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PART 2: An Employer's Guide to the COVID-19 Coronavirus Outbreak & FAQs

Legal Alert

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For Part 1 of our update and FAQs, click here.

As our response to this pandemic crisis evolves and employers' move into uncharted territory, more questions arise. To keep employers current, we offer you key updates about the Families First Coronavirus Response Act (the Act) signed into law on March 18th and answer some other employment questions that many employers are facing.

Q: What changes were made to the Act?

A: As you may recall, the Act, among other things, originally provided paid leave and extended Family and Medical Leave Act (FMLA) leave to employees diagnosed with coronavirus, suffering symptoms of coronavirus, posing a risk to others by being in the workplace, with a child whose school or daycare was closed due to coronavirus, or taking care of a family member diagnosed with coronavirus, including those suffering symptoms or posing a threat to others by their presence in the community.

Through "technical amendments" the House clarified that the leave allowed – via paid leave and FMLA leave – for a parent of a child children whose school or daycare is shuttered due to the pandemic is only applicable if the employee cannot work or telecommute. The original bill arguably offered leave to an employee who could telecommute but chose not to do so.

The technical amendment also shortened the period of time an employee taking FMLA leave must go unpaid from 14 days to ten days. Unlike FMLA for other reasons, FMLA under the Act remains paid (after ten days); however, the amendments added a cap for pay when the basis of the leave is to care for a family member or a child. Such leave is still to be paid at two-thirds of the employee's regular rate of compensation, but there is a cap of $200 per day and $10,000 in the aggregate.

For the paid leave provided by the Act, the technical amendments also extended leave to employees suffering from "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." Likewise, the paid sick leave also included caps on pay. For leave of up to two weeks, it is $511 per day and $5,110 in the aggregate for employees taking leave because they are subject to a quarantine or isolation order advised by a healthcare provider to self-quarantine due to coronavirus reasons or who are experiencing symptoms. The cap for an employee who is taking care of a qualifying family member or who has a child whose school is closed is lower. It is set at $200 per day and $2,000 in the aggregate.

It is important to note that coordination of sick leave and FMLA leave under the Act and an employer's existing paid sick leave and paid time off policies creates further complications. The Act prohibits an employer from applying sick leave or other paid time off otherwise available to meet the required time provided by the Act, however, there are instances in which an employee may want to voluntarily substitute earned paid time off to receive full pay.

Q: How do FMLA eligibility requirements apply under the Act?

A: Generally, FMLA is only available if an employer has 50 or more employees and the employee has been employed for 12 months and worked 1,250 hours in the preceding year. This is not so under the Act. Under the Act, FMLA for covered coronavirus reasons must be provided by employers with fewer than 500 employees (even if they do not meet the 50 employee threshold), though there are certain exemptions available to smaller employers. Moreover, employees who have worked for the 30 days preceding the leave are eligible, meaning leave is no longer restricted to employees with a year of service and a minimum number of hours.

Q: How does the Act interact with my collective bargaining agreement with the union?

A: If you are party to a multi-employer collective bargaining agreement, such as in the construction trades, there are special provisions relating to any applicable leave fund that apply. Otherwise, the obligations under the Act apply to employees covered by a collective bargaining agreement.

Q: When does the Act go into effect?

A: The Act goes into effect 15 days after it is enacted, but as of March 18, 2020, it has not yet been enacted.

Q: Can I adjust compensation for my remote workers who will not be as busy?

A: Generally, yes, assuming your employees are working on an at-will basis and do not have a governing employment agreement, collective bargaining agreement, or binding policy that would prohibit it. Hourly, non-exempt employees are paid only for hours worked. For salaried, exempt employees it is a little trickier. Salaried employees must be paid their full salary in any week in which they perform work; however, if they are working fewer hours, employers may adjust their salaries with proper notice. For exempt employees, employers need to be mindful of the minimum salary threshold. Under the Fair Labor Standards Act, exempt employees must be paid at least $684 per week. If you are reducing an employee's salary below that threshold, you must convert the employee to hourly and have the employee follow standard procedures for recording and tracking hours worked. For many employers, this will not have a negative economic impact because, even though these workers will be theoretically able to earn overtime, their hours worked will not exceed 40 hours in a workweek.

Q: I have a union, what does that mean for asking bargaining unit employees to work remotely?

A: Broadly speaking, your collective bargaining agreement spells out terms and conditions of employment, and may or may not reserve certain rights to management. Working remotely is a term and condition of employment that would ordinarily be subject to bargaining, unless otherwise agreed in your collective bargaining agreement. Also, carefully review your management rights clause, any provisions relating to emergencies, and any force majeure causes.

Q: If I have to conduct a layoff due to the coronavirus, do the Federal Worker Adjustment and Retraining Notification (WARN) Act or the New Jersey mini-WARN (Millville Dallas Airmotive Plant Job Loss Notification Act) apply?

A; This is highly fact dependent. First, if you do not have 100 employees in total, you're generally exempt. If you do have more than 100 employees, you need to consider whether the mix of part-time and full-time employees meets the threshold. Second, if you do have at least 100 employees, are you (i) laying off 500 employees for a period greater than six months; (ii) laying off 50 or more employees that represent one-third of the workforce for a period of greater than six months; or (iii) closing a plant or operation that will result in a layoff of at least 50 employees? If the answer to any one of these is yes, there are potential WARN/Mini-WARN considerations as to required notice; provided however, that a coronavirus-related closing may exempt an employer from fulfilling the entire notice period if notice is given as soon as closing or mass layoff is imminent.

Q: If do have a layoff, will employees be allowed to collect unemployment?

A: Generally, employees who are subject to a layoff are able to collect unemployment, subject to general eligibility requirements.

For more details on the information presented here, contact Adam Gersh, or any member of our Labor & Employment Practice Group.

ATTORNEYS MENTIONED

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