COVID-19 Webinars

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

Questions & Answers from April 2, 2020 Wilson Elser Webinar

Lisa Handler Ackerman  
Partner – Chicago  
312.821.6144  
lisa.ackerman@wilsonelser.com

Bruno Katz  
Partner – San Diego  
619.881.3317  
bruno.katz@wilsonelser.com

Yoora Pak  
Partner – Virginia  
703.852.7861  
yoora.pak@wilsonelser.com

Steve Joffe  
Partner – Los Angeles  
213.330.8970  
steve.joffe@wilsonelser.com

Celena Mayo  
Partner – New York  
212.915.5854  
celena.mayo@wilsonelser.com

Dean Rocco  
Partner – Los Angeles  
213.330.8922  
dean.rocco@wilsonelser.com
Q1. Please clarify that EPSL is a total of 12 weeks, with the first 2 weeks being optional to be paid under the PST (paid sick time) or employer PTO?

R1. EPSL is capped at 80 hours regardless of the qualifying reason. Whether EPSL is paid at 100% or at 2/3s of regular rate depends on the reason for the EPSL. Employers must pay EPSL and cannot require employees to substitute any accrued vacation or sick leave as time off as EPSL.

If the employee needs to take further leave under the emergency FMLA for qualifying reason #5, the employee continues to be paid at 2/3 of his or her regular rate for an additional 10 weeks. If the Employee is sick, or because he or she is quarantined, and unable to work, the employee may be eligible for “traditional” FMLA but not the emergency FMLA leave, neither of which would be paid.

Q2. As a healthcare provider, if an employee has pre-existing conditions or is high risk but has no symptoms, are they eligible for PST (paid sick time)? If a healthcare employee is unable to wear a N-95 mask due to asthma or unable to be fit tested, are they eligible for PST?

R2. As a health care provider (HCP), you may choose to exempt health care workers from the leaves provided by the FFCRA. Assuming that you are providing such leave, as to both questions, yes, an employee could be eligible for emergency paid sick leave or emergency family and medical leave under FFCRA under qualifying reason #2. The HCP should request documentation of the pre-existing condition or the high risk condition. If the employee is considered to be in a high risk category or have pre-existing conditions, then you should also consider their leave requests under the ADA’s accommodation request or under “traditional” FMLA.

Q3. Will the Railroad Retirement Board be offering any additional benefits outside of the regular unemployment benefits currently offered to covered employees?

R3. According to the RRB, it will allow UI for employees who are involuntarily furloughed due to COVID-19. Please see https://rrb.gov/Benefits/Coronavirus for more information. Also consult with your attorneys for more specific guidance.

Q4. Question regarding employees in regulated FRA service, if they are furloughed, are employers allowed to place them through “pre-employment” DOT drug and alcohol testing procedures?

R4. Yes, you can drug test safety sensitive employees as they are called back to work. Also consult any existing CBAs.
Q5. Can you talk about the aggregation of private equity portfolio companies being pooled for evaluation, which will cause many companies to not qualify for this relief. Any comments about this?

R5. Under the SBA’s affiliation rules, private equity groups have to aggregate their employee numbers, which may result in many portfolio companies not qualifying for the relief. Please consult your tax attorney or reach out to counsel for more specific guidance.

Q6. Does the employer pay for the 12 weeks?

R6. Yes, but you may be eligible for tax credits.

Q7. What if the state mandate prohibiting restaurants from providing dine in services is not lifted by 6/1/20?

R7. At this time, the CARES Act prioritizes payroll costs over other expenses. If you find that you have to reduce headcount (which would result in a corresponding reduction in loan forgiveness), we suggest that you not spend the borrowed funds on other costs, until we get further guidance. Please consult your attorney for more specific guidance.

Q8. Would this mean that we need to continue to pay our employees even though there is no work available?

R8. No, if employees have been laid off or furloughed, they should not be paid. The CARES Act does not require that you pay employees who are not working. However, to the extent you have to reduce headcount, the amount of the loan to be forgiven will be reduced correspondingly.

Q9. Can you apply for both the Paycheck Protection program and the Economic Injury Disaster?

R9. Yes. Consult your attorney about potential limitation or restrictions.

Q10. What if the employee believes that the work he or she is required to do is non essential and the employee decides to no longer work, can the employee still apply for unemployment or FFCRA?

R10. A pre-requisite for obtaining paid leave under the FFCRA is that the employee has work to perform but is unable to perform work due to at least one of the COVID-19 reasons outlined in the FFCRA, i.e., either: 1) the employee is subject to quarantine or a isolation order related to COVID-19; 2) A health care provider has advised the employee to self-quarantine; 3) the employee is experiencing COVID-19 symptoms and is seeking a diagnosis; 4) the employee is caring for someone with COVID-19; 5) child care due to COVID-19; or 6) additional conditions as set out by HHS, DOL, or Treasury.
Q11. Is furloughing allowed in CA?

R11. Yes, but please consult your labor and employment attorney regarding your wage hour obligations.

Q12. Does the Emergency Paid Family Leave Expansion Act also apply to employers with 500 or less employees?

R12. Yes.

Q13. If companies do qualify for the loan, do they have to pay back the $10,000 advance?

R13. No. The $10,000 advance is part of the Economic Injury Disaster grant.

Q14. What do you recommend we do for employee requests for leave under gray areas like #6 or not clearly defined? Can we lay off the employees, most of whom would make more on unemployment?

R14. Until we receive additional guidelines on reason #6, each request should be assessed on a case by case basis as a traditional FMLA request. The physician’s certification can guide your response – if the medical condition is COVID-19 related, then FFCRA leave may apply. If not, then the employee would not be eligible for FFCRA leave. In the latter situation, you may still have obligations to provide a reasonable accommodation under the ADA or leave under the traditional FMLA.

Q15. What are the mechanics for an employee to get paid on FFCRA - they request and we just pay and subtract from payroll taxes?

R15. Yes. Please consult your tax professional for more information.

Q16. Are there any issues of potential discrimination re: ADA/places of public accommodation with respect to asking suspected or confirmed positive individuals to leave a store?

R16. The CDC is advising the American public to socially distance ourselves from individuals suspected of or confirmed positive for COVID-19. The EEOC has publicly stated that it does not intend to countermand CDC recommendations regarding public health issues, and such individuals can be excluded from the work premises as a direct threat to public health. Thus, individuals may be screened unobtrusively for symptoms before being allowed into a workplace or store and excluded if they exhibit any symptoms.
Q17. How would FFCRA and NY Paid Sick Leave (paid by employer) work concurrently with each other?

R17. The two leaves do not run concurrently. The employee would be entitled to FFCRA paid sick leave and also entitled to any additional paid sick leave under any other law. The federal law does not substitute or trump state or local law regarding paid sick leave.

Q18. You mentioned employees that can telework can be eligible for EPSL, but I thought the first rule out was that employees do NOT qualify if they can telework?

R18. If the employee is sick and unable to telework, they are eligible for leave under the FFCRA. Employees who are sick but able to telework would not be eligible for leave under the FFCRA.

Q19. What documentation should an employer ask for by way of proof to substantiate the need for leave under the FFCRA under any of the qualifying reasons?

R19. This is the written guidance off the IRS FAQ page, question 44. How Should an Employer Substantiate Eligibility for Tax Credits for Qualified Leave Wages?

44. What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

The employee’s name;
The date or dates for which leave is requested;
A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person’s name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of
care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee’s inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

In addition, the EEOC would allow you to accept alternative documentation, such as an email confirmation of an appointment, an insurance statement, an invoice or receipt of payment showing diagnostic testing performed.

**Q20. What does qualifying reason #6 of the act actually mean/refer to?**

**R20.** Qualifying reason #6 provides an employee is entitled to leave under the FFCRA if: “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.” At this time, we are awaiting further guidance. It has not yet been defined.

**Q21. Are corporations eligible? For example, we are a small business, with fewer than 10 employees, but we are not a sole proprietor.**

**R21.** Yes, corporations are eligible for PPP or EIDL as long as it has less than 500 employees.

**Q22. Is there a time frame?**

**R22.** Yes, applications must be filed by June 30, 2020. However, we strongly recommend that you apply as soon as possible as the pool of funds is limited and unlikely to last.

**Q23. How long do we have to hire our workforce back?**

**R23.** If you want to qualify for loan forgiveness under the PPP, you must rehire employees back by June 30, 2020.

**Q24. What is available for employers with more than 500 employees?**

**R24.** Depending on your industry, the CARES Act may provide other credits and relief. Please consult with your tax professional.

**Q25. Are there any requirements, such as keeping a certain percentage of employees employed?**

**R25.** There are no requirements, but there are penalties with respect to loan forgiveness if you cannot retain headcount.
Q26.  Does the offering of benefits, 401(k), etc. change if the employee is furloughed, or do they remain intact?

R26.  This depends on your plan. We recommend that you consult with your broker, plan documents, or plan administrators.

Q27.  When it comes to the 8 weeks, is that 8 PAID weeks (dates of pay) or expenses across those 8 weeks if it is to pay for rehiring people, etc, even if the dates of pay are outside of that 8 week window? For example: We get the loan on April 16th, but want to pay people for the 1st through the 15th and our normal payroll date is the 20th?

R27.  The 8-week timeline for forgiveness starts at the time of loan origination.

Q28.  What do you mean when you say that the unemployment is retroactive? Does that mean that an employee who is laid off on March 14 will receive $600 per week starting from the date of layoff since the federal program does not begin until April 15?

R28.  As worded in the statute, the additional unemployment benefits may be applied back to January 27, 2020, and run through December 20, 2020. Employees should be referred to their state unemployment agency.

Q29.  Is there any assistance with UI available to those who have only green cards or only an ITIN number?

R29.  This depends on the state. Each state sets up its own eligibility criteria. Generally, legal permanent residents will be eligible for UI. To receive the extended UI under CARES, the foreign national must be authorized to work in the US.

Q30.  I’ve heard this documentation will be essential to claim the tax credit. If that is the case, would a self-certification by the employee be sufficient documentation if it can’t be obtained in other means?

R30.  Please see the response to Q19 regarding the sufficiency of documentation.

Q31.  If you make a distribution to a member of an LLC or a guaranteed payment, does that void the loan being forgiven?

R31.  The loan is forgivable to the extent it is used for permissible purposes and the employer does not reduce headcount or cut payroll. We recommend that you consult your tax attorney about LLC distributions.
Q32. Who pays the employee the additional sick leave? The government or the company the employee works for? Does the government reimburse the employer?

R32. The Company pays for the additional paid sick leave and the emergency family and medical leave if taken for reason #5. However, the Company may be entitled to tax credits or other financial support to offset the cost.

Q33. Are Uber drivers eligible for the Pandemic Unemployment Assistance Program?

R33. Yes.

Q34. We are considered a construction company and 80% of our payroll is to cover labor. If there is some essential work we are required to perform, can we pay our employees their normal pay while in the field, and pay them through the Payroll Protection Act as Hazard pay?

R34. As long as the money is used for a permissible purpose, such as payroll, and the payments you describe are payroll expenses, then this would likely be a permissible use of the loan.

Q35. Are employers able to end health insurance with 3 days notice? The employer’s reasoning is that there isn’t enough full time employees due to covid-19 to cover the costs?

R35. This also depends on your plan and you should consult with your plan administrator or broker.
Fueled by dramatic changes in EEOC regulations, increasing use of social media in the workplace, recent Supreme Court rulings and the ever-broadening scrutiny of the U.S. Department of Labor, the road ahead for employers is strewn with difficult challenges and an inevitable surge in employment claims. Sound, timely and innovative legal advice has never been more critical.

With nearly four decades of experience, Wilson Elser understands that, despite a corporation’s best efforts, employment and labor claims – while often without basis – are nonetheless inescapable. That’s why we form close partnerships with our clients to manage and mitigate risk and help them better navigate the challenging legislative and regulatory terrain of employment and labor law.

We understand that each client defines a “win” according to the particular circumstances of their business needs. When claims arise, Wilson Elser has the experience and wherewithal to act appropriately and decisively, as demonstrated by our outstanding record of dismissals and targeted settlements. In conferring with clients, we take into consideration the demands of their industries, the history of their businesses and what outcomes would constitute success.

Our work transcends claims handling. We preemptively assist clients with a broad range of transactional and contract matters, restrictive covenants and non-compete disputes, labor force reductions and grievances under collective bargaining agreements.

With a caseload that includes private- and public-sector employers, our attorneys are skilled in all aspects of federal and state employment discrimination laws. We handle cases arising under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act and the Employee Retirement Income Security Act. We are – quite literally – at our clients’ side when they appear before such administrative and judicial tribunals as the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board or the U.S. Department of Labor, as well as state and federal administrative agencies and courts.

Wilson Elser’s size and structure allow our employment and labor attorneys to work “cross practice” with other functional areas within the firm. We frequently work with our Government Affairs counterparts to further our clients’ legislative and regulatory agendas. We similarly collaborate with our Medical Malpractice & Health Care and Commercial & Business Litigation practices as dictated by our clients’ needs. Our efforts also align closely with those of Wilson Elser attorneys involved in fair housing and other discrimination claims. We assist in their defense of real estate owners, brokers, property managers, associations and boards against a wide spectrum of discriminatory allegations.

Wilson Elser’s heritage and ongoing involvement in insurance law allow us to deal effectively with the legal issues and industry practices that inform ultimate outcomes. We regularly and successfully assist in navigating the delicate relationship between insurer and insured.

Recognizing that our clients seek cost-effective solutions to complex and potentially protracted cases, we seek to accommodate them through alternate resolution options, including arbitration, conciliation and mediation. To prevent lawsuits and administrative actions from arising in the first place, one of the hallmarks of our Employment & Labor practice is to work proactively with clients to create a culture that reduces legal exposure and avoids specific situations that can give rise to claims.

Inherent in our approach:

- Conducting training seminars for both managers and employees on sexual harassment, hiring and interviewing, wage and hour compliance, affirmative action planning and more.
- Advising on matters of employee termination, preparation of employment manuals, drug testing and avoiding potential instances of discrimination.
- Conducting continuing legal education (CLE) courses.
- Issuing periodic alerts on topical employment- and labor-related matters.
- Sharing our knowledge and experience through authorship and presentations.
- Keeping closely apprised of new and ongoing legislative efforts.