

The background features a dark blue gradient with a starry space pattern. Overlaid on this are several circular gauges and progress indicators. One large gauge on the left has a scale from 140 to 260. Other smaller gauges are scattered across the frame, some with dashed lines and arrows indicating movement or completion. The overall aesthetic is technical and futuristic.

# COVID-19

## EMPLOYER UPDATE

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# DISCLAIMER

- This is strictly for informational purposes. The information is intended to be used solely by the subscribers to the Webinar.
- Any answered questions are for hypothetical purposes only. There is no attorney-client privilege information or specific advice.
- If you have specific questions and are a part of Foley & Foley's On-Call Triage Service, then please feel free to reach out to me at [wendy@foleylawpractice.com](mailto:wendy@foleylawpractice.com).

# COVID-19: EMPLOYEE WITH A POSITIVE TEST

- You can require an employee to self-quarantine for fourteen (14) days if:
  - 1) they have traveled,
  - 2) been in contact with someone who has tested positive,
  - 3) tested positive themselves, or
  - 4) show signs of the illness.
- Under the ADA, employers are allowed to exclude employees from work if they believe they are a “direct threat” to employees. This applies to any illness, including COVID-19
- Under OSHA, employers have a duty to mitigate the spread of an infectious disease. This allows employers to prohibit employees from coming to work if they show symptoms.

# COVID-19: EMPLOYEE WITH A POSITIVE TEST

- If you have an employee who informs you that they have tested positive for COVID-19 you need to:
  - 1) Tell them to quarantine for fourteen (14) days;
  - 2) Ask them who they have had contact with (within six feet for more than 10 minutes);
  - 3) Inform those employees who have been contacted, quarantine them for fourteen (14) days;
  - 4) Clean the area according to the CDC guidelines found here: <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>;
  - 5) Inform the general group of employees that an employee has tested positive for COVID-19 (do not give the name), the people affected have been contacted, and you will be cleaning the area according to the CDC guidelines.



# FFCRA – IMPLEMENTATION

- Get the necessary documentation.
  - Create a notice form.
  - Track and document the leave for reimbursement.
  - You can require a doctor's note and require it to be specific to COVID-19.
  - Similar to the FMLA, if you are aware of an employee taking leave for a qualifying reason, you must give them notice of EPSL or EFMLA
- What you need:
    - Name of the employee;
    - Dates of leave;
    - Reason for taking the leave; and
    - Statement the position cannot work remotely.
  - Self-quarantine by a health care provider: Health Care Provider's name.
  - Quarantine or Isolation Order: name of Government entity and date of order.
  - Care for a child who's school or day care has been closed: name of school and statement from employee that no one else can take care of the child.

# FFCRA -IMPLEMENTATION

- What to do when leave is exhausted?
  - FMLA – does it rise to the level of a serious health condition? (not for EFMLA).
  - ADA – Is it a disability?
    - Engage in the interactive process;
    - Determine a reasonable accommodation;
    - Is there undue hardship?
  - Unpaid leave
  - Furlough/Layoff
- \*\*They will likely be eligible for unemployment
- Should we allow intermittent leave?
  - Can the position be worked remotely?
  - How crucial is the position?
  - Can the duties be performed by other employees?
  - How well can you trust your employee base?

# FURLOUGHS AND LAY OFFS

- Do not contact your workforce during a furlough. Any work performed must be paid.
  - For hourly employees even if they work on 1 hour, they must be paid at least 3.
  - For exempt employees, even if they work one hour, they must be paid their full salary for the week.
- WARN – likely not needed, COVID-19 is an unforeseeable business circumstance exception.
- Termination Checklist:
  - Have another employee in the room
  - Draft a letter with the necessary information
  - Pay out their earned PTO and hours up to that date (if a vacation pay out state).
  - Provide the unemployment pamphlet on application.
  - Be honest and forthright about the reasons for the lay off
  - Stay neutral, do not rehash performance issues

# CARES ACT - UNEMPLOYMENT

- Pandemic Unemployment Assistance (PUA)
  - Unemployment provisions that expand the eligibility for unemployment for COVID-19 reason. This is the normal Weekly Benefit Amount as calculated by the state.
  - Available for 39 weeks
- Federal Pandemic Unemployment Compensation (FPUC)
  - The additional \$600 every week until 7/31/20



# PUA – PANDEMIC UNEMPLOYMENT ASSISTANCE

- The intent of PUA is to expand unemployment eligibility to two groups – those with COVID-19 related issues and those who have already exhausted their unemployment benefits.
- Expanded to self-employed, partially employed, or those lacking a sufficient work history.
- Employees who are eligible for unemployment under PUA are eligible for a WBA under the states determination for 39 weeks.

# PUA – EXPANDED COVID-19 REASONS

- The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- A member of the individual's household has been diagnosed with COVID-19;
- The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;
- A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;

# PUA – EXPANDED COVID-19 REASONS

- The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
- The individual has to quit his or her job as a direct result of COVID-19; or
- The individual's place of employment is closed as a direct result of the COVID-19 public health emergency

# PUA – ELIGIBILITY WITH SICK LEAVE

- Generally, employees cannot receive sick leave AND unemployment. However, the DOL states that if an employee is not getting their full pay through sick leave (i.e. 2/3 rate) they may still be eligible for PUA depending on their salary.
- Similar reasons to Emergency Paid Sick Leave and Emergency Family and Medical Leave – generally would be after the employee exhausted either or both and still could not work.



# UNEMPLOYMENT – FEDERAL PANDEMIC UNEMPLOYMENT COMPENSATION

- FPUC available to four groups of people:
  - Those who are already collecting
  - Those who are eligible for regular unemployment
  - Those who are not normally eligible for unemployment but meet the requirements under PUA for COVID-19 issues.
  - Those who have exhausted their state unemployment benefits but meet the requirements under PUA for COVID-19 issues.

# PUA AND FPUC

- 100% Federally funded for both.
- States must enter an agreement with the Secretary of Labor and must follow their regulations and guidance.
- If you receive at least \$1 of unemployment through the other programs, you are eligible for the \$600 under the FPUC.
- Potentially self-insured employers would not need to cover these additional costs – but still unsure.
- Still does not state a limitation on earning same or more than regular wages.
- You can find the guidance here: [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_16-20.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf) and here for the FPUC: [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_15-20.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20.pdf).
- New York state created a helpful chart found here: <https://labor.ny.gov/ui/cares-act.shtm>, generally applicable to any state that accepts the funding. Still look to your state websites for updated information.

# BRINGING EMPLOYEES BACK

- Offering jobs to furloughed employees:
  - If it is the same position they will need to accept. If they reject the position they won't qualify for unemployment.
  - If it is a different position, then they could refuse and likely still collect.
- Sanitation Considerations:
  - Revise cleaning policies
  - Require personal protective equipment
  - Take temperatures prior to coming to work (though depending on the threat level, may not be permissible)
  - Put up plastic barriers for receptionists
  - Consider more remote work;
  - Do meetings virtually
  - Follow the CDC guidelines for cleaning work spaces
- Maintain the employee relationship:
  - For furloughed and reduced hour employees this means being generous where you can.
  - Be careful of hacking costs to the loss of employee relationship.
  - Be empathetic, understanding, open, and available.
  - The ramp up will happen, it will likely be quick, and you will need to recruit people back – don't lose the forest through the trees.



# OTHER ISSUES

- Masks:
  - You are permitted to require masks
  - Consider those who may have a disability, need to provide a reasonable accommodation for the mask
- Reasonable Accommodations:
  - Those who are “at-risk” would follow a similar ADA process
  - Can offer voluntary lay off at their choice
- Discrimination:
  - When allowing leave, treat everyone equitably – this includes intermittent leave
  - For RIFs – be aware of optics, you can select by department or position. Don’t look at those who are close to retirement. Lay offs are ripe for age discrimination claims.
  - Be aware of your own unconscious bias



# RELIABLE SOURCES

- Department of Labor's – this agency is in charge of promulgating and executing the rules under the FFCRA, if it comes from them, then it is the most accurate/up-to-date information.
- Internal Revenue Service – this agency is in charge of applying tax credits to the FFCRA, they will have the most up to date information.
- Department of Treasury – this is department in charge of the PPP loans, here's their update FAQ to lenders: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.
- Center of Disease Control – In charge of providing evidence-based, scientific information on COVID-19, how to prevent it, how to manage it, and what they symptoms are.
- State or Local Government Orders – each state website has an location where all the executive orders are kept. The order will have the list of essential businesses and the expected enforcement.
- State Department of Health – This will provide the up to date statistics on COVID-19 in your area.
- For SBA loans (PPP) – TALK TO YOUR LENDER, they are the entity taking on the liability of the loan, you want to be sure what they expect from you for forgiveness and implementation of the loan.

# Q&A

The background is a dark blue gradient with a field of small white stars. Overlaid on this are several technical diagrams in a lighter blue color. In the top right, there is a large circular gauge with a scale from 0 to 210 and a needle pointing to approximately 190. Below it is a smaller circular diagram with concentric rings and arrows. In the bottom right, there is another circular diagram with concentric rings and arrows. In the bottom left, there is a circular diagram with a dashed outer ring and a solid inner ring, with an arrow pointing left. In the top left, there is a small circular diagram with a dashed outer ring and a solid inner ring, with an arrow pointing left.