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**What Employers Need to Know About
The New Employment Laws Under
The Families First Coronavirus
Response Act**

WHAT'S NEW FOR EMPLOYERS



- Three employment-related changes:
 - Emergency Family and Medical Leave Expansion Act
 - Emergency Paid Sick Leave Act
 - Tax Credits for Paid Sick Leave and Paid Family And Medical Leave

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- Amends the FMLA
 - Requires that leave be paid for certain amount of time
 - Only applies for certain type of leave
 - Amends job restoration requirement for employers
 - This leave is only temporary

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- New leave requirement when the leave is due to “Qualifying need related to a public health emergency”
 - Qualifying need means:
 - Occurs when employee is unable to work (or telework);
 - Due to a need for leave to care for the son or daughter under 18 years of age of such employee;
 - If the school or place of care has been closed,
 - Or the child care provider of such son or daughter is unavailable
 - Due to a public health emergency:
 - “Public health emergency” means “emergency with respect to COVID-19 declared by a Federal, State, or local authority.”

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- To whom does this new leave requirement apply?
- Applies to “eligible employees”
 - An employee who has been employed for at least 30 calendar days
- Applies to employers with “fewer than 500 employees”
 - No longer has requirement that employer have those employees during 20 or more calendar weeks

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- Some relief for small businesses
- Secretary of Labor can exempt “small business with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern”
- But needs to do so through regulations
- Not automatic
- May take some time

IRS AND DOL PROVIDE SOME RELIEF



- On March 20, 2020, the IRS & DOL issued a letter about the small business exemption (among other things)
 - They note the small business exemption and state that “Labor will provide emergency guidance and rulemaking to clearly articulate this standard”
- They also implement a “non-enforcement period”
 - To allow “employers to come into compliance with the Act”
 - “Labor will not bring any enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply with the Act”

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- The leave must be paid but the employer can elect not to pay for the first 10 days of leave
- However, if the first 10 days are unpaid, employee can elect to substitute accrued vacation leave, personal leave, or medical or sick leave for unpaid leave
- After 10 days, the leave must be paid

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- What amount do you pay?
- Calculate amount that is not less than $\frac{2}{3}$ of employee's regular rate
- The regular rate is the same as the regular rate under the FSLA for calculating overtime
- Must pay for the number of hours employee "would otherwise be normally scheduled to work"
- In no event will the paid leave exceed \$200 per day or \$10,000 in the aggregate, per employee

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- What about job restoration?
- Apply general FMLA restoration rules unless the following apply:
 - Employer employs “fewer than 25 employees” AND
 - The employee takes leave under this section for coronavirus AND
 - The position he held when leave commenced “does not exist due to economic conditions” that affect employment AND
 - Those economic conditions “are caused by a public health emergency during the period of leave” AND

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- AND employer makes reasonable efforts to restore the employee to an equivalent position “with equivalent employment benefits, pay, and other terms and conditions of employment” AND
- If those efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available for the following time frames:
 - for 1 year beginning on earlier of
 - day when the emergency concludes OR
 - the date that is 12 weeks after the date on which the leave commences

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- What if you have multi-employer collective bargaining agreement?
 - Employer can make contributions to fund based on paid leave each of its employees is entitled to under this new law while working for employer

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- What about enforcement?
 - If employer was not subject to FMLA prior to enactment of Expansion Act (i.e., has less than 50 employees), then law specifically prevents employees from filing lawsuits in court
 - But they can file charge with DOL, which can then sue on employee's behalf or seek equitable relief (injunctions, etc.)
 - If employer is subject to FMLA prior to enactment of Expansion Act, then employee can file lawsuit as normal.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT



- How long does this last?
 - Expires December 31, 2020

EMERGENCY PAID SICK LEAVE ACT OVERVIEW



- Overview
 - Requires employers to provide paid sick leave
 - For two weeks
 - Applies to most employees and employers
 - Contains anti-discrimination provision

EMERGENCY PAID SICK LEAVE ACT



- To whom does this law apply?
 - Employees
 - As defined under FLSA; in other words, just about every employee
 - Available to all employees immediately “regardless of how long the employee has been employed by an employer”
 - Employers
 - As defined under FLSA; any industry affecting commerce
 - If private employer, has fewer than 500 employees

EMERGENCY PAID SICK LEAVE ACT



- Employers shall provide to each employee
 - Paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave
- Need for leave applies only to six scenarios

EMERGENCY PAID SICK LEAVE ACT



- Six scenarios

1. Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
2. Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
4. Employee is caring for an individual who is subject to an order [1 above] or has been advised as described in [2 above]
5. Employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions
6. Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and Secretary of Labor

EMERGENCY PAID SICK LEAVE ACT



- What exactly is an employee entitled to?
 - Employee entitled to the following amount of sick time:
 - If full-time, 80 hours
 - If part-time, number of hours equal to the number of hours that such employee works, on average, over a 2-week period
 - If employee's schedule varies and can't determine what they would have worked, then use number equal to the average number of hours that employee was scheduled over the 6-month period ending when employee takes such leave, including hours for which employee took leave of any type
 - If the employee did not work over that 6-month period, then use the reasonable expectation of the employee at the time of hiring of the average number of hours per day he would normally be scheduled to work

EMERGENCY PAID SICK LEAVE ACT



- How is pay calculated?
 - Calculated on employee's "required compensation" and number of hours employee would normally be scheduled to work but in no event shall it exceed:
 - \$511 per day and \$5,110 in aggregate for leave in scenarios 1-3 (personal leave)
 - \$200 per day and \$2,000 in aggregate for leave in scenarios 4-6 (to care for someone else)

EMERGENCY PAID SICK LEAVE ACT



- How much do employers have to pay?
 - Required compensation is greater of:
 - Employee's regular rate under FLSA or
 - Minimum wage under FLSA or
 - Minimum wage in effect in applicable state or locality in which employee is employed
- But if caring for someone else (scenarios 4-6), pay is only $\frac{2}{3}$ of compensation above

EMERGENCY PAID SICK LEAVE ACT



- Employer's other obligations?
 - Have to post notice once Secretary of Labor creates it
 - SOL has 7 days to prepare it, so be on the look out
- Unlawful to discharge, discipline, or in any other manner discriminate against any employee who takes leave or files a complaint, or instituted, or caused to be instituted a complaint (with the DOL) under this section

EMERGENCY PAID SICK LEAVE ACT



- Enforcement?
 - Failing to provide sick leave is same as failing to pay minimum wage, so subject to FLSA damages
 - Back pay, liquidated damages (double damages), attorney's fees

EMERGENCY PAID SICK LEAVE ACT



- Miscellaneous
 - Paid-sick leave does not carry over to next year
 - Sick leave ends when need for leave expires or amount of leave is exhausted
 - Employer may not require, as a condition of providing sick leave under this section, that the employee “search for or find a replacement employee to cover the hours during which the employee is using paid sick time”
 - 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 under this Act
 - Don't have to pay out if employee is fired, resigns, retires, or otherwise separates from employment

EMERGENCY PAID SICK LEAVE ACT



- Miscellaneous
 - Employer can impose “reasonable notice procedures in order to continue receiving such paid sick time”
- Secretary of Labor can impose regulations to:
 - Exclude certain health care providers and emergency responders from eligibility
 - Exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern; and
 - As necessary to carry out the purposes of this Act, including to ensure consistency with new FMLA requirements (double-dipping?)

EMERGENCY PAID SICK LEAVE ACT



- What if you have multi-employer collective bargaining agreement?
- employer can make contributions to fund based on paid leave each of its employees is entitled to under this new law while working for employer

EMERGENCY PAID SICK LEAVE ACT



- When does this start?
 - No later than 15 days after enactment
 - April 2, 2020
- How long does this last?
 - Expires December 31, 2020

INTERSECTION OF TWO LAWS



- They overlap only sometimes
 - FMLA expansion applies only to care for son or daughter when schools or provider is closed; sick leave applies to more scenarios than that
 - All employees eligible for sick leave; under the FMLA expansion, need to have worked for 30 days
 - Sick leave is paid for up to 80 hours; FMLA expansion maybe only after 10 days
- Need to be aware of:
 - Who is requesting leave
 - The reason for leave
- Need regulations to see if they run concurrently or consecutively

EL PASO STAY AT HOME ORDER



- Takes effect today at 11:59 PM
- Directs all residents to stay at home
- Residents may leave to perform certain Essential Activities, to perform work in Essential Business, Government Service, or in Critical Infrastructure
- Residents may also leave to engage in Essential Travel or Minimum Basic Operations

EL PASO STAY AT HOME ORDER



- Essential Activities include:
 - Seeking emergency services, obtaining medical supplies or medication, or visiting a health care professional
 - Obtaining groceries and food, supplies to work from home, household consumer products, and products necessary to maintain the safety, sanitation, and essential operation of residences,
 - Outdoor activities – biking, walking, hiking or running – but must abide by social distancing requirements
 - To care for others
 - To seek a safe residence

EL PASO STAY AT HOME ORDER



- Healthcare operations are exempt from order
 - Hospitals, clinics, dentists, physical and occupational therapy offices, and pharmacies
- Critical infrastructure operations are exempt from order
 - Public work construction, residential and commercial construction, and construction supporting airport operations, water, sewer, gas, roads and highway, solid waste removal, internet cable, and telecommunication systems
 - <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>
- Essential government functions are exempt from order
 - Police officers, fire department, ambulance drivers, and emergency management personnel

EL PASO STAY AT HOME ORDER



- Essential Businesses include:
 - Healthcare operations
 - Stores that sell groceries and other essential supplies
 - Providers of basic necessities to economically disadvantage populations
 - Financial institutions
 - Laundry services
 - Restaurants for consumption off-premises
 - Transportation (airplanes, taxis, Uber/Lyft)
 - Animal shelters & zoos
 - Funeral and post-mortem services

EL PASO STAY AT HOME ORDER



- Enforcement:
 - A person who violates the order will be guilty of a misdemeanor
 - \$1,000 fine
 - Confinement in jail for up to 180 days

NEW MEXICO EMERGENCY ORDER CLOSING ALL BUSINESSES



- Prohibits mass gatherings
 - bringing together five or more individuals in a single room or connected space
- Requires all businesses to close
 - Exception for essential businesses
- Limits lodging facilities to operate at no more than 50%
- Call centers must close
- Casinos must close
 - Unless operating on Tribal lands

NEW MEXICO EMERGENCY ORDER CLOSING ALL BUSINESSES



- Essential businesses include:
 - Healthcare operations
 - Grocery stores, food banks, farmers' markets, convenience store
 - Homeless shelters & food banks
 - Farms, ranches, and other food cultivation
 - Hardware stores
 - Laundromats and dry cleaner services
 - Utilities
 - Funeral homes
 - Financial institutions
 - Restaurants, for delivery or carry out only

TAX CREDITS FOR PAID SICK LEAVE AND PAID FMLA



- Tax credits for employers required to provide paid leave under the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave

TAX CREDITS FOR PAID SICK LEAVE AND PAID FMLA



- Employers are entitled to a credit equal to 100% of the qualified leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act or Emergency Family and Medical Leave Expansion Act
- Qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter
- Qualified family and medical leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter

TAX CREDITS FOR PAID SICK LEAVE AND PAID FMLA



- Tax credits are allowed against the employer's portion of Social Security taxes
- Although limited, employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes the employer would owe

TAX CREDITS FOR PAID SICK LEAVE AND PAID FMLA



- Example:
 - If an employer paid \$5,000 in paid leave and is required to pay \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments
 - The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date

TAX CREDITS FOR PAID SICK LEAVE AND PAID FMLA



- Example:
 - If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments
 - The employer would then file a request for an accelerated credit for the remaining \$2,000
 - The IRS will send the refunds as quickly as possible

TAX CREDITS FOR PAID SICK LEAVE AND PAID FMLA



- Double benefits are not allowed
- No credit will be allowed for wages for which family and medical leave credit is already claimed under other provisions of the tax code
- Employers' gross income will be increased by the amount of the credit

TAX CREDIT FOR HEALTH PLAN EXPENSES



- Credits may be increased to include amounts employer pays for the employee's health plan coverage while they are on leave
- The amount of the employer's group health plan expenses must be properly allocated to the qualified paid leave
- Health plan expenses are "properly allocated" if they are made on a pro rata basis

TAX CREDITS



- Only employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits
- The credits do not apply to government employer
- Employers may elect not to take the tax credits provisions for any calendar quarter

EEOC GUIDANCE



- EEOC updated its 2009 Pandemic Preparedness in the Workplace and the Americans with Disabilities Act guidance
- Updated guidance makes clear that the ADA and Rehabilitation Act do not interfere with employers' adherence to advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace
- Updated guidance was issued on March 21, 2020

EEOC GUIDANCE



- Healthy individuals are not protected under the ADA for potential future illness
- Employees are not protected under the ADA for conditions which are transitory and minor
- Since most COVID-19 cases are mild, a diagnosis of COVID-19 will likely not fall within the purview of ADA protection
- However, complications from COVID-19 may constitute a disability under the ADA

EEOC GUIDANCE – MEDICAL EXAM



- Generally, the ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of employees
- An inquiry is "disability-related" if it is likely to elicit information about a disability
- By contrast, an inquiry is not disability-related if it is not likely to elicit information about a disability

EEOC GUIDANCE – MEDICAL EXAM



- A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health

UPDATED EEOC GUIDANCE – TEMPERATURE CHECKS



- COVID-19 coronavirus pandemic now meets the direct threat standard
- Employers may measure employees' body temperature
- Employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19
- These symptoms currently include fever, chills, cough, shortness of breath, or sore throat

UPDATED EEOC GUIDANCE – HIRING



- Employers may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job
- Employers may delay the start date of an applicant who has COVID-19 or symptoms associated with it
- Because CDC guidance states that an individual who has COVID-19 or symptoms associated with it cannot safely enter the workforce, an employer may withdraw a job offer to an applicant diagnosed with COVID-19 if the applicant would need to start immediately

EEOC GUIDANCE – ACCOMMODATION



- Employers must continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring an undue hardship

EEOC GUIDANCE – ACCOMMODATION



- If an employee with a disability needs the same reasonable accommodation at a remote work site that the employee had at the workplace, the employer should provide that accommodation, absent undue hardship
- In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation

EEOC GUIDANCE



- All medical information, including whether an employee had a fever or other symptoms would be subject to ADA's confidentiality requirements
- Employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or leisure reasons

OSHA CONSIDERATIONS



- OSHA General Duty Clause
- Employers are responsible for recording cases of COVID-19 if:
 - The case is a confirmed case of COVID-19;
 - The case is work-related; and
 - The case involves one or more of the general recording criteria (e.g. medical treatment beyond first-aid, days away from work)

WORKERS' COMPENSATION CONSIDERATIONS



- The employee may be entitled to workers' compensation if:
 - The employee was exposed to the virus while they were traveling for business OR
 - The employee was exposed to the virus at work by a coworker or someone who visited the workplace
- If this occurs, you should contact with your workers' compensation carrier

PRACTICAL CONSIDERATIONS



- Employees suffering from COVID-19 symptoms should be directed to remain at home until the employee meets CDC guidelines to return to work
- Allow longer absences if employees are unwell, including considering remote work
- Ensure the workplace has ample facilities for employees to wash their hands, including water and soap
- Ensure that third-party cleaning/custodial schedules are accelerated.
- Enforce social distancing as recommended by the CDC and state/local public health authorities

PRACTICAL CONSIDERATIONS



- Have a single point of contact for employees for all concerns that arise relating to health and safety concerns
- Same for any issues that may arise while employees are working remotely
- Follow updates from the CDC and the World Health Organization regarding additional precautions

WARN ACT CONSIDERATIONS



- WARN Act
 - Generally requires employers with 100 or more employees to provide notice 60 days before there is an “employment loss” caused by a:
 - “plant closing” or
 - “mass layoff” of at least 33% of the employees and at least 50 employees
 - Those are defined terms under the WARN Act
 - But, to apply, employees must suffer an “employment loss,” which is either:
 - A termination OR
 - A layoff exceeding 6 months OR
 - A reduction in hours of work of more than 50% during each month of a 6-month period

WARN ACT CONSIDERATIONS



- Terminating employees (as opposed to laying them off) may trigger WARN Act notices if a sufficient number of employees are discharged
- By contrast, if an employer lays off its employees, if that lay off does not extend past 6 months (or is not expected to extend that far), the notices under the WARN Act are not triggered

WARN ACT CONSIDERATIONS



- With the Coronavirus, most employers are laying off employees for 3 to 4 weeks
- Therefore, as a general matter, the WARN Act's notice provisions would not be triggered
- But be careful if the layoff:
 - Is expected to exceed 6 months or
 - Turns into employment terminations
 - Both of which would trigger WARN notices

WARN ACT CONSIDERATIONS



- Even if the WARN notices are triggered, there is an exception to providing the required notice when:
 - The layoff or termination is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required
- But, if this exception applies to Coronavirus-related closures or layoffs, the employer must still “give as much notice as is practicable and at the time shall give a brief statement of the basis for reducing the notification period”
- In other words, the WARN Act may apply depending on the method used (termination or layoff), the length of the employment separation, and the number of employees affected



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Thank you