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Coronavirus (COVID-19) Update - Is Your Business Ready for the Employment and Employee Benefit Changes?


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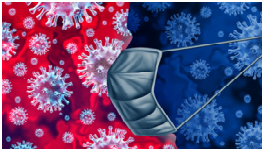
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Agenda

- Background – Current status of COVID-19
- Families First Coronavirus Response Act
- Benefits-related issues during the pandemic
- Employment-related issues during the pandemic
- Q&A



Status of Coronavirus (COVID-19)

- First identified in Wuhan, China in December 2019
- As of March 19, 2020, more than 209,000 cases have been diagnosed globally
- 8,778 people have died – a mortality rate of 4.2%



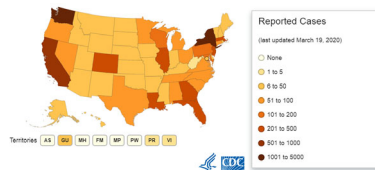
Comparison – One Week Ago

- | | |
|-----------------|-----------------|
| • 125,000 Cases | • 209,000 Cases |
| • 4,613 deaths | • 8,778 deaths |



Coronavirus (COVID-19)

- In the U.S. (as of March 19, 2020)
- 10,442 (1,215 one week ago)
- 150 deaths (36 one week ago)



Paid Sick Leave

- The Emergency Paid Sick Leave Act (the paid leave provision) requires private employers who employ **fewer than 500 employees** (and government employers) to provide paid sick time to employees **to the extent that the employee is unable to work (or telework)** because of certain COVID-19 related reasons.
- Effective Date: **4/2/2020**
- All employees no matter how long employed.
- Exception: Employers of health care providers or emergency responders may elect not to provide this leave to those employees. **Note: this does NOT exempt health care employers generally.**
 - **What is a health care provider?** A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or any other person determined by the Secretary of Labor to be capable of providing health care services.

Paid Sick Leave

1. The 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 concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine.
5. The employee is caring for a son or daughter because the child's school or place of care has been closed or the child's childcare is unavailable due to COVID 19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of the HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Paid Sick Leave

- **80 hours** (or PT equivalent)
- What if employee hours vary from week to week?
- If time off is taken for self-care, employees must be compensated at the higher of (1) the employee's regular rate of pay, (2) federal minimum wage, or (3) the local minimum wage.
- If time off is taken to care for someone else or a child who is not in school, employees must be compensated at 2/3rd of their regular rate of pay.
- **Capped** at \$511 per day or \$5,110 total for 1-3 and \$200/day or \$2,000 total per employee for 4-6;
- There is no carryover from year to year for this paid sick time. Right to pay ends on 12/31/2020
- Once the need for leave ends, the employer is not required to provide any further paid sick leave as required by the Act.
- Employers cannot require an employee to find a replacement before allowing the employee to take this paid sick time.

Paid Sick Leave

- An employee may first use the paid sick time before other leave
- An employer **may not require** an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time.
- Failure to provide leave is an FLSA violation
 - Fines, imprisonment up to 6 months
 - Amount of leave not paid
 - Liquidated damages for willful violations
 - Attorneys' fees
 - Collective Actions????
- Retaliation prohibited
 - Cannot discharge, discipline or in any other manner discrimination against an employee who takes leave or who files a complaint
 - If an employer willfully retaliates, it is an FLSA violation (see above)

Day 1 FAQs – Paid Sick Leave



Day 1 FAQs – Paid Sick Leave

- The Secretary of Labor is supposed to provide guidance within 15 days
- How do we calculate the 500 employee threshold?
- Can employees use this paid sick leave for non-coronavirus illnesses or injuries?
- Can paid sick leave be taken intermittently?
- Can we require a doctor's note upon return to work?
- Do I have to pay out unused leave if I have to terminate the employee or I have to close my business?

FMLA Amendments – Paid FMLA

- Employers who have fewer than 500 employees
- Employees who have worked 30 days or more
 - Includes part-timers
- Exception: Employers of health care providers or emergency responders may elect not to provide this leave to those employees. **Note: this does NOT exempt health care employers generally.**
- 12 weeks total (**10 of them partially paid**)
- For school and childcare-related COVID-19 absences but if employee cannot work or telework
- First 10 days can be unpaid but employee can use any other available paid time off (including paid sick leave) that they have
- 2/3rd of employee's regular pay (at minimum) * hours worked
- Employees should provide notice *if* reasonably practicable
- Caps: Paid E-FMLA may not exceed \$200 per day and \$10,000 in the aggregate.
- Effective **April 2, 2020**

FMLA Amendments – Paid FMLA

- Job Restoration
 - FMLA's standard job restoration requirements will apply to employers with 25 or more employees.
 - For employers who employ fewer than 25 employees, job restoration is not required if all the following conditions are met:
 - The employee takes E-FMLA
 - The position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave
 - The employer makes reasonable efforts to restore the employee to an equivalent position
 - If no equivalent positions are available at the time the employee tries to return from leave, the employer must attempt to contact the employee if an equivalent position becomes available in the next year.

Day 1 FAQs - FMLA Amendments – Paid FMLA

- How do we calculate the 500 employee threshold?
- How is son or daughter defined?
- Can leave be taken intermittently?
- Does the employee need to request E-FMLA?
- What about payment of insurance premiums while on leave?
- What documentation can we require?
- What if the employee has already exhausted their FMLA or has less than 12 weeks remaining?

REMEMBER, THIS IS AN AMENDMENT TO THE FMLA. IT PROVIDES AN ADDITIONAL REASON FOR LEAVE. LOOK TO THE EXISTING FMLA GUIDANCE WHEN YOU CAN.

Employee Benefits Issues

- Implications of Cost Cutting Measures
- Health Plans
- HIPAA and other privacy laws
- Retirement Plans

EMPLOYEE
BENEFITS



Employee Benefits Implications of Cost Cutting Measures

- Furloughs, layoffs, reductions in force, reduction in hours, and leaves of absence
- Impact on health and welfare benefits
 - Section 125 qualifying events to make payroll deduction changes
 - Leave of absence
 - Loss of eligibility
 - COBRA
 - Use of Telemedicine
 - Use of Employee Assistance Programs
- Short-Term Disability Plans
 - Waiting periods
 - Benefits amounts

BENEFITS



Health Plans

- ACA Preventive Service mandate
 - Preventive services are required to be paid at 100%, but does not include testing or treatment for COVID-19
- Families First Coronavirus Response Act requires all fully insured and self-funded plans to cover testing and treatment for COVID-19
- State Insurance Mandates may require coverage of COVID-19 testing and treating for fully insured plans
- IRS Notice 2020-15 released on March 11 that high-deductible health plans ("HDHPs") can pay for Coronavirus-19 related testing and treatment before deductibles are met
 - Health Savings Account ("HSA") eligible individuals will continue to be eligible to contribute to HSA, even if the COVID-19 costs are paid before deductibles are met
 - Telemedicine and its impact on HDHP was not addressed
 - Currently, telemedicine programs must charge fair market value of services to HDHP participants who use telemedicine services

HIPAA and Privacy

- Employer is not a covered entity under HIPAA, but the Health plan is a covered entity
- HIPAA restrictions on uses and disclosures apply to information provided to or obtained from the health plan, unless an exception exists
- Exceptions: Public Health Activities, Serious and Imminent Threat, or Health Oversight



Retirement and Pension Plans

- Review plan terms to determine if mid-year changes can be made to match contributions and employee deferral elections
- Plan terms could provide hardships or in-service withdrawals for plan participants
- Possibility of congressional or governmental agency relief
 - In the past, the IRS has provided relief under disaster relief and extension of funding deadlines
 - Possible usage of Stafford Act



Potential Legal Issues

- Americans With Disabilities Act (ADA)
- Occupational Safety and Health Act (OSHA)
- Family and Medical Leave Act (FMLA)
- Title VII of the Civil Rights Act of 1964
(discrimination based on race or national origin)
- Fair Labor Standards Act (FLSA)



Potential Legal Issues

- National Labor Relations Act (NLRA) and Railway Labor Act (RLA)
- Worker Adjustment and Retraining Notification Act (WARN)
- Workers' Compensation
- Contract / Common law claims
- State and local laws regarding leave, wages, etc.



Legal Issues - ADA

- COVID-19 is generally not a "disability" under the ADA, but could lead to or affect disabling conditions
- Beware of potential "regarded as" claims
- Persons with existing disabilities (e.g., compromised immune systems) might request a reasonable accommodation
 - Don't neglect the interactive process



Legal Issues - ADA

- Employers **may** require individuals who take trips to Europe and other Level 3 countries to stay home upon their return during the 14-day incubation period
- It should be clear that this policy is limited to the unusual circumstances of potential Coronavirus exposure



Legal Issues – ADA / Title VII

- **Temperature check?**
 - EEOC gave the green light
 - Ensure proper procedures (e.g., safety and confidentiality)

https://www.eeoc.gov/eeoc/newsroom/nyask/nyask_ada_rehabilitation_act_coronavirus.cfm



Legal Issues – ADA / Title VII

- Exercise Caution with Screening Questions

COVID-19, Cold and Flu

Ohio Department of Health

How can you tell the difference?

SYMPTOMS	CORONAVIRUS COVID-19	COLD	FLU
Sore throat	Sometimes	Common	Common
Cough	Common	Common	Common
Sneezing	—	Common	Sometimes
Fever	Common	—	Common
Body aches	Sometimes	Mild	Common
Tiredness	Sometimes	Mild	Common
Headache	—	—	Common
Runny/stuffy nose	—	Common	Sometimes
Nausea	—	—	Sometimes
Shortness of breath	In severe cases	—	—

Source: Centers for Disease Control and Prevention, April 2020

Legal Issues – ADA / Title VII

- What about requiring medical clearance (from ill or traveling employees)?
- Be careful of potential national origin, race, ethnicity discrimination claims

Legal Issues - OSHA

- Requires that employers provide employees with workplace free from "recognized hazards" that cause or are likely to cause death or serious physical harm (general duty clause)
- Tension between OSHA and ADA



Legal Issues - OSHA

- Under OSHA, employees may refuse to work when there is a reasonable belief that there is a risk of imminent death or serious injury
- Retaliation for complaints about workplace safety



Potential Legal Issues – FLSA

- Changed pay practices due to
 - telework
 - job coverage
- Monitoring/regulating telework
- Impact on exempt/non-exempt status



Potential Legal Issues – FLSA

- Telecommuting recordkeeping and pay issues
- Deductions for voluntary absences (exempt and non-exempt)
- Deductions for involuntary absences (exempt and non-exempt)




Legal Issues – NLRA

- Union contract policies, such as sick leave, loss of seniority
- Unilateral changes
- If a group of employees refuses to work because of concerns about Coronavirus, the refusal may be considered protected concerted activity
- Hiring replacements


Legal Issues – WARN Act

- Only an issue with six-month shut down
 - Check state law
- Temporary lay-offs or shut downs permitted
- If statute triggered (extreme event), Coronavirus epidemic may be an exception to the 60-day notice requirement


Questions?




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