

COVID-19 CHECKLIST FOR NC EMPLOYERS

Brooks Pierce has been honored to have so many North Carolina employers rely on us for up-to-date guidance on personnel matters stemming from the COVID-19 crisis. We will continue to produce, update, and post alerts for employers on our [COVID-19 Response Resources](#) webpage as promptly as possible. Employers can also expect timely webinars and roundtables from us in the coming weeks, as well as the ability to review past webinars by viewing the recordings on our website.

The following checklist is our latest tool offered to North Carolina employers. It condenses information from prior Brooks Pierce resources and alerts into one location, arranges them by topic in checklist format, provides new crucial information, and includes links to more detailed information. In addition, we've highlighted areas that tend to be more complex. Those are the areas where we encourage you to reach out to your regular Brooks Pierce contact or to one of the members of our [COVID-19 Response Team](#). We hope the checklist below proves helpful to you.

❖ Ensure Compliance with New COVID-19 Related Requirements

- **Review and comply with State and Local Orders/Proclamations:**
 - Latest North Carolina state-wide orders can be found [here](#). The most relevant for employers (as of April 10) is order No. 121, linked [here](#).
 - Check your county and municipality websites for local orders. Many localities in North Carolina have imposed more restrictive measures than the state orders.
- **Determine if your business is a covered employer under new leave laws:**
 - Most private employers with fewer than 500 employees are covered, but complicated rules apply to making this determination if you have affiliated entities.
 - Most public employers are covered, but there are some exceptions and complications if you are a federal agency.
- **Where we can assist you:**
 - Determining which restrictions in state and local orders apply to your company and workers.
 - Understanding how to comply with specific restrictions in state and local orders.
 - Determining if your affiliated entities should be aggregated to determine applicability of new paid leave laws.

❖ If you are a Covered Employer, Comply with and Administer New Paid Leave Laws Correctly. Here are general summaries and links to more detailed explanations of the two paid leave requirements and the record-keeping requirements for each.

- **Post notice of the new laws and email it to any employees who are working remotely if you have not already. To access these posters, click [here](#).**
- **Provide up to 10 days of paid leave under the Emergency Paid Sick Leave Act (EPSLA) for covered reasons. The leave:**
 - Applies to all employees (no waiting period).
 - Is in addition to any other employer-provided leave.
 - Must be provided for the following reasons and paid at these rates:

REASON	RATE	MAXIMUM
Employee is subject to a federal, state, or local quarantine or isolation order	Regular pay	511/day with an aggregate max of \$5,110
Employee has been advised by a health provider to self-quarantine	Regular pay	\$511/day with an aggregate max of \$5,110
Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis	Regular pay	\$511/day with an aggregate max of \$5,110
Employee is caring for an individual who is under quarantine, isolation or self-quarantine as described in 1 and 2 above	2/3 of regular pay	\$200/day with an aggregate max of \$2,000
Employee is caring for a child whose school or daycare has closed (or regular paid childcare provider is unavailable)	2/3 of regular pay	\$200/day with an aggregate max of \$2,000
Employee is experiencing a substantially similar condition specified by Sec. of Health and Human Services	2/3 of regular pay	\$200/day with an aggregate max of \$2,000

- A more detailed discussion of EPSLA is available in this [client alert](#).
- **Provide leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA):**
 - Applies to all employees employed for at least 30 days prior to the leave.
 - Available only for required care for a child whose school or daycare has closed.
 - First two weeks is unpaid (but may be paid if elected by employee under the EPSLA or other PTO).
 - After the first ten days:
 - » Can be required to be concurrent with/supplemented by PTO
 - » Paid leave up to ten weeks at 2/3 regular rate, capped at \$200/day.
 - May be used intermittently if employer agrees.
 - A more detailed discussion of EFMLEA is available in this [client alert](#).
- **Remember these important compliance points applicable to both the EFMLEA and the EPSLA:**
 - Paid leave will only be required if the employee is still actively at work at the time the need for the leave arises; employees on furlough/layoff do not have the right to demand paid leave.
 - The employer must maintain existing insurance coverage benefits during the leaves.
 - Paid leaves are available to full and part-time employees, but the application to employees whose hours have been reduced during this crisis may be complicated (DOL guidance is unclear on the amount of leave in this situation).
 - Employers may exempt “health care providers and emergency responders” (there is guidance on which employees qualify).

- There is a limited hardship exemption for small employers (fewer than 50 employees). The posting requirements remain, but a small employer need not provide the required leaves if “imposition of such requirements would jeopardize the viability of the business as a going concern.” This jeopardy exists when an officer of the business determines and documents one of the following:
 - » Funding the leave would exceed available revenue;
 - » The absence of the employee would entail a substantial risk to the financial health or operational capacity of the business; or
 - » There are not sufficient workers to perform the necessary work provided by the employee seeking the leave.
- **Properly utilize the refundable tax credit to cover the cost of providing paid leave under the Acts (discussed in this [client alert](#)):**
 - Employers report their total qualified leave wages and the related credits for each quarter on their federal employment tax returns, usually Form 941. Employers may reduce the amount of employment tax deposits they are required to pay in the same calendar quarter that it pays the employee’s leave. Employers must account for the reduction in deposits on the Form 941.
 - To request an advance, the employer must first reduce its remaining federal employment tax deposits for wages paid in the same quarter to zero. If the permitted reduction in deposits does not equal the leave payments, the Eligible Employer can file a Form 7200, Advance Payment of Employer Credits Due to COVID-19, to claim an advance credit for the remaining leave payments.
 - The full IRS guidance is available at this [link](#).
- **Where we can assist you:**
 - Understanding how to comply with specific requirements.
 - Determining the applicability of exemptions.
 - Preparing uniform leave policies that include procedures, pay and benefits, PTO coordination (where allowed), return to work rights and restrictions, and employer rights.

❖ **Apply for Available Financial Assistance or Tax Relief**

- **By now, you have been inundated with information about financial aid and tax relief, and more aid may yet be coming out of Congress. There are several alerts on our website (see Financial Relief section on our [COVID-19 Response Resources page](#)) discussing the significant sources of assistance currently available including the CARES Act, the Paycheck Protection Program, SBA lending programs, and, in North Carolina, the Golden Leaf Foundation loans. We also have a webinar recording [discussing the CARES Act](#).**
- **In addition to the tax benefits for the required paid leaves discussed above, there is tax relief available. These other tax opportunities are discussed in our client alert, “[Tax Incentives for Employers in the CARES Act](#),” and in the client alert, “[CARES Tax Benefits for Businesses – Increased Deductions, Increased Use of Losses, and Potential Refunds](#).”**
- **If you have a loan or relationship with a bank, talk to them. We continue to hear that community banks in particular are trying to be flexible.**
- **Where we can assist you:**
 - Understanding the various programs and their implications for your business.
 - Assisting with tax and finance planning and negotiations with lenders.

❖ Prepare and Respond Effectively to COVID-19 Concerns in the Workplace

- **Take measures to keep your workplace safe.** The EEOC has issued guidance that, in the current crisis, following CDC guidance and practices recommended by local health officials do not run afoul of the ADA if applied non-discriminatorily. Examples of some currently allowed measures:
 - Engaging employees in screening themselves.
 - Temperature screening and asking about apparent symptoms.
 - Requiring employees with COVID-19 symptoms to report that information to you and stay home.
 - Requiring doctors' notes certifying fitness for duty to return to work.
 - Requiring employees to follow safety guidance, such as distancing, staggering use of public areas (e.g., break areas), and wearing masks.
 - Disinfecting areas where employees who report symptoms have worked or used facilities.
- We discuss the CDC guidance in more detail in this [client alert](#), or you can view the CDC Guidance [here](#). The CDC guidance on cleaning the workplace is available at [this link](#).
- We discuss the latest EEOC guidance [here](#).
- If you are aware of a confirmed COVID-19 case among your employees, you must report this to the local health department if you are a physician, school principal, operator of childcare facilities, or an individual in charge of diagnostic labs. Other employers may also report, and we recommend you do so in order to obtain the latest expert guidance as it applies to your workplace.
- The DOL has determined that, under OSHA, a confirmed COVID-19 is a “recordable illness” if it is “work-related” (“an event or exposure in the work environment either caused or contributed to the resulting condition”) and meets one or more OSHA general recording criteria (“death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness ... [or] a significant injury or illness diagnosed by a physician or other licensed health care professional”). DOL guidance is available at [this link](#).
- If you have employees who don't want to come to work out of fear, it can be a tricky situation and we encourage you to seek counsel to discuss the specifics of your case. There could be concerted activity issues, OSHA issues, and leave issues. This is an area where there are no general solutions.
- If you have employees request that you provide protective masks or other measures there may be specific additional factors that are important. If OSHA requires [the provision of PPE](#) because of the nature of the workplace or duties, then it usually is the employer's obligation to provide and pay for it. Otherwise, there is ample guidance on the CDC website for obtaining or making one's own mask, and you could refer your employees there.
- **Where we can assist you:**
 - Clarifying how the existing CDC and OSHA guidance apply to your business.
 - Crafting policies for managing COVID-19 in the workplace.
 - Responding to individual employee issues.
 - Determining employer pay obligations (whether to pay employees for screening time or to pay for protective items like masks).

❖ Review How you Can Save Employee Expenses Without Shutting Down.

- As long as an employee does not have a contract or a collective bargaining agreement, an employer can change pay prospectively in North Carolina, with 24 hours advance written notice. The only limit is that the minimum wage (\$7.25/hr., in North Carolina) is still required.
- For guidance on adjusting salaried employees (including ways to change pay or status), see our [client alert](#).
- Benefits can also be adjusted prospectively (some waiting periods may be required), except benefits already vested cannot be forfeited. Non-ERISA future vesting schedules can be reduced or eliminated and ERISA plans can only be amended in accordance with their terms. It is important to read your plan documents.
- Where we can assist you:
 - Clarifying which benefits can be changed, and the effective period for doing so.
 - Structuring salary plans to minimize expense.
 - Complying with ERISA

❖ Review Arrangements for Employees Working Remotely. You may allow or even require your employees to work from home, but have these issues in mind:

- Workers' compensation still applies, so double-check with your carrier that home sites are included in your coverage.
- Non-exempt employees (those entitled to overtime) still need to keep time records. They are also entitled to be paid for travel time during the day if required. Remember the difference between off-the-clock ("on-call") time and compensable "waiting to work" time.
- Unless at-home work is an ADA accommodation, the employer may require the employee to bear any incidental expenses associated with such work, but only if such expenses do not reduce the employee's earnings below minimum wage.
- Keep track of essential job duties that are not getting done remotely and document any reductions in productivity and work quality. This will be important if you later want to deny work-at-home arrangements as a reasonable accommodation under the ADA.
- Cybersecurity is important. This [client alert](#) provides a few key considerations for employers to have top of mind with employees working from home.
- Where we can assist you:
 - Crafting work-from-home policies and procedures.
 - Clarifying compensable time issues.
 - Clarifying ADA issues.

❖ Remind Supervisors and Employees of Non-Discrimination Obligations.

- The DOL has specifically reminded employers that employees reporting unsafe or unhealthy conditions are protected under OSHA from retaliation.
- Likewise, the COVID-19 crisis does not void other discrimination laws, and you should be careful to apply your policies in an even-handed and non-discriminatory manner.

- The EEOC has cautioned against employees harassing other employees based on assumptions about populations likely at risk.
- The interplay with the ADA and FMLA may become issues with employees severely impacted by COVID-19 (themselves or their family members), and these issues can become complex.
- Where we can assist you:
 - Handling employee complaints concerning your COVID-19 response.
 - Clarifying ADA and FMLA issues.

❖ Review your Insurance Policies.

- While a pandemic (which this is) is frequently excluded from business interruption insurance, there is no substitute for reading your policy.
- Confirm insurance for workers' compensation for remote workers, and for workers traveling on-the-clock who have not previously been subject to business travel.
- Check your EPLI (employment practices liability insurance) coverage for exclusions (claim type and locations); the Sick Leave Act is an FLSA requirement, and many EPLI policies exclude FLSA coverage, so don't assume claims for this benefit will be covered.
- If your property requires special COVID-19-related cleaning, check for coverage (e.g., general liability, property, or pollution/environmental).
- More issues are discussed in this [client alert](#).
- Where we can assist you:
 - Understanding your coverage.
 - Assisting with a claim.
 - Representing you against a carrier, or representing you on behalf of a carrier for a covered claim (this may require getting your carrier to agree to designate us as counsel; if you want us to be available to do so, we recommend you negotiate this right with your carrier).

❖ Consider the Effect this Crisis may have on Your Contractual Obligations and Rights.

- The language of your contract is all-important.
- The COVID-19 Crisis will likely not be considered force majeure (act of God), excusing performance of the contract, but it may give rise to the defense that performance became impossible or the contract's purpose has been "frustrated."
- More guidance is available [here](#).
- Where we can assist you:
 - Helping you interpret your contracts and understand your rights, obligations, and options.
 - Representing you in a contract dispute, or, better yet, in helping avoid litigation.

❖ **Prepare for this Crisis to End.**

- **This is a good time to review your employment policies and consider if they need amending before things “return to normal.” For example:**
 - Consider revising how PTO is scheduled so that work flow is not disrupted after the return-to-work.
 - If you want (in light of this experience) to allow more remote work, establish clear policies describing what work is eligible, the conditions on such work, and procedures for requesting/authorizing such work.
 - Determine if you need to make prospective adjustments to benefits (type, amount accrual/vesting).
- **If there is down time, review job descriptions and handle those HR projects you haven’t gotten to.**
- **Examine what this experience has taught you about the pay classifications and how you might better structure the company in the future.**
- **If employees were laid off or furloughed, plan for their return-to-work. How your employees were put into that status could affect what is required for onboarding. In some cases, it may be necessary to complete some or all of these:**
 - Re-employment documentation (I-9, etc.).
 - Re-certification of necessary licenses, background checks, etc.
 - Re-enrollment in benefit plans.
- **Where we can assist you:**
 - Reviewing existing policies to check current compliance and suggest changes.
 - Assisting in drafting new policies.
 - Clarifying the scope of permissible changes in benefits, pay, and existing policies.
 - Identifying return-to-work requirements.

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