



COVID-19 Questions, Answers, and General Guidance for the Idaho State Dental Association

March 22, 2020

*Note this is general guidance available as of March 22, 2020. The law is changing rapidly in this area and different laws and guidance may apply to your business based on its size, on your policies, and the particular issues applicable to you. There is no such thing as uniformly-applicable legal advice that would answer all questions as to all employers. And, it is difficult to give accurate advice without knowing specific facts related to each employer's situation. This is intended, instead, to be generally applicable advice to point you in the right direction and to help you identify issues. Please call me if you have specific questions as to how this impacts your business.

1. Should employers with reduced operations pay out accrued vacation and/or sick leave?

Yes, employment law guidance around the country is indicating that employers should broadly construe their sick leave and/or vacation policies. For many employers, it makes sense at this time to allow employees to exhaust their accrued vacation and/or sick leave before employers make termination decisions that would otherwise require employees to seek unemployment. (note, the answer to this question will change once April 2nd hits)

The Families First Coronavirus Response Act is expected to go into effect on April 2nd and provides employees of businesses with fewer than 500 people two types of paid leave. Employers are being advised to pay out accrued vacation and/or sick leave now (before this law goes into effect). Hopefully, in the next week or so, additional guidance will become available as to exactly how this law will work. In the short-term, it makes sense for employers to pay out leave and/or vacation until more is know about how this law will impact them.

What we know now, is that this law offers employees (who have been employed 30 days) sick leave which is 80 hours of sick leave if they are unable to work or telework because they are

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under medical quarantine or medical treatment for COVID -19, suspect that have COVID-19 or are ordered to quarantine at home by the government.

It also offers family leave which is up to 12 weeks of family leave (with the first 10 days unpaid) if they must stay home with children whose schools or daycares have closed because of the pandemic. When the pay kicks in, it will be at 2/3 of pay with a maximum payment of \$200 per day, or an aggregate of \$10,000 per worker. In other words, it is a maximum of \$1000 per week, far more than unemployment typically pays. Also, individuals would see payout under the sick and family leave provisions quicker than it would take to get payout under unemployment.

Businesses with fewer than 50 employees are also covered, but may get an exemption if the provision causes too much hardship (but there is no guidance on what exactly this means yet).

Pursuant to this Act, businesses will be fully reimbursed by the federal government within three months through 100% tax credits (According to the IRS, those credits can first be claimed against payroll taxes due with any excess owed paid as a refundable credit).

As noted above, once the Families First Act goes into place on April 2, 2020, an employer may **not** require an employee to use other types of paid leave before the employee uses the paid sick leave available under the new law.

Employers should wait until the new law goes into effect (rather than voluntarily paying out extra benefits now) so they get the tax credit and so they are not required to start over and repeat any efforts in the event the law requires employers to start on April 2.

If an employer has already shut down (or is going to shut down in the near future before April 2), then they should pay out accrued vacation and/or sick leave as per their policies and in accordance with Idaho wage and hour law. The applicable law states:

Idaho Code 45-606. PAYMENT OF WAGES UPON SEPARATION FROM EMPLOYMENT. (1) Upon layoff, or upon termination of employment by either the employer or employee, the employer shall pay or make available at the usual place of payment all wages then due the employee by the earlier of the next regularly scheduled payday or within ten (10) days of such layoff or termination, weekends and holidays excluded. However, if the employee makes written request upon the employer for earlier payment of wages, all wages then due the employee shall be paid within forty-eight (48) hours of the receipt of such request, weekends and holidays excluded.

Idaho courts have found that accrued vacation should be paid out at termination in accordance with this statute.

2. Should employers with reduced operations formally lay people off, or where they can, pay for two weeks and see what happens?

The big wildcard here is whether an employer who feels a reduction in staff and/or closure is eminent could lay employees off now and avoid the requirements of the Families First Act (if the layoff occurs before the law goes into effect). Unfortunately, the Act is unclear as to whether an employer is in the clear to do this or not which makes layoffs right now (before we receive additional guidance) somewhat dicey.

For example, we know that the law says that employees seeking to obtain benefits under this Act cannot be retaliated against for utilizing the provisions made available to them. Accordingly, it is possible an employer who lays off employees now to avoid paying benefits under the Act could be the subject of legal action once the application of the law becomes clear. For example, in regular times, an employer could not terminate an employee who indicates they will need to take leave under the Family Medical Leave Act (“FMLA”) without facing liability for retaliation under the FMLA. I would advise against an employer making layoff decisions now aimed at avoiding obligations under the law.

That being said, if closure is unavoidable now for legitimate business reasons, regardless of the Act, then the employer should move forward with closure.

If possible, I would hold off on layoffs and/or closure until we know more about how the new law will apply.

3. Should employees file immediately for unemployment?

If an employer has been required to terminate members of their workforce due to COVID-19 then yes, the employees should apply for unemployment. The Department of Labor is working to expand unemployment benefits available, to loosen the requirements and to expedite the application process due to COVID-19. If a termination or lay-off decision has been implemented, then it would be advisable for employees to seek unemployment.

4. Is unemployment impacted if an employer pays out accrued sick leave/vacation leave?

According to the Idaho Department of Labor’s website, the answer to this is “yes,” an employee’s unemployment will likely be impacted if they receive a pay-out for accrued sick leave/vacation.

5. Will the new federal legislation apply given that there is not a mandate from the Governor to either shelter in place or cut services? If the legislation does apply, does that impact the answers above?

Recall that there are two pieces to the Families First Coronavirus Response Act. One piece applies to expanded FMLA and allows leave for eligible employees who can’t work (or

telework) because their minor child's school or daycare is closed due to COVID-19 due to an emergency declared by a federal, state or local authority.

Due to the number of Idaho school closures, that piece will already be triggered for many Idaho employees and employers when the Act goes into place (unless schools re-open, which seems unlikely at this time). Under that provision of the Act, an employee is entitled to take leave. The first 10 days may be unpaid, but employees may elect to substitute other paid time off such as vacation, personal leave or sick leave. After that, employers must pay eligible employees 2/3 of the employees regular rate of pay, capped at \$200/day or \$10,000 total.

The second piece of the act, paid sick leave, is triggered by a number of qualifying reasons including:

1. Employee is subject to a federal, state or local quarantine or isolation order;
2. Employee has been advised by a healthcare provider to self-quarantine;
3. Employee is experiencing symptoms of COVID 19 and seeking a healthcare diagnosis;
4. Employee is caring for an individual who is subject to either number 2 or 3 above;
5. Employee is caring for his or her son or daughter if the school is closed or place of childcare is closed due to COVID-19 precautions.

In other words, a number of things can trigger the sick leave provision other than a quarantine or isolation order. Several qualifying events have already occurred that could trigger the provisions of this Act once it goes into place.

6. Do any of the answers above change for dentists who are reducing operations to emergency services only vs. those who are completely shutting down?

The answer to this question involves many different issues that could be applicable to employers depending on whether they are permanently closing, temporarily closing, or temporarily reducing operations.

As noted above, there are many new laws on the cusp of implementation that could impact this answer. As noted above the Families First Act will be applicable to employers as of April 2 and will trigger a number of requirements that are not applicable to employers who have already closed down.

7. What does a dentist do if they are treating patients, but the staff does not feel safe? What is their obligation to pay out?

Employees are only entitled to refuse to come to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the

imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.” OSHA discusses imminent danger as where there is “threat of death or serious physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.”

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring travel to an impacted area or to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work. Once again, this guidance is general, and employers must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work.

In addition, Section 7 of the National Labor Relations Act (NLRA) extends broad-based statutory protection to those employees (in union and non-union settings alike) to engage in “protected concerted activity for mutual aid or protection.” Such activity has been defined to include circumstances in which two or more employees act together to improve their employment terms and conditions, although it has been extended to individual action expressly undertaken on behalf of co-workers.

On its own website, the National Labor Relations Board (NLRB) offers a number of examples, including, “talking with one or more employees about working conditions,” “participating in a concerted refusal to work in unsafe conditions,” and “joining with co-workers to talk to the media about problems in your workplace.” Employees are generally protected against discipline or discharge for engaging in such activity.

I would make sure you understand the employee’s concerns – why do they feel unsafe? It’s one thing if they are just worried about the virus in general. It is another thing if they have some kind of safety concern about your business in particular. Is it possible you could help calm their concerns by discussing precautions you are taking to avoid the spread of the virus? Is it possible you could do anything additional at your business to spread people out temporarily or otherwise enact further protocols to disinfect and sanitize? One issue for employers that is being recommended is that they consider temporary social distancing plans – is there any way to keep people further apart in your business? Maybe a discussion of these things would help alleviate concerns?

If an employee refuses to come to work because of safety concerns, I would remind them in writing of your attendance policies (and any other policy about being absent from the workplace without permission); and let them know you need them to return to work or you may have to consider termination.

If the OSHA and NLRB provisions above are not at issue and if the employee refuses, it is likely that you could pursue termination so long as the root of the problem is not some type of

legitimate safety concern. Obviously, in today's climate, this would not be something I would do unless you have no other choice – everyone is somewhat concerned about safety.

I would definitely document your conversations in writing and would keep a dialogue going so you understand their concerns and attempt to address them – you wouldn't want them claiming there was an unaddressed and justified safety concern at your business and they were terminated for raising it, as that could give rise to a claim of wrongful termination.

This analysis would be different if the employee had previously accommodations in place for anxiety, depression or some other medical condition that could trigger further workplace accommodations. I am assuming in my response that a disability is not at issue.

OTHER FREQUENTLY ASKED QUESTIONS

1. Can an employer ask their employees if they are experiencing any COVID-19 symptoms without violating the ADA or other laws?

Yes, employers can ask employees to self-report COVID-19 symptoms. The usual ADA concerns are not applicable here, since COVID-19 could pose a direct threat to your workforce.

2. Can an employer ask their employees if they are in high risk category because of a chronic medical condition?

Probably not. That goes into ADA-protected information. However, you could say to your entire workforce, "The CDC has stated that individuals in certain categories may be at greater risk. If you are concerned about being in higher risk category and would like to share that information so we can address your concerns, please let us know so we can help you."

3. Can you ask employees about their travel plans, including where they are traveling to?

Yes. And, employers can ask employees engaging in personal travel to self-quarantine during the pandemic.

4. Can employers ask employees about medical information concerning their family members?

Be careful. GINA prohibits employers from seeking medical information about family members of employees. However, an employer could direct its employees to disclose any exposure they believe they have been subjected to (without specifying family members). An

employer could also ask employees if they have been in contact with anyone who has tested positive within the past fourteen days.

5. What if an employer believes an employee has been exposed to the virus by a family member?

The employee should frame the directive away from medical information concerning a family member. Instead, the employer could say, “We have concerns you’ve been exposed and would like to take precautions.” In such a case, the employer has the right to send someone home and require self-quarantine if employer has reasonable objective evidence.

6. Can an employer take its employees’ temperatures?

Yes. But the bigger question is if it make sense. Does the employer have equipment to ensure an accurate reading? Does the employer have the ability to keep any medical information obtained from this process confidential? For example, if someone has a higher temperature, will the employer be able to keep that confidential? It likely makes sense for this type of measure in the healthcare industry, but probably not for other occupations.

7. Should an employer require documentation from a healthcare provider if an employee indicates they feel sick?

Yes, but during the pandemic, it may be more important to ensure an employee experiencing symptoms is removed from the workplace than to wait for written documentation.

8. Should an employer require documentation from a healthcare provider if an employee who called in sick wants to return?

It depends on many factors. Did the employee get tested? What did the tests show? How much time has passed? Does the employer need the employee back in the workplace?

9. What if an employer has reduced its hours and has to send a non-exempt employee home?

Non-exempt employees get paid for hours worked, so if they are sent home, it would not likely trigger a wage and hour issue.

10. What if an employer has reduced its hours and has to send an exempt employee home?

Be careful. Exempt employees get paid for the entire week if they worked any hours in the week.

11. What should an employer do if it believes its workers may have been exposed to a patient or co-worker who tested positive for COVID-19?

The employer should notify employees without disclosing the identity of the person who tested positive. In the case of a co-worker who tested positive, this would implicate ADA concerns. In the case of a patient, it would not implicate ADA concerns, but could trigger other privacy laws.

12. With all the news indicating older workers are more at risk than younger workers, can an employer voluntarily take action to send older workers home?

No. This could trigger a discrimination lawsuit under the Age Discrimination in Employment Act.

13. What special considerations apply when an employer allows employees to work from home?

Consider adopting a policy that addresses parameters and expectations for work from home.

14. What if an employee who has an accommodation in the workplace is allowed to work from home? Is the employer required to provide the same workplace accommodations (such as special equipment?)

Yes.

15. Should an employer have an infectious disease policy in place?

Yes. I'm attaching one for you to use as a starting point.