

JacksonLewis

Coronavirus' Impact on Texas Restaurants

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Jackson Lewis P.C. · Dallas

Firm Overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation
- As leaders in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms

Major Changes to the Restaurant Industry

- Dine-in service currently prohibited throughout Texas until April 3
- Most customers are eating at home or using a delivery service
- Many restaurants are temporarily closing, reducing their hours of operation, and/or conducting layoffs
- Economic impact could reach \$225 billion during the next three months
- Health and safety of workers and customers is paramount
- Legal obligations still exist

Keeping Your Staff and Customers Safe

- The World Health Organization (WHO) has declared COVID-19 to be an international pandemic
- During a pandemic, employers should rely on the latest CDC and state or local public health assessments. Remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves
- You can ask your employees if:
 - (1) they have come into contact with someone who has COVID-19,
 - (2) if they have tested positive or are experiencing symptoms, or
 - (3) if they have visited a designated WHO or CDC affected region
 - Employees answering in the affirmative can be directed to stay home
 - Treat employees consistently

Balancing Safety Versus Privacy

- The Equal Employment Opportunity Commission (EEOC) has released guidance covering how employers may act due to the spread of COVID-19
- The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances, such as a “direct threat”
 - A “direct threat” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation”
 - COVID-19, as a pandemic, poses a “direct threat”, which allows employers to take actions that they otherwise might not be able to do
- Can I take an employee’s temperature?
 - 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 precautions, employers may measure employees’ body temperature

Balancing Safety Versus Privacy

- What if an employee appears sick at work?
 - Establishments still have a duty to maintain a safe and healthy workplace under OSHA
- What should I do if an employee or prospective employee tests positive?
 - Employees can be forced to leave the premises, job offers can be rescinded, or start dates delayed
- Can I require an employee to wear a mask or gloves at work?
 - An employer may require employees to wear personal protective equipment during a pandemic. However, be mindful that there may be a shortage of protective gear
- If an employee has been out sick, can I require a doctor's note before they return?
 - Yes. Such inquiries are permitted under the ADA either because (1) they would not be disability-related or (2) they would be justified under the ADA standards for disability-related inquiries of employees (because the pandemic is severe and a direct threat)

Wage and Hour Issues

- Texas does not have any wage and hour laws; we follow federal law (FLSA)
- Non-exempt (or hourly) workers only have to be paid for hours actually worked
- Exempt salaried employees (e.g., managers) generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions
- Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work
- Employees who have PTO can use such PTO consistent with the restaurant's policies
- DOL guidance (Google "DOL FLSA COVID-19")

The Families First Coronavirus Response Act

- The “Families First Coronavirus Response Act” (H.R. 6201) was signed by President Trump on March 18, 2020
- What: it contains paid FMLA and paid sick leave provisions
- Who: both the paid FMLA and paid sick leave provisions apply to private employers with *fewer than 500 employees*
 - The DOL can exempt businesses with fewer than 50 employees “when the imposition of such requirements would jeopardize the viability of the business”
- Timing: both the proposed FMLA changes and the proposed paid sick leave take effect on April 2, 2020
 - The right to paid FMLA leave and paid sick leave expire on December 31, 2020
- How is it paid for: employers must pay the benefits, but they will receive a refundable tax credit for doing so

The Families First Coronavirus Response Act - FMLA

- The Act allows an employee who is unable to work (or telework) to take leave to care for the employee's minor child if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a "public health emergency"
 - The closure of the child's school or childcare is the only reason allowed for paid leave under the amended FMLA
 - Schools throughout Texas are currently closed through April 3, 2020
- Applies to employees who have been employed for at least 30 calendar days
 - Other FMLA requirements (50 employees within a 75-mile radius) do not apply
- The FMLA's requirement that an employee be restored to the same or equivalent position after leave does not apply to an employer with fewer than 25 employees if the employee's position no longer exists due to economic conditions

The Families First Coronavirus Response Act - FMLA

- The first 10 days in which an employee takes emergency leave may be unpaid.
 - An employee may elect, or an employer may require the employee, to substitute any accrued paid vacation leave, personal leave, or medical or sick leave for unpaid FMLA leave
- After 10 days, subsequent absences (up to the full 12 weeks of FMLA leave) must be paid at 2/3 the employee's regular rate of pay. There is a cap of \$200 a day and \$10,000 in the aggregate

The Families First Coronavirus Response Act - PSL

- Beginning April 2, 2020, employers must immediately make available 80 hours of paid sick leave for full-time employees (or the equivalent of the average number of hours over two weeks for part-time employees) for the following reasons:
 1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19
 2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
 3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
 4. The employee is caring for an individual who is subject to an order as described in paragraph (1) or has been advised as described in paragraph (2)
 5. The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions
- To be paid at the employee's regular rate, with the following caps: \$511 per day and \$5,110 in the aggregate for a use described in paragraphs (1), (2), or (3); and \$200 per day and \$2,000 in the aggregate for a use described in paragraphs (4) or (5)

The Families First Coronavirus Response Act - PSL

- The entire 80 hours of paid sick leave is available immediately. There is no accrual rate or period
- Applies to all employees, regardless of tenure
- Unused paid sick leave does not carry over from one year to the next
- An employer is not required to pay unused paid sick leave if an employee separates from employment.
- This benefit is in addition to any existing PTO currently provided by an establishment
- An employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave available under the Act

The Impact of Local Laws on Paid Sick Leave

- Be aware that Austin, Dallas, and San Antonio have passed local laws which may regulate paid sick leave
- Dallas: The PSL went into effect on August 1, 2019, but will only begin to be enforced as of April 1, 2020
 - Establishments need to ensure that they are not only compliant with the Dallas PSL law moving forward, but also that employees have the PSL balances that they would have had if accruals had started on August 1, 2019, the date the ordinance went into effect
- San Antonio: The San Antonio PSL ordinance has been enjoined as a result of pending litigation
- Austin: The Austin PSL ordinance has been enjoined as a result of pending litigation

Pay Reductions, Furloughs, Layoffs, and Closures

- Pay Reductions

- Non-exempt employees still must receive minimum wage (\$7.25 for all hours worked) and time-and-a-half for all overtime hours worked
- Salaried exempt employees can have their salaries reduced if the reductions are prospective (future pay period), the salary basis threshold (\$684/week) is still satisfied, and all other FLSA exemption requirements are still met

- Furloughs

- For salaried exempt employees, should be done in one-week increments
- When employees are furloughed, they should not perform any work, including checking emails
- Check group health plan to determine how long employees who are not actively working may remain covered by your group health plan

Pay Reductions, Furloughs, Layoffs, and Closures

- Layoffs
 - Final pay
 - If a Texas employee is laid off, discharged, fired, or otherwise involuntarily separated from employment, the final pay is due within six calendar days of the discharge
 - Benefits issues
 - Plan terms will govern, but employee benefits will likely end upon the separation date or the last day of the month in which the employee is separated
 - COBRA notices
 - If separation results in loss of benefits coverage, notify the plan and ensure that a COBRA notice is sent to the separated employee

Pay Reductions, Furloughs, Layoffs, and Closures

- Layoffs
 - WARN notices (Texas does not have a mini-WARN)
 - Only applies to companies with 100 or more full-time employees
 - Triggered by a “plant closing” or “mass layoff” and requires 60 days’ notice
 - Unemployment benefits
 - Texas Workforce Commission website
 - Workers can receive benefits immediately after their unemployment benefit applications are approved and the requirement to search for work has been waived for the immediate future
 - Shared Work Program
 - Alternative to layoffs
 - Allows employers to supplement their employees’ lost wages because of reduced work with partial unemployment benefits where at least 10 percent of employees have had their hours reduced by at least 10 percent but not more than 40 percent

Questions?

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Thank **you.**