

## **KADA DEALER BULLETIN**

### **TERMINATIONS, LAYOFFS AND WORKFORCE REDUCTION ISSUES**

Since the passage of recent expansions to the Family Medical Leave Act regarding emergency paid sick leave and emergency paid family leave, many questions have arisen regarding workforce reduction. The foregoing statutes do not go into effect until 12:01 a.m., April 2, 2020. As a result of the delayed effective date, many dealers have asked questions concerning workforce reduction and the timing of same prior to the effective date of these Acts. While various issues remain about workforce reductions as a way of avoiding the effect of the Act, most legal authorities are opining that there is no liability for reductions prior to April 2 since the Act is not retroactive. Again, this would not stop some enterprising plaintiffs' employment attorney from filing litigation. In fact, we are sure such challenges will undoubtedly be filed somewhere in the United States. Nonetheless, depending upon the individual situation of the dealer, workforce reductions may well be undertaken. Each individual dealership is different and each individual dealer will need to make its own decisions.

However, under the pending Senate legislation (which should become clearer in the next 24 to 48 hours) there may be a benefit to attempting to retain substantially all of your workforce. The early drafts of the Senate legislation and information that has been disseminated concerning the Senate Act not only allows for businesses to obtain low-cost loans, but also provides that the loans will be forgiven if the employer maintained its workforce substantially intact.

At this point we have no way of knowing whether that language will be in the final bill. Additionally, we have no way of knowing how the term "substantial" will be defined nor other definitions in the Act.

In order to preserve your existing business and take advantage of what may be coming in the Senate bill, dealers may want to wait and make workforce reduction decisions the week ending March 28 or until March 31 depending upon the payroll ending.

This may become more important when viewed in conjunction with local and possibly state closure requirements. The closure requirements that we have seen routinely are exempting auto repair facilities and even in some states use of the term "automobile" or "vehicle" dealerships. Most do limit the opening to service, parts and potentially body shop activities. It is not clear whether the Senate bill if passed would be retroactive. So, again, dealers do have time to make final workforce decisions.

Guidance issued by the Internal Revenue Service in the last couple of days allows for the payment of sick pay benefits required by the Acts to employees using payroll withholding monies that would have been due to be paid to the Internal Revenue Service. This bold inventive move does give instant liquidity to dealers for required payments beginning April 2, 2020. Here is the link to the IRS bulletin for your review and use:

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

For further information please contact:

Amy Miles ([amy.miles@skofirm.com](mailto:amy.miles@skofirm.com); (502) 568-5751);

Ron Smith ([ron.smith@skofirm.com](mailto:ron.smith@skofirm.com); (317) 822-6787);

Donn Wray ([donn.wray@skofirm.com](mailto:donn.wray@skofirm.com); (317) 608-4369);

Joel Nagle ([joel.nagle@skofirm.com](mailto:joel.nagle@skofirm.com); (317) 822-6784);

Marc Menkveld ([marc.menkveld@skofirm.com](mailto:marc.menkveld@skofirm.com); (317) 608-4370);

Sarah Bishop ([sarah.bishop@skofirm.com](mailto:sarah.bishop@skofirm.com); (502) 875-6245); or

Matthew Wingate ([matthew.wingate@skofirm.com](mailto:matthew.wingate@skofirm.com); (502) 875-6248).

## UPDATES TO THE CORONAVIRUS STATUTES

Last week we sent you an analysis of two amendments to the existing Family Medical Leave Act. Two separate statutes constitute the amendments: (1) the Emergency Paid Sick Time Act; and (2) the Emergency Family Medical Leave Expansion Act (the “E-FMLA”).

It is important to note that these are two separate statutes which are emergency statutes expanding the existing Family Medical Leave Act (“FMLA”). Therefore, procedures, forms and other information currently in the FMLA will most likely be applied to these statutes in future Department of Labor regulations or guidance. Employers, for the time being, until further notice, utilize existing Department of Labor forms which can be found on the Department of Labor website (<https://www.dol.gov/newsroom/releases/osec/osec20200320>). Also, any employer acting in good faith during this emergency time without further guidance, in our judgment, would have a defense against any unfounded claims. We will forward a link to the Department of Labor website providing forms when it becomes available.

There have been a number of questions which have arisen regarding these two statutes. Attached is a bullet point analysis of the two statutes meant to simplify various provisions. You may want to review these analyses and then refer to the summary supplied last week or other materials provided by your accounting firm, etc.

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Our team is available to answer questions. Many different questions have arisen to date and our publications are intended as general advice. Dealers should consult with their own personal attorneys as to their own particular situation.

## **EMERGENCY PAID SICK TIME ACT**

**Effective Date:** April 2, 2020

**Expiration Date:** December 31, 2020

**Businesses Covered:** Those with fewer than 500 employees.

**Possible Exemptions:** The Department of Labor may exempt business with fewer than 50 employees if the business demonstrates that compliance “would jeopardize the viability of the business as a going concern.”

**Employees Covered:** Those who are unable to work due to one or more of 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 health care 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 section (1) above, or has been advised as described in section (2) above;
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
- (6) The employee is experiencing any other substantially similar conditions to be later specified by the Department of Health and Human Services.

**Employee Tenure Requirements:** None.

**Time Paid.**

*Full time employees:* 80 hours.

*Part time employees:* Average number of hours over a two-week period.

**Amount paid.**

*For reasons 1, 2, and 3 above:*

Calculation: (Regular pay)(regularly scheduled hours)

**For example, (\$10/hr.)(40 hours) = \$400**

Cap (maximum amount paid):

\$511 per employee, per day

\$5,110 per employee in the aggregate

*For reasons 4, 5, and 6 above:*

Calculation: Same as above, but employee is paid 2/3 of wages

**For example,**  $(\$10/\text{hr.})(40 \text{ hours}) = \$400(.6666) = \$266.66$

Cap (maximum amount paid):

\$200 per employee, per day

\$2000 per employee in the aggregate

**Order of Sick Leave.** Employer cannot force employees to use current sick leave benefits prior to using statutory sick leave benefits.

**Posted Notice.** Employers must post notice along with other employee notices. Notices will soon be available.

**Potential Liability.** Employers are subject to liability for all unpaid wages plus penalties under the Family Medical Leave Act ("FMLA")