Leave Entitlements Arising from COVID-19

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The onslaught of news and information regarding COVID-19, which evolves daily and often seems contradictory, has led to anxiety and confusion for many companies. In particular, for those individuals in charge of Human Resources, the questions with regard to wages and leave issues are countless. Although the response to inquiries will continue to evolve as the situation develops, the following summary will provide guidance to companies looking to navigate this emerging public health situation.

Review Sick Leave Policies

Review your sick leave policies to ensure they are flexible enough to be consistent with public health directives as they evolve. Be sure your policies conform with any earned sick leave laws that might apply to your employees. For example, leave under the New Jersey Earned Sick Leave Law can be applied to an instance where the employer's business is closed due to a public health emergency, or an employee needs to care for a child whose school or day care has closed due to such an emergency. We have provided a benefits chart that provides guidance from the New Jersey Department of Labor with regard to the various potentially applicable State leave/wage payment benefits as well as guidance on the recently enacted federal paid leave provisions.

Employees without paid sick time can be reluctant to call out sick. As such, if your company is not covered by the recently enacted federal legislation providing for paid leave associated with COVID-19, consider developing an interim public health emergency sick leave plan that provides paid sick leave and/or increases the amount of paid leave that could be implemented in the event of a confirmed cluster of illness in your area or workplace.

Inform your employees that if they appear for work with observable symptoms of illness, including, but not limited to coughing, wheezing or other signs of respiratory illness, they will be sent home and advised to seek medical attention. Although employers are permitted to request some form of fitness-for-duty clearance from a doctor, such requests need to pass the ADA's "job-related and consistent with business-necessity test." See https://www.eeoc.gov/policy/docs/guidance-inquiries.html for guidance from the EEOC on that subject. Generally speaking, the purpose of a fitness for duty clearance is to determine whether the employee can return to work and not pose a threat to coworkers, not to obtain a medical diagnosis. If the employee has not volunteered a diagnosis, employers should be cautious about seeking one unless directed otherwise by a Public Health Agency.

Overview of Federal Legislation Regarding Paid Leave

On March 18, 2020, the President signed into law the Families First Coronavirus Response Act, which provides major expansions to the Family Medical Leave Act (FMLA) and unprecedented federal law entitlement to paid leave for employees. There are two Acts included in this package, both of which are effective April 2, 2020 and will remain in place

until December 31, 2020 -- the Emergency Paid Sick Leave Act of 2020 and the Emergency Family and Medical Leave Expansion Act. There are tax credits available for employers, which are discussed further below.

I. Emergency Family and Medical Leave Expansion Act

Eligible Employers. All employers with under 500 employees

Eligible Employees. All who have worked for the employer for at least 30 calendar days

Note: This is a significant deviation from the FMLA's traditional eligibility provision, requiring an employee to have worked for the employer for 12 months. It also is a significant deviation from the requirements of 50 employees within a 75 mile radius for this one new qualifying reason only.

Qualification for Leave. Employees are entitled to leave when they are unable to work or telework due to a need to take care of a child whose school or day care has closed or whose child care provider is unavailable due to a public health emergency declared by any public authority relating to COVID-19.

Timing of Paid Leave. First 10 days of leave may be unpaid leave, but the employee is entitled to substitute any accrued vacation leave, personal leave, or sick leave for unpaid leave. After 10 days, and up to 12 weeks, employer must provide paid leave.

TotalAmount of Paid Leave. Paid leave cannot exceed $200 per day or $10,000 total. After the $10,000 maximum is exhausted, the remainder of the leave, which can be up to 12 weeks, is unpaid.

Notice and Required Documentation. Where leave is foreseeable, the employee must provide the employer with notice as soon as practicable. The Act does not specify the documentation required for an employee to prove entitlement to leave, but employers should generally require a written statement from the employee concerning the reason for leave.

Employees Returning to Work. In general, employers will be required to return an employee to work at the end of the leave, just as with the FMLA. However, there is an exception for employers with fewer than 25 employees. Such employers are not required to return an employee to work if the employee's position no longer exists due to economic conditions or other changes caused by the public health emergency of COVID-19. The employer still must make a reasonable effort to restore the employee to an equivalent position for a period of up to one year, including by contacting the employee when an equivalent position becomes available.

Notice to Employees. Department of Labor will publish a poster that must be posted in the workplace. *While not required, as many employees are working remotely or not working at all right now, employers should provide employees with a written policy or notice notifying them of leave availability under the Act. This notification could be provided via email, an intranet or on the company website.*

II. Emergency Paid Sick Leave Act

Eligible Employers. All employers with under 500 employees

Eligible Employees. All employees -- regardless of their period of employment

Qualification for Leave. An employee qualifies for sick leave under the Act if the employee is unable to work or telework because of any one of the following:

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 is seeking a medical diagnosis;

4. The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine;

5. The employee is caring for a son or daughter whose school or place of child care has been closed or whose child care provider is unavailable due to COVID-19 precautions; or

6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Overlap With Other Paid Time Off.

- Employers cannot require that employees take leave under existing policies first. Employees are entitled to take Emergency Paid Sick Leave *before* any other leave provided by the employer.

- Employees still are entitled to take whatever paid leave was available to them before the passage of the Act, and employers cannot change their leave polices after the passage of the Act to provide less leave than already has been promised.

- If an employee qualifies for both Emergency Family Leave (addressed above) and Emergency Paid Sick Leave, the employee is entitled to use the Emergency Paid Sick Leave at the same time as the first 10 (unpaid) days of the Emergency Family Leave.

- An employer may not require, as a condition of providing this paid sick time, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

Amount of Paid Leave.

- Full-time employees - 80 hours of paid leave

- Part-time employees - the number of hours they work, on average, over a 2-week period

Paid sick time under the Act cannot carry over from one year to the next. It, therefore, expires on December 31, 2020.

Total Amount of Paid Leave. There are two different rates available.

- Employee leave taken due to a local quarantine, physician-recommended self-quarantine, or experiencing of COVID-19 symptoms (1, 2, and 3 above) must be paid at the employee's regular rate of pay, limited to $511 per day and $5,110 total.

- Employee leave taken due to an employee caring for a person subject to quarantine or advised by a physician to self-quarantine, to care for a child whose school or day care is closed, or for a substantially similar condition specified by the head of a federal agency (4, 5, and 6 above) must be paid at two-thirds of the employee's regular rate of pay, limited to $200 per day and $2,000 total.

No Obligation to Pay Upon Termination. There is no requirement for payment or other reimbursement for unused sick time upon the employee's termination, resignation, retirement, or other separation from employment.

Notice and Required Documentation. The Act does not specify what type of documentation is required for the employee to prove entitlement to paid sick leave, but employers should require that the employee provide a written statement concerning the reason for leave. After the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

No Retaliation. Employers are prohibited from taking adverse action against any employee who takes leave under the Act, files a complaint or suit related to the Act, or who testifies in a proceeding related to the Act. Employers who violate the Act will be considered in violation of the Fair Labor Standards Act.

Notice to Employees. Department of Labor will publish a poster that must be posted in the workplace. *While not required, as many employees are working remotely or not working at all right now, employers should provide employees with a written policy or notice notifying them of leave availability under the EFMLEA.*

Possible Exceptions for Certain Small Businesses

Both Acts give the Secretary of Labor the authority to issue regulations to exempt some small business with fewer than 50 employees from providing family leave when the imposition of such requirements would jeopardize the viability of the business. *Given the recent passage of this law, there is no current guidance on what types of businesses might be exempt.*

Tax Credits for Employers.

Employers with fewer than 500 employees are entitled to a tax credit equal to 100% of the qualified wages they pay to employees for sick leave under the Emergency Paid Sick Leave Act. This credit is refundable against the employer's share of Social Security taxes (6.2%) and the employer portion of the hospital insurance tax (1.45%).

For self-employed persons who would be entitled to Emergency Paid Sick Leave if employed by another business, the credit is allowed against regular income taxes up to the maximum amounts as described for employees above.

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Despite the stress of information overload, this is not the time to be a trailblazer. We advise keeping abreast of official guidance from the Center for Disease Control and Prevention ("CDC"), the U.S. Departments of Health and Labor, the Office of the Governor, and state and local Health Departments prior to making employment decisions.[1]

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[1] These entities provide information that applies to specific industries and generally to all employers. For example, the CDC has released guidance specifically addressed to businesses outlining recommendations and best practices on protecting the workplace. Available here: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html