

CLIENT ALERT: Massachusetts Attorney General Issues Q&A on COVID-19: Employee Rights and Employer Obligations

On April 20, 2020, the Massachusetts Attorney General's Fair Labor Division ("AGO") published a set of "Frequently Asked Questions About COVID-19: Employee Rights and Employer Obligations." Although the Frequently Asked Questions ("FAQs") are described as general guidance only, they contain many important reminders and considerations for employers navigating through the COVID-19 crisis on subjects including layoffs and furloughs, unemployment, earned sick time and more. A link to the FAQs appears [here](#).

Some key highlights for employers from the FAQs are:

Vacation Payout - Layoffs, Furloughs and Termination. In Massachusetts, employers are required to pay out wages including accrued, unused vacation on the day of termination to employees who are involuntarily separated. This vacation payout obligation extends to employees who are temporarily laid off. The FAQs state that if an employee who is temporarily laid off agrees to save accrued vacation for later use, the AGO will not take enforcement action for untimely payment of vacation pay. The FAQs note, however, that the AGO "does not have control over private litigation."

Also, as many employers are aware, furloughs from employment (as opposed to layoffs) are not viewed as terminations and therefore do not require vacation payout. However, **in an important development**, the FAQs sound a note of caution about furloughs in which an employer "becomes unable to continue contributions towards employee benefits plans." In such cases, the FAQs state that the AGO will consider the time when the employer "becomes unable" to make contributions to employee benefits to be the effective date of discharge, requiring vacation payout. Put another way, if an employer removes employees from health (or other) benefit plans, the furlough turns into a termination as of the date that happens. This is likely to surprise employers who have long understood that a qualifying event under COBRA can occur (e.g., a reduction of hours) and yet an employee nevertheless remains actively employed. Employers should consult with counsel if they anticipate that a planned or existing furlough may include moving employees off their benefit plans.

Unemployment Benefits for Employees Out of Work Due to COVID-19. Employees have a right to apply for unemployment insurance benefits not only when they are laid off or fired, but also when they are partially unemployed. The FAQs describe employees as being partially unemployed when their hours or earnings have been reduced by more than one-third, although the actual reduction that would qualify an employee to receive unemployment benefits is calculated on a case-by-case basis. The FAQs also offer a reminder that employees cannot be forced to use all of their earned sick time before applying for unemployment, and that the usual one-week waiting period on filing for unemployment benefits has been waived. MBJ's earlier client alert about changes to Massachusetts unemployment benefits during the COVID-19 crisis can be found [here](#).

Requiring Employees to Be Out of Work Due to Illness. The FAQs confirm that employers can require employees to stay out of work due to the employee's illness or possible exposure to COVID-19. However, any request to have an employee stay out of work should be thought through carefully to ensure compliance with applicable wage and other employment laws. In addition, employees who are asked to stay out of work are potentially eligible to apply for unemployment or leave under the Families First Coronavirus Response Act (FFCRA). MBJ's earlier client alerts on the FFCRA may be accessed [here](#).

Workplace Safety During the COVID-19 crisis. The FAQs remind employers of the need to follow

federal and state guidelines with respect to workplace safety and social distancing restrictions. The FAQs state that if an employee does not feel comfortable carrying out an assignment, employers are encouraged to allow liberal use of earned sick time, vacation or paid time off.

Massachusetts Earned Sick Time and COVID-Related Absences. The Massachusetts Earned Sick Time (EST) law gives most employees in Massachusetts the right to earn and use up to 40 hours of job protected sick leave per year for qualifying reasons to care of themselves and certain family members. The FAQs state that employees may use accrued EST when public health officials or healthcare providers either require or recommend an employee or a family member to quarantine, and the employee follows the recommendation. On the other hand, an employer is not required to allow an employee to use EST for times when an employee misses work because the employee's child's school is closed due to a COVID-19-related closure order. The AGO does, however, encourage employers to allow the use of EST, accrued vacation or other paid time off in these circumstances, and an employee out of work for this reason may be eligible for leave under the FFCRA.

Payment of Hourly/Salaried Exempt Employees in a Business Shutdown. The FAQs also review the obligations a business has to pay its employees when it experiences a shutdown. In general, hourly employees do not have to be paid when they do not work. Salaried exempt employees, however, must be paid their full salary if they perform any work during a workweek. Therefore, if a business shuts down for only part of a workweek, salaried exempt employees who have performed any work that week must receive their full salaries. Employers may, however, require exempt employees to use vacation or other paid time off (other than EST) for those portions of the week the business is closed for a full day.

In addition to these topics, the FAQs also discuss generally the Coronavirus Aid, Relief and Economic Security (CARES) Act, the FFCRA, and other points to consider in managing a workplace in the COVID-19 era. MBJ will continue to watch for updates and further guidance from the Massachusetts Attorney General, and employers are advised to consult with their MBJ attorney as questions arise.

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