



# Monthly Strategies

HR Strategies, LLC

Volume 17, Issue 9  
September 1, 2020

## **VETS – 4212 Filing Cycle Ends**

The U.S. Department of Labor's Veterans' Employment and Training Service (VETS) and Office of Federal Contractor Compliance Programs (OFCCP) have supported affirmative actions to employ and advance in employment of covered veterans since 2008. As legislatively mandated under 38 U.S. Code Section 4212, codified at 41 CFR 61-300, contractors and subcontractors who enter into, or modify a contract or subcontract with the federal government, and whose contract meets the criteria set forth in the above legislation / regulations, are required to report annually on their affirmative action efforts in employing veterans. Data reported through form VETS-4212 is used by OFCCP in compliance evaluations.

The VETS - 4212 reporting requirements apply to all federal contractors and subcontractors with a government contract in the amount of \$150,000 or more at any point during 2019. The deadline for filing the report is September 30, 2020.

## **Philadelphia's Salary-History Ban Takes Effect 9/1/20**

On September 1, 2020 the city of Philadelphia will start to enforce a ban on employers asking job candidates about their salary history or relying on pay history to determine wages. Delaware has had this ban in place since 12/14/17. The intent of the ban is to prevent disparities in pay based on gender from one job to another. To address this inequality, several states and municipalities have enacted bans on asking for previous salary information, although laws vary in terms, scope and applicability

## **Schools Reopening, Now What?**

**Leave of Absence** - In March 2020, the FFCRA was passed, requiring most employers with fewer than 500 employees to provide up to 80 hours of paid leave under the Emergency Paid Sick Leave Act (EPSLA) and up to 10 additional weeks of paid

leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) to employees unable to work in-person or remotely because their children's school or child's place of care (e.g., daycare or preschool) was closed as a result of the pandemic. In these circumstances, leave is paid at two-thirds the employee's regular rate, capped at \$200 per day. An employee who is eligible for both EPSLA and EFMLEA may be entitled to receive a total of \$12,000. The FFCRA will remain in effect until December 31, 2020.

As the new school year begins, employees who have not already exhausted paid leave available under the FFCRA may be entitled to take their remaining leave if their child's school or place of care is closed if:

- There is no other suitable caregiver available; and
- The employee would be able to perform work for the employer, either at the employee's normal workplace or remotely, but for the need to care for their child.

While Department of Labor (DOL) guidance indicates that paid leave is available when a school offers only virtual learning, it is not clear if paid leave is available when a parent chooses virtual learning when in-person learning is an option. Employers should consult the laws of their jurisdictions to determine whether additional state or local leave protections are available for eligible employees.

**Employer-Provided Paid Time Off** - An employee may be permitted to use accrued employer-provided paid time off for an absence related to a school or child's place of care closure after the expiration of federal Emergency Paid Sick Leave. An employer can require that employer-provided paid time off be applied concurrently with leave under the EFMLEA. An employee who is not entitled to or has exhausted their FFCRA leave may be entitled to use accrued paid time off during an absence due to

the closure of a school or child's place of care under an employer plan or policy.

**Unpaid Leave** - Additionally, an employer can extend an unpaid administrative leave of absence to an employee who is absent for COVID-19-related child care issues. While not legally required, it may be a viable option to retain a valuable employee whose position does not need to be immediately filled, support employee morale and avoid hiring and training a replacement employee.

**Remote Work** - DOL guidance encourages employers and employees to collaborate to meet mutual needs. Rather than losing the services of needed employees, employers are becoming creative in offering remote work or other flexible arrangements in order to maintain effective operations. Remote work can be an option for many employees, particularly for those who work relatively independently or whose duties are heavily computer or telephone based. While remote work may be a reasonable accommodation under the Americans with Disabilities Act (ADA) if the employee's own disability prevents them from coming to the workplace, there is no legal requirement that it be made available to employees with child care issues due to COVID-19. Nevertheless, many employers that had not previously considered a non-disability-related remote work option have since implemented this flexible working arrangement.

**Practical Considerations** - The essential functions of the job should be reviewed to determine if they can be performed remotely. Marginal functions that cannot be performed outside the office should be analyzed to determine whether they can be reassigned or "traded" with employees working on site. Employers may also review whether a hybrid in-office/ work-at-home schedule is feasible to allow an employee to perform all of their duties.

**Legal Considerations** - Wage and hour recordkeeping requirements must be followed whether employees work at home or in the workplace. In particular, nonexempt employees must accurately record all hours worked, as well as meal breaks or work breaks, including breaks required to assist children with virtual schooling or other tasks. Requirements for exempt workers vary

and are arguably better suited to telecommuting arrangements. If an exempt employee is working fewer hours remotely than they would typically work in the workplace, they cannot be docked for lost time. Their salary, however, can be prospectively reduced commensurate with the reduction in the work hours. In that event, the \$684 weekly minimum salary requirement must be met for the employee to maintain exempt status. An employer should monitor whether a remote worker's status changes from exempt to nonexempt and follow all applicable compliance requirements.

### **Flexible Scheduling, Shift Work and Job Sharing**

- When feasible, an employer may consider allowing an employee to work a flexible schedule. This may include working outside normal work hours, a schedule with changing start and end times, or a compressed schedule (e.g., a four-day workweek). This may work best for employees who work independently and are not involved in collaborative efforts. A flexible schedule allows an employee to perform their duties in the workplace early in the morning, and/or late afternoon or evening, and then be at home to perform needed child care duties during the day. A flexible schedule could also be offered to employees who work remotely. If the workplace requires shift work, an employer could permit voluntary shift swaps between evening shift employees who do not have child care responsibilities and day shift employees who do. In addition, an employer may explore job-sharing arrangements. Job sharing may be feasible if the employees are available to work or telework for some portion of the day or have child care arrangements available on alternate days. A reduction in hours or job sharing between two affected employees may also be an option to retain experienced employees. Employers should ensure that they offer flexible work arrangements (e.g., teleworking, job sharing or modified schedules) in a fair manner. For example, employees with school-aged children should not be treated differently based on any EEO-protected characteristics (e.g., race, national origin, sex or, in some jurisdictions, familial status).

**Legal Considerations** - The DOL issued guidance easing some of the issues with flexible schedules. Under the DOL's continuous workday rule,

normally all time between the performance of the first and last principal activities of a workday is considered compensable work time. In order to encourage flexibility during the COVID-19 emergency, the DOL has stated that employees allowed to work remotely with flexible hours during the COVID-19 emergency need not count as hours worked all time between their first and last principal activity. For example, if an employee's daily flexible telework schedule is 7:00 a.m. to 9:00 a.m., 11:30 a.m. to 3:00 p.m., and 7:00 p.m. to 9:00 p.m., the hours for the specific blocks designated should be counted as hours worked, but not all time in between their first task at 7:00 a.m. and last task at 9:00 p.m. In addition to federal requirements, employers should comply with any advance-notice scheduling requirements that may apply under state and local predictable scheduling laws.

**Unexpected Absences For Medical Diagnosis or Quarantine** - Even if an employer is in a jurisdiction in which schools remain open for in-person learning, unexpected absences for child care reasons may occur. The absence could be due to seeking a medical diagnosis or quarantine as the result of a child's exposure to a classmate or a school staff member who tests positive for COVID-19. Employers should follow the same analysis as to whether the employee is entitled to any FFCRA paid leave or paid time off for the absence. They should also consider whether the employee may be entitled to leave under the Family and Medical Leave Act (FMLA) if the child has tested positive and exhibits symptoms. Again, unpaid administrative leave is an option. Finally, employers should have a return-to-work protocol for an employee exposed to a COVID-19-exposed or -positive child. For instance, an employer may require the employee to quarantine or to provide a negative test result. CDC guidelines on this issue are constantly evolving and current guidance should be reviewed. As with the virtual schooling situation, employers should consider any flexible working arrangements that may be available. In this case, however, employers should balance the administrative burden and expense of providing adequate options for what may only be a two-week absence against the costs of hiring an additional employee or increasing the workloads of other

employees if the absence extends beyond two weeks.

**Practical Considerations** - Because these absences will be unanticipated, it is important for employers to have backup plans to ensure continued productivity. In addition to a plan for workplace flexibility and sufficient technology available to handle an unexpected absence, it could be beneficial to have an inventory of specific duties for each role to ensure that there are adequate alternate employees cross-trained to perform those duties.

### Best Practices

- Involve employees in discussions about child care coverage challenges and possible solutions and communicate regularly with employees working under flexible work arrangements.
- Utilize written remote work or flexible work agreements specifying expectations of performance, hours, work responsibilities and timekeeping.
- Ensure that employees are accessing business files in a secure manner when working remotely and remind employees of the duty to protect confidential business information.
- Avoid the appearance of or engaging in discriminatory treatment. Consideration should be given to avoiding the appearance of unfavorable treatment on the basis of age or disability by denying an older employee the opportunity to telework while providing it to younger parents. Any employee requests for flexible work arrangements due to a health condition must be processed in compliance with EEO laws. Treat the request of a parent for an accommodation the same regardless of their sex. Finally, employers that are hiring should avoid any implication that an applicant is not chosen because they have school-aged children.

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