is greater
- ▶ Part-time employees are eligible to take the number of hours they normally work in a two-week period
- ▶ Paid sick leave is available to *all* employees immediately upon the Act taking effect (4/2/20)

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ CAUTION! Employers *cannot*...
  - ▶ Require an employee to use other paid leave (of any kind) before using the paid sick leave provided by the FFCRA
  - ▶ Require an employee to find a replacement to cover his or her scheduled work hours
  - ▶ Retaliate against an employee who takes leave available under the FFCRA
  - ▶ Retaliate against an employee who files a complaint or participates in any proceeding related to the FFCRA
  
- ▶ Statutory Caps
  - ▶ Paid sick leave is limited to...
    - ▶ \$511 per day (\$5,110 total) for an employee's own care
    - ▶ \$200 per day (\$2,000 total) for care for someone else

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

### ▶ Paid FMLA Leave

- ▶ The Act amends the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*, to provide employees with up to 12 weeks of leave when they can't work because their minor son or daughter's school or child-care service is closed due to a public health emergency
  - ▶ The Act defines "son" and "daughter" to include biological, adopted, and foster children; step-children; legal wards; and children of persons taking the place of a parent.
- ▶ The first 10 days of leave can be unpaid
  - ▶ The employee can opt to substitute accrued vacation, sick leave, or PTO
  - ▶ *But employers cannot require employees to do so*
- ▶ For the remaining 10 weeks, employers must pay employees at two-thirds their "regular rate" of pay
  - ▶ Subject to a \$200/day (\$10,000 total) statutory cap

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ Employees with variable schedules: the total paid FMLA leave equals the average number of hours worked per day over the previous six months
- ▶ Eligibility: only employees who have been on payroll for at least 30 calendar days are eligible for paid FMLA leave



# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ **DISTINCTION: Employers of 25 or more employees vs. 24 or fewer employees**
  - ▶ 25 or more employees - Employer required to return employee to same or substantially equivalent position upon return from leave
  - ▶ 24 or fewer employees - Employer *not* required to return employee to same or substantially equivalent position upon return from leave *if*
    - ▶ The position held by the employee when the leave started no longer exists due to economic conditions or other changes in operating conditions that effect employment or were caused by a public health emergency, such as the COVID-19 pandemic, during the period of leave;
    - ▶ The employer makes a reasonable effort to restore the employee to a position equivalent to the position he or she held when leave started, including with equivalent salary and benefits; and
    - ▶ The employer made reasonable efforts to contact the employee about equivalent positions.

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ Critical Differences Between the FMLA and the FFCRA
  - ▶ Eligibility
    - ▶ FMLA: Employee must work 1,250 hours during 12 months prior to start of leave
    - ▶ FFCRA: Employee must be on payroll for 30 days prior to start of leave
  - ▶ Paid vs. Unpaid Leave
    - ▶ FMLA: all leave is unpaid
    - ▶ FFCRA: some leave is unpaid
  - ▶ Commingling of Benefits
    - ▶ FMLA: Employer may apply accrued vacation, sick leave, and PTO concurrent with leave
    - ▶ FFCRA: Employee has option to apply vacation, sick leave, or PTO with first 10 days of leave
  - ▶ Return from Leave
    - ▶ FMLA: Employer must return employee to same or substantially equivalent position
    - ▶ FFCRA: Employer may not need to return employee to same or substantially equivalent position

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

### ▶ Tax Credits

- ▶ Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the Act.
- ▶ “Qualifying wages” include wages paid to an employee who takes leave under the Act for a qualifying reason
- ▶ The total tax credit is capped at applicable per diem (and aggregate) wages caps
- ▶ To qualify for tax credits, employers must maintain the following records for 4 years:
  - ▶ Documentation showing how the employer determined the amount of paid sick leave and paid FMLA paid to eligible employees, including records of work (including telework);
  - ▶ Documentation showing how the employer determined the amount of qualified health plan expenses allocated to wages;
  - ▶ Copies of any completed IRS Forms 7200 submitted to the IRS;
  - ▶ Copies of the completed IRS Forms 941 submitted to the IRS or, for employers that use third-party payers to meet their employment tax obligations, records of information provided to the third-party payer regarding the employer’s entitlement to the credit claimed on IRS Form 941; and
  - ▶ Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

### ▶ Statutory Caps and Tax Credits - Paid Sick Leave

#### ▶ Examples

- ▶ 1) EE takes emergency paid sick leave because he has coronavirus symptoms and is awaiting a medical diagnosis. EE works full-time -- eight hours per day -- with a regular rate of pay of \$40 per hour. EE misses work for 10 days and receives 10 days of emergency paid sick leave. EE receives full pay for both weeks, \$1,600 per week and \$3,200 total.
  - ▶ ER will receive a \$3,200 tax credit.
- ▶ 2) EE takes emergency paid sick leave because he must stay home to care for his spouse who has been advised by a health care provider to self-quarantine due to COVID-19 concerns. EE works eight hours per day, with a regular rate of pay of \$30 per hour. EE misses work for 10 days and receives 10 days of emergency paid sick leave. Therefore, EE receives 2/3 of his pay for both weeks (\$1,200 per week and \$2,400 total).
  - ▶ ER will receive a \$2,000 tax credit (8 hours per day x \$30 per hour x 10 days = \$2,400, but the amount is subject to the \$2,000 cap).

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

### ▶ Statutory Caps and Tax Credits - Paid FMLA Leave

#### ▶ Example

- ▶ 1) EE's child's day care closes because of COVID-19, and EE cannot find anyone to take care of her child, nor can EE work remotely. EE misses work for 12 weeks. EE's regular rate of pay is \$70 per hour, and she works eight hours per day. Because EE is eligible for both the 10 days (two workweeks) of paid sick leave as well as 10 weeks of paid FMLA leave, she may receive paid leave for a total of 12 weeks. Therefore, EE will receive as wages:

- ▶ \$46.90 per hour (2/3 of \$70) x 8 hours x 10 days (2 week) = \$3,752 (paid sick leave)
- ▶ \$46.90 per hour (2/3 of \$70) x 8 hours x 50 days (10 weeks) = \$18,760 (paid FMLA leave)
- ▶ ER will receive a tax credit of \$12,000 (\$200 per day cap x 10 days (2 weeks)) + (\$200 per day cap x 50 days (10 weeks)) = \$12,000.

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

### ▶ Documentation for Leave

- ▶ Employee should provide a signed statement containing:
  - ▶ Employee's name
  - ▶ The dates for which leave is requested;
  - ▶ The COVID-19 qualifying reason for leave; and
  - ▶ A statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.
- ▶ If an employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19, he must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.
- ▶ An employee who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 must provide the name of the health care provider.
- ▶ An employee who is caring for an individual who is subject to a governmental quarantine or isolation order or who has been told by a health care provider to self-quarantine must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject, or (2) the name of the health care provider who advised the individual to self-quarantine.
- ▶ An employee who is requesting paid sick leave or paid FMLA leave to care for his/her child whose school or place of care is closed, or whose child care provider is unavailable due to COVID-19, must provide (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ “Health Care Provider” Exemption
  - ▶ Employers of “Health Care Providers” *may* elect to exclude such employees from eligibility for the Act’s paid sick leave and paid FMLA leave requirements
  
- ▶ Who is a “Health Care Provider”?
  - ▶ (1) *For purposes of an employee’s eligibility for paid sick leave and paid FMLA leave due to advice from a health care provider to self-quarantine* - a “Health Care Provider” means a licensed doctor, nurse practitioner, or other health care provider as defined by the FMLA
    - ▶ FMLA defines “health care provider” as
      - ▶ A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices; or
      - ▶ Any other person determined by the Secretary to be capable of providing health care services.

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ Others “capable of providing health care services” include:
  - ▶ Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X ray to exist) authorized to practice in the state and performing within the scope of their practice as defined under State law
  - ▶ Nurse practitioners, nurse midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law
  - ▶ Any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits



# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ Who is a “Health Care Provider”?
  - ▶ (2) “[A] health care provider is *anyone* employed at *any* doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.”
  - ▶ *Note:* “This definition includes *any* individual employed by *any* entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility. *This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.* This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

- ▶ Are audiologists and their employees “health care providers”?
  - ▶ Yes
    - ▶ They are “*anyone* employed at *any* . . . health care center[.]”
    - ▶ They are “*anyone* employed by *any* entity that provides medical services[.]”
  
- ▶ According to the DOL, “[t]o minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.”
  - ▶ In other words, employers should conservatively exempt their employees and, to the contrary, allow employees to quarantine or isolate while receiving the wages otherwise mandated by the Act

# COVID-19 and Employment Law

## *Families First Coronavirus Response Act*

### ▶ Practical Tips

- ▶ Be flexible with, and candidly discuss these issues with, your employees
  - ▶ Determine which employees are essential (in general or just in the office) and which employees are not
  - ▶ Determine on a case-by-case basis, by employee classification, who will be eligible for and who will be exempt from the Act's paid leave requirements
  - ▶ Openly discuss these decisions, and the bases for the decisions, with employees
- ▶ DOL guidance is just that - it's not the law.
  - ▶ Labor Secretary has power to issue regulations, but the courts are the final arbiter of what the law is
  - ▶ While the courts generally defer to agency regulations, they are not always required or willing to do so (and, in fact, the legal issue of deference to agency regulations, and agency interpretation of its own regulations, is constantly being challenged in the courts)
- ▶ Check the DOL website regularly
  - ▶ Fact Sheets, Labor Law Posters

# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

- ▶ The federal government and state governments will be easing if not lifting various restrictions as COVID-19 cases and deaths decrease -- NOW is the time for employers to plan their employees' return to work
- ▶ Employers *MUST* follow WHO, CDC, and state government guidance to maintain a safe workplace
- ▶ The following guidelines are general considerations only
  - ▶ Each employer and industry is different and will need specifically-tailored plan

# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

- ▶ Social Distancing
  - ▶ Do not hold any in-person events or mass gatherings
  - ▶ Hold office/staff meetings virtually
  - ▶ Consider staggering the times when employees return
  - ▶ Consider continuing teleworking arrangements
  - ▶ Stagger break and lunch times (and plan for longer breaks)
    - ▶ Fair Labor Standards Act, 29 C.F.R. 785.18 and 785.19
    - ▶ Kentucky Wages and Hours Act, KRS 337.355 and 337.365
  - ▶ Discourage social practices that violate social distancing, e.g., handshakes

# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

### ▶ Social Distancing

#### ▶ Increase physical space between employees and patients and between patients

- ▶ Have maximum number of people allowed in breakroom, conference room, and lobby
- ▶ Place physical barriers in heavily trafficked areas to keep people at least 6 feet apart
- ▶ Rearrange workspaces to permit greater social distancing
- ▶ Rearrange office furniture and work equipment to permit greater social distancing
- ▶ Develop protocols for elevator use

#### ▶ Limit number of patients and visitors

- ▶ Schedule fewer appointments or space appointments farther apart
- ▶ Only allow visitors if they are a parent, guardian, caregiver, or otherwise essential to the patient

# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

- ▶ **Cleaning, Protection, and Hygiene**
  - ▶ Require employees, patients, and visitors to wear masks or approved facial coverings
  - ▶ Place proper handwashing posters in all common work areas and restrooms
    - ▶ Be flexible with employees' breaks to allow for frequent handwashing
  - ▶ Include additional sanitation measures in common areas and near frequently touched surfaces and equipment
  - ▶ Require employees to disinfect common surfaces following use
    - ▶ Tables, chairs, microwave, refrigerator, door knobs, light switches, etc.
  - ▶ Provide hand sanitizer, disinfecting wipes, and proper disposal in all common areas and at work stations where employees cannot leave to wash hands between interactions with patients and visitors
  - ▶ Coordinate with landlord or facility maintenance to increase air exchange in facility

# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

- ▶ Employee and Visitor Screening
  - ▶ Mandate that employees with symptoms stay home and follow call-in procedures
  - ▶ Institute safe screening practices for employees and visitors prior to entrance
    - ▶ Place conspicuous messaging preventing entrance if employee or visitor is sick or has experienced any COVID-19 symptoms in last 14 days
    - ▶ Provide alternative for visually impaired and Spanish-language option
    - ▶ *NOTE:* Ensure that hourly, non-exempt employees are compensated for health screening if required under federal, state, or local law
  - ▶ Consider implementing temperature checks upon entrance in a safe and confidential manner (and send anyone home who presents with an elevated temperature)
    - ▶ *NOTE:* Be sure to comply with EEOC guidance
      - ▶ Request volunteer to take temperatures; provide volunteer with appropriate PPE (gloves, mask, eyewear, and gown)
      - ▶ Take temperatures as privately as possible; DO NOT line up employees to take temperatures
      - ▶ Use infrared thermometers, not oral thermometers
      - ▶ Pay employees who, due to elevated temperatures, are sent home
      - ▶ Maintain temperature readings/records in a confidential medical file separate from personnel file



# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

### ▶ HR Policies

- ▶ Be mindful of privacy concerns and any necessary accommodations
- ▶ Consider suspending or reconfiguring security practices that require touching of frequently-touched surfaces (e.g., PIN-entry devices, time-clock stations, sign-in books, etc.)
- ▶ Review and update attendance, leave-of-absence, FMLA, and PTO policies to prepare for COVID-19 absences
- ▶ Prepare policy and procedure for FFCRA leave requests and recouping tax credits
- ▶ Prepare policy for employees diagnosed with COVID-19 regarding return-to-work procedures and requirements
- ▶ Review and update teleworking/telecommuting policies

# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

### ▶ HR Policies

- ▶ Prepare policies and procedures to track positive cases to provide proper notification for those exposed and to prevent further spread
- ▶ Review and update policy for reporting safety issues
- ▶ Review and update timekeeping policies and procedures to allow for social distancing and accurately recording working time
- ▶ TRAIN MANAGEMENT, SUPERVISORS, AND EMPLOYEES ON ALL POLICIES AND PROCEDURES
  - ▶ Have *all* employees sign and date acknowledgement of policies and training on policies, and place signed forms in each employee's personnel file
- ▶ TRAIN SUPERVISORS ON HOW TO MONITOR COMPLIANCE WITH AND ENFORCE POLICIES AND PROCEDURES

# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

### ▶ Other Considerations

- ▶ Stay abreast of latest federal, state, and local guidance and restrictions, and remain compliant with public health orders
- ▶ Develop strategy for employees who decline to return to work or who need additional time off
  - ▶ NLRA, ADA, OSHA, and other employment-law implications
  - ▶ Unemployment Insurance Fraud: if employee declines to return to work because he or she is earning more in UI benefits than in wages, employers in most states must report that work is available and that the employee is refusing to return for an unexcused reason
- ▶ Be mindful of interactive process under ADA for accommodation requests
  - ▶ Accommodations could include PPE, remote work, alternative scheduling, alternate work locations, alternate work assignments, increased social distancing, and leaves of absence

# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

### ▶ Other Considerations

- ▶ Create a plan for when employees may resume business travel
- ▶ Be mindful of anti-discrimination and anti-retaliation laws when returning employees to work, when responding to complaints, or addressing safety issues
- ▶ Prepare contingency plan in the event increased outbreak or spike in infections results from eased restrictions
- ▶ Be mindful of employees' rights under collective bargaining agreements
- ▶ Encourage employees to raise questions and issues

# COVID-19 and Employment Law

## *Return-to-Work Guidelines*

### ▶ Other Considerations

- ▶ Employers that communicate openly and candidly with employees, and that act in ways that demonstrate genuine concern for employees, are more likely to see reduced absences and increased productivity
- ▶ Appoint Chief Covid-19 Officer to ensure all public safety and health guidelines are implemented and enforced

# COVID-19 and Employment Law

## *CARES Act - Payroll Protection Program Loans*

- ▶ Section 1102: Qualifying businesses are eligible for Small Business Administration PPP loans of up to 2.5 times average monthly payroll (as defined in the Act)
- ▶ Section 1106: PPP loans are forgiven in an amount equal to qualifying expenditures (payroll, interest, utilities, and certain other expenses) paid or incurred in the 8-week period following origination of the loan
- ▶ In general, forgiveness of indebtedness is taxable income (IRS Code Section 108)
  - ▶ However, Section 1106(i) of the CARES Act provides that any amount which “would be includable in gross income of the eligible recipient by reason of [such] forgiveness . . . shall be excluded from gross income.”

# COVID-19 and Employment Law

## *CARES Act - Payroll Protection Program Loans*

- ▶ This provision was intended to provide a benefit to the borrowing business by allowing the full amount of the loan to be used for qualifying costs.
- ▶ What the CARES Act provided the IRS appears to have taken away
  - ▶ IRS Notice 2020-32 (5/1/20): Citing Section 265(a)(1) of the Code, which disallows any deduction if “allocable to one or more classes of income ... wholly exempt from the taxes imposed by this subtitle...,” the Notice concludes that the expenses paid with the PPP loan are *not* deductible
  - ▶ This treatment effectively puts the taxpayer in the same position as if the forgiveness of the loan were fully taxable
  - ▶ This seems counter to Congress’s intent under the CARES Act; hopefully the IRS will reconsider this position

Questions?





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