Update to Employment Implications and Options During The Coronavirus Pandemic

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Topics for Today

- Recap of FFCRA
- Paid Sick Leave ("EPSLA")
- Expansion of FMLA ("EFMLA")
- DOL Guidance/Proposed Regulations
- EEOC Guidance
- Amended H.B. 197
- Ask An Employment Law Attorney
A “covered employer” includes:

- a public agency that employs 1 or more employees

A “covered employee” means:

- all employees are eligible for two weeks of paid sick time for specified reasons related to COVID-19.
- employees employed for at least 30 days are eligible under EFMLA for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19
FFCRA/Paid Sick Leave

• **80 hours of paid sick leave** for full-time employees at the employee’s regular rate of pay where the employee is unable to work (or telework) because:

(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; or

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
FFCRA/Paid Sick Leave

• **For leave reasons (1), (2), or (3):** employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate (over a 2-week period).
FFCRA/Paid Sick Leave

Two weeks (up to 80 hours) of **paid sick leave** for full-time employees at two-thirds the employee’s regular rate of pay because the employee is unable to work (or telework) because:

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2);

(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; and

(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.
FFCRA/Paid Sick Leave

- For leave reasons (4) or (6): employees taking leave are entitled to pay at \(\frac{2}{3}\) their regular rate or \(\frac{2}{3}\) the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate (over a 2-week period).

- For leave reason (5): employees taking leave are entitled to pay at \(\frac{2}{3}\) their regular rate or \(\frac{2}{3}\) the applicable minimum wage, whichever is higher, up to $200 per day and $12,000 in the aggregate (over a 12-week period).
FFCRA/Paid Sick Leave

• For Part-time employees:
• A part-time employee is entitled to leave for his or her average number of work hours in a two-week period.
• So calculate hours of leave based on the number of hours the employee is normally scheduled to work.
• If the normal hours scheduled are unknown, or if the schedule varies, you may use a six-month average to calculate the average daily hours.
FFCRA/Paid Sick Leave

• Unless an employee is teleworking intermittently, paid sick leave for reasons (1)-(4) and (6) must be taken in full day increments.
• Unless the employee is teleworking, once they begin taking paid sick leave, they must continue to take paid sick leave until either:
  • (1) they use the full amount of paid sick leave; or
  • (2) they no longer have a qualifying reason for taking paid sick leave.
**FFCRA/Paid Sick Leave**

- *If the employer agrees*, the employee may take paid sick leave intermittently to care for their child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons.
Reason # 5 for Paid Sick Leave:

If 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.
FFCRA/EFMLA

- A full-time employee is eligible for up to 12 weeks of leave (two weeks of paid sick leave followed by up to 10 weeks of paid expanded family & medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

- Again, employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $12,000 in the aggregate (over a 12-week period).
FFCRA/EFMLA

• EFMLA is available from April 1- December 31, 2020.
• BUT, an employee’s eligibility for EFMLA does depend on how much FMLA the employee has taken during the 12-month period used by the employer (for example, calendar year).
• The employee may take a total of 12 workweeks for FMLA or EFMLA during a 12-month period.
Like Paid Sick Leave, an employee can only take EFMLA leave intermittently *with the employer’s permission*.

“Intermittent expanded family and medical leave should be permitted only when you and your employer agree upon such a schedule.”
Concurrent Use of Accrued Paid Leave

- Unless the employee agrees, an employer may not require an employee to use other accrued paid leave prior to using the first two weeks of Paid Sick Leave/unpaid EFMLA.
- During first two weeks of Paid Sick Leave/unpaid EFMLA, an employee can supplement pre-existing paid leave, up to their normal earnings, only if the employee and employer agrees.
Concurrent Use of Accrued Paid Leave

- After the first two weeks, an employer may require an employee to supplement the remaining EFMLA with accrued paid leave (although likely not sick leave).
- The employee must be paid the full amount to which they are entitled under the existing paid leave policy for the period of leave taken.
Documentation to Support FFCRA Leave

- DOL guidance refers to what the IRS requires, which is a \textit{written request for leave} that includes:
  1. The employee’s name;
  2. The date or dates for which leave is requested;
  3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
  4. A statement that the employee is unable to work, including by means of telework, for such reason.
Documentation to Support FFCRA Leave

• In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include:

1. The name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and,

2. If the person subject to quarantine or advised to self-quarantine is not the employee, that person’s name and relation to the employee.
Documentation to Support FFCRA Leave

- In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include:
  - 1. The name and age of the child (or children) to be cared for,
  - 2. The name of the school that has closed or place of care that is unavailable, and
  - 3. A representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and,
  - 4. With respect to the employee’s inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.
Who is a son or daughter of the employee?

- Biological, adopted, or foster child, step-child, a legal ward, or a child for whom the employee stands in loco parentis (someone with day-to-day responsibilities to care for or financially support a child).
- An adult son or daughter (i.e., one who is 18 years of age or older), who:
  - (1) has a mental or physical disability, and
  - (2) is incapable of self-care because of that disability.
FFCRA/Paid Sick Leave & EFMLA

• Employers Can Decide To Exempt:

• (1) An Employee Who is a Health Care Provider

• (2) An Employee Who is an Emergency Responder
Health Care Worker Under FFRCA

• DOL Proposed Regulations define a health care provider to include, with regard to counties:
  • Anyone employed at a hospital, health care center, clinic, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, or similar institution.
  • Includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility.
Emergency Responder Under FFCRA

- DOL Proposed Regulations define this to include:
- Law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency,
- Includes individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
EEOC Guidance

• PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT

• UPDATED IN RESPONSE TO COVID-19 PANDEMIC – March 21, 2020
EEOC Guidance

- Employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19.
- Currently these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.
- An employer can send home an employee with COVID-19 or symptoms associated with it.
EEOC Guidance

• Employers may measure employees' body temperature.
• As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.
• An employer can send home an employee with COVID-19 or symptoms associated with it.
EEOC Guidance

• Employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee’s return to the workplace after visiting a specified location, whether for business or personal reasons.
• An employer may require employees to wear personal protective equipment during a pandemic.
What should other employees be told?

- What if an employee tests positive for COVID-19?
- Employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the ADA.
- The fellow employees should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).
Recommended Notification to Employees

- Disclose the building and floor location of the employee;
- the onset-of-symptoms date or the date of exposure;
- the date of a positive test; and
- the last date that the employee was in the building.
Governor DeWine signed H.B. 197 on March 27, 2020.

Through the duration of the pandemic, but not later than December 1, 2020, it:

allows members of a public body to attend and conduct public meetings by teleconference and video conference, “or any other similar electronic technology.”
Amended H.B. 197

- the public body must provide access to meetings which the public would otherwise be entitled to attend, “commensurate with the method in which the meeting [or hearing] is being conducted.”
- the public body shall ensure the public can observe and hear the discussions and deliberations of all the members of the public body, whether the member is participating in person or electronically.
Questions
Thank you!

If you have any questions about today’s presentation or a legal issue you would like to discuss, contact:

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