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EMPLOYMENT LAW ALERT

TWO NEW CORONAVIRUS-RELATED LEAVES OF ABSENCE ENACTED

On March 18, 2020, President Trump signed into law two new types of paid leave that certain smaller employers (fewer than 500 employees) must provide to employees who need leave for certain coronavirus-related reasons. Both leaves of absence become effective on **April 2, 2020**. The following provides a very basic overview; we anticipate that new regulations will be issued which hopefully will provide more details regarding implementation of the leaves.

Paid FMLA Leave to Care for a Child Due to a School or Day Care Closure Because of the COVID-19 Public Health Emergency (“Emergency Family and Medical Leave Expansion Act”)

How much leave time is provided by the new law?

Up to 12 weeks of leave time for qualified employees.

Which employees are eligible?

Any employee who has been employed for at least 30 days with the employer (which is different than the standard FMLA eligibility criteria of employment for 12 months and 1,250 hours).

For what reason can employees take this leave?

Employees who are unable to work (or telework) because they need to care for their son or daughter (under 18 years of age) whose school or place of care has been closed, or whose child care provider is unavailable, due to a declared public health emergency related to COVID-19.

Is the employee paid during the leave?

The first 10 days are unpaid, but the employee may elect to substitute any accrued vacation, personal, medical, or sick leave. After that, the employer must pay the employee a calculated amount of pay during the remainder of the 12 weeks of leave.

How much does the employer have to pay the employee during the leave?

After the first 10 days, the employer must pay the employee at least two-thirds of the employee’s “regular rate of pay,” as defined by the Fair Labor Standards Act (*i.e.*, the “regular rate” that is used for overtime purposes), for the number of hours the employee otherwise would normally be scheduled to work, up to a maximum of \$200 per day and \$10,000 during the leave period. If the employee does not have a regular schedule, the Act provides a method of calculating the hours of pay.

Is the employer required to maintain the employee’s benefits during the leave?

Yes. The employee is entitled to the same benefit continuation as with other types of FMLA leave.

Does the employee have a right to their job after the leave?

In some cases. For employers with 25 or more employees, the standard FMLA reinstatement rights apply. For employers with fewer than 25 employees, reinstatement is not required if the employee's job does not exist at the time of return and certain other conditions are met (but the employee must be provided the position if it is recreated within one year).

Will the federal government reimburse the employer for the cost of the leave?

The employer can take a payroll tax credit in the amount of 100 percent of the pay provided to employees during this leave (up to the maximums described above) and the health plan costs incurred by the employer, in the calendar quarter in which such paid leave was provided. If the tax credit amount is larger than the employer's applicable tax liability, the employer will be reimbursed by the federal government. If the employer provides a more generous amount of pay than required by the Act, the excess amount cannot be taken as a payroll tax credit.

Do employees who take this type of leave have other protections?

Yes. Because this new type of leave is an addition to the federal Family and Medical Leave Act, the anti-retaliation provisions of the FMLA apply.

For how long is this leave available?

Until December 31, 2020.

When will we have more details on how to implement this leave?

The Secretary of Labor is authorized to publish regulations which, among other provisions, could exclude certain health care providers, emergency responders, and small businesses with fewer than 50 employees when the leave would jeopardize the viability of the business as a going concern. Also, the Secretary of the Treasury is authorized to publish regulations regarding the tax credit process.

Will we need to notify employees of this new type of leave?

Probably. The Act does not specifically address this question. However, the FMLA, of which this new leave is now a part, requires employers to have a written policy explaining the types of FMLA leave available, and to designate qualifying leaves as FMLA leave. We anticipate that the regulations, once issued, will provide more specific guidance on notice requirements.

10 Days of Emergency Paid Sick Time
("Emergency Paid Sick Leave Act")

How much sick time is provided by the new law?

Full time employees are entitled to 80 hours; part time employees are entitled to the average number of hours they work over a two-week period. However, the sick pay amounts are capped, and the rate of pay is reduced for certain uses of sick time; see below.

Which employees are eligible?

All employees, except that an employer can deny leave to a health care provider or an emergency responder.

For what reason can employees use this sick time?

Sick time can be used by employees who are unable to work (or telework) because they:

- (1) are subject to a government quarantine or isolation order related to COVID-19;
- (2) have been advised by a health care provider to self-quarantine due to COVID-19 concerns;
- (3) are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) are caring for an individual who is subject to an order or advice as described in (1) or (2);
- (5) are caring for a son or daughter of such employee because of a COVID-19 related closure of the child's school or place of care or the unavailability of the child care provider; or
- (6) are experiencing substantially similar conditions to be specified by the Secretary of Health and Human Services.

How is the employee's sick pay calculated?

For sick time used for reasons (1), (2) and (3) above: sick pay is calculated using the employee's "regular rate of pay," as defined by the FLSA; the maximum amount of sick pay per day is \$511; and the maximum amount of total sick pay is \$5,110. For sick time used for reasons (4), (5) and (6) above: sick pay is calculated using two-thirds of the employee's "regular rate of pay," as defined by the FLSA; the maximum amount of sick pay per day is \$200; and the maximum amount of total sick pay is \$2,000.

When does the employee's ability to use sick time end?

The employee must return to work, and their eligibility for this sick time ends, beginning with the next scheduled shift after the circumstances giving rise to the need for the leave have ended.

May an employer require an employee who needs to use sick time to find a replacement employee to cover the hours missed?

No.

May the employer require the employee to notify the employer of sick time use?

After the first day of sick time, an employer may require the employee to follow reasonable call in or notice procedures in order to continue receiving sick pay.

May an employer require an employee to use other types of paid leave before using this sick time?

No.

Does an employer have to provide this sick time if it already provides a sick time benefit that is as generous as what the Act requires?

Yes. This benefit is in addition to any sick time provide by state statute, an employer policy, or a collective bargaining agreement.

Will the federal government reimburse the employer for the cost of the leave?

The employer can take a payroll tax credit in the amount of 100 percent of the pay provided to employees during this leave (up to the maximums described above), in the calendar quarter in which such paid leave was provided. If the tax credit amount is larger than the employer's applicable tax liability, the employer will be reimbursed by the federal government. If the employer provides a more generous amount of pay than required by the Act, the excess amount cannot be taken as a payroll tax credit.

Do employees who use this sick time have other protections?

Yes. An employer may not discharge, discipline, or otherwise discriminate against an employee who uses the sick time or who files a complaint or testifies or is about to testify in a proceeding instituted to enforce the sick time requirement.

For how long is this sick time available?

Until December 31, 2020.

When will we have more details on how to implement this sick time requirement?

The Secretary of Labor is required to issue guidelines within 15 days after the effective date of the Act that explain how to calculate the sick time pay, and that could exclude certain health care providers, emergency responders, and small businesses with fewer than 50 employees when the leave would jeopardize the viability of the business as a going concern. Also, the Secretary of the Treasury is authorized to publish regulations regarding the tax credit process.

Will we need to notify employees of this new sick time?

Yes. Employers are required post a notice, and the Department of Labor is required to publish a sample notice within seven days of the effective date of the Act.

MASSACHUSETTS AMENDS UNEMPLOYMENT STATUTE
TO ADDRESS COVID-19 ISSUES

On March 18, 2020, Massachusetts Governor Baker signed legislation amending the state’s unemployment statute to address the rapid rise in unemployment claims filed as a result of the COVID-19 pandemic. Under the Massachusetts unemployment statute, individuals who are eligible for unemployment benefits normally have a one-week waiting period before they can begin collecting the benefits. The new legislation waives the one-week waiting period for “any person who has become separated from work as a result of any circumstance relating to or resulting from the outbreak of the 2019 novel Coronavirus or ‘COVID-19’ or the effects of the Governor’s March 10, 2020 declaration of a state of emergency.” Employers who are forced to lay off or furlough employees should encourage employees to apply for unemployment benefits (and provide them the DUA Form 0590A); however, employers should not advise employees whether they will or will not be eligible for unemployment benefits. Benefit eligibility is determined by the Massachusetts unemployment agency, not the employer.

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Given the coronavirus pandemic, employers are wise to keep informed as to the various legislative and other developments that may impact their business planning and legal obligations to employees. Although we are temporarily working remotely to encourage appropriate social distancing, we remain available to advise you through this difficult time. Calls to the office will ring through to our cell phones, and of course we remain available by email. Please email or call us if we can be of any assistance.

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