he COVID-19 pandemic has sent employers into a frenzy as they try to stay abreast of new developments and do everything they can to protect their employees. As a result, many employers are getting creative. While working with the best of intentions, these employers may be creating legal issues that can negatively impact their organizations and the employees they are trying to protect. Below is a top 10 list of employer mistakes to avoid during the COVID-19 crisis.

**Mistake 1: Promising Health Benefits Without Reviewing the Terms of the Applicable Plan Documents**

Employers are frantically trying to figure out how to keep employees on their group health plans, but some are actually promising continuing benefits to employees who are no longer actively working (and to some who have been discharged or laid off as a result of the COVID-19 crisis). Employers may want to review the terms of the applicable plan documents before making representations to employees about continued health benefits. Plan documents typically set out eligibility requirements,
and ignoring these requirements can be problematic.

Employers with workers who are still employed may want to check with insurers regarding eligibility and continuing benefits when employees are no longer performing work (or are performing work, but have reduced hours). Even if the insurer gives the go-ahead, logistical challenges such as how to arrange for premium payments may still arise. For those individuals who are no longer eligible for coverage, notice under the Consolidated Omnibus Budget Reconciliation Act (COBRA) must be provided.

**Mistake 2: Allowing Non-Exempt Workers to Telecommute Without Proper Systems in Place to Record Actual Hours Worked**

Executive orders are popping up all around the country, and many of them are directing employers to implement work at home arrangements for their employees to the fullest extent possible. These directives, and the proactive steps employers were already taking, naturally result in non-exempt employees working remotely. Under federal and state law, non-exempt employees must accurately and fully record and report all hours worked. Thus, prior to allowing non-exempt employees to telecommute, employers may want to have a written policy in place to ensure that non-exempt employees are properly recording and reporting their time (such as through a web-based timekeeping system, phone app, phone line, or manual time sheets).

In addition, employers may want to remind employees that, while they will be paid for all hours worked in accordance with applicable federal (and state) laws, employees are not authorized to work overtime hours without the express written permission of their manager, supervisor, or other individual who has authority to grant permission. If an employee works overtime hours without permission, they still must be paid for the hours worked. Employers can, however, address the unauthorized overtime via disciplinary procedures.

**Mistake 3: Failing to Recognize Potential Issues When Establishing Direct Assistance Funds for Employees**

There are requirements and conditions as well as taxation issues to consider when establishing direct assistance funds for employees. For example, how will the assistance fund be funded? Who will qualify? How will it be administered? And the list of questions goes on and on. For more information on this topic, see our recent article, “[Lending a Helping Hand: Employer Options for Providing Financial Support to Employees Affected by the Coronavirus](https://www.employerknowledge.com/article/lending-a-helping-hand-employer-options-for-providing-financial-support-to-employees-affected-by-the-coronavirus).”

**Mistake 4: Ignoring WARN and Mini-WARN Laws**

The [Worker Adjustment and Retraining Notification (WARN) Act](https://www.employerknowledge.com/article/warn-act) requires that employers give advance notice to employees and local governments in cases of qualified plant closings and mass layoffs. Many states have their own “mini-WARN” laws as well, which may mandate greater requirements for employers.

As result of the COVID-19 crisis, some employers are faced with shutting down their
operations, laying off employees, or placing employees on unpaid leaves of absence. Others are doing everything they can to keep operations going and avoid layoffs. Both groups should be mindful of their WARN obligations and consider providing as much notice as practicable in the event of a plant closing or mass layoff. (For more information on reductions in force/WARN, see FAQs 47-54 of our blog post, “COVID-19: FAQs on Federal Labor and Employment Laws.”)

**Mistake 5: Employers Implementing Across-the-Board Pay Cuts But Forgetting to Check Exempt Employees’ Salaries**

Many employers are implementing across-the-board pay cuts in an attempt to avoid layoffs. However, when doing so, it is important to ensure that exempt employees’ salaries meet the required salary level requirements to keep the exemption. Similarly, employers will want to be aware of minimum wage laws (federal, state, and local) to confirm that these pay cuts don’t reduce employees’ pay below the required minimum wage. Applicable wage payment laws also may require written notice prior to implementation of the pay reductions. Finally, employers may want to review any existing employment agreements that contain provisions regarding pay.

**Mistake 6: Guaranteeing Employees They Will Be Eligible for Unemployment Benefits and/or Promising a Certain Amount**

Employers want to reassure their departing employees (or employees who are being temporarily laid off or subject to reduced hours) that they will be eligible for unemployment benefits. However, employers are generally unable to determine an employee’s eligibility for unemployment benefits or the amount of benefits the employee will receive. Employers can provide information to employees regarding the process for filing for unemployment benefits with the applicable state unemployment agency.

Employers can also remind employees to list COVID-19 as the reason for their loss of work or hours on their unemployment applications to take advantage of any flexibility or additional benefits provided under state and federal law. By doing so, the employer’s account may not be charged for benefits drawn if non-charging is allowed because the employee’s separation was caused by COVID-19.

**Mistake 7: Placing Employees on Families First Coronavirus Response Act Leave Prior to Effective Date**

The Families First Coronavirus Response Act (FFCRA) applies to employers with fewer than 500 employees (for extensive details on how to calculate 500 employees for purposes of this new law, see our article, “The Families First Coronavirus Response Act FAQs: The FMLA Amendments and Paid Sick Leave Requirements of the New Law”). The FFCRA provides two types of leave: paid family leave and paid sick leave. Notably, these provisions apply from the effective date of the act (i.e., April 1, 2020) through December 31, 2020. There are accompanying tax credits that may be available as well.

Covered employers may be under the impression that they can place employees on paid sick or family leave at any time and receive the accompanying tax credits.
However, covered employers may not begin to offer FFCRA-related leaves until April 1, 2020.

**Mistake 8: Using Attendance Policies to Discharge Employees Without Taking Note of Special Circumstances**

Some employers may be taking the stance that they can strictly enforce their attendance policies to discharge “problem” employees and hopefully avoid layoffs and other reductions in force. However, employers will want to be cognizant of applicable executive orders that might prevent employees from reporting to work. In addition, some employees may have underlying health reasons that cause them to be absent from work (such as covered disabilities under the American with Disabilities Act, protected serious health conditions under the Family and Medical Leave Act, and other medical issues protected under applicable state laws). Thus, employers may want to evaluate these possible scenarios before implementing attendance-based terminations.

**Mistake 9: Allowing Performance and Misconduct Issues Slide**

It is inevitable that even the best employers have workers who simply are not performing satisfactorily, and the COVID-19 crisis has not changed that fact. Employers are understandably hesitant to discharge employees during this time even when fully justified in doing so. Nonetheless, employers will want to consider holding employees accountable for any misconduct or poor performance and applying this standard consistently to all employees to avoid allegations of disparate treatment. (Note: if you are planning to adopt different standards during this time, consider creating new policies clearly stating the current expectations.)

**Mistake 10: Establishing Bonus Programs Without Keeping in Mind Regular Rate of Pay Requirements**

Some employers have experienced an increase in business. To increase morale for those employees who are required to continue working and/or to thank them for their hard work, some companies are implementing bonus programs. However, it is important to remember that for purposes of calculating overtime for non-exempt employees, non-discretionary bonuses must be included in the regular rate of pay. (Some state/local wage and hour laws may have even more enhanced requirements than federal law.) Few bonuses are considered discretionary under the federal Fair Labor Standards Act; thus, employers will want to confirm how the bonuses should be classified before rolling out new bonus programs.
