Employment Law Questions Facing Your Business during the Pandemic

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Families First Act

- Requires certain paid sick leave and paid leave for childcare reasons
- Effective April 1, 2020
- Covers all employers with fewer than 500 employees
- Employers with fewer than 50 employees may be exempted

Families First Act

- Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:
  1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
  2. has been advised by a health care provider to self-quarantine related to COVID-19;
  3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
  4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
  5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
  6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Sick Leave Requirements

- Calculating Sick Leave Hours
  - Under EPSLA, full-time employees are entitled to up to 80 hours of job-protected leave
  - Full-time employee is one who is regularly scheduled to work at least 40 hours per week
  - If an employee is regularly scheduled to work fewer than 40 hours, "part-time employee" and is entitled to the number of hours the employee is regularly scheduled to work in a two- week period

Sick Leave Requirements

- Calculating Sick Leave Pay
  - Employers cannot require employees to use other paid leave prior to or concurrent with EPLSA leave
  - EPSLA leave is paid at a rate that is the greater of the employee's regular rate of pay or the minimum wage rate in the employee's jurisdiction, up to $511 per day and $5,100 total, for leave taken for the employee's own condition (Reasons 1-3)
  - For employees using EPSLA to care for an individual or for childcare reasons, EPSLA is paid at a rate that is equal to two-thirds of the applicable EPSLA rate, up to $200 per day and $2,000 total (Reasons 4-6)

Family and Medical Leave

- Under the EFMLEA, eligible employees who are unable to work (or telework) because they need to care for a child under 18 because the child's school or place of care has been closed, or the childcare provider is unavailable due to the COVID-19 emergency, can take up to 12 weeks of leave
- Paid at a rate that is equal to two-thirds of the applicable EPSLA rate, up to $200 per day and $2,000 in the aggregate (Reason 5)

Tax credits for required paid leave

- Refundable tax credit for certain leave provided to employees
- 100% of the qualified sick leave and qualified family leave wages paid to employees
- Cannot claim a tax credit for any paid leave you provide in excess of the amounts required to be paid under the Act or for any leave provided before April 1, 2020 (or after December 31, 2020)
- Tax credit for qualified sick leave wages cannot exceed $200 ($511 if the employee is the one quarantined or sick) for each day for which the employee receives qualified sick leave wages, capped at 10 days per employee
- Tax credit for qualified family leave wages paid to an employee cannot exceed $200 for each day for which the employee receives the qualified family leave wages, capped at $10,000 per employee

Required DOL Posting

- Department of Labor published required poster
- Even if you have fewer than 50 employees or are an exempt health care provider, you should post the poster
- An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website
- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Unemployment

- Terminated, laid off, or furloughed employees may qualify for benefits
- Employees whose pay rate or work hours have been cut may qualify for benefits
- In North Carolina, benefits paid to employees because of COVID-19 will not be charged to their employer's unemployment accounts

North Carolina Rules

- North Carolina max benefit per week is $350
- Max duration is 12-20 weeks depending on current unemployment rate (currently 12 weeks maximum duration)
- Employees can apply online here: https://des.nc.gov/apply-unemployment

North Carolina Rules

- Governor Cooper's Executive Order on March 17, 2020
  - Effective immediately and in effect indefinitely
- Employers will not be charged for unemployment benefits provided to workers for reasons related to COVID-19
- Workers encouraged to apply online
- DES to "interpret flexibly or waive:
  - One-week waiting period for benefits
  - Able to work and available to work requirements
  - Work search requirements
  - Actively seeking work requirements
  - "Lack of work" requirement

North Carolina Rules

- Can employees quit and qualify for unemployment?
  - Cut in pay of 15% or more
  - Cut in hours of 50% or more
- Can employees who have hours cut but are still employed qualify for partial unemployment?
  - Cut in regular schedule of 60% or more

Federal Supplement

- $600 additional per week for employees who are receiving state unemployment benefits (ends July 31, 2020)
- Up to 13 additional weeks beyond state maximum
- DES intends to implement the programs in the following order.
  - **Federal Pandemic Unemployment Compensation (FPUC):** Additional $600 in weekly unemployment insurance benefits to eligible claimants. We are currently testing our system for this program and anticipate making the first payments by April 17, 2020.
  - **Pandemic Unemployment Assistance (PUA):** Unemployment compensation for individuals not eligible for regular unemployment insurance or any extensions to unemployment insurance. This will provide benefits to eligible self-employed workers and independent contractors. We anticipate the system will be ready to accept claims for this assistance around April 25, 2020.
  - **Pandemic Emergency Unemployment Compensation (PEUC):** Up to 13 additional weeks of benefits for those who have exhausted their state unemployment benefits. A definitive timeline for completing system updates for this program is not yet available.

Employee Benefits

- May be ways to continue some or all benefits during a furlough or layoff. Must review terms of each plan. Many plans include a provision that employees be “employed” or “actively at work” and, therefore, employees may lose eligibility under the terms of the plan if they are not performing services
- In addition, service requirements for eligibility (such as offering benefits only to employees working at least 30 hours per week) may cause an employee to lose eligibility during a temporary leave (but not in all circumstances)

Employee Benefits

- CARES Act allows a sponsor of a 401(k), 403(b), or 457(b) plan to permit distributions of up to $100,000 during 2020 to a participant who:
  - Is, or whose spouse or dependent is, diagnosed with COVID-19, or
  - Experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having hours reduced, or being unable to work due to lack of childcare as a result of COVID-19
- Not subject to the normal 10% early withdrawal penalty
- Participants who take such distribution may take the distribution into income over the three year period beginning on the date of the distribution and may repay such distribution to a qualified plan
- In addition, 401(k) and 403(b) plans may permit loans to participants impacted by coronavirus (as described above) of up to the lesser of $100,000 or 100% of the participant's vested account balance

Layoffs and Furloughs

- Layoff v. Furlough: What is the difference?
- Consider health insurance coverage benefits of furloughs
  - Cigna
  - Blue Cross Blue Shield NC
- COBRA requirements
- H-1B or E-3 visa employee cannot be placed on unpaid furlough because of the prevailing wage requirements

WARN Act

- Worker Adjustment and Retraining Notification Act of 1988
- Covers employers with 100 or more employees
- Requires 60 days' notice in advance of certain layoffs
- Plant shut down of a facility or operating unit within a single site of employment and layoff of 50 or more employees
- Mass layoff is a reduction in force that is an employment loss of 500 or more employees during a 30 day period or a loss of 50-499 employees if they make up at least 33% of the employer's active workforce

WARN Act

- WARN Act exceptions (there are three – one applicable)
  - **Unforeseeable business circumstances:** When the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required (i.e., a business circumstance that is caused by some sudden, dramatic, and unexpected action or conditions outside the employer's control, like the unexpected cancellation of a major order)
- Layoffs of six months or less do not trigger WARN

Searching for answers to your questions?
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