March 30, 2020

COVID-19: Key Questions From Employers

COVID-19 has resulted in a rapid flurry of new legislation and executive orders at both the federal and state levels in recent weeks, as well as additional guidance from government entities such as the CDC, OSHA, the DOL and the EEOC. By now, most employers understand the basic rules to prevent further spread of COVID-19, such as frequent hand washing, cleaning and disinfecting frequently touched surfaces and sending symptomatic workers home. This article addresses some of the more difficult and recurring questions employers are confronting in applying both pre-existing and newly enacted law in a number of areas related to COVID-19. Due to the speed at which government entities and healthcare authorities have implemented new legislation, executive orders, and guidance in response to COVID-19, employers should consider the guidance below in light of the most recent legal and medical authority on these issues.

1) How should an employer with multiple affiliates determine if it meets the "500 employee" threshold for coverage under the Emergency Family and Medical Leave Expansion Act (FMLEA) and the Emergency Paid Sick Leave Act (EPSLA)?

President Trump signed into law the Families First Coronavirus Response Act (FFCRA) on March 18, 2020, and included therein the FMLEA and the EPSLA. The applicability of both Acts to private employers is limited to those with "fewer than 500 employees." Recent guidance from the U.S. Department of Labor (DOL) on the FMLEA and EPSLA states that, "typically" a corporation (including its separate establishments or divisions) would be deemed a single employer for purposes of the 500-employee threshold, and where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they qualify as joint employers under the FLSA.[i] The DOL further states that separate entities may be a single employer under the FMLEA and the EPSLA if they meet the "integrated employer" test under the FMLA. In the integrated employer analysis, employers must consider such factors as: (1) common management, (2) interrelation between operations, (3) centralized control of labor relations, and (4) degree of common ownership/financial control. 29 C.F.R. § 825.104(c). The DOL also stated that employers should include temporary employees who are jointly employed by the employer and another entity, regardless of whether the jointly employed employees are maintained on the employer's payroll, but that independent contractors are not counted. Employers that conclude that certain employees *are* jointly employed for purposes of the FFCRA should keep in mind the potential adverse consequences for purposes of other labor laws, such as wage/hour violations by staffing agencies supplying temporary workers.

2) Is leave under the EPSLA in *addition* to leave available under applicable state law?

Section 5107 of the EPSLA states that nothing therein shall be construed to "diminish the rights or benefits that an employee is entitled to under any–(A) other Federal, State, or local law; (B) collective bargaining agreement; or (C) existing employer policy." Therefore, the paid leave granted under this new legislation is in addition to any other leave to which an employee may be entitled pursuant to an employer's policies or state or local law. Moreover, in its guidance, the DOL made clear that an employer may not deny employees paid sick leave if the employer provided paid leave for a reason identified in the EPSLA *prior* to the Act going into effect (April 1, 2020). The EPSLA also expressly provides that employers may not require employees to use paid leave provided by the employer before the employee may use that time provided by the EPSLA. However, the EPSLA does not preclude employers from amending their own policies. Employers may do so as long as their policy documents allow such amendments and otherwise provide the minimum leave required by the EPSLA and applicable state or local laws.

3) Can employers reduce employees' compensation during this period of economic uncertainty?

An extraordinary step that some employers facing a liquidity crisis are considering is temporarily reducing some or all of their employees' compensation or weekly hourly expectations, instead of engaging in layoffs. Employers generally must pay non-exempt employees only for hours worked absent a contract providing otherwise, and employers may reduce non-exempt employees' regularly scheduled hours for a variety of reasons, including reduced demand for products or services or a temporary closure. Employers also may prospectively reduce non-exempt employees' hourly wages, so long as such compensation does not fall below the applicable minimum wage.

On the other hand, employers must pay exempt employees their full salaries for any week during which they perform *any* work, "without regard to the number of days or hours worked." 29 C.F.R. § 541.602(a)(1). They "need not be paid for any workweek in which they perform no work." *Id.* If employers employ exempt workers "at will" and no contract provides any right to a specific salary for a period of time, employers may prospectively reduce their salaries. The DOL's September 2019 guidance recognized this right in these circumstances: "An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to a Part 541 exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements."[ii] Employers concerned about maintaining the exempt status of employees whose salaries they have reduced must also consider the minimum salary such employees must earn under the FLSA or applicable state law. If an employer reduces salaries below the applicable salary threshold (currently $35,568 under the FLSA, and higher amounts in certain states or municipalities), the employer must comply with minimum wage and overtime laws applicable to non-exempt employees.

4) What should employers do when an employee has symptoms of or tests positive for COVID-19?

Employers have an obligation under OSHA to maintain a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to their employees. 29 U.S.C. § 654(a)(1). To that end, employers should follow the guidance from medical professionals, the CDC, local health departments, OSHA, and the EEOC regarding how to respond to varying risks of exposure of employees to COVID-19. The CDC has published guidance titled "Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)"[iii] in which it directs that "[e]mployees who have symptoms (i.e., fever, cough, or shortness of breath) should notify their supervisor and stay home." CDC further states "[e]mployees should not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers and state and local health departments."

The CDC has published a table titled "Summary of CDC Recommendations for Management of Exposed Persons by Risk Level and Presence of Symptoms" that sets forth recommended action for "people who have been determined to have at least some risk for COVID-19."[iv] The Guidance does not answer the

key question of whether an employee has "some risk for COVID-19," as the agency's table of "Exposure Risk Categories" ("High," "Medium," "Low," and "No identifiable risk") does not replace "an individual assessment of risk for the purpose of clinical decision making." Whether an employee has "some risk for COVID-19" is a factual question that employers must assess in consultation with medical professionals and public health officials.

If an employer learns that an asymptomatic employee has been exposed to someone who has tested positive for COVID-19, it must conduct a risk assessment under the CDC's guidelines to determine whether to advise the employee to remain at home. Of course, this applies only to the extent the employee is still physically in the workplace, either because the employee works for an "essential business" under the applicable stay-at-home order, or is there is no such order in effect in the relevant jurisdiction. With respect to co-workers of such an asymptomatic employee, the CDC does not currently recommend "testing, symptom monitoring or special management" for those individuals exposed to asymptomatic people with potential exposure to COVID-19 ("contacts of contacts").

However, if an employee is *symptomatic*, and in either the CDC's "Medium" or "High" risk category, employers should send the employee home and recommend that the employee seek medical treatment. Employers should further disclose at least to those employees known to have been in "close contact" (as defined by the CDC) with such a symptomatic employee (without disclosing the employee's name, as required under the ADA) that they may have been exposed to a symptomatic individual with COVID-19, and take any additional actions recommended by medical or healthcare professionals. To that end, the employer should ask the at-risk employee to identify the persons with whom the employee had close contact while symptomatic in the workplace.

5) What additional actions can employers take to contain the spread of COVID-19 within their workforce?

As noted above, employers should follow guidance issued from health authorities in determining measures to take to contain the spread of COVID-19. Some employers are instituting mandatory temperature checks of all employees before they enter the workplace. The EEOC views measuring body temperature to be a medical examination,[v] and the ADA prohibits such examinations of employees unless the examination is job-related and consistent with business necessity. However, the employer may conduct such an examination if it has a reasonable belief, based on objective evidence, that an employee poses a "direct threat." The EEOC's March 21, 2020 guidance on "Pandemic Preparedness" states that, due to healthcare authorities' acknowledgment of the community spread of COVID-19 and their attendant precautions, COVID-19 presents a "direct threat" and employers may take employees' temperatures.

Rather than implementing mandatory temperature checks, employers may instead require workers to complete pre- and post-shift questionnaires in order to collect data on employees' actions to monitor their current and recent symptoms, travel activity, social distancing and cleaning/sanitizing efforts during their time at work. Eliciting such information assists employers in keeping the workforce healthy through timely identification of immediate issues, as well as in informing any "close contacts" of such individual during the relevant time period if the employee is diagnosed with COVID-19. Employers should consider whether time spent completing such questionnaires could result in additional compensable time owed to non-exempt workers.

6) Are employees who are temporarily laid off (i.e. "furloughed") entitled to paid or unpaid leave under the FFCRA?

The FMLEA and EPSLA each state that compensation for paid leave must be calculated based on "the number of hours the employee would otherwise be normally scheduled to work." §§ 110(b)(2)(B)(II); 5110(5)(A)(ii). Many employers have taken the well-reasoned position that furloughed employees would not otherwise be scheduled to work *any* hours, and therefore need not be paid for leave they take under the Acts. The DOL confirmed this position in a recent update to its guidance on the FFCRA.[vi]

7) Will an employer's continuation of health care benefits for employees on furlough or temporary lay-off disqualify an employee from receipt of unemployment benefits?

State laws address whether an employer's continuation of and payment for health care benefits of a furloughed or temporarily laid-off employee disqualifies the employee from receiving unemployment benefits. In some states, dismissal or severance pay that is paid to employees while furloughed or laid off reduces or delays the amount of unemployment benefits to which an employee is entitled. However, some states, like New York,[vii] do not reduce or delay unemployment benefits where employers continue providing health care benefits.

8) How does the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) affect state unemployment benefits for laid off employees?

The CARES Act, signed into law by President Trump on March 27, 2020, significantly expanded unemployment benefits to cope with a surge in claims resulting from economic slowdowns related to COVID-19. First, the CARES Act expands unemployment coverage to include part-time workers, gig workers, the self-employed, freelancers, and independent contractors. The CARES Act also expands coverage to include people who were about to commence a new job and could not, or who did start but were immediately laid off, because of the COVID-19 outbreak. The law now incentivizes states to waive the typical one-week waiting period, and to start paying unemployment benefits immediately. Further, while unemployment benefits typically replace only 40% of an individual's prior income, the CARES Act, through July 31, temporarily provides an additional $600 per week on top of the typical unemployment benefit, in an effort to supplement the incomes of individuals put out of work due to the COVID-19 pandemic. The CARES Act also extends the term of unemployment benefits by an additional 13 weeks. So, individuals can now receive unemployment benefits for a total of 39 weeks in most states, which previously offered only 26 weeks of benefits.

9) How does the CARES Act affect FMLEA benefits employers may provide to rehired employees?

The CARES Act enlarged the definition of "eligible employee" under the FMLEA to include "rehired employees," *i.e.* individuals who were laid-off on or after March 1, 2020 but who are rehired and who had worked for the employer for at least 30 of the last 60 calendar days prior to the employee's layoff. Thus, employers might consider rehiring recently laid-off employees who would have been eligible for FMLEA benefits had they not been laid off, and then immediately putting them on leave with FMLEA benefits. Because payments made pursuant to the FMLEA are reimbursable to employers via refundable tax credits, this course of action would come at little cost to eligible employers. Employers might reasonably engage in such rehiring both to make use of the new law to benefit their workers at little cost, and also to provide additional optionality to retain and redeploy (rather than jettison) such workers when business conditions improve.

However, before taking action to rehire employees and put them on FMLEA leave, employers should consider how such rehiring might impact compliance with state and federal laws governing plant closing or mass layoffs, such as the WARN Act. While employers may have avoided the need to provide advance notice of layoff due to unforeseeable business circumstances related to COVID-19, rehiring workers only to undertake another layoff at the end of the FMLEA leave period arguably could be viewed later as being foreseeable. However, employers do not have a duty to provide WARN Act notice to employees to whom they communicate at the time of hire that the period of employment will be temporary and will end at a particular time. *See* 20 C.F.R. § 639.5(c). As such, an employer using the rehire provision of the CARES Act solely to provide FMLEA benefits may seek to avoid WARN Act liability by notifying employees in writing upon their rehire that their re-employment is temporary and will terminate at the end of the FMLEA leave period subject to possible changes in the business environment whereby the rehiring could be extended.

10) What are the employment issues that a business should keep in mind when considering whether to take a SBA loan provided under the CARES Act?

The CARES Act makes loans with favorable terms, such as guaranteed low interest rates and initial deferment periods, available under Sections 7(a) *and* 7(b) of the Small Business Act (SBA), the type of loan depending on whether the employer is small, with fewer than 500 employees, or medium-sized with 501 to 10,000 employees. For Section 7(b) loans to medium-sized employers, those favorable terms come with strings attached that impact the business's workforce strategy. Among other conditions to receipt of Section 7(b) loans, a borrower must make a good faith certification that the funds it receives will be used to retain at least 90% of the borrower's workforce through September 30, 2020 at full compensation and benefits. Borrowers must also affirm that they will remain neutral in union organizing efforts for the term of the loan and will not outsource or offshore any jobs until two years after completion of the term of the loan.

Businesses should carefully consider the implications of the conditions attached to these loans. Whether a particular business concludes that the benefits of a SBA loan would outweigh the cost of maintaining the workforce at 90% capacity through September 30 or being neutral to union organizing during the term of the loan will likely depend on the facts and circumstances of each business.

11) Is financial relief available for participants in retirement plans?

Under the CARES Act, qualified individuals may take coronavirus-related distributions from eligible retirement plans of up to $100,000 in 2020 without incurring the additional 10% tax ordinarily imposed on early withdrawals. The CARES Act further provides that the maximum amount that a qualified individual may borrow from his or her plan account balance is temporarily increased to the lesser of $100,000 or 100% of the participant's vested account balance under plan. A "qualified individual" under the CARES Act is an individual (i) who is diagnosed with COVID-19 by a test approved by the Centers for Disease Control and Prevention, (ii) whose spouse or dependent is diagnosed with either virus by such a test, or (iii) who experiences adverse financial consequences as a result of being quarantined, furloughed or laid off or having to work reduced hours due to either virus, being unable to work due to a lack of childcare due to either virus, closing or reducing hours of a business owned or operated by the individual due to either virus, or other factors as determined by the Secretary of the Treasury.

12) Are retirement plans required to be amended now to implement the new changes?

Although it appears that the changes set forth in the CARES Act are permissive under eligible retirement plans rather than mandatory, we expect further guidance to be forthcoming to determine how to implement the changes, if desired by applicable plan sponsors. Further, although plan sponsors may implement the new distribution and plan loan provisions prior to adopting plan amendments providing for these features, plan sponsors may wish to work now with their plan service providers to adopt amendments and prepare participant communications. Plan sponsors who implement the loan provisions should also work with their plan service providers to update loan procedures.

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ENDNOTES

i U.S. Dep't of Labor, Families First Coronavirus Response Act: Questions and Answers, Q&A 2, available here.

ii U.S. Dep't of Labor, Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues (Sept. 2019), available here.

iii Centers for Disease Control and Prevention, available here (last updated Mar. 21, 2020).

iv Centers for Disease Control and Prevention, Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019 (COVID-19) Exposures: Geographic Risk and Contacts of Laboratory-confirmed Cases, available here (last updated Mar. 22, 2020).

v U.S. Equal Employment Opportunity Comm'n, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT, available here (last updated Mar. 21, 2020).

vi See U.S. Dep't of Labor, Families First Coronavirus Response Act: Questions and Answers, Q&A 26 & 28, available here.

vii See New York Dep't of Labor, Dismissal/Severance Pay and Pensions: Frequently Asked Questions, available here.

If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to any of the following:

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