COVID-19 Webinars

Employment Law Issues in the Face of the COVID-19 Pandemic

April 2, 2020

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Welcome
The presentation will begin at 1:05 p.m.

CLE and CE credits are pending. Email alex.hernandez@wilsonelser.com if you wish to be contacted regarding CLE or CE credits for this webinar.

Employment Law Issues in the Face of the COVID-2019 Pandemic
(as of April 2, 2020)

The presentation is provided is for informational purposes only and should not be relied upon for legal advice. Your participation in this webinar does not create an attorney-client privilege.
Your Panelists for Today’s Webinar

- Lisa Handler Ackerman
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- Bruno Katz
  Partner
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- Celena Mayo
  Partner
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- Yoora Pak
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Questions?

Type questions in the Questions section

or

Email Yoora Pak at yoora.pak@wilsonelser.com

Government Responses to COVID-19

- Federal Government
  - Families First Emergency Coronavirus Response Act (FFCRA)
  - CARES Law

- State and Local
  - Stay-at-home Orders
  - Restrictions regarding non-essential business
  - Work from home mandates
Government Responses to COVID-19

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Families First Coronavirus Response Act (FFCRA)

Takes effect April 1, 2020

Divisions of the FFCRA:
A. Appropriations
B. Nutrition Waivers
C. Emergency Family and Medical Leave Expansion Act (EFMLEA)
D. Emergency Unemployment Insurance Stabilization and Access Act of 2020
E. Emergency Paid Sick Leave Act (EPSL)
F. Health Provisions
G. Tax Credits for Paid Sick and Paid Family and Medical Leave
H. Budgetary Effects

FFCRA: Overview of Paid Leave Provisions

Emergency Paid Sick Leave
- Up to 80 hours (approx. first 10 days)
- 6 different qualifying reasons
- Full pay or 2/3 pay (depending on qualifying reason), subject to caps

Emergency Paid FMLA
- Up to 12 weeks (approx. days 11-60)
- 1 qualifying reason
- Weeks 1 and 2: unpaid
- Weeks 3-12: 2/3 paid, subject to caps

Covered Employers
Private employers with less than 500 employers;
A public agency; and
EPSL only “any other entity that is not a private entity”
Emergency Paid Sick Leave Act (EPSL)

Six Qualifying Reasons
An employee who is unable to work or telework because:
1. Employee is subject to quarantine or isolation order related to COVID-19.
2. Employee advised by a health care provider to self-quarantine because of COVID-19.
3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. The employee is caring for an individual subject or advised to quarantine.
5. The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unable, due to COVID-19 precaution.
6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Eligible Employee
- Employees on the payroll for 30 days
- Excludes Health Care Workers

Length of EPSL and Amount Paid
- Caps at 80 hours for full-time workers or the average number of hours across a two-week period for part-time employees.
- 100% up to $511 per day maximum not to exceed aggregate of $5,110
- 2/3 up to $200 per day maximum not to exceed aggregate of $2,000

Emergency Paid Family Medical Leave Expansion Act (EPFMLEA)

Eligible Employees
- Any full-time or part-time employee that has been on the employer’s payroll for 30 calendar days
- Health Care provider exclusion

One Qualifying Reason
- An employee can take leave for “a qualifying need related to a public health emergency”
- One qualifying need: when an employee is unable to work (or telework) to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency
Emergency Paid Family Medical Leave Expansion Act (EPFMLEA) – Child Care Leave

Up to 12 weeks
• First two weeks paid under EPSLA (qualifying reason 5), at 2/3's of your wages during that time
• Remaining 10 weeks paid at 2/3s of the employee’s regular rate
• Maximum pay-out of $200/day and $12,000 total for 12 weeks

Exemption for Small Employers – Child Care

Relief for Smaller Employers (with less than 50 employees)
• Exempts employers with fewer than 50 employees from providing paid sick leave and expanded FMLA if one of three conditions is met:
  • Small business expenses and financial obligations exceed available business revenues and cause small business to cease operating at minimal capacity
  • Absence of employee(s) requesting paid sick leave or expanded FMLA would entail substantial risk to financial health and operational capabilities of small business because of their specialized skills, knowledge of the business, or responsibilities; or
  • Not sufficient workers who are able willing and qualified and will be available at the time and place needed to perform the labor or services provided by the employee requesting paid sick leave or expanded FMLA and these labor or services are needed for small business to operate at minimal capacity.

THE CARES ACT

• Passed and signed March 27, 2020
• $2 Trillion Relief Bill
• The majority of provisions involve tax relief for businesses affected by COVID-19, but, also includes programs that will impact the way employers structure their workforces in the face of economic challenges brought about by the COVID-19 pandemic.
• Highlights of the Act Include:
PAYCHECK PROTECTION PROGRAM
- Forgivable loans through commercial lenders approved by the SBA.
- Money can be used for payroll, mortgage, rent or utility payments.
- What businesses are eligible:
  - less than 500 employees
  - Sole proprietors, independent contractors and self-employed
  - Some franchises
  - Accommodation and food services with no more than 500 employees in any one location.
- How much is available:
  - 2.5 times your monthly payroll costs; $10M cap.; first $100,000 of each employee’s salary, plus employee benefits and state/local taxes.

ECONOMIC INJURY DISASTER LOANS
- $10B available for Economic Injury Disaster Loans (EIDL’s) for small businesses.
- Generally available to businesses with 500 or fewer employees.
- Grants capped at $2M
- Applicants can obtain an advance of up to $10,000 to use for providing paid sick leave to employees, maintaining payroll, making rent/mortgage payments and other business expenses, and the advance need not be repaid.
- Administered by SBA

PANDEMIC UNEMPLOYMENT ASSISTANCE PROGRAM
- Substantial expansions on unemployment benefits.
- Up to 39 weeks of unemployment benefits to individuals unable to work because of COVID-19, even if they would not otherwise qualify for state unemployment benefits.
  - Have COVID-19 Diagnosis
  - Have COVID-19 Symptoms and Seeking Diagnosis
  - Have Family Member with COVID-19
  - Providing Care to Family Member with COVID-19
  - Child’s School or Daycare Closed
  - Cannot Get to Work Because of Quarantine
  - Ordered by Healthcare Provider to Self-Quarantine
PANDEMIC UNEMPLOYMENT ASSISTANCE PROGRAM

- Cannot Start New Job as Scheduled Due To COVID-19
- Quit Job because of COVID-19
- Became Head of Household because of COVID-19 Death
- Cannot Go to Workplace Closed Due To COVID-19
- An additional $600 per week to the unemployment benefits they receive through state programs.
- Allows states to waive “waiting week”
- An additional 13 weeks of unemployment benefits.
- Supports short-time compensation or Work Share programs.

Other Leave Considerations

- State FMLA
  - May apply to smaller employers and provide greater leave
- Paid sick leave laws
  - Usually at city or local level
- ADA Reasonable Accommodations

State or Local Responses

- Stay at Home Orders
- Closure of non-essential businesses
- Exemptions allowed
- Businesses can continue to operate as long as employees can telework or work remotely — in-office personnel prohibited
### Terminations vs. Furloughs - Key differences

<table>
<thead>
<tr>
<th>Termination</th>
<th>Furlough</th>
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<tbody>
<tr>
<td>End of employment relationship permanent</td>
<td>Mandatory suspension from work based on economic necessity</td>
</tr>
<tr>
<td>Payout of final wages due and owing including any government-aided benefits (deferred on the state level i.e. accrued leave, vacation time)</td>
<td>Any payment of work done before Furlough can be taken as unpaid vacation. Payment of accrued time off is based on state or local law. Consult your attorney for specifics.</td>
</tr>
<tr>
<td>Subject to new hiring processes and new hire must begin background check back after termination.</td>
<td>No new hire process required. Employee remains eligible for unemployment benefits at the end of the Furlough period.</td>
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### Alternatives to Layoffs

- **State Work Share Programs**
  - Reducing hours for all employees in affected department
  - Available in some states
- **Job Sharing**
  - Eligible for unemployment benefits to offset lost wages
  - Not available in all states
- **Eligible for unemployment benefits to offset lost wages**
- **Job sharing**
  - Combination of the above two methods

Check with your attorney if you have questions about your specific situation.
Other Considerations in Reducing Workforce

- Federal and state COBRAs
- Healthcare continuation coverage?
- Federal and state WARN Act Notices
  - Providing notice for mass layoffs or reduced hours or other employment loss
  - "Unforeseen business circumstances" exception – does it apply to COVID-19 related layoffs?
- State mini-WARN Act may require greater notice, if applicable

Other Considerations in Reducing Workforces

- State Wage Theft Issues if unilaterally reducing wages
  - What kind of notice must be provided?
- Unemployment Benefits
  - Partial benefits may be available for reduced hours or reduced pay – check your state
  - Waiting period likely waived
  - Employment efforts waived
- State Wage-Hour Issues
  - No reductions below minimum wage
  - State minimum wage may be higher than current federal minimum wage of $7.25
  - Protecting exemption status

Wilson Elser's Expertise

Wilson Elser’s COVID-19 Task Force consists of attorneys across the country focusing on these issues 24/7.

Please visit our firm’s Coronavirus Resource Center
https://www.wilsonelser.com/coronavirus_resource_center_home
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