PRIVATE PRACTICE SECTION
American Physical Therapy Association

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Coronavirus/COVID-19: - *General[1] Considerations for Physical Therapy Private Practices*

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Every day brings new concerns and challenges for physical therapy practices who prioritize the health and safety of their employees/communities but remain very mindful of the need to continue to meet their business goals and obligations and provide care to patients. Although it is impossible to discuss every situation that can arise, below are answers to questions that practices are frequently asking and a discussion of some common scenarios that a practice may encounter.

REDUCING STAFF

Q: *Our practice is facing a substantial reduction in patients and, therefore, revenue; to manage cashflow and help us weather this storm, can we reduce wages across the board or across certain positions?*

A: Generally, yes, employers have a broad discretion to change wages, with some important caveats:

- Do so only prospectively. Employees cannot find out after the fact that they are paid less than they expected for work already completed. The amount of notice required can vary from state to state.
- Make sure hourly non-exempt employees' regular wage rates are not reduced below applicable federal or state minimum wage rates;
- Make sure that salaried exempt employees' wages are not reduced below applicable federal (currently $684/week) or state minimum salary thresholds (otherwise these employees become non-exempt and the employer must track their actual work hours and pay overtime rates for hours in excess of 40 in a week); and
- Make sure decisions regarding wages are not discriminatory on the basis of legally-protected characteristics, such as race, sex, age, etc.;

Q: *Does it matter whether we "lay-off" an employee as opposed to "furloughing" them or simply not scheduling an employee to work?*

A: The terms "layoff" and "furlough" do not have uniform legal meanings. As such, there is a concern that an employee may take away a meaning or nuance from the use of such terms that is not intended by the employer. What's most important is whether the employer is seeking

[1] **DISCLAIMER***: Please note that this article is not intended to, and does not, serve as legal advice to the reader but is for general information purposes only. Nothing in this article constitutes nor substitutes for specific legal advice that takes into account your organization's specific jurisdiction(s) or circumstances. Regulations and guidance related to COVID-19 based legislation is being published frequently, which may affect the information provided in this document. Please seek legal counsel if you need specific guidance.*

to end the employment relationship. If so, it is critical that the employer clearly communicate that decision. If an employer is ending the relationship, it needs to follow its policies regarding terminations (for example, if applicable, the payout of earned but unused PTO).

Practices usually have broad rights to layoff or terminate employees for whom it no longer has work, subject of course to any specific contractual or other legal considerations. If a practice wishes, given the current unprecedented circumstances, to provide salary continuation or other benefits that it typically does not, it should clearly communicate its plans to employees and seek legal guidance. Issues to consider in the practice's decision to lay off staff include eligibility for unemployment compensation, employee benefits and COBRA, risk of employment discrimination claims, and other related issues.

When an employee is no longer employed, that person should no longer provide services for the practice, even if on a "volunteer" basis. Allowing such an individual to continue to provide services raises a number of issues, including concerns related to wage and hour laws and potential professional liability insurance coverage issues.

If a practice reduces or terminates the hours of an employee that individual would generally be eligible for unemployment, with the ultimate eligibility determination to be made by the applicable state agency. If the employer elects to reduce an employee's income without terminating employment, in many states that employee may still be eligible for partial unemployment based on the reduction in compensation.

Whatever phrase that is used (e.g., "termination", "lay-off", and "furlough") does not limit, increase or otherwise determine a separating employee's legal rights or the employer's potential liability. Anytime an employee is subject to an adverse job action, he or she may challenge that action under any discrimination or other employment rights law.

Keep in mind that practices who receive loans under the recently-established Paycheck Protection Program discussed below can have the forgiveness of that loan reduced if any staff or wage reductions that were taken prior to getting the loan are not reversed by June 30, 2020 (see details below).

Q: *Can our practice continue, as a gesture of goodwill, to keep those who are "laid-off" on our healthcare plan for a month or so?*

A: Check your insurance contract or contact your insurance broker. Some insurance contracts are very restrictive about who can continue to be covered after a reduction in hours, layoff, etc. Once any minimum work or other requirements are met, practices may wish to modify their policies to allow for a broader provision of health insurance coverage to difference classes of employees. The practice must consider how it elects to treat part-time employees that are recently subject to a reduction in work hours as compared to employees that have historically been part-time to mitigate the risk of discrimination claims and otherwise avoid a violation of the terms of the applicable insurance plan.

Q: *Can our practice ask an employee who is no longer busy to perform different tasks or duties? And, if so, what if he or she refuses?*

A: An employer typically enjoys broad rights in assigning work. As such, as long an there isn't a contract or agreement that specifies the duties an employee will perform, an employer can usually reassign an employee to other tasks. If an employee refuses to perform certain tasks, it is critical to understand whether the refusal is based upon limitations imposed by the employee's health condition. If so, the employer will need to follow its usual approach to evaluating whether a reasonable ADA accommodation is required or if the employee qualifies for a leave under an existing program, plan, policy or applicable law.

Q: *What do we do if an employee appears to be ill and/or unable to perform any of his/her work duties?*

A: Practices have broad rights to make sure that those who report for work can perform their job duties in a way that is safe for themselves and others. So, if a practice has a reasonable basis to question an employee's ability to safely perform his/her job or be in the workplace, it generally may send the employee home pending further investigation of the circumstances. Such an investigation should focus on the employee's functional capabilities and ability to work in his/her workplace (not the specific medical nature of the employee's condition) and rely on the opinions of medical providers/professionals (not lay assumptions or generalizations). Although laws such as the Americans with Disabilities Act typically limit an employer's rights to seek certain medical information from employees or candidates, the U.S. Equal Employment Opportunity Commission has relaxed its view on this in certain specific ways given the extraordinary circumstances that this crisis presents. Here is a link to more information regarding the EEOC's position:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

NEWLY ENACTED PAID LEAVE BENEFITS

Q: *Does the recently passed paid sick law apply to my practice?*

A: Although virtually all private (non-government) employers with fewer than 500 employees are covered by this law, the Families First Coronavirus Response Act ("FFCRA") (discussed more fully below), with these caveats/provisos:

- Employers with fewer than 50 employees may be exempted by the Secretary of Labor "when the imposition of such [paid leave] requirements would jeopardize the viability of the business as a going concern";
- Employers with fewer than 25 employees are not subject to one part of the expanded FMLA leave; and
- Employers who employ "health care providers" or "emergency responders" (more on these terms below) may "elect to exclude" these workers from these paid leaves.

The last bullet point – which discussed health care providers - has been the subject of a lot of discussion and confusion in the physical therapy community. The law itself clearly states that employers may (under procedures that aren't established yet) be able to exclude those individual employees who meet a long-standing definition of "health care provider" set forth in the FMLA. Over the years, it has been held that physical therapists qualify as health care

providers when "acting under the orders or upon referral by a health care provider." Very recently FAQs issued by the Department of Labor with specific regard to the FFCRA, however, take a broader approach, as follows:

> *Who is a "health care provider" who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?*
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> *For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.*
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> *This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.*
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> *To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.*

As additional guidance is published on this issue it will be made available through PPS and other sources.

Q: *What does the FFCRA require employers to do?*

A: Effective April 2, 2020, the FFCRA requires covered employers (see previous Q&A) to provide two different kinds of paid leave for certain Coronavirus/COVID-19-related reasons. The costs of these paid leaves will be offset by tax credits (against the 6.2% social security tax payment employers usually make to the federal government with each payroll)[2].

The two leaves are as follows:

[2] The government will establish a process by which employers are reimbursed if this credit does not fully cover the leave payments made.

1. **Paid sick time**. Employees shall receive paid[3] sick leave[4] if they are unable to work (or telework) due to a need for leave because:
    a. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
    b. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
    c. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
    d. The employee is caring for an individual who is subject to an order as described in a., above, or has been advised as described in b., above;
    e. The employee is 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 precautions;
    f. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

2. **Expanded FMLA leave**. Employees who have been employed for at least 30 days are entitled to up to 12 weeks of job-protected[5] paid[6] leave if they are unable to work (or telework) due to a need to care for a son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a COVID-19-related public health emergency.

It is very important to note that not all Coronavirus/COVID-9-related reasons trigger the right to these leaves. For example, the FFCRA does NOT require employers to provide paid leave under broader circumstances, e.g., an employer's decision to cease operations, reduce headcount or hours, etc. It is up to employers to decide whether to expand their current paid time off plans/policies to cover these other situations.

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[3] Leave time taken for reasons 1a.-c. is to be paid at the employee's regular rate of pay, subject to daily and aggregate limits of $511 and $5,110, respectively. Leave time taken for reasons 1d.-f. is to be paid at 2/3 of the employee's regular rate of pay, subject to daily and aggregate limits of $200 and $2,000, respectively.

[4] The duration of the paid sick leave is: 80 hours for full-time employees; or, for part-time employees, the number of hours each works on average over a two-week period.

[5] Employers with fewer than 25 employees are exempt from the requirement to restore an employee to his/her prior position (or an equivalent) upon the expiration of the need for leave, if the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency (*e.g.*, a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions.

[6] During the first two weeks of this expanded FMLA leave, an employee can opt (but not be required by the employer) to receive accrued vacation, personal, or sick leave. The remaining period is to be paid at 2/3 of the employee's regular rate, subject to daily and aggregate limits of $200 and $10,000, respectively.

Some other key attributes of the FFCRA:

- This paid sick time is to be made available to employees in addition to existing paid leaves and, accordingly, an employer cannot require an employee to use other paid leave before the employee uses this paid sick time;
- An employer cannot require, as a condition of providing this paid sick time, that employees search for or find a replacement to cover the hours they are off;
- This paid sick time shall be available for immediate use by employees regardless of how long any employee has been employed; and
- The requirement to provide both leaves sunsets on December 31, 2020.

Q: *We have an employee who is on the schedule but says that he isn't comfortable reporting to work – what should we do?*

A: It is important to understand the basis of the employee's request.

- Is it due to the employee's own health condition?
    - A practice providing FFCRA leave needs to understand if the employee has one of the qualifying conditions that entitles him/her to paid leave, i.e., is the employee unable to work because he/she: (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

    - Employees who are unable to work due to a non-COVID-19-related condition should be treated in accordance with whatever plans or leave programs that the practice has established (e.g., FMLA, STD, LTD, sick days, PTO, etc.) should be administered in accordance with their terms and conditions.

- Is it due the COVID-19-related health condition of someone else?

    - Under the FFCRA, if the employee is unable to work because he/she is caring for someone who: (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, the employee may be entitled to paid leave.

    - If an employee is unable to work because he/she is caring for someone affected by any non-COVID-19-related health condition, the practice should handle the situation in accordance with the plans or leave programs that the employer has established (e.g., FMLA, non-FMLA family leave, sick days, PTO, etc.) should be administered in accordance with their terms and conditions.

- Is it due to something else (e.g., lack of childcare for a child whose school has closed, general anxiety)?

- Under the FFCRA, if the employee is unable to work because he/she is 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 precautions, the employee may be entitled to paid leave.

- For all other "personal reasons" that do not fall in the above categories, whatever plans or leave programs that the practice has established to cover absences for personal non-health-condition-related reasons (e.g., personal days, PTO, etc.) should be administered in accordance with their terms and conditions. If a practice wishes to expand its plans and programs given due to the current unprecedented circumstances, it should clearly communicate its plans to employees and seek legal advice if needed.

WORKPLACE FLEXIBILITY

Q: *We are requiring employees who are not required to be in the office to work remotely – are there any issues we should be aware of?*

A: Practices typically have broad rights to direct their workforce, including where employees perform their duties. That said, here are some key considerations:

- It is critical that employees are well aware of a practice's expectations of them while they are working remotely (e.g., work hours, duties, reporting structure, clocking in/out (especially for non-exempt employees), deliverables, accessibility, etc.). It is absolutely critical that a practice knows/controls at all times who is working and who isn't. (One illustration: generally, salary exempt employees must be paid their full salary for any week in which they perform any work, so a practice who doesn't intend to pay salaries to physical therapists during a long shutdown must make sure that exempt employees perform no work during any week in which they are not paid.)

- If a particular employee's work calls on them to handle confidential or private information in a certain way (e.g., in compliance with HIPAA or other privacy laws), practices must ensure that there are policies and procedures in place to ensure compliance with all legal and contractual requirements.

Q: *Can my practice require or offer therapists the ability to see patients in the home?*

A: The practice should take additional steps such as confirming that the practice and its employees have appropriate automobile and liability insurance, determining whether third party payors will reimburse for services provided in the home, and considering additional steps in the employment screening process such as confirmation of a valid driver's license.

NEW AND EXPANDED LOANS AVAILABLE BECAUSE OF *CARES*

The Private Practice Section has numerous resources available on the Coronavirus Aid, Relief and Economic Security Act (CARES), including a summary of the law (available at https://ppsapta.org/sl_files/2EE3C73D-A98C-3629-1C30CC4C0955AE89.pdf) and a webinar (available at https://ppta-learningcenter.apta.org/student/mycourse.aspx?id=e921b574-4db2-

451f-9dec-5ccc627436ce). As an additional resource, the SBA has established a Paycheck Protection Program website (available at https://www.sba.gov/funding-programs/loans/paycheck-protection-program-ppp#section-header-8). The below FAQs are intended as a supplement to these resources.

Q: What is the difference between an Economic Injury Disaster Loan (EIDL) and a loan under the Paycheck Protection Program (PPP)?

A: The EIDL's purpose is to provide loans to small businesses suffering lost revenue due to COVID-19. The funds can be used to pay for payroll expenses, fixed debts, accounts payable, and other expenses. The loan amount is up to $2,000,000. The loan is not forgivable; however, a borrower can request an advance of $10,000 which does not need to be returned if the EIDL loan is denied. The loan is subject to certain collateral and guarantee requirements depending on the amount borrowed. Additional information about EIDL loans and a loan application is available at https://www.sba.gov/funding-programs/disaster-assistance

The PPP's purpose is to provide loans to small businesses to pay payroll costs (as defined in detail in the PPP, but including employee compensation, payments for certain leaves, group health benefits and insurance premiums, rents, and other items) to keep a business operating during COVID-19. Loan proceeds may be used for payroll expenses, mortgage interest payments, rent and utilities, and interest on certain pre-existing debts. The loan amount is up to $10,000,000 or 2.5 times the business's average monthly payroll costs (which are calculated in a specific way set forth in the law), whichever is less. The loan is forgivable for up to 100% of eligible expenses paid with loan funds during the 8 weeks following the closing of the loan, subject to compliance with PPP's loan forgiveness requirements. For tax purposes, the loan amount forgiven shall be excluded from gross income. The PPP loan program does not include collateral or guarantee requirements. Additional information about PPP loans, including a "sample" loan application (private lenders that participate in the PPP will establish their own forms, but this sample form should allow a practice to start gathering the required information), are available at https://www.sba.gov/funding-programs/loans/paycheck-protection-program-ppp#section-header-2

It is possible to have both an EIDL and a PPP loan; however, the loans cannot be for the same purpose.

For additional information on the PPP application process, practices should contact their current lender.

Q: Under the PPP, if our practice has previously made payroll reductions in March 2020, can the practice pay the employees during our covered period (i.e., the eight week period after our PPP loan is originated) to retroactively make the employees "whole" and have these amounts be forgiven?

A: Although staff and/or wage reductions made during the Coronavirus crisis reduce (under specific formulas) the amount of loan forgiveness a borrower is eligible to receive, there will be no reduction in loan forgiveness if all staff or wage reductions are undone by June 30, 2020. (See next Q&A for more details.)

The amount of the loan that is eligible for loan forgiveness, subject to the above, includes amounts spent on qualifying expenses such as payroll costs, which include salary, wage, commission, or similar compensation (subject to a $100,000 per employee cap , applied on a pro rata basis). With the caveat that more regulations related to PPP are still forthcoming, PPP does not place limits on employers and how they choose to compensate their employees other than the effect that certain specific unremedied wage reductions may have on the amount eligible for forgiveness. Note that following the practice's covered period it will be required to submit an application for loan forgiveness which will be reviewed by the specific lender. As stated above, the amount available under a PPP loan is the lesser of 2.5 times the practice's average monthly payroll costs incurred during the year prior to the loan or $10,000,000, and the amount of forgiveness cannot exceed the value of the loan. Given the items outside of traditional payroll that are eligible for forgiveness (e.g., utilities, rents), each practice will need to assess the PPP in its entirety to determine how best to manage traditional payroll and other expenses under this program.

Q: How is the amount of loan forgiveness determined under the PPP?

A: A practice that borrows money under the PPP is eligible for loan forgiveness for qualified operating expenses paid during the practice's covered period (i.e., the eight week period after the loan originated). The forgivable amount is based upon payroll costs, payments on utilities, rents, and other items. The forgivable amount is subject to reduction if there is a reduction in (i) the average number of full time equivalents per month for the covered period as compared to either February 15, 2019 to June 30, 2019 or January 1, 2020 to February 29, 2020; or (ii) a reduction in greater than 25% in wages paid to employees compared to the practice's most recent full quarter. However, if a practice has reductions in employment or wages during the period beginning February 15, 2020 and ending 30 days after enactment of the CARES Act, these reductions will not reduce the forgivable amount of the loan if by June 30, 2020 the practice eliminates these reductions.

EXPANDED UNEMPLOYMENT UNDER *CARES ACT*

Q: *I am a solo practitioner. If I am unable to keep my practice open, can I receive unemployment compensation benefits?*

A: Although unemployment compensation laws vary from state-by-state, here are some general considerations. Unemployment compensation is generally due employees who become "unemployed," which is usually defined by a loss of certain amount of wages. So, if you are an employee (even the lone employee), you may be eligible. Second, the recently-passed FFCRA and the CARES Act dramatically expands unemployment compensation benefits to many who may not have previously been entitled, such as the self-employed, so-called "gig workers," etc., so monitor those changes closely and seek the advice of a local attorney or the state unemployment compensation bureau.

ADDITIONAL GUIDANCE

A number of questions submitted during the Webinar or otherwise sent to PPS are not able to be answered definitively at this time given the need for additional guidance from regulatory agencies. As this guidance becomes available, PPS will provide further resources to assist in answering additional questions that have been posed.

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