Coronavirus Employment Law Update: Paid FMLA, Paid Sick Leave, and Other FAQs

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During this unprecedented crisis, the rules for employers are changing every day as federal, state, and local lawmakers issue new regulations, restrictions, and reporting requirements. To help employers navigate the maze of employment laws that are implicated by coronavirus, below is an overview of the paid FMLA and paid sick leave provisions of the Families First Coronavirus Response Act (FFCRA). Also included are several relevant employment law frequently asked questions.

The Families First Coronavirus Response Act

FFCRA was signed into law by President Trump on the evening of March 18, 2020. It becomes effective on April 2, 2020, and is currently scheduled to remain in place until December 31, 2020. The law does not apply to employers with 500 or more employees. In addition, this new law authorizes the Department of Labor (DOL) to exempt employers with less than 50 employees from the paid leave requirements if doing so would jeopardize the viability of the business.

There are two parts to FFCRA. First, the law requires covered employers to provide eighty hours (two weeks) of paid sick leave. The sick leave is paid at the employee's regular rate of pay to a cap of $551 per day. Paid sick leave may be used in five circumstances:

1. The employee is quarantined because of a government order related to coronavirus
2. The employee's doctor orders a quarantine
3. The employee is experiencing coronavirus symptoms and is seeking medical care
4. The employee is caring for an individual who is quarantined by order of the government or a doctor
5. The employee is caring for a son or daughter whose school or daycare has been closed

Second, the FFCRA requires that covered employers provide twelve weeks of family leave to employees who have been employed for at least 30 days. During the first two weeks of family leave, the employer need not provide any pay, and the employee may, at their option, elect to use paid sick leave or other paid time off. During the third through twelfth weeks of family leave, employees receive two-thirds of their regular rate of pay to a cap of $200 per day (a maximum benefit of $1,000 per week for ten weeks). Paid family leave may be used only when an employee is caring for a son or daughter whose school or daycare has been closed due to coronavirus. The same eligibility requirements for FMLA apply to paid family leave, meaning that only employees who have worked at least 1,250 hours during the twelve months preceding the leave and who work within a 75-mile radius of at least 50 employees are eligible. That being said, employers with 25 or fewer employees do not have to restore an employee from leave if the employee's job has been eliminated due to economic necessity.

FFCRA provides covered employers with a dollar-for-dollar tax credit (not a deduction) for benefits paid.

Employment Law FAQs

Q: *I am concerned about employee privacy rights, especially when it comes to medical conditions. May I require that my employees disclose a positive test for coronavirus and/or that they are experiencing flu-like symptoms?*

A: Yes. Employers have a right and a duty to protect their employees, customers, and members of the public from threats to their safety and welfare. You may require that your employees disclose a positive test for coronavirus, and you may instruct employees to disclose if they are experiencing symptoms associated with coronavirus such as fever, cough, and/or shortness of breath.

Q: *If one of my employees appears sick, may I send him or her home?*

A: Yes. If an employee appears to have flu-like symptoms or shortness of breath, you may send them home and suggest that they seek medical treatment and testing for coronavirus. Employers should provide training to supervisors so they know what symptoms to look for, and to make sure that they are not overreacting to a single cough or sneeze.

Q: *May I send an employee home if the employee has had close contact with another individual who has tested positive even if the employee does not have any symptoms?*

A. Yes. Consistent with the Centers for Disease Control (CDC) guidance, you may send an employee home if someone in their household has symptoms, if they sat on an airplane within six feet of someone with symptoms, or if they otherwise have had close contact with an individual with symptoms.

Q: *If one of my employees has tested positive for coronavirus, do I have any reporting obligations?*

A. Yes. Employers are required to report positive cases to the CDC and their local health department. In addition, employers should notify any employees who have been exposed to a co-worker who tests positive. You should also communicate with any customers or vendors who were in contact with an employee who tests positive. Consistent with CDC guidance, to the extent possible, employers should avoid disclosing individual employee names when transmitting coronavirus-related reporting.

Employees who have worked closely with a co-worker who tests positive should be sent home for at least fourteen days (the incubation period). We also recommend that employers hire a professional cleaning service to further reduce the likelihood of transmission.

Q: *I am going to need to implement a layoff. Are there any special rules I need to follow when selecting employees for layoff?*

A. Yes. Whenever an employer is conducting a layoff (temporary or permanent) or furlough, the employer must be mindful of potential discrimination claims. Layoffs often give rise to discrimination claims, particularly claims of age discrimination. Laying off all of your highest-paid employees first may seem like a smart business decision, but it often results in older workers suffering a disproportionate impact. Typically, the most conservative method for implementing a layoff is strict seniority (for example, the last person hired in a given department is the first one laid off). To the extent that an employer deviates from seniority, it should be ready to articulate and, in the best-case scenario, document its legitimate reasons for doing so. In other words, if an employer is basing is layoff decisions upon relative job performance, it ideally would have written performance evaluations to justify its decision-making process.

Q: *Can I require that a laid-off employee be bound by a non-competition agreement or other restrictive covenant?*

A. It depends. In many jurisdictions, when an employer lays off an employee for lack of work or for other reasons beyond the employee's control, the courts weigh such lay off as a factor that militates against upholding a restrictive covenant agreement. Unfortunately, there is no bright-line rule with respect to this question.

Q: *Do I need to provide my employees with advanced notice prior to implementing a layoff?*

A. It depends. Under the federal WARN Act, employers with at least 100 employees need to provide sixty days' notice or pay in lieu of notice to employees in the event of a covered layoff. Under WARN, a covered layoff means that a layoff that impacts at least: (a) 500 employees at a given site; or (b) 50 employees at a given site, provided those employees make-up at least 1/3 of the total workforce at the site. Only layoffs lasting at least six months are covered by the WARN Act. There are "natural disaster" and "unforeseen business circumstance" exceptions under the WARN Act, but they have been construed very narrowly in the past, and it remains to be seen how the DOL and courts are going to apply them to pandemic-related layoffs. More conservative employers may choose to issue WARN notices. Another option would be to wait and see if further guidance becomes available on the applicability of the exceptions.

Many states and cities have their own versions of the WARN Act. In many instances, these mini-WARN laws provide greater compliance issues for employers. For example, New Jersey's mini-WARN law does not have any emergency exceptions for mass layoffs.

Q: *Will my employees be able to collect unemployment compensation if they are laid off?*

A. Generally, yes. Although eligibility rules for receiving unemployment compensation benefits vary from state to state, as a general matter, employees who are laid off or otherwise separated from employment because of the current crisis will be deemed eligible.

Q: *Can we discipline an employee who refuses to report for work?*

A. It depends. Under OSHA, an employee can refuse to report for work if doing so poses an "imminent danger." Although the DOL has not issued guidance on this precise issue, we believe that an "imminent danger" exists for this purpose only if one or more individuals at the employee's worksite have tested positive. In addition, an employee may be absent from work without any adverse consequences if the absence is covered by the FFCRA.

Q: *Do I need to report coronavirus cases on the company's OSHA 300 log?*

A. It depends. According to the DOL, coronavirus cases are reportable on an employer's OSHA 300 log only if the case is work-related.

Q: *Can I instruct my employees that they are not permitted to engage in travel for personal reasons?*

A. Yes. There is nothing unlawful about prohibiting employees from engaging in weekend travel or other personal travel. However, because these types of rules are difficult, if not impossible, to enforce and will likely give rise to employee morale issues, we do not recommend that most employers implement them.

Q: *Can I discipline employees who are complaining about having to come into the office or who refuse to travel as part of their job?*

It depends. This is dangerous territory. Under federal labor law, an employer cannot take adverse employment action against employees who engage in "protected concerted activities." This could include employees who are complaining about their working conditions and/or job duties. Before moving forward with any discipline, employers should consult with an experienced employment attorney.

Q: *After a non-exempt (hourly) employee uses all of his or her sick time and other paid time off, do I need to pay that employee for missed work hours?*

A. No. A non-exempt employee needs only to be paid for actual hours worked. That being said, employers who are contemplating cutting work hours for all employees should consider whether it makes sense to convert otherwise exempt (salaried) employees to non-exempt status prospectively and for a finite period of time.

If you have any concerns about the impact of the coronavirus pandemic on your business or compliance with FFCRA, please contact the Labor & Employment Group or the Cohen Seglias attorney with whom you work.