

MARR JONES & WANG

A LIMITED LIABILITY LAW PARTNERSHIP

Labor and Employment Law

FAQS ON COUNTY ORDERS TO WORK FROM HOME Current as of 4:30 p.m., March 23, 2020

In addition to the city and county orders issued earlier, on March 23, 2020, Governor Ige issued an order requiring non-essential business to close or have their employees work from home. Essentially businesses are encouraged to have employees work from home. What does this mean for employers? If you are subject to a collective bargaining agreement please review its terms as it may address layoffs.

1. If I have to close and/or lay off employees, do I have to continue their wages?

As of today, no. The initial federal legislation (the Families First Coronavirus Response Act (“FFCRA”)) did not provide for pay for employees impacted by shutdowns or reductions in hours/operations. However, the legislation now pending in Congress may provide for financial incentives to continue paying impacted employees through loans or other incentives,

2. What happens to employees’ benefits such as medical coverage?

As of now, there is no requirement that benefits such as medical coverage be continued. If you are subject to the Prepaid Health Care Act and lay off employees or reduce their hours below 20 hours/week at some time this month, coverage will not be required for April. Again, the pending federal legislation may address this. Employees will be very concerned about having medical coverage as the FFCRA only provided for free testing not free treatment. If possible, you should consider continuing to provide medical coverage for employees through the end of April as you may receive an incentive for doing so. If your employees contribute to the premium cost, they may be still be required to do so, although you may need to defer collecting their portion.

3. If I have exempt employees, can I reduce their hours and pay them only for the hours they work?

No. An exempt employee’s pay may not fluctuate based on the quantity of work. If they work any part of a workweek, they still must be paid their weekly salary. You can order them not to work for an entire workweek and not pay them for that week. That means no they may not be required to check emails, respond to phone calls, or perform any other work.

4. Do I need to give notice under any federal or state law of a layoff?

The federal WARN Act requires 60 days' notice of a mass layoff which is defined as at least 33% of the workforce at a single site of employment, 50 of which must be full time employees. A mass layoff under WARN is a layoff that is expected to be six months or longer. Under WARN, a shorter notice may be given for "mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required." The events of the last few days, we believe, will fall under that exception.

If you meet the numerical threshold for a mass layoff but do not believe the layoffs will extend for six months, you need not give a WARN notice. Under WARN, you can revisit this as circumstances change. If you feel more comfortable giving a WARN notice please consult your MJW attorney for specific advice.

5. Will employees receive unemployment benefits?

Yes, if they have been laid off. If employees' hours are reduced and their weekly unemployment benefit exceeds their weekly pay they are considered to be "part total" unemployed and will receive benefits. The one-week waiting period has been waived. The 26 weeks of benefits will most likely be extended by at least 13 weeks.

6. Can employees use accrued vacation/PTO?

The laws do not regulate these type of benefits, it is discretionary but many companies are permitting employees to use accrued leaves to continue their pay.

7. Am I required to allow my employees to work from home?

No. The orders signed by the Mayors do not require that you allow your employees to work from home.

8. If we are remaining open but need to reduce the workforce, must we do it by seniority?

If you have a CBA, its terms will govern. For non-represented employees, review your handbook to see if it addresses this. The general rule is you do not need to reduce the workforce in order of seniority provided you do so using legitimate non-discriminatory reasons. You may need to retain employees with specialized skills.

9. If an employee returns to Hawaii and is required under the Governor's order to self-quarantine for 14 days must they be paid?

Maybe. The FFCRA requires employers with less than 500 employees to provide 80 hours of paid sick leave to full-time employees (that amount is prorated for part-time employees) if:

- a. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- b. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- c. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- d. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
- e. The employee is caring for a son or daughter because his or her school or place of care has been closed, or his or her child care provider is unavailable due to COVID-19 precautions.
- f. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

We should have more information once the Department of Labor issues regulations under FFCRA (anticipated by April 2, 2020). However, the paid sick leave provisions do not apply to stay home orders.

10. Can I require employees who are of a certain age or have certain conditions to stay home?

No. The discrimination laws are still in effect. You can offer to allow employees who may be at higher risk to remain home, but you should not mandate it or ask employees if they have certain health conditions. In addition, if an employee is not comfortable continuing to come to work do not force them.

We will update this once a federal stimulus bill passes and is signed into law. In addition, it appears the Governor will be issuing a state wide remain at home order although the definition of “essential business” is consistent with other states and should not change,

Marr Jones & Wang is committed to assisting our clients in these challenging times. Our attorneys are all working remotely and are available to answer your questions.