

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

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Questions?

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

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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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Coronavirus (COVID-19) Employer Updates

April 7, 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

- 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

FFCRA Enforcement Period

- The DOL will not bring enforcement actions against employers for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e., March 18 through April 17, 2020, **provided that** the employer has made reasonable, good faith efforts to comply with the Act.
- If the employer violates the Act willfully, fails to provide a written commitment to future compliance with the Act, or fails to remedy a violation upon notification by the Department, the Department reserves its right to exercise its enforcement authority during this period.
- After April 17, 2020, this limited stay of enforcement will be lifted, and the Department will fully enforce violations of the Act, as appropriate and consistent with the law.

Visit to the Doctor's Office

- Employee Handbook – When was your last physical?
- Handbook Leave of Absence Policies? What was promised?
- Leave of Absence Practices – Does your company's leave practices follow your policies?

Maryland Health Working Families Act (“MHWFA”)

- Maryland Healthy Working Families Act requires Maryland employers to provide paid sick and safe leave to employees (unpaid leave if employing less than 15 employees)
- Leave began accruing February 11, 2018 for employees already hired
- Employees must earn at least 1 hour of leave for every 30 hours they work
- Leave may be used for a variety of health-related reasons, even for health events of family members

MHWFA (Cont.)

- Employees must receive 1 hour of leave for every 30 hours they have worked
- Employees can earn up to 40 hours of leave per year
- Up to 40 hours of unused leave must *carryover* to the next year, *unless* the employer makes available the employee's full annual allotment of leave at the beginning of the year
- Employer may award leave as it accrues, or they can award the full amount an employee would earn at the beginning of the calendar year
- Employers can limit the amount of leave earned at any given time to 64 hours (once employee hits this mark, they stop earning leave until they use some of it)

MHWFA (Cont.)

- Employees must be able to use leave for the following reasons:
 - To care for their own mental or physical illness, injury, or condition
 - To care for a family member's mental or physical illness, injury, or condition
 - Obtaining preventive medical care for themselves or their family member
 - Maternity or paternity leave
 - An absence caused by domestic violence, sexual assault, or stalking committed against either the employee or their family member, and the leave is being used:
 - To obtain medical or mental health attention,
 - To obtain services from a victim services organization,
 - For legal services or proceedings, or
 - Because the employee has temporarily relocated as a result of the incident

MHWFA: “Family Member” Defined

- Spouse
- Child
 - Including biological, foster, adopted, step, as well as one who the employee has a legal or physical custody/guardianship over
- Parent
 - Biological, foster, adopted, or step parent for the employee *or* the employee’s spouse
 - Or one who was the legal guardian of, or stood in loco parentis to, the employee or employee’s spouse
- Grandparent
 - Biological, foster, adopted, or step grandparent of the employee
- Grandchild
 - Biological, foster, adopter, or step grandchild of the employee
- Sibling
 - Biological, foster, adopted, or step sibling of the employee

MHWFA Requirements for Employees

- Employees must provide up to 7 days notice for a use of leave that is *foreseeable*
 - If unforeseeable, must provide notice as soon as practicable
 - Employer may deny leave use if the employee fails to provide required notice *and* the absence will cause a “disruption”
- Employer can request verification of the use of leave if an employee uses leave for more than 2 consecutive shifts
 - Verification may also be required if the employee uses leave between the 107th and 120th calendar days of being employed (if it is a term agreed to at time of hire)
 - If employee fails to provide verification, subsequent requests to take leave for the same reason may be denied
- An employee *cannot* be required to find a replacement

Maryland Flexible Leave Act

- Applies to employers with 15+ employees
- Employees must be allowed to use any earned “leave with pay” to care for illness of a child, spouse, or parent.
- “Leave with pay” includes vacation leave and sick leave
- Employees must be allowed to elect the type and amount of leave with pay to use

The Family and Medical Leave Act (“FMLA”)

- **Application:** Covers all private employers that employed 50+ employees for at least 20 workweeks in current or preceding calendar year
- **Requirements:** Employer must grant up to 12 weeks of unpaid leave to employees in a 12-month period, for the employees to use for a variety of reasons including their own or family member’s serious health condition
- **Eligibility:**
 - Work for a covered employer
 - Have worked for the employer for 12 months (need not be consecutive)
 - Have worked 1,250 hours in 12 months prior to the start of leave
 - Work at a location where the employer has 50 + employees in a 75-mile radius

The Americans with Disabilities Act (“ADA”)

- **Application:** Employers with 15+ employees
- **Requirements:** Employers are required to provide “reasonable accommodations” to employees with qualifying disability
- **Eligibility:** Employees are protected by ADA if they have: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record (or past history) of such impairment; or (3) are regarded by employer as having a disability.

ADA and Sick Leave

- ADA may require employer to provide additional leave even after all available sick leave has been used
- Employer must engage in “interactive dialogue” to determine if there are any reasonable accommodations that would allow employee to perform essential functions of the job without causing undue hardship

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.

Requesting FFCRA Leave

Per the IRS, a request for EPSL or FMLA+ should be initiated by the employee, and should include the following:

- (1) the employee's name;
- (2) the dates for which the employee is requesting leave;
- (3) a statement of the reason for the leave; and
- (4) a statement that the employee cannot work or telework during the leave period.
- (5) For quarantine-related leave, the name of the government entity recommending quarantine or the name of the health care provider.

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 EPSL*

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 EPSL 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

Requesting FFCRA School Leave

Per the IRS, when requesting FFCRA leave for school or daycare closures, the employee should identify the following:

- (1) the name and age of the child or children needing care,
- (2) the name of the school or place of care,
- (3) a representation that no other person will be caring for the child, and
- (4) if the child is older than 14, a statement describing special circumstances making it necessary to be absent to care for the child.

School Leave - Definitions

What is a “place of care”?

- A “**place of care**” is a physical location in which care is provided for your child. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.
- **Who is my “child care provider”?**
- A “**child care provider**” is someone who cares for your child. This includes individuals paid to provide child care, like nannies, au pairs, and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

School Leave – Teens and Adult Children

- “***Son or daughter***” includes a child 18 years of age or older with a disability who cannot care for him or herself due to that disability.

School Leave Essentials

- Employees may take FFCRA childcare leave to care for her/his child **only when** s/he needs, and actually is, caring for her/his child **if** s/he is unable to work or telework as a result of providing care.
- Generally, an employee does not need to take such leave if a co-parent, co-guardian, or the child's usual care provider is available to provide the care the child needs.

School Leave – Online Courses

- **My child’s school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it “closed”?**
- Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is “closed” for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as “distance learning,” your child is still expected or required to complete assignments.

Calculating FML “Regular Rate” for Part-Time Employees

- Regular schedule: Apply the number of hours that the employee was regularly scheduled to work during the week
- Varying schedule:
 - Apply 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, apply 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
- Consistent with established FMLA principles, employee must continue to make any normal contributions to the cost of health coverage.

Interaction of FMLA Expansion with Regular FMLA

- Employers Not Otherwise Covered by FMLA:
 - Only required to provide FML 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 FMLA 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

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

EPSL Reasons

- Under the Emergency EPSL, 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.

EPSL 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

EPSL 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 EPSL.
- 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

EPSL Continued

- EPSL 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 EPSL 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 EPSL

- 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
- EPSL notice cannot be required until after the first day of leave.

Employee Benefits During EPSL

- If an employee elects paid sick leave, the employer must continue health coverage
- Review health plan for any possible COBRA issues

EPSL & Shelter at Home Orders

How do I know if I can receive EPSL for a Federal, State, or local quarantine or isolation order related to COVID-19?

- A Federal, State, or local quarantine or isolation order includes quarantine or isolation orders, as well as shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority that cause you to be unable to work (or to telework) ***even though your employer has work that you could perform but for the order.***
- You may not take paid sick leave for this qualifying reason if your employer does not have work for you as a result of a shelter-in-place or a stay-at-home order.

FFCRA Self-Quarantines

When is an employee eligible for EPSL to self-quarantine?

- An employee is eligible for EPSL if a health care provider directs or advises her to stay home or otherwise quarantine herself because the health care provider believes she may have COVID-19 or is particularly vulnerable to COVID-19, and quarantining based upon that advice prevents her from working/teleworking.
- An employee may take paid sick leave under the FFCRA only to seek a medical diagnosis or if a health care provider otherwise advises her to self-quarantine. She may not take paid sick leave under the FFCRA if she unilaterally decides to self-quarantine for an illness without medical advice, even if she has COVID-19 symptoms.

EPSL to Care for Others

An employee may take paid sick leave to care for an individual who,

1. as a result of being subject to a quarantine or isolation order,
2. is unable to care for him or herself and
3. depends on you for care and
4. if providing care prevents you from working and from teleworking.

An employee may only take paid sick leave to care for an individual who genuinely needs her care. Such an individual includes an immediate family member or someone who regularly resides in her home. She may also take paid sick leave to care for someone if her relationship creates an expectation that she would care for the person in a quarantine or self-quarantine situation, and that individual depends on her for care during the quarantine or self-quarantine.

Care for Another's Child

- May I take FMLA+ to care for a child other than my child? **No.** Expanded family and medical leave is only available to care for your own “son or daughter.”

Care for Another's Child (cont.)

- May I take **EPSL** to care for a child other than my child? *It depends.*
- School-related EPSL is limited to an employee's own "son or daughter."
- However, EPSL is also available to care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. If you have a need to care for a child who meets these criteria, you may take paid sick leave if you are unable to work or telework as a result of providing care.

Teleworking

- **When am I able to telework under the FFCRA?**
- You may telework when your employer permits or allows you to perform work while you are at home or at a location other than your normal workplace. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA.
- **What does it mean to be unable to work, including telework for COVID-19 related reasons?**
- You are unable to work if your employer has work for you and one of the COVID-19 FFCRA qualifying reasons prevents you from being able to perform that work, either under normal circumstances at your normal worksite or by means of telework.
- If you and your employer agree that you will work your normal number of hours, but outside of your normally scheduled hours (for instance early in the morning or late at night), then you are able to work and leave is not necessary unless a COVID-19 qualifying reason prevents you from working that schedule.

Teleworking (Continued)

If I am or become unable to telework, am I entitled to paid sick leave or expanded family and medical leave?

- If your employer permits teleworking—for example, allows you to perform certain tasks or work a certain number of hours from home or at a location other than your normal workplace—and you are unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then you are entitled to take paid sick leave.
- Similarly, if you are unable to perform those teleworking tasks or work the required teleworking hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, then you are entitled to take FMLA+. Of course, to the extent you are able to telework while caring for your child, EPSL and FMLA+ is not available.

Intermittent Leave

The DOL limits the use of intermittent leave for those **working onsite** to two conditions:

- 1) that the employee and employer agree to the use of intermittent leave; and
- 2) such use is limited to the employee's need to care for a child whose school or place of care is closed, or where childcare is unavailable.

With respect to **teleworking**, intermittent leave is available for employees who are taking EPSL or FMLA+, but only if the employer agrees.

FFCRA Limitations – Employer-Approved Leave

- **May I take paid sick leave or expanded family and medical leave under the FFCRA if I am on an employer-approved leave of absence?**
- It depends on whether your leave of absence is voluntary or mandatory.
 - **Voluntary**: If your leave of absence is voluntary, you may end your leave of absence and begin taking paid sick leave or expanded family and medical leave under the FFCRA if a qualifying reason prevents you from being able to work (or telework).
 - **Mandatory**: However, you may not take paid sick leave or expanded family and medical leave under the FFCRA if your leave of absence is mandatory. This is because it is the mandatory leave of absence—and not a qualifying reason for leave—that prevents you from being able to work (or telework).

FFCRA Limitations – Workers Compensation or STD

- **May I take paid sick leave or expanded family and medical leave if I am receiving workers' compensation or temporary disability benefits through an employer or state-provided plan?**
- In general, no, unless you were able to return to light duty before taking leave. If you receive workers' compensation or temporary disability benefits because you are unable to work, you may not take paid sick leave or expanded family and medical leave. However, if you were able to return to light duty and a qualifying reason prevents you from working, you may take paid sick leave or expanded family and medical leave, as the situation warrants.

EPSL “Substantially Similar Condition”

- The U.S. Department of Health and Human Services (HHS) has not yet identified any “substantially similar condition” that would allow an employee to take paid sick leave. If HHS does identify any such condition, the Department of Labor will issue guidance explaining when you may take paid sick leave on the basis of a “substantially similar condition.”

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 EPSL for their own condition, \$200/day per employee taking EPSL 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

New Updates from DOL

- DOL released **23** additional FAQs late last night (3/26)
- Addresses various confusing/uncertain situations, such as:
 - Intermittent use and increment of leave use
 - Eligibility during furloughs or layoffs, and the timing of such
 - Inability to “top off” 2/3rds pay with other accrued leave
- Expanded discussion on these updated FAQs follows

Required Documentation

- Employers should seek from employees appropriate documentation to support their need to take paid sick leave and/or expanded FMLA
 - Employers are **required** to seek this documentation for expanded FMLA leave requests (just as an employer would request such documentation for traditional FMLA leave)
 - Could include a notice posted by the government, school, or daycare center – published on the internet, in a newspaper, in an email, etc.
 - Employers should retain all documentation if they intend to claim a tax credit under the FFCRA
- Documents include a copy of the Federal, State, or local quarantine or isolation order, or written documentation from healthcare provider advising employee to quarantine

Able/Unable to Work

- “Able to telework”: when an employer permits/allows the employee to perform work while at home or at a location other than the normal workplace
- “Unable to work or telework”:
 - Unable to work if the employer has work for the employee to do, but one of the COVID-19 qualifying reasons prevents the work being performed, either under normal circumstances or by means of telework
 - However, if there is an agreement that the employee will work the normal number of hours, but they will be performed outside the normally scheduled hours, the employee is still able to work and leave is not necessary

Becoming Unable to Telework

- If the employer permits teleworking, and the employee is unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, the employee is entitled to take paid sick leave
- Also, if the employee is unable to perform the teleworking tasks or work the required hours because he/she needs to care for a child whose school or place of care is closed, then the employee is entitled to take expanded family and medical leave
 - But to the extent that the employee is able to telework while caring for the child, paid sick leave and expanded family and medical leave is not available

Intermittent FMLA+ Leave While Teleworking

- Employees are allowed to take intermittent leave pursuant to the expanded FMLA reason, but only if the employer agrees
- The employee may take intermittent leave in any increment, provided that the employer agrees to the increment
 - Example: employer and employee agree on 90-minute increments, so the employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking
- Collaboration and flexibility is encouraged by the DOL

Intermittent Paid Sick Leave While at Regular Worksite

- Not permitted for most EPSL reasons while working at regular worksite (as opposed to teleworking)
- Leave under the paid sick leave provision may not be taken intermittently if the employee:
 - Is subject to a federal, state, or local quarantine order;
 - Has been advised by healthcare provider to self-quarantine;
 - Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - Is caring for an individual who is subject to quarantine order or advised by healthcare provider to stay home;
 - Is experiencing any other substantially similar conditions
- Once the employee begins taking paid sick leave for one of these reasons, must continue taking it until they either (1) use the full amount of paid sick leave, or (2) no longer have a qualifying reason

Intermittent Paid Sick Leave While at Regular Worksite (Cont.)

- If the employee no longer has a qualifying reason for paid sick leave before exhausting all of the paid sick leave available (80 hours in total for full-time employee), the employee may take any remaining paid sick leave at a later time, until Dec. 31, 2020
- One reason not listed for prohibited intermittent leave – taking paid sick leave to care for a child whose school/place of care is closed
 - Intermittent leave may be taken for this reason, even if the employee is still at the regular worksite, but only upon employer-employee agreement

Intermittent FMLA+ Leave While at Regular Worksite

- Permitted, but only with employer-employee agreement
- Can agree to a work schedule where employee works Tuesday and Thursday, and stays home to take care of a child Monday, Wednesday, and Friday

Closed Worksites

- FFCRA's effective date is **April 1**
- If a worksite has been closed prior to the effective date, employees are not eligible for any leave pursuant to the FFCRA
- Likely eligible for unemployment benefits, though (unless employee is being paid pursuant to a paid leave policy, in which case, the employee would not likely be entitled to full unemployment benefits)

Closed Worksites (Cont.)

- If the worksite is closed after April 1, the employee is not entitled to leave unless it is taken prior to the FFCRA's effective date
- Still might be eligible for unemployment benefits

Closed Worksites (Cont.)

- If an employer closes while the employee is on leave, the employer must pay the employee for any paid sick leave or expanded family and medical leave used before the employer closed
- But as of the date of the closure of the worksite, the employee will no longer be entitled to paid sick leave or expanded family and medical leave
- This is true whether employer closed due to lack of business or because employer was directed pursuant to a federal, state, or local directive

Continued Health Coverage during Expanded FML

- If employer provided group health coverage that has been elected by the employee, the employee is entitled to continued group health coverage during the expanding family and medical leave on the same terms as if still working
 - Same for family coverage under a plan
- Employee must generally continue to make contributions to the cost of health coverage
- If employee does not return to work at the end of the expanded family and medical leave, eligibility for continuing same health coverage depends on the plan
 - If no longer eligible, might be eligible for COBRA
 - Employers must continue health coverage during paid sick leave

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)

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 Products
 - For amounts paid after 12/31/2019, eliminates prohibition against health plans, HSAs and Archer MSAs from reimbursing expenses for over-the-counter drugs other than insulin without a prescription.

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.

Health/Welfare Considerations

- Balancing furloughs with ACA measurement periods and insurance contract language
- Reductions in income
- COBRA – to start the period or not?
- Changing Dependent Care FSA and Health FSA elections
- Administration of disability claims procedures
- Notification requirements
- Administration of FSAs
- Amendments – permissive versus mandatory
- Keeping up with reporting guidance

Retirement Considerations

- Voluntary implementation of COVID-19 flexibility
- Eliminating fixed contributions under 401(k) Plan
- Eliminating a safe harbor contribution
- Partial terminations
 - Facts and circumstances test, but the general rule is that a partial plan termination may occur when plan participation decreases by 20 percent or more.
- Eligibility for temporary employees
- Fiduciary risk under 401(k) plans?
- Spousal consent

Guesses at Future Legislation

- COBRA Subsidies
- COVID-19 Treatment

QUESTIONS?

THANK YOU!

Thank You for Attending!

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