



Webinar

COVID-19 Employment Issues: Paid Leave, ADA, Collective Bargaining and Business Continuity

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April 1, 2020

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Q & A

Don't forget to submit your questions to our presenters.

How? Click on the Chat box at the bottom left of your screen and be sure to click "send."



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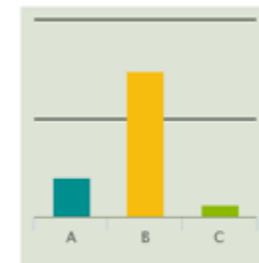
Poll Questions

Click on your screen in the box next to your answer choice.

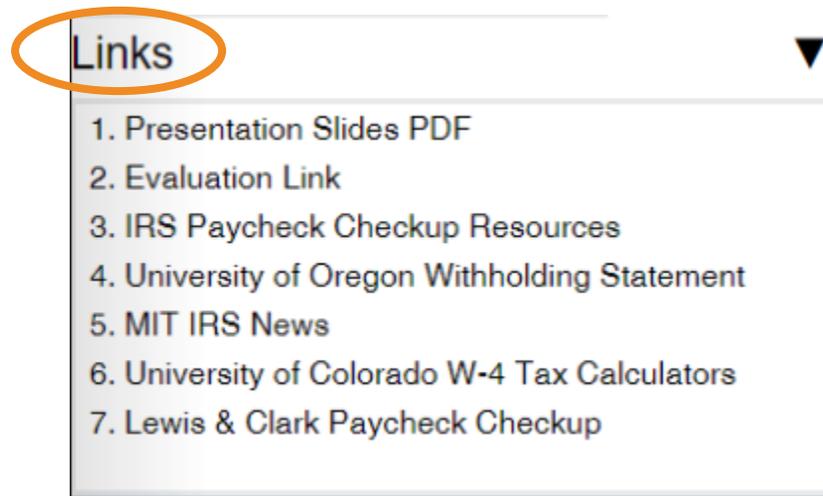
Poll Question

At which stage would you currently place your institution overall when it comes to most strategic decision-making?

- 20% - 1 A Reliant on gut, intuition, experience
- 74% - 19 B Data-informed
- 6% - 2 C Data-driven



Handouts



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Presenters



Jeff Herring
Chief Human Resource Officer
The University of Utah



Jim Paretto
Shareholder
Littler Mendelson P.C.



Jonathan Fritts
Partner
Morgan Lewis

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Today, we will cover the following topics as they relate to COVID-19:

- Collective Bargaining
- Americans with Disabilities Act (ADA)
- HR Strategy
- Paid Leave

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Jonathan Fritts

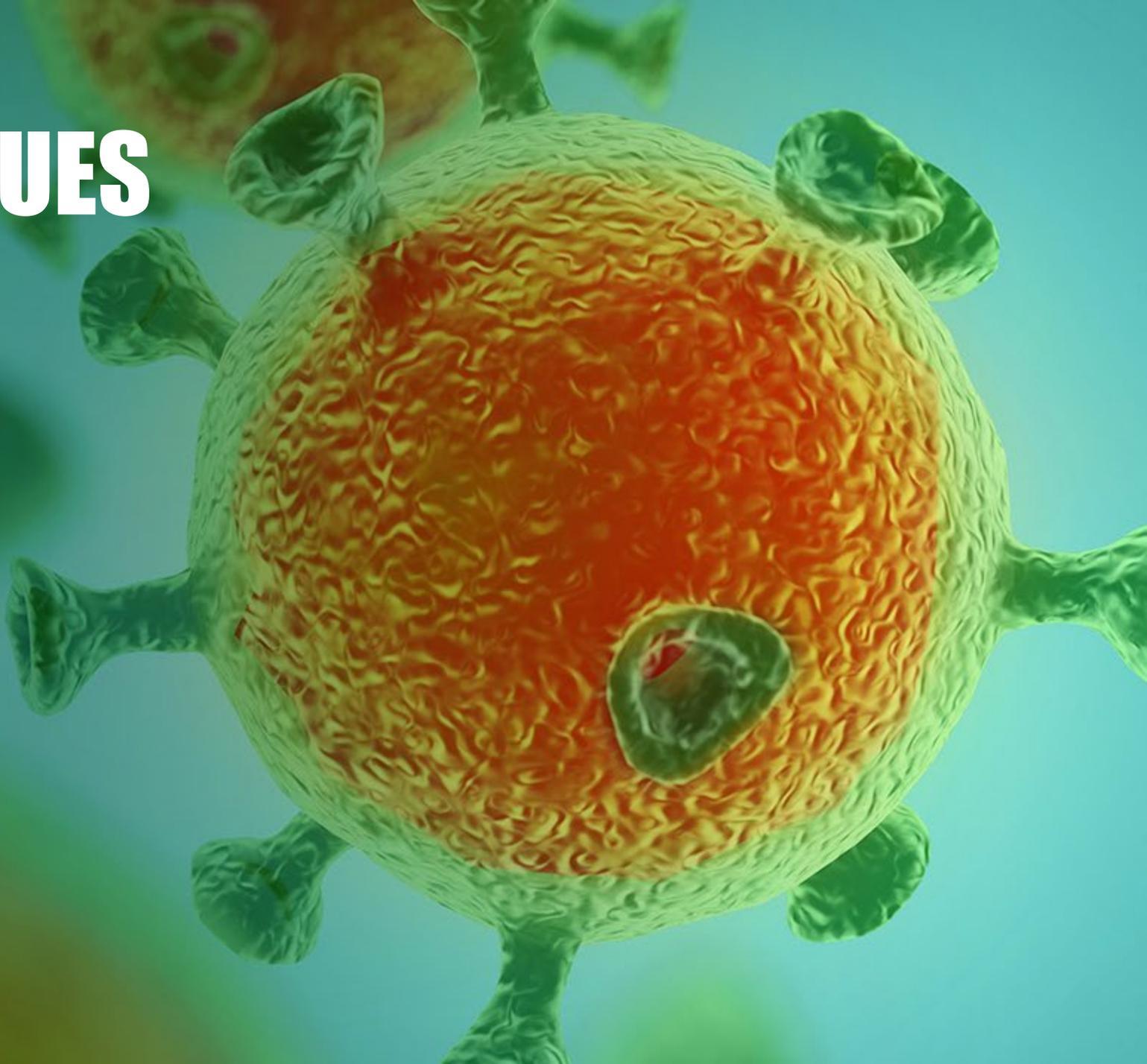
Partner

Morgan Lewis

Morgan Lewis

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BARGAINING ISSUES



Mid-Contract Bargaining Issues

- First consideration – defining “management rights” and flexibility under the current CBA that does not require bargaining or union agreement...
- Alternatively, need to bargain to agreement with union over temporary modifications to deal with the crisis.
- Legal requirements imposed by federal government, state government, or localities likely take precedence over conflicting CBA, although employers may still have to bargain over “effects” of those mandates.



Unilateral Change Based on Contract – *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019)

MV Transportation, Inc. and Amalgamated Transit Union Local #1637, AFL-CIO, CLC. Case 28–CA–173726

September 10, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN,
KAPLAN AND EMANUEL

In this case, we once again visit an issue that has repeatedly sown division among the members of the National Labor Relations Board and between the Board and reviewing courts of appeals. That issue is whether a “clear and unmistakable waiver” standard or a “contract coverage” standard should apply when considering whether an employer’s unilateral action is permitted by a collective-bargaining agreement. When the full Board last visited this issue in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), a majority reaffirmed adherence to the “clear and unmistakable waiver” standard. Today, for reasons that follow, we overrule *Provena St. Joseph* and adopt the “contract coverage” standard.

368 NLRB No. 66

Unilateral Change Based on Contract – *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019)

Prior Precedent: “Clear and unmistakable waiver”

Under the “clear and unmistakable waiver” standard:

- Required contract terms to “specifically express [the parties’] mutual intention to permit unilateral employer action with respect to a particular employment term.”
- In other words, management rights clauses – even broad ones – were not sufficient to allow employers to take unilateral action.
- This strict standard offered little flexibility for employers.

“contract coverage” standard.

Unilateral Change Based on Contract – *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019)

1. **Issue**: What constitutes a waiver sufficient to allow an employer to take lawful unilateral action?
2. **Facts/Holding**: The Board overturned prior precedent and established the “contract coverage” standard.
 - This standard focuses on the “plain terms of the agreement,” allowing the Board to “ascertain and give effect to the parties’ intent ‘plainly expressed’ in a collective bargaining agreement.”
 - “Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated [the Act].”
 - Under this standard, the contract no longer needs to “specifically express” the parties’ mutual agreement in order for the employer to act unilaterally.

“contract coverage” standard.

First Contract and Post-Expiration Issues

- During the first contract bargaining or after the expiration of the existing CBA, an employer must maintain the status quo on mandatory subjects of bargaining.
 - E.g., wages, benefits, hours of work.
- The status quo obligations remain until the parties reach an overall agreement or bargaining impasse.
- Potential exceptions:
 - “Past practice” defense under expired contracts
 - *RBE Electronics*, 320 NLRB 80 (1995) – “exigent circumstances” exception to make specific changes, with or without bargaining over that change

What Does This All Mean When Dealing with Unions in Response to COVID-19?

- Provide union with advance notice of operational changes, layoffs, temporary shutdowns, or policy changes in response to COVID-19
- Respond to union requests for information as promptly as possible
- Engage in effects bargaining, if union requests, and possibly decision bargaining
 - Circumstances may require bargaining in a compressed time period
- No duty of either party to agree to modify terms of existing CBA
 - But there may be a mutual interest in bargaining temporary, mid-term modifications
- Absent a specific agreement to modify the CBA, rely on existing terms of CBA and past practice to take unilateral action

Virtual Bargaining Best Practices

- Use video platform
- Ground rule on all participants joining by video and not just phone
- Ground rule on no recording
- Logistics for passing proposals
- Separate caucus “rooms”



Section 502 Exception to No Strike Clause

- Section 502 of the LMRA, 29 U.S.C. § 143, permits workers otherwise subject to a “no strike” clause *to refuse to work* because of an “abnormally dangerous condition.”
- What is required?
 - “[A]scertainable, *objective evidence* supporting its conclusion that an abnormally dangerous condition for work exists.”
 - “[S]ome identifiable, *presently existing* threat to the employees' safety.”
 - *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 387 (1974).

Section 502

- Courts have found that the following types of evidence will not meet the high bar for Section 502 protection:
 - Subjective beliefs
 - Speculation of possible harm
 - Generalized doubts about an employer's ability to respond to a threat
- Procedure for preventing/stopping an unlawful strike that involves contract dispute → *Boys Markets* injunction.
- Practical concerns with pursuing injunctive relief during this crisis period, which may counsel in favor of joint problem-solving rather than disciplining employees or seeking injunction.

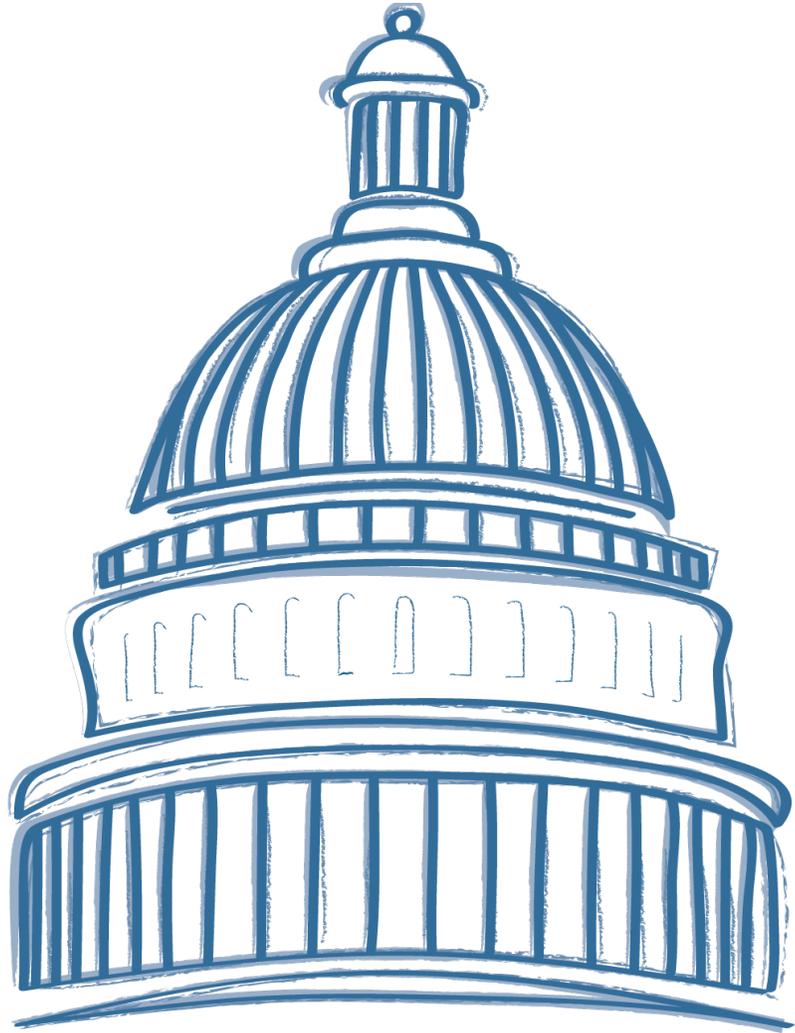
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Jim Paretto
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ADA ISSUES

Are there American with Disabilities Act Issues and How do I Handle Leave Issues?



What About Thermal Scanning and Taking Employees' Temperatures?

- **Direct threat** is an important ADA concept during an influenza pandemic.
- Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.
- During a pandemic, employers should rely on the latest CDC and state or local public health department assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

- How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?
 - During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?
 - Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
- Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?
 - Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

- When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?
 - Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.
- If an employer is hiring, may it screen applicants for symptoms of COVID-19?
 - Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

- May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?
 - Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.
- May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?
 - Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.
- May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?
 - Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

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Jeff Herring

Chief Human Resource Officer

The University of Utah



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COVID-19 Planning in Higher Ed

Learning Objective

- Plan a response to the pandemic, including tasks involved with transitioning to telework and online course for students
- Review lessons learned and next steps and anticipate implementation at your institution

COVID-19 Planning in Higher Ed

Challenge: Plan a response to the pandemic and then transition a workforce to telework and students to online courses

- Coordination
 - Cabinet
 - Deans
 - Emergency Management



COVID-19 Planning in Higher Ed

Planning

- Travel Form and Protocols
 - Students
 - Faculty
 - Personal
 - Work
- Employee Clinics
 - Telehealth
 - Return to work assessment

Returning Traveler Self-Reporting Form
Please report recent travel from areas affected by novel coronavirus (COVID-19)

The university is asking students, faculty, and staff returning from areas significantly impacted by COVID-19 to self-isolate and to implement social distancing. This includes international travel from countries with Centers for Disease Control and Prevention **level two and three travel health notice** as well as domestic travel within the United States. This form will help those individuals inform the university of their situations and allow the university to reduce the risk of any potential spread of COVID-19. The university will not release personal information about returning students, faculty, and staff.

*What is your name or UNID? ⓘ
Please start typing your name or uNID, then select from drop-down list.

*What is your university affiliation? Please check all that apply.
 Student
 Student - International
 Student - Housing and Residential Education
 Student - University Student Apartments
 Staff - Campus
 Staff - Hospital, Health Sciences, or Clinics
 Faculty

*What is your email address?

*What is your preferred phone number?

*Where are you traveling from?

*Date of return travel

*Are you symptomatic? ⓘ

COVID-19 Planning in Higher Ed

Planning

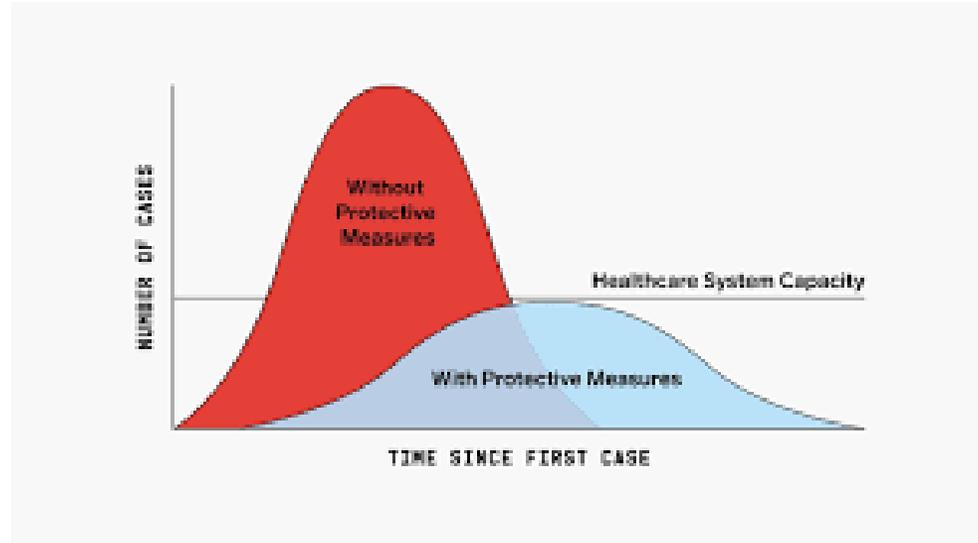
- Emergency Management
 - Coordinate
 - Employee/Student Hotline
- Employee Clinics
 - Telehealth
 - Return to work assessment
- HR Leave Teams
 - Sick/Vacation/Admin Leave
 - ADA/FMLA
 - New FFCRA



COVID-19 Planning in Higher Ed

Planning

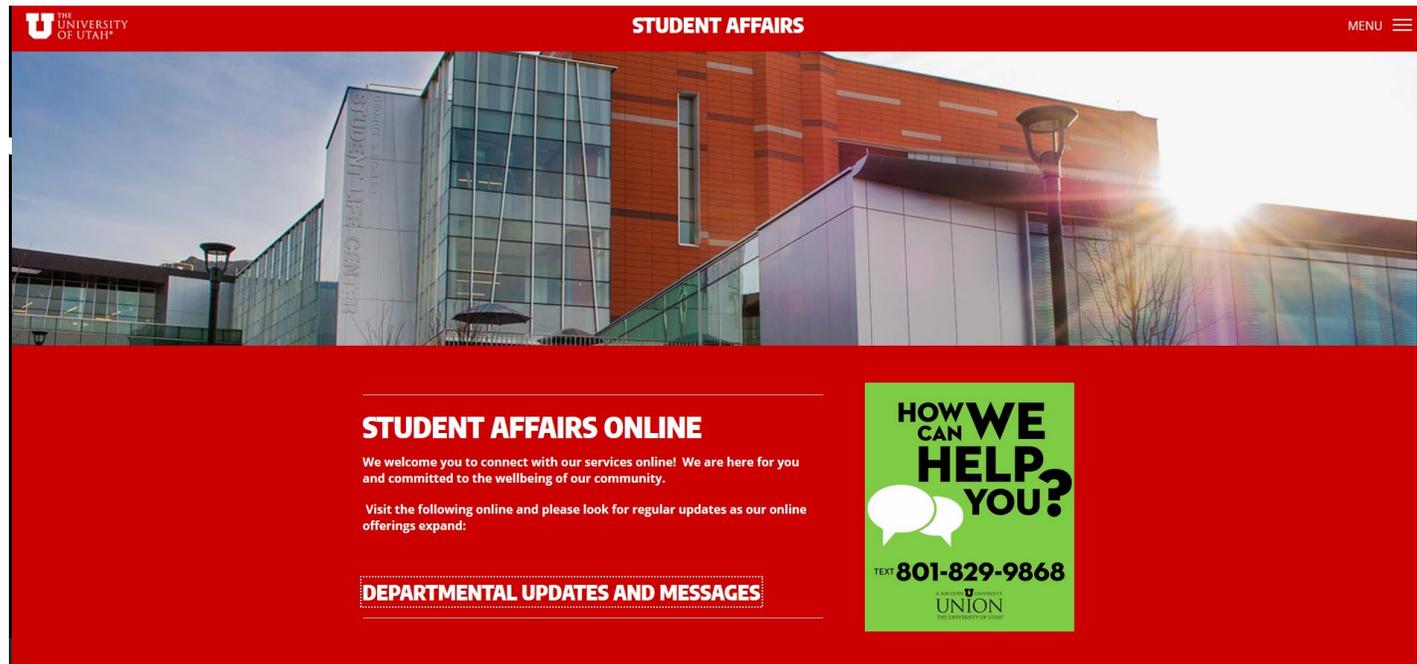
- Health Care Planning
 - Flatten the Curve
 - Prep the infrastructure
 - Leverage our resources (testing)
 - Coordinating Employee Clinics
 - Reducing elective visits
 - Telehealth
- Facilities
 - Cleaning
 - Traffic
 - Temporary facilities



COVID-19 Planning in Higher Ed

Planning

- Student Affairs
 - Traveling Students
 - Internships
 - Housing
 - Dining
 - Childcare
- Legal
 - Contracts with Universities
 - Visas and Work permits
 - I-9's



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DEPARTMENTAL UPDATES AND MESSAGES

HOW CAN WE HELP YOU?

TEXT **801-829-9868**

UNION

COVID-19 Planning in Higher Ed

Planning

- Human Resources
 - Telework
 - Mandatory employees
 - Childcare
 - Technical Requirement
 - Security Requirements
 - Workers Comp
 - EAP services

The screenshot shows the top portion of the University of Utah's Human Resources website. The header includes the university logo, navigation links (HOME, CAREERS, JOB LIST, FORMS, CONTACT), and a search bar. The main content area features a large graphic of COVID-19 virus particles and the text: "Human Resource Management COVID-19 Special Protocol". Below this, there is a section titled "Travel to and from CDC Warning Level 2 and 3 Areas and domestic emergency areas" with a "pause" button and a "2" indicator. A sidebar on the left lists "HR Departments" such as Absence Management, Administration, Benefits, Compensation, and Employment Services. The main text area begins with "Welcome to Human Resources" and a paragraph about the university's commitment to research and teaching.

The screenshot shows the "Administration" section of the University of Utah's COVID-19 Special Protocol webpage. It features a navigation menu on the left with "HR HOME" and "Administration Home" highlighted. The main content area is organized into several sections with red headers: "COVID-19 Special Protocol" (with a "Webpage last updated: 3/22/2020" note), "Important Contacts" (listing phone numbers for the COVID-19 Hotline, RedMed, Work Wellness Center, and HR Benefits Team), "Important Links" (listing various COVID-19 related resources), "Exposure Guidance" (providing instructions on what to do if exposed to COVID-19), and "COVID-19 Telecommuting Protocol and Guidance" (providing instructions on when to begin teleworking).

COVID-19 Planning in Higher Ed

Poll Question #1

How much of your workforce has been able to transition to telework?

- a) 0-25%
- b) 25-50%
- c) 50-75%
- d) 75-100%

COVID-19 Planning in Higher Ed

Lessons Learned

- Account for Research Staff
- Work closely with facilities to close buildings
- Coordinate, coordinate, coordinate
- Know the values and use them to plan
- Be kind and calm



COVID-19 Planning in Higher Ed

Next Steps and Paid Leave

- Break down the new federal laws
- Understand how to track expenses
- Change deadlines
 - Retirement meetings
 - Wellness benefits
 - Etc.
- Personnel Taskforce
 - HR
 - Finance
 - General Counsel



COVID-19 Planning in Higher Ed

Poll Question #2

Are you planning on furloughing employees?

- a) Yes
- b) No

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FFCRA: Paid Leave Issues and DOL Guidance

FFCRA: What You Need to Know Right Now

- FFCRA is not retroactive—April 1 is the date DOL has announced
- If you're covered by FFCRA, you have to post the poster:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- DOL is answering some questions (but others remain):
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>



Overview of FFCRA Paid Leave Provisions

- Emergency Paid Sick Leave (“EPSL”)
 - Up to 80 hours (~ first 10 days)
 - 6 different reasons, including school closure b/c COVID-19
 - Full pay or 2/3 pay (depending on reason)—subject to monetary caps
- Emergency Paid FMLA (“FMLA+”)
 - Up to 12 weeks (~Days 11-60)
 - 1 reason only—schools/childcare
 - Weeks 1 -2 unpaid by this provision
 - Weeks 3 – 12: 2/3 pay—subject to monetary caps

**PAID
LEAVE**

Monetary Caps on Paid Leave Under FFCRA

- EPSL

- Reasons 1-3 = 100% pay, capped at \$511 per day, or \$5,110 total
- Reasons 4-6 = 2/3 pay, capped at \$200 per day, or \$2,000 total

- FMLA+

- 2/3 pay, capped at \$200 per day, or \$10,000 total



Is Your Organization Covered by FFCRA?

- Private employers with **fewer than 500 employees** (so 499 and below), and public entities of any size (“and any other entity that is not a private entity...” for EPSL)

So When and How Do I Count to 500?

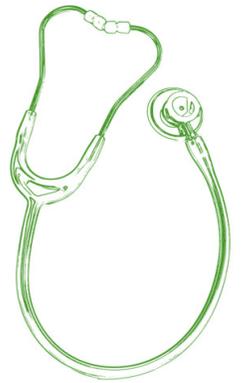
- WHEN? “...at the time your employee’s leave is to be taken...”
- Practical effect: if you’re close to 500, whether or not you are a covered employer could change from day to day
- Everybody counts for headcount purposes—full-time, part-time, temps (including those from an agency, per DOL)
- Combine entities? DOL is talking joint employment and “integrated employer” under FMLA “classic” [but be mindful of taking a position here in the short-term that doesn’t align with your realities, or other positions you’ve taken before]

Small Business (Fewer than 50 Employees) Exemption

- An employer with fewer than 50 employees (small business) is exempt from providing paid sick leave and expanded family and medical leave **ONLY** due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern
 - Provision of paid sick leave or expanded family and medical leave would result in **small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;**
 - The **absence of the employee or employees** requesting paid sick leave or expanded family and medical leave would entail a **substantial risk to the financial health or operational capabilities** of the small business because of their specialized skills, knowledge of the business, or responsibilities; **or**
 - 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 paid sick leave or expanded family and medical leave, and **these labor or services are needed for the small business to operate at a minimal capacity.**

Health Care Provider Exemption

- Employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, 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.
- This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions 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.**
- To 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.



What if We Already Provide Generous Time Off Benefits?

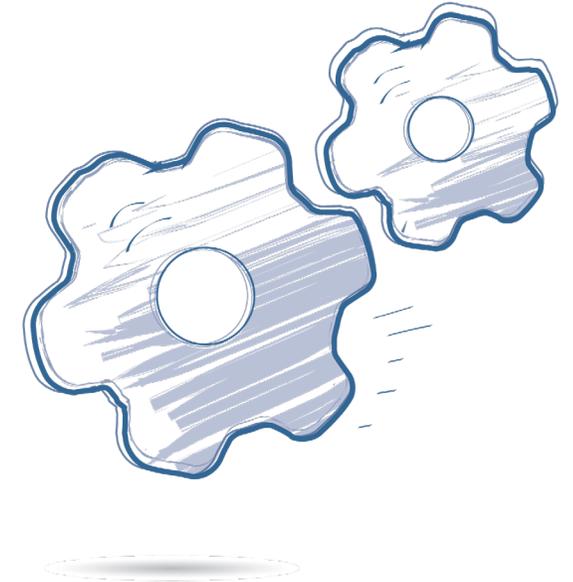
- EPSL and FMLA+ are on top of whatever you are already doing, or what state or local law already requires you to offer (which is what you'll likely continue to do between now and April 1)
- BUT... any **FMLA+ leave comes out of employee's existing FMLA bank** (for employers covered by FMLA prior to the new expansion)

What if We Already Provide Generous Time Off Benefits?

- As of April 1, you cannot require employees to use their existing paid time off prior to using paid FFCRA time (if they are eligible for FFCRA time)
- Allowing employees at 2/3 to “top off” to 100%—you can permit, but cannot force (and no tax credit for the top off)

How Do I Figure Out How Much to Pay Someone?

- Depends on normal work schedule and reason for leave
- How many hours they get paid for
 - EPSL = full-time employees up to 80 hours (approximately two weeks)
 - FMLA+ = up to 12 weeks total leave, but only 10 weeks paid under this provision
 - Part-time employees – average number of hours in a two-week period (normal work schedule); if schedule varies or schedule is unknown, six month average, or if not employed that long, agreement at hiring
- Rate of pay for those hours = greater of the regular rate, or the minimum wage under federal, state or local law



Documentation

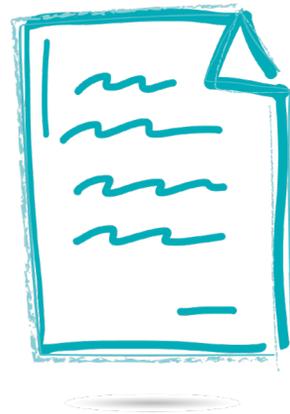
- DOL's most recent Q&A (15 & 16):
 - Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. **If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information** for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. **You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.**
 - If one of your employees takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, you may also require your **employee to provide you with any additional documentation in support of such leave**, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, **this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.**



Documentation

- More:

All existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA. For example, if you are taking leave beyond the two weeks of emergency paid sick leave because your medical condition for COVID-19-related reasons rises to the level of a serious health condition, you must continue to provide medical certifications under the FMLA if required by your employer.

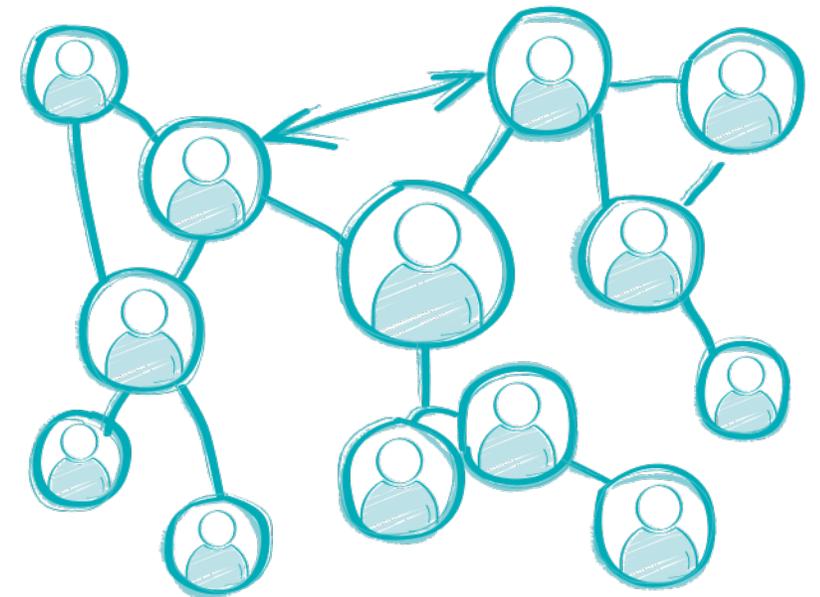


Furloughs and Layoffs

- DOL FAQ 23-28
- If employer closes worksite before April 1, 2020, no EPSL or FMLA Leave required – may be eligible for U/I
- If employer closes after that date, no additional leave, but again, may be eligible for U/I
- What if worksite will re-open in future? No leave while worksite closed.
- Same thing for furloughed employees
- Corollary: If employee is receiving leave, no U/I eligibility

How to Navigate All of This

- Consult with your labor and employment counsel
- Watch dol.gov and irs.gov for updates
- Complimentary COVID-19 employer resources available at <https://www.littler.com/coronavirus>



Questions?



Thank You!

COVID-19 Employment Issues: Paid Leave, ADA,
Collective Bargaining and Business Continuity

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