

# BRINGING YOUR WORKFORCE BACK

## AN EMPLOYMENT LAW PERSPECTIVE

**Yavapai College Small Business  
Development Center**

**Wednesday, June 3, 2020**



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- Primarily work with small employers with less than 50 employees

***Necessary Disclaimer:** Information that will be shared in today's presentation is for informational purposes only and does not constitute legal advice. Attending this webinar does not create an attorney-client relationship.*



# LOTS OF POTENTIAL LAND MINES



Americans with  
Disabilities Act

FFCRA



State Paid  
Sick Leave



**Employee Rights**  
Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

## LAI D OFF VS. FURLOUGHED

- **Laid Off**—Employees were separated from employment for lack of work.
  - When they return, employer needs to follow rehire process, which includes Form I-9 and E-Verify.
- **Furloughed**—Employees remained on the payroll, either without pay or with partial pay.
  - Do NOT complete Form I-9 or E-Verify.

## DEVELOP A RETURN TO WORK PLAN

### ▪ Determine Staffing Needs

- **Will everyone be offered work?** If no, identify who will be offered work based on **neutral objective criteria** (i.e., job performed, longest tenured people, those who are cross-trained at other jobs.)
- Age and health are not permissible criteria.

### ▪ Implement Safety Measures for Employees and Others

- Keep people healthy and minimize litigation risks.

### ▪ Return to Work Offer Should be in Writing

- Employee should also accept or decline work in writing.



#### SAMPLE RETURN TO WORK LETTER

TO: Workers at Robust Retailer  
 FROM: Marilyn Manager  
 SUBJECT: Your Return to Work  
 DATE: June 3, 2020

It's been a difficult and challenging time for everyone! Our business has been closed for two months and, as a result, you've been out of work. Arizona's "Stay at Home" order was recently lifted and we're ready to resume business operations, with safety measures in place that meet or exceed guidelines from the Center for Disease Control (CDC), the Arizona Department of Health Services (AZDHS), and our industry's association.

We want you to return to work! We will begin putting employees back on the work schedule by **Monday, June 15<sup>th</sup>** and need to know who will be coming back. **Returning employees will be paid the same rates as before the closure. Work hours may vary depending on business needs and the number of employees who return to work.**

Please check one of the following three options:

1. \_\_\_\_\_ I am ready to return to work effective June 15, 2020. Please put me on the work schedule.
2. \_\_\_\_\_ I do not want to return to work even though work is available beginning June 15, 2020. I am voluntarily resigning from my employment effective June 14, 2020. I understand that if I am currently receiving state unemployment compensation benefits that the benefits may end (the decision will be made by Arizona DES).
3. \_\_\_\_\_ I am unable or not available to return to work on June 15<sup>th</sup> for the following reason:

(Employees who list a reason will be contacted. Some employees may be eligible for paid leave, depending on the reason.)

Employee Signature \_\_\_\_\_

Date Signed \_\_\_\_\_

Employee Name (Printed) \_\_\_\_\_

Employee Cell Phone Number \_\_\_\_\_

Return this signed form to Ollie Office Manager by **no later than Monday, June 8<sup>th</sup>**. Email it to Ollie at [ollie@roretailer.com](mailto:ollie@roretailer.com) or text your response to Ollie at 928-111-1234. Direct any questions to Ollie at 928-111-1234. Employees who do not respond may be separated from employment effective June 14, 2020.

This letter is not a contract of employment. Employees at Robust Retailer are employed "at-will."

### Sample Letter

Message will vary based on:

- If employees will be offered different jobs;
- If employees' pay will change;
- If there are any operational changes;
- And more!



## EASY OUTCOMES

- **Employees agree to return...**
  - Train them on new safety precautions and insist on compliance.
  - Be sensitive to those who are hesitant to be around others—point out the safety measures.
- **Employees decide to resign...**
  - Wish them well.
  - Make them eligible for rehire.



## MORE COMPLICATED OUTCOMES

### **Employees are unable or unavailable to return...**

1. They want to continue receiving unemployment benefits;
2. Childcare reasons;
3. They or a family member has COVID-19;
4. They or a family member has another illness;
5. They have an underlying medical condition that may put them at greater risk from COVID-19; or,
6. They are afraid to return to work.



## EMPLOYEE DOESN'T WANT TO GIVE UP UNEMPLOYMENT BENEFITS

- When they applied for benefits, they agreed that if they were offered a job today, they must be able to accept it.
- They have to file weekly certifications—one of the questions asks if they refused any job offers and makes it clear that if they didn't have a good reason, they may be disqualified from receiving benefits and may have to pay back benefits received after they declined the job offer.
- Employers may notify the state of refused job offers.



### What You Must Do to Request Weekly Pandemic Unemployment Assistance Benefits


Please check each box below to indicate that you have read and understand the following requirements before you continue.

- To be eligible for benefits each week you **MUST** be able to go to work each day. If you were offered a job today, you must be able to accept it.
- Beginning this Sunday, you **MUST** file a weekly certification to receive benefits. You can file online at [\[redacted\]](#). Continue to file each week if do not have a job. You cannot be paid for any week(s) that you do not claim.
- You **MUST** report ANY earnings for the week you work, **even if you've not yet been paid**. Include all income, commissions, tips and gratuities. Report the gross amount before deductions.
- If your contact information changes, inform the UC service center ([\[redacted\]](#)), the [\[redacted\]](#) system ([\[redacted\]](#)) and the United States Postal Service immediately, even if you are not filing for benefits at that time.
- You **MUST** read and understand the Pandemic Unemployment Compensation Handbook, which explains these requirements in more detail. Please [click here](#) here to download and view the PUA Handbook.
- I acknowledge that any false statements in this document are punishable pursuant to [\[redacted\]](#), and CFR 625.14 referenced in Section 2102 of CARES Act of 2020, relating to unsworn falsification to authorities, and that a person who knowingly makes a false statement or knowingly withholds information to obtain UC or other benefits commits a criminal offense under Section 801 of US Law 43 P.S. 871, and may be subject to a fine, imprisonment, restitution, and loss of future benefits.



## REASONS TRIGGERING FEDERAL PAID SICK LEAVE LAW

**Families First Coronavirus Response Act (FFCRA)—Employees are eligible for paid sick leave if work is available and they can't work for the following reasons:**


1. Federal, state, local quarantine or isolation order relating to COVID-19;
  2. Self-quarantine at healthcare provider's advice relating to COVID-19;
  3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
  4. Caring for an individual who is subject to a quarantine or isolation order or who is self-quarantined related to COVID-19; or,
  5. Caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable due to COVID-19.
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## FFCRA PAID SICK LEAVE

### ▪ First 4 reasons—

- quarantine/isolation order,
- self-quarantine at healthcare provider's direction,
- experiencing symptoms and seeking diagnosis, or
- caring for someone who falls within the first two reasons above

**Then the employee is eligible for up to 2 weeks (80 hours maximum) of paid sick time.**

- **If it applies to the employee directly--they receive full pay.**
  - **If employee is caring for someone, then employee receives 2/3 rate of pay.**
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## FFCRA CHILDCARE LEAVE

- **Childcare Leave**—Employee is eligible for up to 12 weeks at 2/3 rate of pay for average hours worked.
- Childcare provider must be unavailable for reasons related to COVID-19.
  - If school is closed for summer break, that doesn't apply.
  - Employee's alternate childcare must be unavailable due to the virus (i.e., grandmother is caregiver in summer, has health issues).
- Tax credits are available to employer unless the money used to pay for sick or childcare leave came from PPP funds.
  - Employee is required to provide documentation in support.



## ARIZONA PAID SICK TIME (PST)

- If employee can't work for a reason that doesn't fall within the federal paid leave law, if the reason falls within the state law (i.e., has the regular flu), and they have paid sick time available then you must allow them to use it.
- Unlike federal law, the employer can't require documentation, unless employee misses 3 consecutive work days.
- Employers with less than 15 employees—24 hrs. PST year
- Employers with 15 or more employees—40 hrs. PST year



## MEDICAL CONDITION PUTS THEM AT RISK

- **Employee does not want to return to work due to an underlying medical condition.**
  - Possible Americans with Disabilities Act (ADA) and state disability law protection.
  - Applies to employers with 15 or more employees.
- **Employer should ask for medical documentation supporting refusal to work, or listing restrictions on the employee's ability to work.**
  - Discuss with employee possible accommodations—i.e., assign to job away from public, work from home, work a different shift with less people, etc.
  - If 50 or more employees, FMLA leave may apply.



## MEDICAL CONDITION OR AGE PUTS EMPLOYEE AT RISK, BUT THEY WANT TO WORK

- **Age and disability non-discrimination laws prohibit employers with 15 or more employees from telling these employees that they have to stay home.**
  - Age is not an acceptable reason to prevent employees from working.
  - If the employee has serious health concerns and being in the workplace would put the employee's health in jeopardy, the employer can prevent the employee from working only if they can show that the employee is a "direct threat" to him/herself (ADA).
    - Get legal assistance before you do this.
- **You can and should tell an employee who is sick to stay home.**





## EMPLOYEE IS AFRAID TO RETURN TO WORK

- A **generalized fear** of contracting COVID-19 in the workplace is not enough for OSHA protection.
- Employee must have a **reasonable belief** that there is a **threat of death or serious physical harm** if they return to work.
- Employer should try to address employee's fear by describing safety measures that will be in place.
  - If employee refuses to return to work—possible options are vacation, short unpaid leave, or separate from employment being eligible for rehire.



## EMPLOYEE COMPLAINTS ABOUT SAFETY

- When employees (more than one, or one on behalf of others) **complain about unsafe working conditions**, they are generally protected from disciplinary action under the **National Labor Relations Act (NLRA)**.
- Safety complaints must be addressed and taken seriously.
- Be aware of this legal protection!



# QUESTIONS?



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