Coronavirus Legal Update: What Employer’s Need to Know

While other potential legislation is being discussed and debated on Capitol Hill, the only federal law currently enacted to address the COVID-19-related employment issues is the Families First Coronavirus Response Act (FFCRA). There are also State laws, administrative actions and executive orders about which employers need to become acquainted. The following is a summary of the more important elements of the FFCRA and recent changes in the New York State law that could have a profound impact on employers during this public health emergency.

Please note that we have two on-demand videos addressing COVID-19-related employment issues: 1) “Responding to the Coronavirus: An Employer’s Guide” which answers many of the practical legal questions related to operating your business during this public health emergency; and 2) “Coronavirus Legal Update: An Employer’s Guide” which more specifically explains the FFCRA and New York State laws discussed below.

Federal Families First Coronavirus Response Act (FFCRA)

The law was signed on March 18, 2020 and becomes effective on April 2, 2020. It contains two main provisions impacting employers: 1) the expanded Family and Medical Leave Act (FMLA); and 2) Emergency Paid Sick Leave. Unless extended by an act of Congress, both provisions should “sunset” or end on December 31, 2020.

A. Expanded FMLA

As most employers are aware, the FMLA provides job-protected leave for:

- Employee’s own or immediate family member’s “serious health condition”; and
- Family member’s military service-related leave

The FFCRA creates a new category of protected FMLA leave, i.e., “qualifying need related to a public health emergency” with respect to COVID-19. This term is defined as a need to care for employee’s child if child’s school or daycare has been closed, or childcare provider is unavailable, due to the public health emergency.

Before the FFCRA, FMLA only applied to employers of 50 or more. Solely with respect to this public health emergency leave, the FMLA now applies to all private employers with fewer than 500 employees. The law provides possible exemptions for health care providers and emergency responders. In addition, employers with fewer than 50 workers can seek exemption from the U.S. Secretary of Labor, if the economic viability of their business is jeopardized by complying with new law.
Before FFCRA, to be eligible for any FMLA leave, an employee had to be employed for one year and work at least 1,250 hours preceding the request for leave. Now, public health emergency leave is available to any employee employed for 30 calendar days.

One of the most dramatic changes from the existing FMLA law is that the expanded FMLA leave law will be, at least partially, paid. The initial 10 days leave (again, leave to care for a child displaced from school or daycare) are unpaid, unless an employee voluntarily elects to use existing accrued paid time off to cover the unpaid leave. Thereafter, the remaining period of public health emergency leave is paid, up to the full 12 weeks of leave. The employees who qualify for this will receive “at least two-thirds of the regular rate” they would have earned under a normal work week schedule.

Like the traditional FMLA, employers are expected to return employees to the same position when leave ends. However, if an employer is unable to immediately reinstate the employee to the same or equivalent position because no such positions exist, the employer must make “reasonable efforts” to contact and reinstate the employee during the year following the conclusion of the leave period.

B. Emergency Paid Sick Leave

FFCRA also provides 80 hours of paid sick time for full-time employees and prorated leave for part-timers. This portion of the law applies to employers with fewer than 500 employees and, unlike the expanded FMLA, to all government employers. Also, unlike the FMLA, employees are eligible for this paid sick leave no matter how long they have been employed.

Emergency Paid Sick Leave is available for any employee:

1. Subject to a Federal, State, or local quarantine or isolation order related to COVID–19;
2. Who has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;
3. Experiencing symptoms of COVID–19 and is seeking a medical diagnosis;
4. Caring for an individual subject to 1 or 2 above;
5. Caring for child if school or daycare has been closed, or the childcare provider is unavailable, due to COVID–19 precautions; and/or
6. Experiencing any other “substantially similar condition” specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

Leave based on employee’s own circumstances (i.e., criteria 1-3 and 6 above) is paid at the employee’s regular rate of pay up to max of $511 per day and $5,110 in the aggregate. Leave to care for another person (i.e., criteria 4 and 5 above) may be paid at 2/3 of the employee’s regular rate of pay up to a maximum of $200 per day and $2,000 in the aggregate.

An employee may choose to use paid sick time under this Act before using other paid leave provided by the employer. An employer may not dictate how an employee will do this. The law also prohibits retaliation or discrimination against an employee for exercising his/her rights under this law.

There will be payroll tax credits to reimburse private sector employers for their cost of providing required paid sick leave and expanded FMLA under FFCRA. Those credits will not be available to public employers. More details on how to apply for and receive those credits will be forthcoming from the Dept. of Treasury, etc.

New York State Law

New York State has some additional legal requirements for employers, i.e.:

- Governor’s Executive Orders on Workforce Density Reduction Restrictions; and
- Benefits for Employees Subject to Ordered Quarantine or Isolation Due to COVID-19.

A. Workforce Density Executive Order
On March 18, 2020, Governor Cuomo mandated a 50% reduction in the workforce of all non-essential private and not-for-profit entities (excluding state and local governments and authorities). The requirement cut across all departments and shifts of an organization and mandated that, by 8 PM on March 20, 2020, only 50% of the total number of employees reporting to a site be allowed to work. The Governor subsequently modified the restriction on March 19, 2020, to 75%; and again on March 20, 2020, to 100%. This was required to be complied with no later than March 22, 2020.

The Governor’s orders contained exceptions for “[a]ny essential business” including:

“… health care operations including research and laboratory services; essential infrastructure including utilities, telecommunication, airports and transportation infrastructure; essential manufacturing, including food processing and pharmaceuticals; essential retail including grocery stores and pharmacies; essential services including trash collection, mail, and shipping services; news media; banks and related financial institutions; providers of basic necessities to economically disadvantaged populations; construction; vendors of essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses; vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public.…”

Under the Governor’s initial and subsequent orders, it was made clear that other businesses could be deemed essential after requesting an opinion from the Empire State Development Corporation, (See expanded list and application for an opinion form at https://esd.ny.gov/guidance-executive-order-2026,) In fact, in Executive Order 202.8 it was noted that:

“Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. An entity providing essential services or functions whether to an essential business or a non-essential business shall not be subjected to the in-person work restriction, but may operate at the level necessary to provide such service or function.”

In other words, upon application to the Empire State Development Corporation both essential entities and businesses providing essential services to those entities could be exempted from the Order’s in-person restrictions.

B. Benefits for Employees Subject to Ordered Quarantine/Isolation

New York also enacted a law that became effective March 18, 2020, that requires employers to provide certain benefits to employees subject to any order of quarantine, isolation or precautionary quarantine issued by the State of New York, the New York State Department of Health, a local board of health, or any other governmental entity authorized to issue such an order due to COVID-19.

The statute itself does not adequately define “order of quarantine or isolation” but the term was defined in NYS Dept. of Health Guidance, i.e., “Interim Containment Guidance: Precautionary Quarantine, Mandatory Quarantine and Mandatory Isolation Applicable to all Local Health Departments (LHD)” According to this guidance, an employee is consider subject to Mandatory Quarantine if the “[p]erson has been in close contact (6 ft.) with someone who is positive, but is not displaying symptoms for COVID-19; or person has traveled to China, Iran, Japan, South Korea or Italy and is displaying symptoms of COVID-19.” Required mandatory isolation is reserved for any “[p]erson [who] has tested positive for COVID-19, whether or not displaying symptoms for COVID-19.” And precautionary quarantine orders for those who meet “one or more of the following criteria: (i) has traveled to China, Iran, Japan, South Korea or Italy while COVID-19 was prevalent, but is not displaying symptoms; or (ii) has had a proximate exposure to a positive person but has not had direct contact with a positive person and is not displaying symptoms.:"
Any employee subject to such an order will be entitled to the following benefits:

- Private sector employers with 10 or less and net income less than $1 million would be required to provide job protection for the duration of the quarantine/isolation order. Affected employees may use paid family leave and disability benefits (short-term disability) for the period of quarantine/isolation, including wage replacement for their salaries up to $150,000.
- Private sector employers with 11-99 employees, and employers with 10 or fewer employees with net income greater than $1 million, must provide at least 5 days of paid sick leave and job protection for the duration of the quarantine/isolation order. Paid family leave and disability benefits (short-term disability) also available,
- Private employers with 100 or more employees, as well as all public employers (regardless of number of employees), would be required to provide at least 14 days of paid sick leave and guarantee job protection for the duration of the quarantine/isolation order.

It should be noted that an employee is not eligible for paid benefits if he/she traveled to a country for which CDC has a level 2 or 3 travel notice, the travel was not required by employer, and employee was provided notice of travel health notice and the limitations of this law before the travel. Such an employee could use any accrued leave available but not the days available under this law.

Also note that these benefits are not available to employees deemed asymptomatic or not yet diagnosed, and who are physically able to work while under the order of quarantine or isolation, whether through remote access or other similar means.

If you have any questions, please feel free to contact us.