



Montana Nonprofit Association



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Information

- The following Information has been compiled from various sources by Westaff/Personnel Plus! HR Consultants
- It has been updated to be current as of this morning but It contains perishable information that can change at any time.
- Consult a qualified advisor for updates.
- We are HR consultants, NOT attorneys

Pandemic Issues

- Employers are in a panic to address questions related to:
 - Paying Employees during the pandemic
 - Dealing with too many or too few staff
 - Safety Issues
 - Making Temporary/Permanent Policy Changes
 - Responding to Requests for Time Off
 - Understanding Unemployment Insurance
 - Being prepared for emergency legislation such as The Families First Act
 - This webinar seeks to address some of those questions and concerns

Payroll Concerns

- Employers must pay non-exempt employees the agreed to pay amounts for time they actually work, including overtime as applicable.
 - Can change Pay prospectively including changing future salary
- Pay exempt employees according to salary basis rules
 - Pay salary is worked a portion of a week
 - Can reduce pay if absent and no sick pay available
 - If activated for national guard duty pay salary but you may offset salary.
 - Employers may give exempt staff every 2nd,3rd or so week off to lessen financial burden
 - Rules for salary may be found at 29 CFR 541.602

Last Paycheck Concerns

- Section 39-3-205 of Montana laws provides:
 - When an employee is separated for cause or laid off from employment by the employer, all the unpaid wages of the employee are due and payable immediately upon separation unless the employer has a written personnel policy governing the employment that extends the time for payment of final wages to the employee's next regular payday for the pay period or to within 15 days from the separation, whichever occurs first.
 - **Immediately** is defined as the sooner of the end of the shift or four hours unless a policy has been adopted.

Employee Scheduling Concerns

- Employers may reassign employees (absent policies or contracts to the contrary), reduce their hours or transfer them to other shifts or properties.
- Remember that such changes may have consequences for employees continuing to be employed or may force employees to take protected leaves.

Issues of Too Many/Few Staff

- Some businesses are finding themselves short staffed- especially when pandemic related time off affects staff
 - Hiring using normal, yet expedited process
 - Consider using a temporary help service to staff immediately.
(Disclaimer: Westaff is such an agency)
- If necessary to lay off, decide if job attaching worker is applicable and appropriate
 - Job Attachment means the work search requirement is suspended
- Absent contracts, employers can schedule as they believe appropriate to meet their business' needs.

Laying Off Staff

- If laying Off Staff, direct them to montanaworks.gov to file for UI benefits
- Designate those affected as either laid off or terminated
- A list of affected employees may be sent to UI to speed the process. A fax number has been provided.
- It is not required by law that you cash out benefits such as accrued leave if layoff is temporary
- If is or becomes permanent, at least vacation pay is due and payable. Other benefits payable per policies.

Unemployment Insurance

- Temporary emergency rules were adopted on March 17th, 2020 by Montana Governor Bullock that provide UI benefits for:
 - Claimants directed by their employer to leave work or not report to work due to COVID-19 qualify as being temporarily laid off by the employer and eligible for benefits.
 - Workers who must quarantine or who need to take care of a family member due to COVID-19 are also considered temporarily laid off and eligible for benefits.
- The waiting week is considered satisfied upon layoff.

Unemployment Insurance Issues

- ***Claims will not be chargeable to employer's account.***
 - According to MDOLI reimbursable employers will NOT be charged for these benefits but they will be charged for the administration fee.
 - The date to file wage reports and pay unemployment insurance contributions is extended if delay is related to COVID-19.
- Claimants are responsible for staying in contact with their employer and return to work when they have the opportunity.
- Claimants must still meet monetary and other non-monetary eligibility standards.

UI Generally

- The maximum weekly benefit in Montana amount is currently \$510; the minimum amount is currently \$151.
- Claimants may receive benefits for up to 28 weeks.
 - The Phase 3 Coronavirus Response Act may create a federal extension to extend beyond the 28 week maximum and increase the WBA by \$600
- Individuals who suffer a reduction in hours may qualify for partial weeks of benefits.
 - Employees receiving UI benefit may earn up to 25% of the WBA with no penalty. Thereafter, it is a 50 cent reduction for each dollar earned over the 25% threshold

Emergency UI Benefits

- Claimants are not eligible for Coronavirus benefits if they could work from home but choose not to.
- People who think they are eligible for these benefits can usually apply for benefits online at montanaworks.gov or by phone. 3.28 Million individuals opened new claims last week.

Plant Closing/WARN Act Concerns

- The federal and most state WARN Acts require employers of 100+ to provide at least 60 calendar days advance written notice of a plant closing and mass layoff affecting 50 or more employees at a single site of employment.
 - Layoff must be discharged or laid off for six months or more
- An exception applies to closings and layoffs that are caused by unforeseeable business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required

Employee Safety Concerns

- OSHA and CDC have issued Guidance
 - Certain industries (i.e. health care facilities, deathcare, airlines, border protection, etc.), have far greater risk
- Employers may need to report Coronavirus cases to OSHA but conflicting info exists.
- Follow CDC and OSHA suggestions for reducing risk

Samples of Mitigation Measures

- Staggering shifts were possible to reduce personal contact
- Conducting business by phone or internet
- Reducing personal contact by closing food service except for “to go” orders
- Providing sanitizers.
- Allowing telecommuting where doing so makes sense.

Mitigation Measures

- Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60% alcohol, or wash their hands with soap and water for at least 20 seconds.
- Provide soap and water and alcohol-based hand rubs in the workplace.
- Place hand rubs in multiple locations or in conference rooms to encourage hand hygiene.

Employer Safety Actions

- Place posters that encourage [staying home when sick](#), [cough and sneeze etiquette](#), and [hand hygiene](#) where they are likely to be seen (Available from CDC on-line.)
- Provide tissues, disposable wipes and no-touch disposal receptacles for use by employees.
- Routinely clean all frequently touched surfaces in the workplace using the cleaning agents that are usually used in these areas and follow the directions on the label.

Safety Issues

- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and the employer should refer to CDC guidance for [how to conduct a risk assessment](#) of their potential exposure.
- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but ***maintain confidentiality*** as required by the Americans ADA.

Workers Compensation

- Some employees may be able to claim workers' compensation benefits under the occupational disease portion of the law.
- You should consult with your work comp carrier and OSHA regarding reporting of such cases.

Policy Issues

- Employers may wish to temporarily or permanently suspend or alter policies. You should consider:
 - Actively encouraging sick employees or employees with sick family members to stay home
 - Having non-punitive leave policies that don't punish employees who take time off. Automatically penalizing employees for absences may be considered retaliation
 - Suspending any requirements to require a healthcare provider's note for employees who are sick
 - Separating/segregating sick employees until they can risk assessed related to being at work or sent home

REVIEW/ADOPT TELECOMMUTING Policy

- As appropriate, a policy should address:
 - What positions are eligible for telecommute
 - How tools, equipment and services will be provided
 - Employers normally must pay for out of pocket costs of telecommuting
 - Working schedules and core hours
 - Security and privacy issues
 - Implications for volunteers, contractors
 - Expectations including safety, appropriate activities, timekeeping etc.
 - Other policies and procedures that may need to be modified (picking up paycheck, etc.)

Families First Act

- The Families First Coronavirus Response Act (the “Act”) was enacted on March 18th. It is Phase 2 of the Congressional response to the pandemic.
- **The Act becomes effective on April 1st.**
- The leave provisions expire on December 31, 2020.
- The bills contain anti-retaliation provisions designed to protect employees who seek to use these benefits.
- A new required emergency leave poster was issued on Tuesday and should be posted by April 1st

Families First Act

- Law contains two sections dealing with employee leave rights. Both are now in effect and each has its own name:
- The Emergency Paid Sick Leave Act (“EPSLA”).
- The Emergency Family Medical Leave Expansion Act (“EFMLEA”) and;

Qualifying for Paid Sick Leave

- Sick leave pay is available leave to employees who regardless of tenure:
 - 1. Are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - 2. have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

Emergency Paid Sick Leave Act

- 3. Are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- 4. Are caring for an individual who is either (1) subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

Emergency Paid Sick Leave Act

- **5.** Is caring for a son or daughter of who's school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions; Or
- **6.** The employee is experiencing any other substantially similar condition specified by the Secretary of HHS, Treasury and Labor.

Small Business Protection

- Both Leave laws covers employers with fewer than 500 employees but provides a possible exemption to small businesses with fewer than 50 employees in cases where the viability of the business is threatened.
- For Paid Sick Leave the exemption is only from the section on providing leave for at-home children.
- For Emergency FMLA the exemption is from the required paid FMLA leave
- USDOL will provide emergency guidance and rulemaking soon

Pay During Emergency Sick Leave

- The rate of sick pay is the employee's (FLSA) regular rate (i.e., full pay including commissions and other payments) unless leave is for an eligible family member and then it is two-thirds the employee's (FLSA) regular rate.
 - Full-time employees are entitled to 2 weeks (80 hours) of sick pay and part-time employees are entitled to the typical number of hours that they work in a typical two-week period.
 - This paid sick leave is in addition to any paid sick leave already offered by an employer and employers cannot eliminate their current benefits based on the EPSLA.
 - Maximum Daily pay is \$511. Minimum wage applies

Paid Sick Leave

- Employers cannot require an employee to first use already provided employer benefits before seeking Emergency Paid Sick Leave, nor ;
- require an employee to find a replacement, nor;
- fire an employee for taking benefits under Emergency Paid Sick Leave.

Emergency FMLA

- Emergency FMLA expands the coverage of the FMLA:
 - It covers only employers (including non-profits) with fewer than 500 employees. All public employers are covered.
 - An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employees.
- Applies to employees after 30 calendar days employment

Emergency FMLA

- The law adds a new qualifying reason to take FMLA:
- ... *an(y) absence from work to care for a child of an employee if the child's school or place of care has been closed, or the child-care provider is unavailable, due to a public health emergency due to coronavirus as an FMLA eligible event.*
- Note: Benefits available only while a public health emergency declaration is in force.

Emergency FMLA

- The first 10 days of Emergency FMLA leave is unpaid
 - Employee may receive pay under the Emergency sick leave program or may use their leave banks.
- Employees may choose to use earned any available paid time off but the employer cannot mandate the use of available paid time off if the employee elects not to use it.

Emergency FMLA

- After the 10 days, employers must provide the employee paid leave of not less 2/3 of the employee's (Fair Labor Standards Act) **regular rate** times his/her usual schedule of weekly hours for the up to remaining 10 weeks of leave.
 - Note: **Regular Rate of Pay** is defined in 29 CFR 778 but generally includes most forms of pay excepting seven statutorily exempt types of pay (such as tips)
- Emergency Paid Sick Leave Benefit Limited to \$200 a day

Coverage for Self Employed

- People who are self-employed are also eligible for the tax credit of up to 80 hrs of sick pay at their average pay and 12 weeks of family leave pay at two-thirds their normal rate.
 - These workers must show they had to comply with a self-isolation recommendation or that they had to care for a child whose school closed due to the coronavirus.
 - Their benefit is capped at the same \$511 per day for paid sick leave and \$200 for family leave (or the average daily income the person usually receives if it is less than those amounts).

Paying for Emergency Leave

- Under guidance that will be released soon, eligible employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS.
 - The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes and the employer share of Social Security and Medicare taxes.

Reimbursement Example

- If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of employer and employee federal payroll taxes in order to make qualified leave payments, and file a request for an accelerated credit for the remaining \$2,000.
- If amounts paid are less than taxes due, excess is deposited as normal.

No Social Security Tax

- Emergency Paid Sick Leave and FMLA payments mandated by the Act are exempt from the 6.2% Social Security tax component of the employer's federal payroll tax that normally applies to wages.
- Employers must pay the 1.45% Medicare tax component of the federal payroll tax, but they can claim a credit for that outlay.
- Employee's portion is still deducted.

Additional Provisions

- The bill also includes provisions that:
 - expand unemployment benefits and provide grants to states for processing and paying claims,
 - establish requirements for providing coronavirus diagnostic testing at no cost to consumers,
 - Increases Medicaid, VA and other healthcare reimbursements
 - Provides relief from certain nutrition program provisions

As We Speak...

- Congress is in the process of Sending Trump HR 748, *The CARES Act*, that makes changes to Unemployment Insurance, provides funds to distressed industries and businesses plus makes payment direct payments
 - Americans with under \$75,000 in income (\$150,000 for a couple)
 - Higher wage individuals will receive a smaller amount up to incomes of \$98,000
 - Families with Kids will get \$500 more per kid
- Bill passed Senate. House in recess but expected to Act soon. President pledged to sign.

New Unemployment Provisions

- An extended unemployment insurance program for 13 weeks on top of the time allowed under state UI Programs.
- It will also add \$600 per week on top of the employee's WBA for four months.
- It will apply to traditional workers for small and large businesses as well as those who are self-employed and workers in the gig economy- (Think Uber drivers).

Business Loans

- The Bill provides loans, using the SBA's 7a loan program
- Employers with fewer than 500 employees per location may request an amount equal to one year's payroll costs up to \$10 million
- Loans may be used for payroll, benefits, debt service rent/lease payments and more
- These loans would be retroactive to February 15, 2020, to help bring workers who may have already been laid off back onto payrolls.

Loan Forgiveness

- The portion of the loan used for payroll costs, mortgage interest, rent, and certain utility payments (i.e., total payroll costs) may be forgiven on a tax-free basis.
- The amount to be forgiven is the sum of the total payroll costs of the borrower during the 8-week period beginning on the date of the loan.

Forgiveness Reductions

There is a provision, however, that reduces the amount that may be forgiven if the employer either:

- Reduces its workforce during the 8-week covered period when compared to other periods in either 2019 or 2020, or
- Reduces the salary or wages paid to an employee who had earned more than \$100,000 in annualized salary by more than 25% during the covered period.

Emergency Loan Limitations

- The law prohibits businesses controlled by the President, Vice President, members of Congress and heads of executive departments and their children and relatives from participating in the loan or investment programs,
- There are also provisions to ban stock buybacks worker protections attached to federal loans for businesses and prohibits airlines from using the funds for CEO bonuses.



That Today's
Webinar

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