

COVID-19 Preparedness: Updates and Answers from Smith & Downey

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March 27, 2020



Questions?

During the webinar if you have any questions please feel free to...

- Text Richard: (443) 250-8606
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Upcoming Webinars

MARCH 31ST, 9 AM – 10:30 AM EST

All You Need to Know on the Latest with COVID-19

Presenter: Laura Rubenstein, Esq.

APRIL 8TH, 12 PM – 1 PM EST

How to Prepare for a DOL Audit

Presenter: Stacy Barrow, Esq.

APRIL 29TH, 12 PM – 1 PM EST

International Employee Benefits: Intro to Mergers & Acquisitions

Presenter: Lewis Mosley



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- Upcoming Webinars
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Coronavirus (COVID-19) Employer Updates

March 27, 2020



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Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.

Families First Coronavirus Response Act

- Signed into law last week and is effective April 1, 2020, although there is a nonenforcement period until April 17.
- Overview:
 - New paid sick leave for COVID-19 reasons
 - Expansion of Family and Medical Leave Act (FMLA)
 - Which includes certain COVID-19 reasons and a new paid leave component
 - Has payroll tax credit included to help fund the paid leave mandates
 - Unemployment help for state unemployment insurance
 - Two “Divisions” related to employment law:
 - Division C – Emergency Family and Medical Leave Expansion Act
 - Division E – Emergency Paid Sick Leave Act
 - Applies to employers with fewer than 500 employees

Calculating 500 Employees

- DOL will follow the FLSA “joint employer” test for paid sick time, and the FMLA “integrated employer” test for emergency FMLA expansion
- The integrated employer test is fact-specific and generally looks at the following factors (no one factor controls, the relationship is viewed in the totality):
 - Interrelation of operations (i.e., common offices, common record keeping, shared bank accounts and equipment);
 - Common management, common directors and boards;
 - Centralized control of labor relations and personnel (i.e., do you share HR functions, share the same handbook, etc.);
 - Common ownership and financial control.

Division E – Emergency Paid Sick Leave

- Applies to employers with fewer than 500 employees
- Provides ten days of paid leave
 - 80 hours for full-time employees
 - Pro-rata amount for part-time employees based on two-week average
 - May be used for six COVID-19-related reasons
 - Amount paid is subject to caps, which are subject to the reason the leave is being used
- Secretary of Labor may issue certain regulations which would exclude health care providers and EMTs from the definition of “employee” and exempt employers with fewer than 50 employees if certain circumstances apply

PST Reasons

- Under the Emergency PST, there are six uses for sick leave:
 1. The employee is subject to a Federal, State, or local quarantine;
 2. A health care provider has advised the employee to self-quarantine;
 3. The employee has symptoms and is seeking diagnosis;
 4. The employee is caring for an individual under quarantine;
 5. The employee is caring for a child whose school or place of care is closed or a child care provider is unavailable due to COVID-19; or
 6. The employee is experiencing any other substantially-similar condition.

“Unable” to Work or Telework

- Unclear what it means to be “unable” to work or telework
- Could mean the following:
 - Employee is literally unable to work or telework because the employee cannot be set up to do the job from home; or
 - Employee could theoretically do the job from home, but working or teleworking is impossible or impracticable due to the child’s needs

PST Payment

- For reasons 1, 2, and 3, the employee must be paid at his/her normal rate of pay, up to \$511/day and \$5,110 in the aggregate
- For reasons 4 or 6, the employee must be paid at 2/3rds his/her normal rate, up to \$200/day and \$2,000 in the aggregate
- For reason 5 (to care for a child whose school/place of care), the employee must be paid at 2/3rds his/her normal rate, up to \$200/day and \$12,000 in the aggregate
 - Due to its inclusion in expanded FMLA section
 - Payments are for a 12-week period – two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave

PST Part-time Calculation

- Regular schedule: Part-time employees are entitled to a pro-rata amount based on number of hours regularly worked during a two-week period
 - Example: Employee regularly scheduled to work 25 hours a week. Employee is entitled to 50 hours of PST.
- Varied schedule:
 - Calculated based on the average number of hours the employee was scheduled per day over the last 6 months before leave
 - If the employee has not worked 6 months, he/she is entitled to the reasonable expectation of the employee at the time of hire regarding the average number of hours he/she would be scheduled to work

PST Continued

- PST must be available for immediate use on April 1, regardless of how long the employee has been employed by an employer
- The Act also prohibits an employer from requiring employees to draw from existing paid time off (personal, sick, vacation leave, etc.)
 - The employee must be allowed to use PST before dipping into any other accrued leave provided by the employer
 - Consider it a **new leave bank** – in addition to other leave already provided by the employer
- Notice and Records:
 - Must post the DOL-provided notice/poster
 - Must keep records related to use for 3 years

Required Notice for PST

- Where leave is foreseeable, an employee should provide as much notice of leave to the employer as is practicable
- After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time

Intermittent PST Use?

- Unclear, but it's a likely "yes"
- Amount of PST is described in "hours"
- Employee's right to take paid sick leave ends on the "next scheduled workshift immediately following the termination of the need for paid sick time"
- Raises some question as to whether the employee would be able to use any remaining sick leave in the future once they have returned from leave

Employee Benefits During PST

- Likely treat the same as you do for any other paid bank of leave (vacation, PTO, sick leave, etc.)
- Review health plan for any possible COBRA issues

Division C – FMLA Expansion

- Also applies to employers with fewer than 500 employees
 - There is an exemption for health care providers and EMT workers, as well as employers with fewer than 50 employees, *if* the leave would jeopardize the viability of their business as a going concern
- Employees are eligible if they've been on payroll for 30 calendar days immediately prior to the day leave would begin
- Allows for up to 12 weeks of leave
- Provides for an additional use for FMLA leave:
 - Where the employee is unable to work or telework due to the need for leave to care for his/her minor child (younger than 18 years old) because the child's school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency
 - *Use is also included in the Emergency PST*

FMLA Expansion

- The first ten work days may consist of unpaid leave
 - The employee is able to substitute any accrued vacation leave, personal leave, or medical/sick leave for this unpaid leave – and the employee may use unused PST time as well
- After first ten days, leave must be paid in an amount equal to 2/3rds of the employee's regular rate of pay
 - Up to \$200/day, and \$10,000 in the aggregate
- The employee is only entitled to a total of 12 weeks of leave due to caring for a child whose school or place of care has closed because of COVID-19
 - First two weeks can be paid under the Paid Sick Leave provision, while the next 10 weeks will be paid under the FMLA expansion provision

Intermittent FML Use?

- Also unclear (similar to PST)
- Aggressive interpretation: If an employee can physically do the job from home, they are not “unable to work or telework” and not entitled to emergency FML
- Conservative interpretation: An employee may be able to physically do the job from home, but realistically is not able to telework because of the needs of the child
- Recommendation: Track hours actually worked; pay regular rate for hours actually worked; pay 2/3rds wage rate for hours not worked up to normal schedule (and capped at \$200/day); and only count hours not worked against the 12-week entitlement

Calculating FML “Regular Rate” for Part-Time Employees

- Regular schedule: Pay the number of hours that the employee was regularly scheduled to work during the week
- Varying schedule:
 - Pay the average hours that the employee was scheduled to work per day over the 6-month period prior to when the employee takes the leave (including hours employee was on other leave)
 - If employee has not worked 6 months, pay the number of hours per week the employee reasonably expected to work at the time of hire

Employee Benefits During Emergency FML

- Regular FMLA provisions regarding benefits apply
- Because emergency FML will be paid, may deduct health insurance premiums from pay
- The Act allows employers to recoup cost of health insurance premiums, as well as wages, through tax credits

Interaction of FMLA Expansion with Regular FMLA

- Employers Not Otherwise Covered by FMLA:
 - Only required to provide family for this one reason (unable to work or telework because of child's school/place of care is closed)
- Employers Otherwise Covered by FMLA:
 - Employees must meet regular eligibility requirements for regular FMLA reasons
 - Must have worked for employer for at least 12 months, for at least 1,250 hours during past 12 months, and work at a location with 50 employees in a 75-mile radius
 - Only waive regular eligibility requirements for this one emergency FML reason
 - Count any emergency FML toward standard 12-week FMLA entitlement
- **Only leave taken for this expanded reason is paid**

Reinstatement After Emergency FML Leave

- Reinstatement
 - Typical FMLA reinstatement rules apply
 - Except for employers with fewer than 25 employees and:
 - The employee's position no longer exists
 - Reasonable efforts have been made to restore the employee to an equivalent position
 - And reasonable efforts have been made to contact the employee about an equivalent position for at least 1 year

Tax Credits under Act

- Employers have to pay for leave upfront, then may use a tax credit, up to the capped amounts
 - 100% tax credit, up to \$511/day per employee taking PST for their own condition, \$200/day per employee taking PST for their family member's condition, and \$200/day per employee taking Expanded FMLA leave
- Tax credits applies to the employer's Social Security tax payable on W-2 wages for a calendar quarter (it does not apply to employer Medicare tax) – will likely go down as credit on quarterly **Form 941**
- Amount of tax credit is equal to the sum of the following:
 - Dollar amount of required sick leave paid to employees, plus
 - Dollar amount of required FMLA leave paid to employees, plus
 - Dollar amount of health insurance premiums paid by the employer that are allocable to Required Sick Leave wages
- If the tax credit exceeds the tax imposed by the employer's Social Security tax, excess may be claimed as a refundable overpayment

Adjustment Period

- DOL has announced a 30-day non-enforcement period from March 18 through April 17 – provides employers time to adjust
- Employers who act reasonably and in good faith compliance with the law will not be subject to enforcement action by the DOL during the 30-day period
- DOL will instead focus on providing “compliance assistance” to employers during this period

Additional Resources for Financial Assistance to Cover Leave

- Maryland has received official designation from the US Small Business Administration for its Economic Injury Disaster Loan Program
- Provides low-interest federal disaster loans for small businesses impacted by the COVID-19 pandemic
- Loans will allow businesses to pay bills, payroll, and accounts payable, with long-term payments stretching up to 30 years
- Small businesses and private non-profit organizations can apply direct to the SBA for financial assistance:
 - www.sba.gov/funding-programs/disaster-assistance

Other Maryland Assistance Programs

- Unemployment Insurance Workshare Program:
 - Allows employers to reduce hours of work while avoiding layoffs, by dividing available hours equally among employees
 - Employees are eligible to receive partial unemployment benefits, based on their reduction in weekly work hours
 - Must apply for and be accepted into the program
- COVID-19 Layoff Aversion Fund:
 - Maryland fund provides grants up to \$50,000
 - Can be used to pay for wages/benefits *if* the employer is enrolled in the Workshare Program

Maryland Expansion of Unemployment Insurance

- Maryland has expanded its unemployment insurance coverage for COVID-19 reasons, including:
 - The individual's employer temporarily ceasing operations due to COVID-19, preventing employees from coming to work;
 - The individual being quarantined due to COVID-19, with the expectation of returning to work after the quarantine is over; and
 - The individual leaving employment due to a risk of exposure or infection of COVID-19, or to care for a family member due to COVID-19.
- Maryland, and many other states, has also waived the waiting period for receiving unemployment benefits, and the requirement to search for other employment

WARN Act

- 60 days' notice for a “plant closure” or “mass layoff”
- Coverage:
 - Applies to employers with 100 or more employees
 - “Plant closure” – shutdown of a single site with 50+ employees
 - “Mass layoff” – layoff of 50-499 employees who make up at least 33% of the workforce; 500+ employees automatically qualify
 - Calculations are made over 90-day period
- Exceptions for notice:
 - WARN does not apply to temporary shut downs (affected employees means loss of employment for at least 6 months)
 - Unforeseeable business circumstances and natural disasters allow notice period to be less than 60 days – must still provide notice and why the notice period was not the full amount
- Check state “mini-WARN” acts (such as NY)

Coronavirus – COVID-19

- Those infected can experience no symptoms, all the way up to severe impact
- Transmitted through respiratory droplets – person to person within 6 feet
- Could also transmit through hard surface contamination
 - Although it's unknown how long the virus survives on each surface
- Symptoms (may appear 2-14 days after initial exposure):
 - Fever
 - Cough
 - Shortness of breath
- Follow the CDC's guidance and guidelines (every agency follows them as well)

Workplace Steps

- Think about OSHA General Duty Clause – must furnish a place of employment free from recognized hazards
- What to communicate with employees:
 - Stay home if they are sick
 - Report any illness or possible exposure
 - Conduct frequent hand washing and use hand sanitizer
 - Practice proper distancing and cover coughs/sneezes
 - Review leave policies
- Additional steps:
 - Provide more soap, sanitizers, sanitizing wipes, tissues, etc.
 - Perform additional cleaning
 - Cancel events

Protective Gear

- Unless the workplace is at a high risk, protective gear is not recommended/required
 - Not required to permit masks or gloves in the workplace – but think about ADA reasonable accommodations
- Surgical masks are not respirators – they do not generally protect individuals from catching the virus
- Respirator masks are OSHA-regulated, as are nitrile gloves
 - Employers must conduct training for proper glove use if using nitrile gloves, and must provide notice if allowing use of respirator masks (such as the N95)

Social Distancing

- Consider telecommuting for some of your workplace
- Stagger work schedules if possible
- Eliminate shared meal times
- Relocate employees to other areas in the office

Telecommuting

- Think about costs:
 - Some states require reimbursement
- Security concerns
 - Especially for trade secrets and HIPAA-covered information
- ADA concerns:
 - Costs related to reasonable accommodations at home
 - Could potentially set up future reasonable accommodation requests
- Timekeeping
 - Make sure non-exempt employees are keeping their time
- OSHA
 - Illness and injury reporting still applies, but OSHA does not generally regulate home offices

Telecommuting Continued

- Establish clear procedures
- Communicate expectations for productivity
- Set schedules
- Communicate availability for telecommuting
- Expectations for continuing communications

Employee Travel

- Business travel
 - Limit it to only essential travel
 - Cancel travel to CDC Level 2/3 countries
 - Identify risk factors
 - Related directly to the specific employee
 - And regarding the location traveling to
- Person travel
 - Require compliance with CDC travel restrictions
 - Require quarantine for employees traveling from Level 2/3 countries

Screening Employees

- Medical examinations and disability-related inquiries are generally restricted under the ADA
- COVID-19 has lessened these restrictions somewhat
 - Can run temperatures of employees (but high fever does not necessarily mean COVID-19, and no fever does not necessarily mean no COVID-19)
 - And always keep employee medical information confidential
- Think of non-invasion ways of screening
 - Can ask employees whether they have traveled or come into close contact with someone affected by COVID-19
 - Can also ask about possible symptoms
- Can require employees to report if they have been diagnosed with COVID-19

Visitors

- Be aware of disability-related inquiry if the visitor is an applicant (same ADA concerns)
- Generally, though, employment laws do not apply to visitors
 - Can screen and ask questions related to COVID-19
- Can also generally ban all visitors from coming into workplace

If an Employee is Sick

- Send them home immediately
 - Keep their information confidential
 - Can ask for certification from doctor saying that the employee is clear of the virus – but it's recommended to not do this right now
- Think about the various sick and safe leave laws that are now applicable
 - State laws – both sick leave and family/medical leave
 - Newly enacted Emergency Paid Sick Leave and FMLA Expansion
 - Think about other ways to help employees out
 - Unpaid leave
 - Flexible leave
 - Fronting leave

If an Employee is Sick

- Workers' Compensation?
 - Could apply if the employee is able to prove he/she contracted it at work
- OSHA
 - Reportable if it's work-related
- Department of Health
 - Should report to them as well
- Unemployment Insurance
 - Maryland just expanded UI to cover certain COVID-19 terminations and self-quarantines
- Communicating with staff
 - Let employees know that someone has contracted the virus – keep information confidential, though
 - And conduct a deep cleaning of the employee's area

Quarantines

- If the employee is quarantined, but still able to work, must pay them for time worked – or the entire week if it's an exempt employee
 - Exempt employees can be told to not perform any work during the quarantine – must not work for entire week
- If unable to work, should be cognizant of paid sick leave laws, but can generally require use of PTO

Requests to Stay Home

- Maryland/most other states have not yet closed non-essential offices and businesses – can still require coming to work (generally advised against it, though)
 - Can also require employees to stay home
- If employee is fearful and requests to stay home, work with them and consider allow use of certain leave time (paid or unpaid)

Union Obligations

- Look at Collective Bargaining Agreement
 - Anything related to leave, management rights, telework?
- Might have to bargain any changes related to leave
 - Duty to bargain might be suspended for compelling reasons
- Comply with existing CBA obligations until discussed with Union and/or changed

Response Plan

- Create a plan to:
 - Establish contact persons
 - Address risks and concerns
 - Explore distancing options
 - Communicate expectations
 - Create communication plans
- Plans related to this response should be in writing, should be clear, and should account for existing policies as well as the new laws

State Laws

- State stay-at-home orders and closures
 - Large number of “essential” businesses can remain open – remainder must close
 - Mid-Atlantic states: Maryland, D.C., West Virginia, Pennsylvania (in certain counties)
 - Nothing prevents telework programs
- State sick leave laws
 - Maryland’s Healthy Working Families Act
 - Applies to absences due to the employee’s illness, the employee getting tested for COVID-19, and taking care of a family member who is ill due to the virus
 - DC’s Family and Medical Leave (similar to FMLA, but applies to employers with 20 or more employees)
 - Expanded to cover absences due to a “declaration of emergency” where the employee is quarantined at the recommendation of the Mayor, government agency, or is required to be quarantined

Benefits – Early Guidance

- Notice 2020-15: An HDHP will not fail to be HSA qualified merely because the plan provides benefits for testing and treatment of COVID-19 without regard to whether the minimum deductible has been satisfied
 - Applies to all medical care and items for testing and treatment of COVID-19
- Other HSA requirements were maintained (including restrictions on no-cost telemedicine for non-COVID-19, but see later slide)
- Family First Coronavirus Response Act: Group health plans and insurers offering health insurance coverage must cover, may not impose any cost sharing requirements (e.g., deductibles, copayments and co-insurance) for COVID-19 testing.
- HHS FAQs (March 12, 2020). Included in the definition of essential health benefits:
 - Coverage for the diagnosis and treatment of COVID-19;
 - Medically necessary isolation and quarantine required by and under the supervision of a medical provider during hospital admission (and, depending on circumstances, maybe in the home); and
 - A COVID-19 vaccine, when one becomes available, starting on the beginning of the plan year that is 12 months after the Advisory Committee on Immunization Practices recommends the new vaccine.

Benefits – CARES Act

- Section 3201: Technical correction.
 - Technical correction to the FFCRA to further clarify the definition of what is included in the mandate applicable to all group health plans to provide first-dollar coverage with no cost-sharing for COVID-19 testing.
 - Expanded to include certain tests outside of the FDA approval process.
 - Should be low impact since most have already consulted with providers/carriers and have already implemented the initial mandate.
- Section 3202: Minimizing price gouging
 - For COVID-19 testing covered with no cost to patients, this provision requires an insurer to pay either the rate specified in a contract between the provider and the insurer (before the Public Emergency was declared), or, if there is no contract, a cash price posted by the provider.
- Section 3203: Vaccine will be No-cost Preventive Care W/15 Days
 - Once receiving the appropriate rating designation, a COVID-19 vaccine will be deemed included under the ACA no-cost preventive care mandate applicable to all group health plans within 15 business days of receiving the appropriate designation (as opposed to the first plan year after designation).
 - Could have impact to plans if the cost of the vaccine is high.

Benefits – CARES Act

- Section 3224: HIPAA Considerations for COVID-19
 - This provision directs HHS to issue guidance within 180 days to clarify the extent to which protected health information (PHI) may be shared under the HIPAA privacy rules during the COVID-19 public health emergency.
 - Note that there are already existing regulations under the HIPAA privacy rules that permit the use or disclosure of PHI among certain parties for public health purposes.
- Section 3701: Telemedicine Relief
 - This provision establishes a safe harbor to allow for the use of all forms of telehealth and other remote care services (with no deductible required) without adversely affecting the eligibility of the HSA-HDHP or impairing the ability to make or receive HSA contributions.
 - Not limited to COVID-19.
 - Relief sunsets on 12/31/2021 for calendar year plans.
 - Key relief for large employers, especially with respect to being able to open up behavioral health telemedicine services in light of the pandemic.
- Section 3702: Over-the-counter Menstrual Products
 - For amounts paid after 12/31/2019, this provision defines medical expenses to include menstrual care products so that they qualify for tax-favored treatment under HSA, health FSAs, and Archer MSAs.

Benefits – CARES Act (other)

- Section 2206: Educational Assistance
 - Educational assistance programs can be expanded to permit employer payment of student loans made before 1/1/2021
- Section 2202 – Coronavirus-related Distributions and Plan Loans
 - Rules are only for those impacted by COVID-19 or spouse (specific definition)
 - Coronavirus-related distributions up to \$100,000 takeaways:
 - Not subject to the early withdrawal 10% tax penalty.
 - The amount can be included in income ratably over a three-year period.
 - The participant can also choose to repay part or all of the distribution amount to the Plan within three years.
 - Plan Loans takeaways:
 - Applies to loans taken within 180 days of enactment.
 - Increases plan loan limits to the lesser of \$100,000 or 100% of account.
 - Outstanding loan repayments in 2020 can be delayed for 1 year.
- Section 2203 – Waiver of RMDs for the 2020 calendar year for all DC Plans
- Section 3607 – DOL granted authority to waive deadlines for health emergency
- Section 3608 – Waive minimum contributions to single employer DB plans.

Various Benefits Considerations

- Balancing furloughs with ACA measurement periods and insurance contract language
- COBRA – to start the period or not?
- Privacy Issues
- Changing Dependent Care FSA and Health FSA elections
- Cancelling or changing deferrals under NQDC Plans
- Hardships and/or loans?
- Changing 401(k) contributions
- Fiduciary risk under 401(k) plans – Emergency sessions?
- Administration of disability claims procedures

QUESTIONS?

THANK YOU!

Thank You for Attending!

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