

COVID-19 PANDEMIC: LEGAL ISSUES FOR EMPLOYERS

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Overview

- Federal government and NJ have passed new laws at rapid pace
- Laws require employers to offer PAID leave to affected employees
- Laws also require employers to allow use of sick time that is required by law already for COVID-19 related absences
- Major stimulus bill also available for businesses



Overview

- Employers do have ability to screen employees for COVID-19
- Traditionally, employers reluctant to “ask too much” about medical conditions
- But, special rules apply during a pandemic, and governments are recognizing this
- NOTE: laws keep changing, so try and keep on top of it!!



CARES Act

- \$2.2 trillion federal stimulus law
- Numerous provisions in CARES Act but these affect employers:
 - Supplemental unemployment comp
 - Payroll Protection Act: Forgivable small business loans
 - Payroll tax credit



CARES Act: Unemployment Compensation Supplement

- Employees temporarily or permanently laid off entitled to unemployment comp
- Employees unable to work OR reduced hours due to COVID-19
- Examples:
 - Workplace closure
 - Unable to work because ill with COVID-19
 - Caregiver due to school/child care closure
 - Job offer rescinded due to COVID



CARES Act: Unemployment Compensation Supplement

- NJ Unemployment comp calculation:
 - 60% of average wages
 - Up to maximum of \$713 per week
- CARES Act provides \$600 per week supplement
 - Even if that puts employee >100% of salary
- Supplement capped at 4 months
- BUT up to 39 weeks of State UI financed by federal govt



CARES Act: Unemployment Compensation Supplement

- Federal supplement will be administered by NY Dept of Labor (Unemp. Comp)
- Money will flow from federal government to States
- Supplement also available to self-employed individuals and independent contractors
 - NOT entitled to State UI in almost every State
 - Owners/corporate officers included



CARES Act: Unemployment Compensation Supplement

- Self-employed/contractors will receive either:
 - (1) \$300 OR
 - (2) \$600 plus $\frac{1}{4}$ of the average weekly benefit amount of regular compensation paid to eligible individuals in NJ as of 1/1/20 (estimated at \$75 extra)



CARES Act: Unemployment Compensation Supplement

- Entitled to \$600 PLUS IF:
- (1) net earnings from self-employment of not less than \$2,500 during the last 6 month period; OR
- (2) the individual had a contract or other offer of employment suspended or rescinded due to COVID-19



CARES Act: Paycheck Protection Program

- CARES has a potentially VALUABLE means to keep your business afloat
- \$370 billion dedicated to provide monies to small businesses through SBA loan
- AND loan (principal and interest) may be forgiven if spent on certain expenses
- BUT BUT BUT Caution – devil in details
- NEED TO ACT QUICKLY



CARES Act: Paycheck Protection Program

- **STRONG ADVICE:** get guidance from an attorney and a lender
 - Complex program
 - Moving parts
 - Overlap with other federal and state assistance that **COULD** impact ability to have loan forgiven



CARES Act: Paycheck Protection Program

- Money available through low-interest SBA loans
 - Max 4% loan over max of 10 years
 - Recent guidance: 0.5% for 2 years
- Max loan amount – LESSER of:
 - \$10 million OR
 - 2.5 TIMES average monthly payroll (average of 12 months before crisis began)



CARES Act: Paycheck Protection Program

- Businesses eligible:
 - LESS than 500 employees
 - Can exceed 500 e'ees total, and use location-based figure, in food / hospitality industry and possibly franchises
 - Non-profits included
 - Sole proprietorships
 - Exclusions for certain businesses (porno industry and few others – NOT YOU)



CARES Act: Paycheck Protection Program

- Loan (principal and interest) may be forgiven (don't have to pay it back) IF:
 - Payroll costs (employees < \$100,000/year) up to 8 weeks
 - Rent
 - Mortgage and other debt interest
 - Utilities
- Payroll costs broadly defined
- Limit: 25% non-payroll (guidance)



CARES Act: Paycheck Protection Program

- Payroll costs:
 - Salary, wages, commissions, tips
 - PTO (vacation, sick, etc.)
 - Severance
 - Health care premiums
 - Retirement benefits
 - State/local payroll tax to employer



CARES Act: Paycheck Protection Program

- Amount of loan forgiven is reduced if laid off employees NOW versus 2/15/20
- Example: payroll expenses at 50% of prior, forgivable amount may be reduced by 50%
 - Devil in details – need to await federal guidance
 - CAN hire e'ees back and take full advantage of forgivable loan



CARES Act: Paycheck Protection Program

- Money will flow through SBA loan
- Must use lender which handles SBA loans
 - Approx. 1,800 lenders nationwide
 - NOTE: existing lender best option due to expected crush of applications
- Traditional SBA loan req'ts waived:
 - Personal guaranty may be lifted
 - Need not be funding of last resort



CARES Act: Paycheck Protection Program

- CARES timetable
- Applications opened on APRIL 3, 2020
- Loans available thru June 30, 2020
 - IF money does not run out
- If not forgiven, loan repayments delayed
- Question: Is there enough funding ??????



Families First Coronavirus Response Act

- Congress' second stimulus – passed on 3/18/20
- First federal req't ever of PAID leave
- Effective on April 1, 2020
- Bill has numerous provisions, including more money for COVID-19 testing and funding State unemployment compensation funds
- But two major provisions for employers



Families First Coronavirus Response Act

- Applies to ALL employers with **500 or less** employees
 - Not a TYPO
 - Assumption: large companies would take care of their own
- Also applies to all State and Local government employers



Families First Coronavirus Response Act: Exceptions

- Employers of “health care providers” or “emergency responders” can opt out of paid leave
- “Health care providers” defined broadly in FAQs:
 - **Anyone employed at** DR’s office, hospital, health care center, clinic, post-secondary h.care educ’l institute, nursing facility or home, retirement facility, home health care provider, lab or testing facility, pharmacy “or any similar institution, employer or entity”
 - Anyone employed **at any entity that contracts with** the above entities to “provide services or to maintain the operation of the facility”



Families First Coronavirus Response Act: Exceptions

- “Emergency responders” also defined broadly in FAQs:
 - FFs, doctors, paramedics, etc.
 - Employees who are necessary for “comfort” and “nutrition” of patients or to prevent COVID-19 spread
 - Includes public health and public works personnel
 - Includes anyone employed at any of the facilities or “whose work is necessary to maintain the operation of the facility”



Families First Coronavirus Response Act: Exceptions

- Small business “exception”:
 - 50 or less employees
 - Includes non-profits or religious organizations
 - Statute: Must show that providing paid leave would “jeopardize the viability of the business”



Families First Coronavirus Response Act: Exceptions

- FAQs: Small business “exception” applies if authorized officer of business determines:
 - (1) Paid leave would result in business’s expenses & financial obligations > revenue AND cause cessation of operations at minimal capacity; or
 - (2) Absence of e’ees causes subst’l risk to finances or operations of business fir to specialized KN/skills; or
 - (3) Not sufficient workers for business to operate at minimal capacity



Families First Coronavirus Response Act: #1: Paid Leave

- Law sets up brand new federal paid leave
- 10 days of paid leave:
 - Full-time employees: 80 hours over 2 weeks
 - Part-time employees: Average number of hours worked over two week period
- KEY: Paid leave comes FROM the employer
 - BUT reimbursed by the federal government through payroll tax offsets and tax refund
 - So, cash flow issue, not a net employer expense



Families First Coronavirus Response Act: #1: Paid Leave

- Paid Leave is allowed for FIVE reasons
- How much Paid Leave depends on which of the FIVE reasons



Families First Coronavirus Response Act: #1: Paid Leave

- “Employee Paid Sick Leave”:
 - (1) Employee subject to COVID-19 quarantine or isolation by government
 - (2) Employee advised by health provider to self-quarantine due to COVID-19
 - (3) Employee has COVID-19 symptoms AND is seeking medical diagnosis



Families First Coronavirus Response Act: #1: Paid Leave

- “Employee Paid Sick Leave”
- Note: Reason (1) does not include a State or City’s essential business closure OR a “shelter in place” order where essential businesses can remain open
- Reason (1) does cover order directed at any e’ee requiring e’ee to stay at home, such as employee is quarantined or isolated by government
 - Example: Diamond Princess cruise ship passengers



Families First Coronavirus Response Act: #1: Paid Leave

- “Employee Paid Sick Leave”
- Amount: Full pay up to \$511 per day
- So, \$5,100 over 10 days
- Will mean full pay for most workers
 - \$132,860 annual salary



Families First Coronavirus Response Act: #1: Paid Leave

- “Caregiver Paid Sick Leave”:
 - (4) Employee is caring for “individual” subject to COVID-19 quarantine or isolation by government
 - (5) Employee caring for “son or daughter” because school closed, or child care provider no longer available, due to COVID-19
- AGAIN, does not appear to cover any essential business closure, other than day care closed or child care provider not available



Families First Coronavirus Response Act: #1: Paid Leave

- “Employee Paid Sick Leave”
- Amount: 2/3 of salary, up to \$200 per day
- So, \$2,000 over 10 days
- Well below full pay for most workers



Families First Coronavirus Response Act: #2: Emergency Paid Family Leave

- Emergency Paid Family Leave is allowed for ONLY ONE reason
- Much longer leave period
- This is not new law, but amendment of existing law – the Family Medical Leave Act (FMLA)
- FMLA is not applicable to employers below 50 employees, NORMALLY
- This FMLA amendment extends FMLA to all employers with 500 or less employees



Families First Coronavirus Response Act: #2: Emergency Paid Family Leave

- Emergency Paid Family Leave is allowed only for ONLY ONE reason: Employee caring for “son or daughter” because school closed, or child care provider no longer available, due to COVID-19
 - Same as Reason (5) for Paid Leave
- First two weeks are unpaid (during Paid Leave period)
- Then it is paid for UP TO 10 weeks



Families First Coronavirus Response Act: #2: Emergency Paid Family Leave

- Emergency Paid Family Leave amount is similar to Caregiver Paid Leave
- Amount: 2/3 of salary, up to \$200 per day
- So, \$2,000 over 10 days
- Well below full pay for most workers



Families First Coronavirus Response Act: #2: Emergency Paid Family Leave

- Emergency Paid Family Leave is amendment to FMLA
- But, broad expansion for COVID-19:
 - Applies to all employers with 500 or less employees
 - Employees need only have been employed for 30 days to be eligible (FMLA normally is 12 months)
 - Employees do not need to have worked 1,250 hours in prior year, as normally required for FMLA
- Note: not available if have used their FMLA time already



Families First Coronavirus Response Act: Paid Leave/PTO

- (1) Federal paid leave is primary and in addition to other leave entitlements, unless employee agrees otherwise
- (2) if E/r & e/ee agree, employee can supplement aid leave with PTO
- (3) Employers MAY require employees to use PTO concurrent with federal paid leave IF PTO can be used per employer's policies (e.g. employer could not require concurrent use of paid sick leave if the policy only allows use if the employee is sick)



Families First Coronavirus Response Act: Paid Leave/PTO

- (4) employer COULD amend its policies to allow use sick time to care for a child, and thus require concurrent use of PTO
- (5) If employer requires concurrent PTO use, amount of pay must at least equate to the federal paid leave benefit
- (6) once PTO is exhausted, the balance of federal paid leave benefits must be provided.



Families First Coronavirus Response Act: Intermittent Leave

- Intermittent leave may be available for both paid leave and emergency fam. leave
- Employer consent required, including what increments of time are permitted
 - Can also be agreed to for teleworkers
 - Can limit it to school/child care closures
- Intermittent leave not permitted for e'ees at workplace and with COVID-specific reason (i.e., not school/child care)



Families First Coronavirus Response Act: Payment

- Both types of paid leave are to be reimbursed, dollar for dollar, by U.S. government
- Two methods:
- (1) Offset against social security taxes (6.25%) paid by employers
 - For all employees in same calendar quarter
- (2) If still need more, refund on tax return via dollar-for-dollar tax credit



Families First Coronavirus Response Act: Payment

- No regulations or guidance issued
- Employers may be able to file quarterly tax returns to receive refund earlier than annual tax return
- Creates cash flow problem over a quarter, at least



QUESTIONS

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COVID-19: Impact of Local Paid Leave Laws

- Federal paid leave laws just passed do not alter requirements of local paid leave laws
- Employees may choose to save their sick/PTO and use federal leave
- But if employees prefer to use sick/PTO they are entitled to by local law or company policy, they must be allowed to do so
- NY law recently amended to extend leave to COVID-19 situation



NJ Laws: New Jersey Family Leave Act.

- New Jersey Family Leave Law (NJFLA)
 - Covers employers with 30 or more EEs.
 - Covers employees out to care for others (very expansive definition includes non-family).
 - Up to 12 weeks of leave (which may run concurrently with the FMLA).
 - Provides for job reinstatement to equivalent (virtually identical) position.
 - Does not provide for any pay.
 - New Amendment – Key employee exemption much more limited during epidemics.



New Jersey Earned Sick Leave Law

- NJ Earned Sick Leave (Paid Sick Leave)
 - All NJ EEs must be provided with up to 40 paid sick leave hours per year, earned at 1 hour of paid leave for every 30 hours of work.)
 - Employee can use this time for own illness or to take care of another.
 - Can be used for government mandated work closure due to COVID-19 – even if EE is not sick.
 - Can be used because EE is afraid to come to work.
 - Beware if you mix NJ Sick with your PTO banks.



New Jersey Family Leave Insurance

- FLI covers most employers in NJ, even small employers not covered by NJFLA.
- FLI is not a leave law – does not provide job protected leave. Like Temporary Disability, but for an employee out of work due to need to take care of family member (defined very broadly to include many non-family members) who has serious health condition.
- Current benefit period is 6 weeks (increasing to 12 weeks on 7/1/20)
- Maximum weekly benefit currently \$650 (increasing to \$860 on 7/1/20)
- Employee applies through NJ DOL.



New Jersey Family Leave Insurance (Cont.)

- Serious health condition recently expanded for states of emergency declared by Governor or public health authority to include communicable disease (e.g. COVID-19), known or suspected exposure, or efforts to prevent such disease, which requires in home care or treatment of family member due to:
 - A healthcare provider or authority determines presence of family member in community may jeopardize others, and
 - Recommendation by provider or authority that family member be quarantined or isolated)



New Jersey Temporary Disability Insurance

- Almost EEs in NJ are covered by NJ TDI.
- EEs must be unable to work due to illness or injury.
- Provides up to 26 weeks of benefits.
- Benefits 2/3 of EE's average weekly wage, up to a max \$667 per week (On 7/1/20, goes up to 85% of their average weekly wage up to a max of \$881 per week).



New Jersey Temporary Disability Insurance (cont.)

- Same expanded reasons as TDI.
- Serious health condition recently expanded for states of emergency declared by Governor or public health authority to include communicable disease (e.g. COVID-19), known or suspected exposure, or efforts to prevent such disease, which requires in home care or treatment of EE due to:
 - A healthcare provider or authority determines presence of EE in community may jeopardize others, and
 - Recommendation by provider or authority that EE be quarantined or isolated)



Unemployment

- For many situations where the employee is out of work due to a workplace closure due to government order during COVID-19, after earned sick leave, the employee may be best served by applying for unemployment.



Non-Discrimination Laws

- New Jersey Law Against Discrimination (NJLAD)
 - Protects against disability discrimination.
 - Having COVID-19 or assuming employee has/will have COVID-19 is a form of disability discrimination.



Non-Discrimination (cont.)

- New Law passed March 20, 2020
 - Makes it illegal to fire an employee because employee asks for or takes leave for COVID-19 based on doctors note.
 - When employee is able to return, employer may NOT refuse to reinstate employee with no loss of pay, seniority, benefits, etc.
 - Does this give employees who go out for COVID-19 more rights than others?
 - Effective immediately and will last as long as long as Governor's COVID-19 Emergency.

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Accommodations & COVID-19

- Must continue to provide reasonable accommodations, even during a pandemic
- Same accommodations at a telework site
- Eg: Employee had a screen reader and needs one at home
- EEOC recognizes may be delays because of pandemic so advises to use “interim solutions” as practical



Medical Inquiries & COVID 19

- ADA and NJLAD limit disability related questions and medical exam
- Direct Threat Defense:
 - Substantial risk of significant harm to the health and safety of others in workplace AND
 - Cannot be eliminated through a reasonable accommodation



Can You Take Temperatures of Employees?

- EEOC says Yes
- Because of pandemic declaration, community spread, and CDC precautions
- But note fever does not necessarily mean COVID-19



Can You Exclude Employees with Symptoms From Workplace ?

- EEOC says Yes
- Can request medical exam and testing per EEOC
- Can exclude co-workers exposed to infected person



Can You Require Medical Exam at End of Quarantine?

- Before returning to work?
- EEOC says maybe, but cautions against it
- Exposing healthy worker to illness
- But seems defensible to require



Can Employees Refuse to Report to Work?

- Does the workplace present “imminent danger” ---OSHA rule
 - Reasonably expected to cause death or serious physical harm
 - Must be immediate—occur in a short time
- Working in medical setting without PPE?



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