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COVID-19 and the Workplace: Guidance Regarding Employment and Benefits Issues Facing Employers Now

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March 20, 2020

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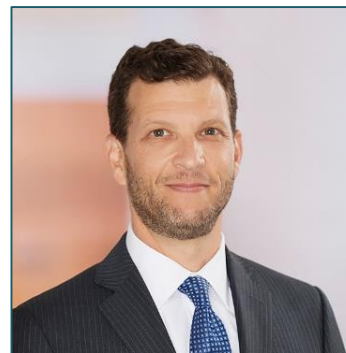
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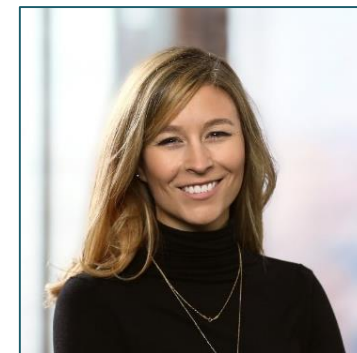
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Legislative Initiatives and General Overview of Workplace Issues

Family First Act



Family First Act – Federal Legislation Amending FMLA and Providing for Paid Sick Leave

Overview

- Effective April 2 and sunsets December 31
- Amends FMLA – COVID-19 leave amendments apply to employers of 500 employees or less
- Eligible employees: working at least 30 days for covered employer prior to taking leave
- DOL has power to grant hardship exemptions
- Waiting for regulations for more guidance
- No greater rights to continued employment than other employees (does not amend those provisions of FMLA) so may terminate while an employee is on leave provided that termination is part of wider employment action
- Make effective now, prior to April 2? No legal reason to wait except as it may relate to tax credits available to employer

Family First Act – High Level Details

FMLA Provisions

- Provides up to 12 weeks of job protected leave (restoration rights) if unable to work or telework because an eligible employee is caring for a child because a child's caregiver is unavailable or school closed because of the COVID-19 public health emergency
- First 10 days of FMLA is unpaid but the employee may elect (but cannot be required to elect) to substitute accrued vacation, personal leave or sick time for unpaid leave
- After the first 10 days, the employer must pay no less than 2/3 of employee's regular base salary rate capped at \$200/day - \$10,000 in total aggregate

Family First Act – High Level Details

Paid Sick Leave Provisions

- New law – Emergency Paid Sick Leave Act – sick leave related to COVID-19
- Also effective April 2 and sunsets December 31
- Same application as FMLA amendments (500 or less, with hardship exemptions)
- Different from FMLA amendments in that it applies to all full-time employees (with some exceptions) regardless of duration of employment
- 80 hours of paid sick leave is available immediately (pro rated for part-time employees)
- Paid sick leave under FFA is in addition to but not in lieu of any other statutory or employer provided pay
- FFA sick pay cannot be carried over to next year or paid at termination

Family First Act – High Level Details

Paid Sick Leave Provisions

Statutory reasons to use FFA Sick Leave:

1. 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 COVID-19-related concerns;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for someone who is subject to a quarantine or isolation order or who has been advised to self-quarantine;
5. The employee is 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 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 Treasury and the Secretary of Labor.

Family First Act – High Level Details

Paid Sick Leave Provisions

- Employers are required to pay employee's regular rate of pay up to a cap of \$511 per day and \$5,110 in the aggregate for sick leave use under reasons (1)-(3) above (employee quarantine or isolation order, self-quarantine recommendation or experiencing symptoms and seeking treatment), and (ii) at 2/3 of employee's regular rate of pay capped at \$200 per day and \$2,000 in the aggregate for sick leave use under reasons (4)-(6) above (caring for others and additional government-specified conditions).
- There are separate provisions regarding this paid sick leave benefit for employees subject to a multi-employer collective bargaining agreement.
- Employers must post a notice related to this section in a conspicuous place in the workplace. A model notice will be provided by the Department of Labor by next week.

Selected State and Local Legislative Developments

New York

- **In-Office Workforce Reduction Measures (Starting 3/20)**
 - Starting tonight in New York State, the Governor has mandated that all “non-essential” businesses reduce their in-office workforces by at least 75% through April 17th.
 - This executive order excludes “essential” operations like health care, shipping, food production, infrastructure, transportation, and numerous other industries.
- **New York State Enacts Paid COVID-19 Leave Law**
 - Covers all private and public employers
 - Supplements any existing sick leave already provided by employers’ leave policies
 - Allows employees subjected to precautionary/mandatory quarantines and isolation to take leave, including up to 14 days of paid leave for large employers (100+ employees)
 - Leave amounts and paid/unpaid status vary by employer size

California

- Paid Sick Leave applies to leave necessary to care for or treat COVID-19 and should also include preventative care such as self-quarantine; employers cannot require an employee to use PSL; it is up to the employee to use or not
 - California Labor Commissioner's office suggests – but does not require – employers allow their employees to use paid sick leave in the event the employee's school or child care facility closes as a result of COVID-19.
- By executive order, Governor Newsom has suspended California's WARN notice requirements (but still must give as much notice as practical)
- Shelter in place orders for over 10 counties across CA and LA (as of 3/20) requiring individuals to stay in their homes unless performing essential activities (like performing essential jobs, medical visits, groceries, or outdoor activities that apply social distancing rules)

California

San Francisco

- New guidance issued by the SFO Office of Labor Standards Enforcement on paid sick leave requires employers to allow their employees to use accrued paid sick leave for time off related to COVID-19, including for self-quarantine and to care for children whose daycares or schools are closed on the recommendation of a public official
- Workers and Families First Program for SFO businesses:
 - Following the exhaustion of an employee's currently allocated paid sick leave, the City will reimburse up to 40 hours (5 days) of pay (at minimum wage - \$15.59) for each employee, with the employer to pay the difference between minimum wage (\$15.59) and the employee's full hourly wage.
 - To be eligible, an employee must have exhausted all currently available sick leave, exhausted or be ineligible for federal or state supplemental sick leave, and the employer must agree to participate in the program
 - To date, there is no information on when the program will begin or who is responsible for applying for the reimbursement (employee or employer) and the webpage announcing the program has not been updated since the day of the announcement.

Unemployment Insurance

Unemployment Insurance

- According to statistics released by the Department of Labor on Thursday, advance claims on unemployment insurance rose to 281,000 nationwide and 58,208 in California, gains of 70,000 and 14,823, respectively.
- States are experiencing thousands more UI applications than before COVID-19
 - Massachusetts: on Monday alone, received at least 19,884 new initial unemployment claims. Massachusetts had received 4,667 new initial claims for the week ending on March 7
 - New Jersey: number of applicants crashed their claims system (15,000 in one day – record)
 - Ohio: this week 45,000 (from 6,500) week before
- Guidance from US DOL – allow unemployment even if due to a temporary shut down (i.e. due to the shelter in place regulations or an individual's quarantine)
 - Also allows states to expand eligibility for unemployment benefits due to impact of COVID-19
 - States temporarily waiving waiting period – NY, Cal, Virginia, Mass, Wisconsin, Arkansas, Nevada, Kentucky, Texas, Penn, Washington. We assume many (all?) will follow.
- Fair to assume that most reasons relating to impact of COVID-19 (reduction in hours, self-quarantine, child care) will give rise to benefits

MAKING SENSE OF ALL OF THESE LAWS, EXECUTIVE ORDERS AND EMPLOYER POLICIES

- Remember – employees will be entitled to greatest benefits under applicable Federal, state and local laws
- Employer's policies as currently formulated should be applied, but thought should be given to exigent modification to allow for more flexibility
- Law of “locality” for wage and hour purposes – where are your employees working
- Pay attention to recordkeeping – particularly given that some of these payments may be the subject of Federal (or state) tax credits
- Organize your information gathering – Federal, state and local websites have excellent and up to date information
- Communications to workforce about monitoring and applying these new laws

Best Practices for Communications Regarding COVID-19 in the Workplace

- Communications generally – who, what, when, why, where and frequency
- Importance and necessity for protocols for addressing positive COVID-19 cases in the workplace
- How to communicate to employees regarding a positive COVID-19 case in the Workplace
- How to communicate to employees who were in contact with an infected individual
- Social media/communication protocols

Employee Benefits

Furloughs and Group Health Plans

Employers needing to reduce the size of their workforces in response to flagging consumer demand might want to be continue to provide group health plan (GHP) coverage to affected employees during a "furlough" period

ERISA Requirements	Fully Insured Plans	Self-funded Plan
<p>Plane document/Summary Plan Description establishes GHP eligibility terms and conditions; e.g., an employee must work 30 or more hours per week</p>	<p>Dropping below 30 hours is a "reduction in hours" that results in a loss of coverage</p> <p>To continue coverage required a plan amendment and notice to the carrier; carrier consent may also be required if the change runs afoul of carrier underwriting guidelines</p>	<p>Dropping below 30 hours is a "reduction in hours" that results in a loss of coverage</p> <p>To continue coverage required a plan amendment and notice to (and consent of) the stop-loss vendor</p> <p>Failure to get</p>

Alternative approach: treat the reduction in hours as COBRA qualifying event, a portion of which the employer can choose to subsidize

Health Savings Accounts (HSAs), Preventive Care, Etc.

- *General rule:* Employees may make and receive contributions to HSAs only if they are enrolled in a “high deductible” health plan (HDHP) and not covered under a plan that is not a HDHP—which means that the employee is subject to cost sharing; covering medical expenses before the minimum deductible is reached would make employees ineligible to make or receive HSA contributions
- *Exception:* Existing HSA rules have an exception for “preventive” care, but not for services and items purchased to treat a disease
- *Modification:* IRS Notice 2020-15 provides that that:
 - Group health plans that otherwise qualify as HDHPs will not lose that status merely because they cover the cost of testing for or treatment of COVID-19 before plan deductibles have been met
 - As in the past, any vaccination costs continue to count as preventive care and can be paid for by an HDHP

Impact on 401(k) and Other Retirement Plans

- Investment benchmarks, which have been in rising since the financial crisis in 2008-09, are now experiencing major losses reminiscent of 2008, where target-date funds experienced losses exceeding 20 percent
- Participants will demand access to their retirement funds, and a time where their account balances have already been decimated
- Expect the IRS to provide relief under the disaster relief authority conferred by Internal Revenue Code sections 7508 and 7508A, which set out a list of time sensitive acts that are automatically postponed for taxpayers affected by Presidentially declared disasters
- Expect a ramp-up in the volume and plan loans; and plan fiduciaries will also be under pressure to approve hardship distributions
- Similar to 1987 and 2008, plans that do not daily value will be under pressure to make interim valuations to avoid harming current participants at the expense of terminating employees
- Also similar to 1987 and 2008, defined benefit plans will have funding challenges that are mitigated only somewhat by generous smoothing rules

HIPAA

HIPAA applies to "Covered Entities," i.e., health plans, healthcare providers, and health care clearinghouses); it does not apply to disability, life, or pension plans, nor does it apply directly to employers

CMS/OCR Notice	Telehealth Initiative	Other HIPAA Disclosures
OCR will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA rules against covered health care providers in connection with the good faith provision of telehealth services	CMS/OCR announced a waiver potential HIPAA penalties for good faith use of telehealth during the emergency.	<ul style="list-style-type: none"> • Disclosures for treatment • Disclosures for public health activities • Disclosures to prevent a serious and imminent threat

Employers are free to require screening for a temperature in order to come on the work site; but they cannot access GHP information on employees that tested positive for the coronavirus for monitoring or other purposes. The former is an "employer" function; the latter involves a covered entity, i.e., the group health plan.

Layoffs and Furloughs

Furloughs, Layoffs & Reductions in Force

What is the difference?

- Furloughs: A “furlough” is considered to be an alternative to layoff. When an employer furloughs its employees, it requires them to work fewer hours or to take a certain amount of unpaid time off. An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services.
- Layoffs: A layoff is a separation from payroll. An employee is laid off because there is not enough work for him or her to perform. (The employer may believe that this condition will change and intends to recall the person when work again becomes available).
- Reductions in Force: A reduction in force (RIF) occurs when a position is eliminated without the intention of replacing it and involves a permanent cut in headcount. A layoff may turn into a RIF or the employer may choose to immediately reduce their workforce.

Furloughs, Layoffs & Reductions in Force (Cont'd)

What are some key considerations for employers?

- Gather all relevant information and discuss with key stakeholders
- Set criteria for employment determinations:
 - Attorney-Client Privilege – Everything should go through counsel.
 - Select the Criteria – Determine criteria and create documentation that clearly and fully explains the criteria, setting uniform standards for each and establishing a criteria hierarchy.
 - Select Decision Makers – The first round of decision-makers likely will be the front-line managers, particularly where performance-based criteria are used, but final decisions should be left to neutral decision makers where possible.
 - Select Individuals for Layoff – Using the selection criteria set forth in the policy, managers should select those employees appropriate for the employment determinations.

Furloughs, Layoffs & Reductions in Force (Cont'd)

What are some key considerations for employers?

- Analyze & avoid disparate treatment and disparate impact
- Review compensation to ensure parity
- Determine if the company has federal contractor obligations
- Assess whether it is appropriate/feasible to offer separation packages
- Consider security measures relating to company information & workplace safety

Furloughs, Layoffs & Reductions in Force (Cont'd)

What are best practices for communicating these decisions to employees?

- Select and train “notifiers”
- Announce the employment decisions to the affected employees:
 - Conduct an in-person meeting with more than one company representative present.
 - Refrain from engaging in arguments; keep it short and to the point while staying on-script.
 - Do not make false promises or empty assurances.
 - Provide key documents and government-mandated notifications.
- Announce the employment decisions to the remaining employees

Furloughs – Basics

- “Furlough” is not a defined legal term.
- The employer’s obligations in a furlough depend on the laws, regulations and policy terms that apply to the unpaid leave.
 - Unemployment benefits
 - Health care continuation
 - Insurance continuation
 - Wage payments

WARN Act – Basics

What is the Federal Worker Adjustment and Retraining Notification Act (“WARN”)?

- The WARN Act aims to protect workers and communities by requiring larger employers to provide at least 60 calendar days of advance written notice prior to a “plant closing” or “mass layoff”.
- WARN applies to employment losses that occur over a 30-day period.
- However, WARN also impacts total losses that occur over a 90-day period:
 - An employer is required to give advance notice if it conducts a series of smaller layoffs that collectively would reach the WARN thresholds over 90 days.
 - Yet, notice is not required if an employer can show that multiple layoffs occurred because of separate and distinct actions, and were not attempts to evade WARN.

WARN Act – Triggering Events

What triggers the federal WARN Act?

- Under the WARN Act, employers with **100 or more** full time workers must provide written notice at least 60 calendar days in advance of covered events.
- Circumstances that trigger WARN notifications include the following:
 - **Plant Closings:** Closing of “employment site” that affects 50 or more workers.
 - **Mass Layoffs:** “Job loss” that affects (i) 50 or more workers and over 1/3 of workers, or (ii) 500 or more workers.

WARN Act – Triggering Events

What events **DO NOT** trigger the federal WARN Act?

- Circumstances that do not trigger WARN notifications include the following:
 - Closing of a temporary facility or completion of a temporary project, when employees were hired with the understanding that their employment would end with the facility or project;
 - Closure of a facility or operating unit due to a strike or lockout where the closing is not intended to evade WARN; or
 - Layoffs or closings that do not trigger the above WARN thresholds.

WARN Act – Notice requirements

What employer notices are required by the WARN Act?

- Under federal WARN, employers must provide written notice to:
 - Affected Employees (if the employees are not represented by a union);
 - The state’s rapid response dislocated worker unit; and
 - The local chief elected official of the local government where the closing or mass layoff is to occur
- The contents of the notice will vary depending on the recipient.
- Employers are encouraged to consult with their counsel to construct proper notices.

WARN Act – Potential COVID-19 Exceptions

What WARN exceptions exist that might relate to COVID-19 events?

- There are three main exceptions to WARN's 60-day notice requirement, all of which may immediately apply to COVID-19-related events:
 - Unforeseeable Business Circumstances
 - Natural Disasters
 - Faltering Company
- Even if an exception applies, any event that triggers WARN still require the necessary notices "as soon as practicable." The exception-based notice should include a statement as to why the employee did not receive the full 60 day notice.

WARN Act – State Law “Mini WARN Acts”

What state laws exist relating to layoff and closure notices?

- It is imperative that employers also review state WARN laws (also referred to as “mini-WARN” laws) when assessing a layoff, furlough, or closure.
- Many states, including New York, California, Massachusetts, Illinois and New Jersey have their own laws, with varying thresholds and notice periods.
- An employer is not exempt from fulfilling the obligations of a state mini-WARN act just because it has complied with federal WARN.



Legal Guidelines for Managing a Remote Workplace

Disability-related Inquiries, Accommodations and Medical Examinations

- **EEOC's pandemic flu preparedness:**
 - Disability-related inquiries and medical exams are generally prohibited, except under limited circumstances:
 - Job-related and consistent with business necessity (i.e., employee's ability to perform essential job functions will be impaired by a medical condition; or an employee poses a direct threat due to a medical condition).
 - Direct threat is fact-specific inquiry, EEOC relies on CDC and other health officials to decide whether a pandemic is objectively severe enough to rise to the level of a direct threat.
- **On March 18, 2020 the EEOC released updated guidance stating that because the CDC has acknowledged community spread, employers may take employee temperatures.**
- **Does this mean employers should start taking temperatures?**
 - Practical considerations
 - Legal considerations
- **What about home office accommodations?**
 - If an employee has a disability that needs the same reasonable accommodation at a telework site, the employer should provide it, absent undue hardship.
 - Example: ergonomic accommodations

Occupational Safety and Health Act – Does it Apply to Remote Workers?

- **Home offices are covered by OSHA, but....**
 - OSHA will not conduct home office inspections
 - OSHA does not expect employers to conduct inspections of home offices
 - OSHA will not hold employers liable under OSHA for home offices
- **Employers are required to keep OSHA 300 logs and must still keep records of work-related injuries and illnesses occurring in a home office.**
- **What if some employees are still in the office and contract COVID19? Does an employer have an obligation to record or report this to OSHA?**
 - OSHA state COVID19 is a recordable illness
 - All employers should be documenting any instance of COVID19 in their workplace, even if exempt from keeping an OSHA 300 log (low risk industries such as legal services, financial investment firms, real estate firms, insurance carriers);
 - All employers are required to report “severe injuries” to OSHA – including death or hospitalization for injuries that occur *on the job*.
 - Difficult to show nexus between COVID19 and workplace

Telecommuting and Cyber Security

Cyber Attacks and Remote Working

- Lots of malicious activities
 - Beware of any email that claims to be from the government and prompts you to click on a link, download an attachment, or asks for personal information.
 - Beware of any email claiming to be from senior management with similar prompts
- Communicate, communicate, communicate! with employees about potential fishing attacks
- Be in touch with IT providers – whether in house or contracted (make sure management is in touch)
 - External provider will be triaging the exact same problems for other users/companies

As you work remotely, be aware of your surroundings

- Do not work in unsecured locations
- Avoid downloading company documents on personal computers or leaving company documents lying around
- Do not upload documents to personal cloud-storage accounts (like Dropbox or iCloud)

Wage and Hour Issues

Working Remotely

- Under FLSA, employers must compensate employees not only for work the employer directed, but work “suffered or permitted to be performed”
 - Employers are still responsible for overtime pay without the employer’s express permission, but when the employer “knows or has reason to believe” the employee is continuing to work. 29 C.F.R. 785.11

Mitigating Risk

- Set expected hours for non-exempt workers
 - Remember state-specific meal and rest break laws
 - Set clear standards on expectations to answer emails and “work” outside of regular hours
- Use software that can accurately capture hours remotely
- Use a written policy that requires employees to receive permission for overtime
- Addressing attendance and absence policies up front

Workers' Compensation at Home

- **Workers' compensation is a fact specific inquiry, and laws vary state by state**
- **Injury or illness is compensable if it arises out of/is in the course of employment**
- **Injury that occurs at home and on work time could be covered by workers' compensation**
 - Burden is on the employee to prove he/she was acting in the interest of the employer when the injury occurred
- **Is COVID-19 covered by workers' compensation?**
 - It depends... can be more difficult to prove
 - For health care workers, waste management workers, other high risk areas, likely yes depending on facts and state law
 - COVID-19 could be an “occupational disease” under state law
 - Arise out of/is in the course of employment
 - Be caused by conditions peculiar to the work performed
 - Workplace creates risk of contracting disease that do not exist for general public
 - For most, no long term affects of COVID-19, so associated costs are limited

COVID-19 IMPACTING BUSINESSES

- Other issues we are monitoring and advising on:
 - Changes in the delivery of health care, including providers' increased use of telehealth
 - Cybersecurity risks related to remote work
 - Force majeure provisions in contracts
 - Insurance coverage for Coronavirus-related losses
 - Policy updates at local, state, and federal levels
 - Regulatory changes and updates (SEC filing deadlines, FDA response, etc.)
 - Supply-chain shortages
 - Travel and visa restrictions

“

As the impact of the COVID-19 virus is being felt around the world, I want to assure you that Mintz is prepared to continue providing the highest level of service to our clients.

”

**- Bob Bodian,
Managing Member**

- Mintz's [COVID-19 Insight Center](#) available on our website

THANK YOU! QUESTIONS?



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