Update for Employers on COVID-19

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In recent weeks, employers and their employees have faced extraordinary challenges. As states of emergency have been declared at the federal, state, and local levels, the COVID-19 pandemic has raised many questions for employers on a broad range of issues, including health and safety, privacy, wage and hour, and leaves of absence, to name only a few. Employers are understandably concerned about the well-being of their workforces, clients and customers, legal compliance and risk mitigation issues, and widespread business interruption.

In response to this unprecedented crisis, federal and state legislatures and administrative agencies have implemented several measures that will have an immediate, direct impact on employers. Key developments, described in more detail in this post, include the following:

- Effective April 2, 2020, the federal Families First Coronavirus Response Act (FFCRA) will temporarily expand the Family and Medical Leave Act (FMLA) to entitle eligible employees of businesses with fewer than 500 employees to take partially paid FMLA leave for childcare reasons arising out of the pandemic. The FFCRA will also provide paid sick leave for employees dealing with certain coronavirus-related issues.

- Because many public health officials have recognized the widespread community transmission of COVID-19, the Equal Employment Opportunity Commission (EEOC) has declared that the coronavirus can now be considered a direct threat to the health and safety of employees. As a result, the EEOC recently issued a statement broadening actions employers can permissibly take, including medical inquiries, in response to the pandemic.

- With large segments of their exempt and non-exempt workforces rapidly transitioning to telework, employers must remain vigilant about wage and hour compliance. The Department of Labor's Wage and Hour Division recently released guidance addressing common wage and hour concerns related to these dramatic shifts in the way people work.

- Under the Occupational Health and Safety Act, employers are required to maintain a safe work environment and protect employees from recognized hazards. Covered employers are also required to record and report certain workplace injuries. The Occupational Health and Safety Administration has issued updated guidance in response to the pandemic.

- The Massachusetts General Court has been working to deliver relief for the Commonwealth's businesses and workers. These relief measures include waiving the one-week waiting period to collect unemployment benefits. In addition, the Massachusetts Department of Unemployment Assistance is seeking to expand benefits eligibility for certain contingencies related to COVID-19.

This blog post provides employers with an overview of recent employment law developments in the COVID-19 pandemic and is not a substitute for legal advice. The situation is rapidly evolving and implementation of the measures described in this post will vary depending on the unique needs of each workplace and situation. Employers are encouraged to contact an attorney in Peabody & Arnold's

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FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

The FFRCA contains two key employment provisions: the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. The law will be in effect from April 2, 2020, through December 31, 2020.

Emergency Family and Medical Leave

Overview

The Emergency Family and Medical Leave Expansion Act (EFMLEA) temporarily expands the coverage of the FMLA.[1] Eligible employees are now allowed to use up to 12 weeks of FMLA leave that is specifically for childcare-related absences arising out of a public health emergency caused by COVID-19 as declared by federal, state, or local officials.

Coverage

The EFMLEA applies only to employers with fewer than 500 employees. However, employers with fewer than 50 employees may be excluded from coverage by way of a potential hardship exemption. The U.S. Department of Labor (DOL) is drafting regulations that address the criteria for the hardship exemption.

Employees are eligible to take EFMLEA leave if they have worked for a covered employer for at least 30 days and are unable to work or telework because of a need for leave to care for a minor child if the child's school or place of care is closed or the child's childcare provider is unavailable due to a public health emergency related to COVID-19. If the need for leave is foreseeable, then employees may be required to provide their employer with notice "as is practicable."

The DOL has the authority to create regulations to specifically exclude from eligibility employees who are either health care providers or emergency responders. The DOL has not yet issued these regulations.

Requirements for Employers

The first 10 days of EFMLEA leave may be unpaid, however, employees may (but cannot be required to) elect to substitute Emergency Paid Sick Leave under FFCRA or accrued vacation, personal leave, medical or sick leave for this 10-day period.

After the initial 10-day period, employers must pay the employee an amount that is not less than two-thirds of the employee's regular rate of pay, or the applicable minimum wage, whichever is greater, for each day of leave taken thereafter. Employers, however, are not required to pay employees taking EFMLEA leave more than $200 per day or $10,000 in the aggregate. The EFMLEA contains provisions for calculating the amount of leave for employees who work part-time or varying schedules.

Employees returning from EFMLEA leave must be restored to their prior position or an equivalent position, subject to certain limitations applicable only to employers with fewer than 25 employees.

Emergency Paid Sick Leave

Overview

The Emergency Paid Sick Leave Act (EPSLA) requires covered employers to provide eligible employees with paid sick leave related to COVID-19.

Coverage

Like the EFMLEA, the EPSLA applies to employers with fewer than 500 employees. However, the DOL has the authority to issue regulations to allow employers of health care providers and emergency responders to opt out of coverage, and to also exempt small businesses with fewer than 50 employees from being required to pay in certain situations. We expect DOL regulations on these exemptions to be forthcoming.

The EPSLA covers more employees and situations than the EFMLEA. There is no length of employment requirement for eligibility under the EPSLA, meaning employees are eligible to use this leave immediately. Employees are eligible if they are unable to work or telework because of one of the following reasons:

- They are subject to a federal, state or local quarantine or isolation order related to COVID-19;
- They have been advised by a health care provider to self-quarantine due to COVID-19 related concerns;
- They are experiencing symptoms of COVID-19 *and* are seeking a medical diagnosis;
- They are caring for someone who is subject to a federal, state or local quarantine or isolation order, or advised to self-quarantine, due to COVID-19;
- They are caring for a child if the child's school or place of care is closed or the child-care provider is unavailable because of COVID-19; *or*
- They are 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.

An employer of an employee who is a healthcare provider or first responder may elect to exclude such employee from the EPSLA.

Requirements for Employers

Employers must provide all eligible full-time employees with 80 hours of paid sick leave. Part-time employees must be provided with a prorated amount of paid sick leave.

There are two different levels of paid sick leave. Employers must pay employees at their regular rate of pay up to a limit of $511 per day and $5,110 in the aggregate for sick leave used under reasons (1) to (3) listed above. Employers must pay employees at two-thirds (2/3) their regular rate of pay up to a limit of $200 per day and $2,000 in the aggregate for sick leave used under reasons (4) to (6) listed above.

These paid sick leave amounts are in addition to, and not in lieu of, any other statutorily provided or employer-provided paid sick leave benefits. Employers must therefore allow employees to use this paid sick leave benefit before other sick leave, if the employee elects to do so.

Employees may not carry unused EPSLA sick leave amounts over into the new year, and any unused amount of EPSLA sick leave will not be paid out upon termination.

Employers may not require as a condition of providing paid sick leave under this Act that employees involved search for or find a replacement to cover the hours during which they use paid sick time.

Employers will be required to post a notice informing employees of this paid sick leave benefit in a conspicuous place in the workplace. The DOL will issue a model notice for employers before the law goes into effect.

Violations

Employers who violate the EPSLA will be subject to the same penalties for violations of the Fair Labor Standards Act (FLSA). Additionally, employers may not discriminate or take retaliatory actions against employees who are exercising their entitlement to paid sick leave.

Tax Credits and Unemployment Benefits

The FFCRA also provides refundable payroll tax credits to employers who are required to pay employees under the EFMLEA and the EPSLA. These credits will be equal to 100% of qualified paid leave benefits, subject to certain limitations and offsets. Additionally, emergency grants are being made available to eligible states in order to pay out unemployment insurance benefits.

HEALTH-RELATED AND MEDICAL INQUIRIES

As discussed in our previous blogpost, the ADA prohibits employers from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances. On March 19, 2020, the EEOC updated its 2007 Guidance entitled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" (2007 Guidance) to make clear that the ADA and the Rehabilitation Act do not interfere with or prevent employers from following the advice of the Centers for Disease Control and Prevention (CDC). The updated 2007 guidance also states that the pandemic now meets the definition of a "direct threat" under the ADA. The updated 2007 Guidance notes that the situation is rapidly evolving and the EEOC's assessment of direct threat may change in accordance with advice from public health officials.

Given the pandemic declaration, the CDC's recent determination that there is widespread transmission of COVID-19 in certain parts of the United States, and the EEOC's announcement that COVID-19 poses a direct threat, employers may now make broader health-related inquiries of their employees and/or implement mandatory medical examinations. The EEOC recently provided examples of what employers may be allowed to do in response to the COVID-19 pandemic, including the following:

- Screen employees for COVID-19 symptoms (fever, chills, cough, shortness of breath, or sore throat), which includes taking the body temperature of employees in non-invasive manners.

- Ask employees if they are experiencing any COVID-19 symptoms;
- Require employees to disclose whether they have tested positive for COVID-19;
- Require a doctor's note specifically certifying the employee does not have COVID-19 and is fit to return to work;
- Screen job applicants for symptoms of COVID-19 after making a conditional offer of employment, so long as it is required for all applicants;
- Delay the start date of an applicant who has COVID-19 or symptoms of COVID-19; and
- Withdraw a job offer when an applicant is needed to start immediately but has been diagnosed with COVID-19 or has symptoms of COVID-19.

Any and all medical information about employees and job applicants must be kept strictly confidential and maintained on separate forms and in separate medical files that are treated as a confidential record.

WAGE AND HOUR ISSUES

Employers must be aware of wage and hour requirements, particularly with the increased number of employees telecommuting and working remotely during this time. Employers are encouraged to speak with counsel regarding wage and hour issues in their unique workplaces.

Exempt Employees

Employees who are properly classified as exempt under the FLSA are generally paid on a salary basis regardless of the number of hours worked and are not entitled to receive overtime pay. Exempt employees who perform any work during a work week should be paid their full weekly salary, with limited exceptions and provided that they do not qualify for leave under EFMLEA, EPSLA, or other benefit plan or policy. Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work. It is important to note, however, that employers cannot deduct pay from an exempt employee's salary if the employee is ready, willing and able to work, but is not able to work at the direction of the employer (such as when the employer closes the workplace due to the pandemic or imposes a telework policy).

Non-Exempt Employees

Unlike exempt employees, non-exempt employees are generally paid hourly and are entitled to receive overtime pay. Employers must pay non-exempt employees for time worked, but employers need not pay non-exempt employees who are absent from work and perform no work, unless the employee qualifies for leave under either the EFMLEA or EPSLA.

As workplaces transition to telework on a wide scale, it is critical for employers with non-exempt employees working remotely to adopt policies that ensure wage and hour compliance for non-exempt employees. For example, employees must still be provided mandatory breaks and be compensated for all time worked—including overtime. Non-exempt employees should be reminded of the employer's policies regarding timekeeping and approval of overtime. Employers should work to create strategies to

ensure non-exempt employees are accurately reporting remote work time.

The DOL's Wage and Hour Division recently issued guidance on common issues related to COVID-19 arising under the FLSA.

WORKPLACE HEALTH AND SAFETY

General Duty

Under the Occupational Safety and Health Act (OSH Act), employers have a general duty to maintain a safe work environment and protect employees from recognized hazards that are causing or are likely to cause death or serious physical harm. Because COVID-19 will likely meet the standard for a recognized hazard in many workplaces, employers should take steps to ensure their work environments are free from potential exposure to COVID-19.

OSHA has published guidance specifically for employers entitled "Guidance on Preparing Workplace for COVID-19" (OSHA Guidance). The OSHA Guidance addresses many questions employers have about how to maintain a safe work environment, including information about the symptoms of COVID-19 and how it spreads; how employers can reduce workers' risk of exposure to the virus causing COVID-19 in the workplace; how to properly assess and classify the risk of occupational exposure of workers; and what standards exist that are applicable to employers for protecting workers from exposure to and infection of COVID-19.

The CDC has also issued guidance for mitigating risk of exposure in the workplace. This CDC guidance provides mitigation strategies specifically for businesses in certain geographic areas, including Massachusetts.

Recording and Reporting Requirements

The OSH Act requires most employers with more than 10 employees to record and, in some instances, report serious work-related injuries and illnesses.

OSHA has advised that employers must *record* cases of COVID-19 on the OSHA Form 300 log if there is a "confirmed case" of COVID-19, the case is "work-related," and the case involves one or more of the general recording criteria under the applicable regulations. Work-relatedness is typically presumed when an injury or illness results from exposures in work environments. Employers must record work-related injuries or illnesses if they result in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or a significant illness diagnosed by a physician or other licensed health care professional. Employers who need to access OSHA's Injury and Illness Recordkeeping Forms can do so by visiting OSHA's website.

Employers must *report* a COVID-19 illness to OSHA within twenty-four (24) hours when an employee's confirmed case of COVID-19 infection was contracted on the job or during business travel and the employee is hospitalized. In the case of work-related COVID-19 employee death, the employer must report to OSHA within eight (8) hours. It is important to note that there are separate reporting requirements for healthcare facilities. Employers who need to access OSHA's reporting form can do so

by visiting OSHA's website.

Employers are encouraged to consult with counsel regarding when COVID-19 illnesses are recordable and/or reportable events.

Refusals to Work

The OSH Act protects employees who refuse to work if they reasonably believe they are in "imminent danger." According to OSHA, "imminent danger" refers to situations where there is a "threat of death or serious physical harm," or where there is a "reasonable expectation that. . . health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency." In the event an employee refuses to work, employers should carefully evaluate the specific circumstances presented and contact legal counsel.

MASSACHUSETTS UNEMPLOYMENT INSURANCE

In coordination with the DOL, the Baker administration has taken proactive steps to assist Massachusetts workers and employers impacted by COVID-19 through modifications of the Commonwealth's unemployment insurance program. These efforts are ongoing, and employers should visit this website to monitor new developments.

On March 18, 2020, Governor Baker signed a bill into law that waives the one-week waiting period for unemployment benefits. Governor Baker has also requested that the Department of Unemployment Assistance (DUA) be permitted to provide benefits immediately to all persons who face interruption in work as a result of the COVID-19 pandemic. The DUA has started filing emergency regulations to ensure the unemployment insurance program rules are applied flexibly in light of the current crisis. Additional emergency regulations are being filed by DUA to allow people impacted by COVID-19 to collect unemployment benefits where there is a temporary workplace shutdown.

The DUA has also provided a step-by-step guide for employees who are filing for unemployment as a result of COVID-19 contingencies. The guide can be found here.

Employers who are impacted by COVID-19 may request up to a 60-day grace period to file quarterly reports and pay contributions to the unemployment system, and deadlines missed by employers may be excused under the good-cause provision.

QUESTIONS AND ADVICE

As the COVID-19 pandemic progresses, the response from federal, state, and local government and administrative agencies will continue to evolve. Employers are encouraged to contact an attorney in Peabody & Arnold's Employment Law and Litigation Practice Group with questions and for additional information.

[1] Employers should be mindful that the FMLA still applies where its coverage and eligibility requirements have been met. The DOL's Wage and Hour Division recently issued additional guidance for issues related to COVID-19 arising under the FMLA. It appears that employees are entitled to a combined

total of 12 weeks of FMLA leave, whether the leave is taken for reasons provided in the EFMLEA or for other permissible reasons under the FMLA.

