Monday, March 23, 2020

How things have changed since I published my Employer’s Guide to COVID-19 less than a week ago. While the guidance, recommendations, and issue-spotting set forth in that article have not changed, the legal landscape concerning the novel coronavirus has. State governors have issued emergency orders. New laws have taken, or will take, effect. Non-essential business have been instructed to close their doors and convert to remote work arrangements, if possible. People have been advised to stay home. Here’s an update on what’s changed and how it impacts you, your business, and your employees.

The Families First Coronavirus Response Act

On March 18, 2020, the President signed into law the Families First Coronavirus Response Act (“FFCRA” or the “Act”). The Act, which applies to all employers having less than 500 employees as well as government employers with limited exceptions, imposes significant obligations on employers related to COVID-19. The law takes effect no later than Thursday, April 2, 2020, but employers are advised to comply with the new requirements immediately. The FFCRA’s requirements expire December
31, 2020, assuming we’re through this pandemic by then.

In brief summary, the FFCRA requires the payment of sick leave by all employers to their employees under certain scenarios, and the Act creates new enhanced paid FMLA requirements related to COVID-19, which applies to employers and employees not previously covered by FMLA. In addition, the law creates tax credits equal to 100% of the FFCRA-mandated paid leave payments made by an employer to its employees each calendar quarter, and the law allows broader access to unemployment insurance for employees laid off or away from work for certain reasons caused by the coronavirus. The FFCRA also mandates that COVID-19 testing be provided at no cost to employees under their health care plans.

The Paid Sick Leave Requirements

The FFCRA establishes a new paid sick leave requirements for employees impacted by COVID-19. This paid leave is available to employees for immediate use regardless of the employee’s length of employment. An employee qualifies for paid sick leave under the FFCRA, provided the employee cannot work or telecommute, for any of the following pertinent reasons: (1) the employee has been diagnosed with COVID-19 or advised by a health care professional to self-quarantine; (2) the employee is experiencing symptoms of the virus and is seeking a medical diagnosis; (3) the employee is caring for an individual who has been required to quarantine; or (4) the employee must care for a child because of the closing of the child’s school or childcare program due to COVID-19 precautions. Full-time employees are eligible to receive up to ten days (80 hours) of paid sick leave; part-time employees are entitled to receive the average number of hours they work over a two-week period as defined under the Act. The quantum of pay the employee is entitled to receive depends on the situation. Employees required to self-quarantine under the first two scenarios (above) are entitled to receive their full pay up to a maximum payment of $511 per day (and $5,110 in the aggregate for the 10 days). Employees who must take leave to care for another must be paid the lesser of two-thirds (2/3) their full rate of pay or $200 per day ($2,000 in the aggregate).

While the FFCRA imposes these new requirements on employers and gives new paid leave rights to employees, it does not interfere with or trump the employer’s preexisting policies, nor does it replace otherwise applicable law. Employers must recognize the interplay between the FFCRA, other applicable laws (such as the ADA, FMLA, and any state-mandated earned sick leave laws), contracted rights under employment contracts or collective bargaining agreements, and the employer’s own policies and procedures, all of which theoretically could come into play in a particular employee leave situation. For instance, as the FFCRA makes clear, an employee affected by COVID-19 has the right to use paid emergency sick leave before using existing PTO benefits; an employer cannot require an employee to use PTO prior to receiving paid sick time under the FFCRA.

The law prohibits employers from requiring an employee to find a replacement when using COVID-19 qualifying paid sick leave. On the other hand, the law requires that an employee return to work as soon as the need for leave ends, even if the employee has not used all of the paid sick time available under the Act.
Emergency/Enhanced FMLA Provisions

In addition to guaranteeing paid sick leave as explained above, the FFCRA amends the FMLA to provide emergency paid family leave to all employees of small and mid-sized businesses (full and part-time employees of companies having 500 employees or less) who are unable to work (or telework) in order to care for a child during this national emergency. The standard 50-75 test (50 employees within a 75-mile radius) to determine FMLA applicability does not apply to the enhanced paid leave provisions for COVID-19 related childcare. In addition, the FMLA requirement that an employee work for at least 12 months and 1,250 hours to be eligible for FMLA leave is not required for E-FMLA; rather, an employee must be employed for only 30 days to qualify for job-protected leave for coronavirus-related emergency family leave, and there is no minimum hour baseline.

An employee may avail himself/herself of paid leave under the E-FMLA if the employee cannot work because the employee must care for his/her child under 18 years of age because the child’s school has been closed or customary child care provider is not available due to COVID-19. While the FFCRA amendment to the FMLA does not mandate payment for the first 10 days of E-FMLA, an employee may elect to use PTO or earned sick leave for the unpaid portion of leave, or can seek paid leave under the emergency paid sick leave provision of the Act. Employers cannot force an employee to use PTO or earned sick time, take emergency paid sick leave, or take unpaid leave for the first 10 days of E-FMLA; the employee decides.

For this emergency caregiver paid leave, after the first 10 days of leave, the employee is entitled to receive two-thirds (2/3) of the employee’s regular rate of pay for the remaining E-FMLA leave time taken by the employee (up to the 12-week maximum). However, the Act provides a cap on the daily payment at $200 per day, and a total cap of $10,000 (ten weeks, or 50 days, at $200/day). As with the COVID-19 paid sick leave, employers receive a dollar-for-dollar tax credit for payments made for paid E-FMLA leave.

As with the FMLA, employees who exercise their right to receive paid E-FMLA leave to care for a child due to a loss of childcare because of the coronavirus are entitled to job restoration to the same or a substantially equivalent position provided they can return to work within the protected leave period. There is, however, a limited exception for employers having less than 25 employees. For these smaller businesses, E-FMLA does not guarantee or require job restoration if the following conditions are met: (i) the position held by the employee no longer exists due to economic conditions or other changes in the business conditions of the employer; (ii) the employer can demonstrate it made reasonable efforts to restore the employee, but cannot; and (iii) the employer must make reasonable efforts to contact the employee if an equivalent position becomes available for up to one-year from the earlier of (a) the date on which the qualifying need related to a public health emergency concludes, or (b) the date that is 12 weeks after the date on which the employee’s leave commenced.

Important Considerations for Both Provisions

There are certain considerations that come into play for both the paid sick leave
provision and the emergency childcare leave provision of the FFCRA. Those considerations include:

- If the need for leave is foreseeable, an employee must provide notice as soon as practicable;

- Small business exemptions are possible. The U.S. Secretary of Labor may issues regulations to exempt small businesses having fewer than 50 employees if these new requirements will jeopardize the viability of the business as a going concern;

- Employers of certain health care providers or emergency responders may elect to exclude such employees from the application of this rule. In other words, while health care providers and emergency responders may elect to offer these paid leave benefits to their employees, they are exempt from the Act;

- Employers are prohibited from discriminating or retaliating against any employee who takes paid leave under the Act, has filed a complaint or instituted a proceeding under or related to this Act, or has testifying – or will testify – in such a proceeding; and

- Employers will be required to display a poster, which the USDOL is in the process of issuing.

Summarizing, the FFCRA provides some incredible new benefits for employees affected by COVID-19, whether it’s paid sick leave for the employee who must quarantine himself/herself due to exposure or diagnosis, or paid family leave to the employee who must care for a child whose school has closed or whose regular childcare provider is unavailable due to this national emergency. These impositions on employers are onerous and may create incredible strain on their viability. In turn, the law creates some new benefits for employers, including tax credits for 100 percent of what they pay out to employees (subject to the noted limits), and the law creates certain exemptions, or potential exemptions for the smallest employers impacted by the Act.

New State Lockdowns and Office Closings

In addition to having to learn, understand and comply with the emergency legislation being passed by Congress, employers must grapple with the new limitations on business created by state governments. Within the last few days, the Governors of both New Jersey and Pennsylvania imposed stringent new limitations on non-essential businesses operating in their states.

New Jersey Mandates

On March 16, 2020, Governor Philip Murphy issued Executive Order 104, which, among other things: established statewide social mitigation strategies; limited the scope of service and hours of operation for restaurants and certain retail establishments; and deemed certain businesses “essential,” including grocery stores, pharmacies, healthcare providers and gas stations, to name a few. On March
21st, Governor Murphy issued Executive Order 107, which promulgates extraordinary new precautionary measures to combat COVID-19. Executive Order 107 imposes the following on all employers, employees and residents of the State of New Jersey:

- All New Jersey residents must remain home – “sheltered” – unless they are: (1) obtaining goods or services from essential retail businesses; (2) getting takeout food; (3) seeking medical attention, essential social services, or assistance from law enforcement or emergency services; (4) visiting family or other individuals with whom the resident has a close personal relationship (e.g. caretaker or romantic partners); (5) reporting to, or performing, their job; (6) exercising or engaging in outdoor activities with immediate family members, caretakers, household members, or romantic partners while adhering to social distancing practices with other individuals; (7) leaving the home for an educational, religious, or political reason; (8) leaving because of a reasonable fear for health or safety; or (9) leaving at the direction of law enforcement or other government agency.

- Gatherings such as parties, celebrations or other social events are prohibited.

- The use of public transportation is prohibited unless an individual has no other reasonable alternative.

- The brick-and-mortar of all non-essential retail businesses, and all recreational and entertainment businesses must close (for the full list, see the Order).

- All businesses, including non-profits, in New Jersey must accommodate their workforce, wherever practicable, for telework arrangements. To the extent remote work arrangements are not feasible, employers must make their best efforts to reduce staff on site to the minimum number of essential employees.

- All schools in the State are closed to in-person education or instruction.

- Certain businesses or services are excluded from the Executive Order, including health care providers, food banks, and law enforcement agencies, to name a few.

- Penalties for violations may be imposed.

Executive Order 107 took effect on Saturday, March 21, 2020, at 9:00 p.m., and shall remain in effect until revoked or modified by Governor Murphy.

In addition, on March 19, 2020, Governor Murphy signed into law a new anti-retaliation law with respect to the novel coronavirus. The new law prohibits employers in the state from firing, demoting or otherwise punishing workers if they take time off because they have, or are likely to, have COVID-19.

In relevant part, the anti-retaliation law, which took effect immediately, provides as follows: “An employer shall not ... terminate or otherwise penalize an employee if the employee requests or takes time off from work based on the written [ ] recommendation of a medical professional licensed in New Jersey that the employee take that time off for a specified period because the employee has, or is likely to
have, an infectious disease, which may infect others at the employee's workplace.” In addition, the new law requires an employer to reinstate the employee to the position the employee held when the employee’s leave commenced with no reduction in seniority, status, benefits, pay or other terms or conditions of employment. Notably, while this new state law does not provide paid leave to an employee, it provides a job restoration requirement that exceeds the protections afforded under the FFCRA (discussed above).

In addition to providing a private right of action to any employee aggrieved by a violation of this new anti-retaliation act, an employer may be subject to a fine of $2,500 for each violation of the act.

On March 16, 2020, the New Jersey Department of Labor and Workforce Development also created a chart on COVID-19 scenarios and benefits available to employees, which New Jersey employers may find helpful when it comes to navigating the uncharted territory we’ve entered.

**Pennsylvania Mandates**

Like New Jersey, Pennsylvania has implemented extraordinary measures to combat the coronavirus. On March 19th, Governor Tom Wolf issued an Executive Order closing all non-life sustaining businesses.

Effective March 19th at 8:00 p.m., Governor Wolf indicated that enforcement actions will be taken against restaurants and bars that continue their dine-in business, and only carry-out, delivery and drive-through food and beverage service may continue so long as social distancing measures are practiced.

In addition, effective March 21st at 12:01 a.m., any business in the Commonwealth of Pennsylvania that is not life-sustaining may not operate any brick-and-mortar or physical operation, regardless of whether the business is open to members of the public. The Order does not apply to virtual or telework operations, where no physical presence is required. In other words, if your Pennsylvania business is not life-sustaining, the physical operation of the business must close and only telework operations may continue. In conjunction with this Order, the State of Pennsylvania issued a spreadsheet identifying businesses that may continue their physical operations and those which may not. Again, enforcement actions may be taken against businesses that fail or refuse to comply with Governor Wolf’s Order by continuing their physical operations if the business is not “life-sustaining.”

The Commonwealth of Pennsylvania has provided online guidance to responding to COVID-19 in Pennsylvania.

COPYRIGHT © 2020, STARK & STARK