

Updated FAQs on Families First and Reopening Businesses

Since the passage of the Families First Coronavirus Response Act, many employers have closed or partially closed their businesses and are considering reopening, which raises numerous issues regarding employees' return to work. Further, the United States Department of Labor ("DOL") has since promulgated regulations providing more guidance on the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLA"). The FAQs below offer some general guidance on factors employers should consider in determining the best way to negotiate the reopening of their Practices. Employers should recognize that this is a fast-moving and quickly evolving set of circumstances, so the answers to these questions may change and may depend on each employer's conditions.

FAQ #1 – Most of my employees are drawing unemployment benefits. What if they tell me they would prefer to remain at home when I call them to return to work?

ANSWER – Generally, if work is available for them and they reject returning to work, they would not continue to be eligible for benefits. DEW should be notified that work has been made available for them.

FAQ #2 – If they still decide not to return to work, what does that mean as far as their employment status?

ANSWER – If an employee decides not to return to work after a layoff, it could be construed as a voluntary resignation. However, an employer may elect to allow an employee simply to remain on an unpaid leave for a period of time.

FAQ #3 – What options are there if an employee refuses to return to work because they are nervous about the virus?

ANSWER – An employer can allow an employee to remain out of work on some type of unpaid leave, but the employee should still not qualify for unemployment.

FAQ #4 – My employees are telling me that they need the paid leave to take care of their children? I understood there is an exemption in the Families First Act for "health care providers" and that they are not required to provide the leave under either or both acts. Can't I deny the leave based on the fact that dental practices are health care providers are exempt from the acts?

ANSWER – Unfortunately, "dentists" are not contained in the definition of "health care providers" under the two statutes or the regulations that accompany them. The DOL has provided no definitive written guidance on the status of dentists as it relates to either act. However, the DOL has verbally stated that it takes the position that dentists ARE "health care providers" within the meaning of the Act and can be excluded from coverage of the paid leave requirements.

FAQ #5 – So, then are only the dentists themselves excluded from coverage and not entitled to the paid leave, or all the employees in the practice excluded from coverage?

ANSWER – That is not entirely clear. The statute specifically states that only those employees that are the actual “health care providers” can be excluded from coverage, which would presumably NOT cover everyone in the practice. However, the newly promulgated regulations contradict the statute by stating that every employee employed by the health care provider would be exempted.

FAQ #6 – Is it possible to claim an exemption from coverage of the Act because my practice is small and with under 50 employees?

ANSWER – Maybe, but it would require some analysis and documentation to ensure you can meet the criteria. The new regulations provide that there must be a determination made that to provide the paid leave would “jeopardize the viability of the business as a going concern.” In order to do that, the employer must show that it can meet at least one of the following criteria:

- 1) That the leave requested would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- 2) That the absence of the employee or employees requesting the leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
- 3) That there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting the leave and that these labor or services are needed for the small business to operate at a minimal capacity.

FAQ #7 – If I believe my practice qualifies for either the “health care provider” exemption or the “small business” exemption under the Families First Act, and my employees request paid leave, how should I notify them that we are not covered?

ANSWER – You should notify them in writing that you believe your practice is exempt from coverage and explain why.

FAQ #8 – What recourse would an employee have who believes they are entitled to the paid leave and wrongly denied it?

ANSWER - They would be entitled to file a complaint with the DOL, who would then investigate. If DOL determined that an exemption was improperly claimed the employee would be entitled to actual damages (pay for the time he or she should have been able to take), liquated damages (doubled), plus attorney’s fees. Even if DOL agrees with the employer and finds no

violation, the employee would have a private right of action and could file a lawsuit against the employer.

FAQ #9 – Am I required to bring everyone back to work at the same time, same rate of pay and same schedule when I reopen my practice?

ANSWER – No. You have broad latitude in terms of how you operate your business. However, if you plan to reduce pay or hours, you should provide 7 days written notice to the employees affected.

FAQ #10 – How do I decide who should return and when?

ANSWER – Start by looking comprehensively at all aspects of your business – financial, operational, etc. and determine how best and most fiscally responsibly you can meet those needs and what resources you require to meet them and then when. Consider bringing them back on a staggered basis and constantly reassess.

FAQ #11 – So, I am not required to bring every employee back to work?

ANSWER – There is no legal requirement that employees must be returned to work from a layoff. South Carolina is an “at-will” state, which means that both the employee and employer may terminate the employment relationship at any time, with or without cause, as long as such termination does not otherwise violate a state or federal law.

NOTE: No statements provided herein should be construed as legal advice for any given situation, but as general information only. For specific legal advice, contact Kris Cato below, or your legal counsel.

Should you have any further questions or seek assistance in reopening your Practice, please do not hesitate to contact Kris Cato at kris@blaircato.com. She offers a special hourly rate to SCDA members. Kris has been certified by the South Carolina Supreme Court as a specialist in the area of labor and employment law.