

A Physician Practice's Survival Guide for Challenging Times

Staffing Spotlight: Retention, Reduction & Mitigation

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Presenters:

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Reducing and Controlling Labor Costs

- Temporary or permanent?
- Methods
 - Reassigning employees
 - Reducing hours
 - Salary reduction
 - Furlough
 - Permanent layoff



Unemployment Compensation Benefits

- State-specific laws and processes
- Benefits triggered in most states if
 - Hour reduction, salary reduction, temporary or permanent layoff
- Some key issues and differences
 - Who can or is required to file?
 - Required method for filing?
 - Coverage for partial unemployment?
 - Maximum weekly benefit amount?
 - Affected by separation pay or paid time off?
 - Other eligibility requirements?



FFCRA – Enhanced Unemployment Compensation Benefits

- Based on
 - Waiting period waiver
 - Work search requirement waiver for employees directly impacted by COVID-19 on account of an illness in the workplace or direction from a public health official to isolate or self-quarantine
 - No charge to most employer accounts for these COVID-19 related benefits
 - Self-insured employers still charged
- CARES Act changes unemployment
 - Adds additional \$600 weekly UI benefit, if employee is eligible for at least \$1 of state UI benefits



Furlough

- Eligible for unemployment compensation
- Maintain attachment to employer
 - Easier to start up once “all clear” sounded
- Eligible for FFCRA benefits (maybe)
- No requirement to pay out accrued pay (most states)
- Potential lose of health benefits
 - Trigger COBRA
- No WARN exposure if less than 6 months
 - Beware of state mini-WARN Acts



Permanent Layoffs

- Eligible for unemployment compensation
- Not eligible for FFCRA benefits
- Requirement to pay out accrued pay
- Lose eligibility for health benefits
 - Trigger COBRA
- WARN Act notice may be necessary but unforeseen business circumstances may apply



Families First Coronavirus Response Act (FFCRA)

Emergency Paid Sick Leave Act (EPSLA)

Emergency Family and Medical Leave Expansion Act (EFMLEA)



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Employer Tax Credit

- **For payments ER made for FFCRA paid leaves**
 - 100% is refundable as a tax credit
 - Reimbursement as a credit against Social Security and Medicare payroll taxes
 - Supporting documentation
 - U.S. Treasury may develop a mechanism for more accelerated reimbursement to small businesses



FFCRA

- **Which employers are required to provide paid sick and family leave?**
 - Private employers: Fewer than 500 employees
 - Governmental employers (regardless of the number of employees)
 - NOTE: This includes employers who are otherwise exempt from the FMLA who have fewer than 50 employees



FFCRA

- **Are certain employees exempt?**
 - Employers may exclude employees who are health care providers and emergency responders
 - Exempt some EEs but not all?
 - Based upon positions?
 - Based upon qualifying conditions?
 - Certain federal government employees



Events That Trigger Paid Sick Leave for Employees

- **Unable to work or telework because employee is:**
 1. Subject to a federal, state or local quarantine or isolation related to COVID-19
 2. Advised by HCP to self-quarantine due to concerns related to COVID-19
 3. Experiencing symptoms of COVID-19 and seeking medical diagnosis
 4. Caring for an individual who is subject to (1) or (2)
 5. Caring for his/her child because school or place of care is closed or child care provider of child is unable to care due to COVID-19 precautions
 6. Experiencing any other substantially similar condition specified by Secretary of Health & Human Services



Events That Trigger Extended Family Leave for Employees

- **Only One Reason:**

5. Caring for employee's child whose school or childcare provider is closed or unavailable for COVID-19 reasons.



What Type of Paid Sick Leave is Available (EPSLA)?

Generally:

- Two weeks (up to 80 hours) of paid sick time at the regular rate of pay for reasons #1-3

OR

- Two weeks (up to 80 hours) of paid sick time at two-thirds the regular rate of pay for reasons #4-5



What Type of Paid Family Leave is Available (EFMLEA)?

- Up to an additional 10 weeks of paid family leave for reason #5
 - At two-thirds the regular rate of pay
 - EE must have been employed for at least 30 calendar days at time leave is to be taken



Required Notice of Rights

- Employers must conspicuously post a notice of employee rights in a form to be prepared by DOL
- Employers may not discriminate or retaliate against employees who use paid sick time or paid family leave, or who engage in other protected activity
- Remedies
 - For failure to provide paid sick time, FLSA remedies apply
 - For failure to provide paid family leave, FMLA remedies apply





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Managing COVID-19 Impacts: The Special Problem of Physician Employment Agreements

Alex Maultsby

Scenarios

- Reducing hours
- Reducing pay without reducing hours
- Assigning different duties
- Ending employment



Overarching Contract Issues

- Most contracts have notice provisions that prevent immediate termination
- Most contracts require that any changes be in writing and signed by both parties
- Most contracts specify the precise services to be provided and the precise compensation (often under a formula)



So ...

- It can be very difficult to mandate reductions in hours, pay or duties – absent mutual agreement to amend
- There must be some mutual benefit for an amendment to be enforceable



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What Does Mutual Benefit Require?

- It means your amendment document needs to recite what the physician gained by the amendment.
- Simplest for a physician-employee: “The Practice agrees to refrain until no earlier than [June 1] from exercising its right under Paragraph X of the Physician Employment Agreement to issue a Notice of Termination of that Agreement, in exchange for Physician’s agreement to amend that Agreement as set forth below:”



What Does Mutual Benefit Require?

- Physician Owners/Partners
- Their mutual promises to each other can be enough of a “benefit” – each received the benefit of the promise of the others to take fewer dollars out of the Practice in compensation.
- NOTE: If a physician who is an owner or a partner has an employment agreement, too, then amending the employment agreement needs to refer to the benefit the physician is receiving as a result being an owner.



Key Takeaway

- Making changes to pay or duties is not as simple as imposing and announcing the changes.
- Gather all of the relevant documents:
 - Partnership/PLLC Membership Agreement
 - Employment Agreement
 - Compensation Plan
- Understand how they interact and find or create some benefit for the physician who is agreeing to lower pay.



Warning: “Salary” Payments

- Salary payments
- Every U.S. worker is an hourly employee until she is not
- How is she “not”
 - Professional duties: Being a doctor
 - Receiving a salary
- What is a salary?



Warning: “Salary” Payments

- A salary is an established amount every pay period that is not subject to reduction due to the quality or quantity of work
- The established amount must be at least \$684 a week, unless the employee did no work in that workweek
- If not at least that amount, then there are recordkeeping obligations
- AND, if not paid at all for a workweek in which work is done, there is a minimum wage issue



Changes in Duties

- Mandated changes: For example, can we require a physician to pitch in at local hospital?
- Requested changes: For example, what if a physician asks to moonlight in order to make up for lost pay?
- Non-compete issues: For example, do we lose enforcement rights later if we allow exceptions now?



Same As It Ever Was ...

- Does our physician have a right to FMLA leave?
- Does our physician have a disability?
- What do accommodations look like?



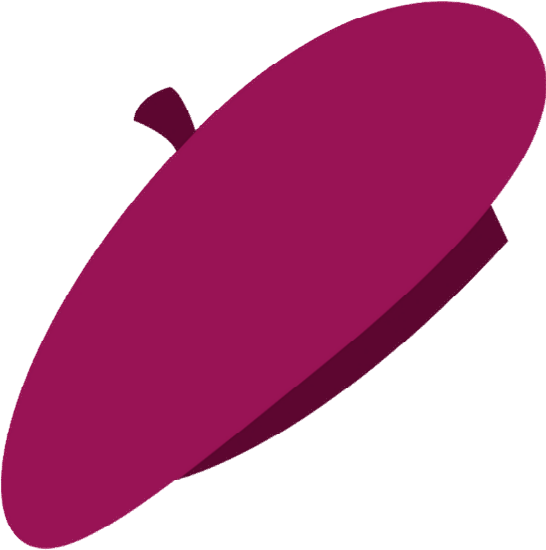


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Managing COVID-19 Information Regarding Employees

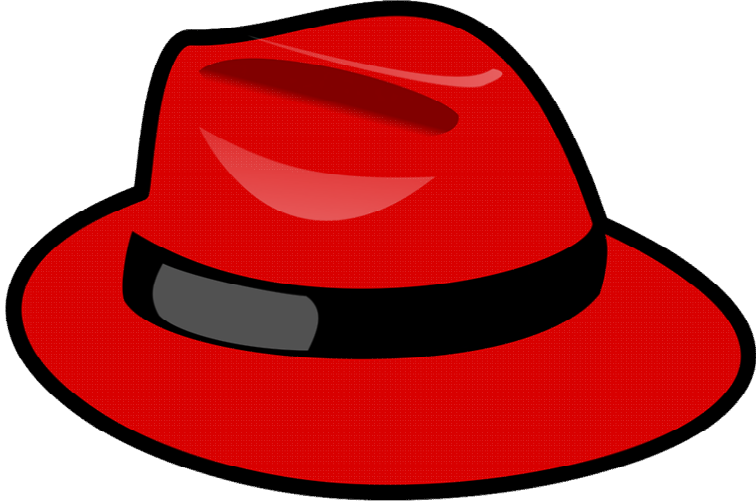
Maureen Demarest Murray, Esq.

What Hat Are You Wearing? Provider



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What Hat Are You Wearing? Health Plan



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What Hat Are You Wearing? Employer



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What Hat Are You Wearing? Colleague



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Analysis

Which hat or who received the information?

- Provider covered by HIPAA
- Health plan covered by HIPAA
- Employer **Not** covered by HIPAA



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Employment Information ≠ PHI

Protected health information excludes individually identifiable health information in employment records held by a covered entity in its role as employer.

45 CFR 160.101



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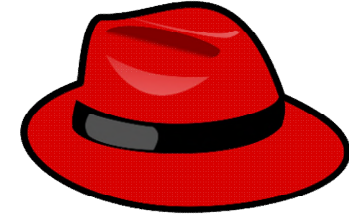
Employment Information ≠ PHI

The following is not PHI and can be shared with HR or managers:

- Pre-employment physical that reveals positive COVID-19
- Employment drug or COVID-19 test screen
- FMLA doctor's note clearing employee after COVID-19
- Fitness to work testing
- Testing for work-related exposure to COVID-19



Scenario 1



- Your physician practice health plan receives claims information concerning an employee that tested positive and received treatment for COVID-19.
- Can the personnel handling the health benefits plan share that information with the employee's manager?



Scenario 2



- Your employee's spouse advises his boss that the employee tested positive and received treatment for COVID-19.
- Can the information be shared with co-workers?
- How and what follow-up steps should be taken?



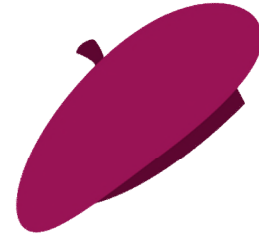
Scenario 3



- One of your PA's advises a colleague that a family member tested positive for COVID-19. That PA saw 50 patients before the PA became aware of the exposure.
- Can the colleague tell the office manager?
- Is there any duty to notify the 50 patients?
- How and what steps, if any should be taken?



Scenario 4



- You have a family practice
- One of your certified nursing assistants is also a patient
- He manifests some symptoms of COVID-19 and comes to one of your physicians for screening and an assessment
- The CNA is tested and tests negative
- Must or may you report?
- Must or may you inform other staff?
- Suppose the test results are positive



Permissible COVID-19 Disclosures

- CDC and local and state public health authorities
- CMS
- First responders
- Other treating providers
- Family members of person with COVID-19
- To prevent or lessen a serious or imminent threat to the health or safety of a person or the public and consistent with other applicable law



Required COVID-19 Disclosures

- Required disclosures for nursing homes
[Trump Administration Announces New Nursing Homes COVID-19 Transparency Effort](#)
- Applies to skilled nursing beds
- Does not apply to other types of providers
- Does not change fundamental HIPAA requirements
- Adds entities to which SNFs make public health reports



Resources

- **Fox Rothschild:**
 - <https://www.foxrothschild.com/coronavirus-resources/>
- **U.S. Department of Labor:**
 - <https://www.dol.gov/agencies/whd/pandemic>
- **OSHA Coronavirus Guidance:**
 - www.osha.gov/SLTC/covid-19/
- **EEOC Guidance:**
 - https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- **CDC:**
 - <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>
- **U.S. Department of Health & Human Services:**
 - <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>
 - <https://www.hhs.gov/about/news/2020/03/24/ocr-issues-guidance-to-help-ensure-first-responders-and-others-receive-protected-health-information-about-individuals-exposed-to-covid-19.html>
 - <https://www.hhs.gov/about/news/2020/04/02/ocr-announces-notification-of-enforcement-discretion.html>



Thank you!

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