

Coronavirus/COVID-19: - *General¹ 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. 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.

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 to end the employment relationship. If so, it is critical that the employer clearly communicate

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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.

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 as 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.

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).

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

A: Probably. 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.

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

A: Effective April 2, 2020, the FFCRA requires covered employers 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:

- 1. Paid sick time.** Employees shall receive paid³ sick leave⁴ 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;

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

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.

- 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-protected⁵ paid⁶ 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-19-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.

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.

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.

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?
 - Once the FFCRA takes effect, a practice 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 to 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.

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.

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, recent legislative activity will likely expand unemployment compensation benefits to many who may not have previously been entitled, so monitor those changes closely and seek the advice of a local attorney of the state unemployment compensation bureau.

It should also be noted that the FFCRA extends paid leaves (and the tax credits) to self-employed individuals who would have been eligible for the paid leaves if they were an employee.

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