In this episode of The Proskauer Brief, partners Harris Mufson, Seth Safra, Mike Lebowich and Guy Brenner discuss recent developments associated with the coronavirus (COVID-19) pandemic. Tune in as we address the latest legislative developments and issues employers should be thinking about when confronting the ramifications of this virus in the workplace.

TRANSCRIPT

Harris Mufson: Welcome to The Proskauer Brief: Hot Topics in Labor and
Guy Brenner: I think, a few things before we get into them. I’m going to talk about the lead provisions in the bill that was passed this past week by Congress and a couple of things listeners need to bear in mind. First of all, we’re taping this on March the 20th, the law doesn’t go into effect, isn’t in fact now and may not go into effect until April the 2nd. In addition, there are currently regulations that are being worked on by the Department of Labor that are going to fill in a lot of the questions that employers have; and so anyone who’s listening to this should, you know, keep on top of developments because this is a new law, a law that was put together hastily, and there’s going to be a lot of guidance out there hopefully to help fill in the gaps. The other thing that employers need to bear in mind is that this new law only applies to employers who have under five hundred employees. How you calculate the number of employees has been something that everybody on this call has been dealing with this week from our clients. That’s hopefully something that will be illuminated by regulations coming out by the Department of Labor, but if you have more than five hundred employees these are laws that don’t apply to you directly.

So let’s talk about the substance of the laws. One component is a paid sick leave component. This is limited to eighty hours maximum of paid sick leave and the amount of sick leave that the employees are entitled to depends on the reasons why they’re taking leave. If they’re taking the leave because they’re quarantined by a state order or local order or if they’re quarantined by some kind of medical professional’s guidance or if they have symptoms of the coronavirus and are seeking a diagnosis than they’re entitled to one hundred percent of pay up to five hundred and eleven dollars a day ($511) or a maximum of five thousand one hundred and ten dollars ($5,110). They can also take this paid sick leave up to eighty hours if they’re caring for somebody who is ill or has been quarantined or if they are caring for someone; a child whose school has been closed or their child care has been closed. For those later reasons its only two-thirds pay up to a maximum of two hundred dollars ($200) or two thousand dollars ($2,000) in aggregate. So that’s the paid sick leave component. The second component of the leave bill that was passed relates to an amendment to the Family and Medical Leave Act, and it only applies to circumstances where employee can’t work or telework because their child’s school has closed or because childcare is closed, and so in those circumstances the first two weeks are not paid. I think the idea is that they will be covered by the paid sick leave law I just talked about, and then the next ten weeks will be paid but again they’ll be similar to the provision for taking childcare leave under the sick-leave law in that, it’s only two thirds of your pay up to a maximum of two hundred dollars ($200) a day, up to ten weeks, for a total max of ten thousand dollars ($10,000). The important thing to note for both of these types of leave is that while employers are mandated to pay, the law provides for a credit on payroll taxes from the federal
government that should cover the cost of these paid leave provisions. So it’s important that employers determine whether or not they’re covered and if they are, provide with leave and seek reimbursement when they submit their quarterly payroll tax submissions.

Harris Mufson: Thank you, Guy, for that helpful summary. I think, Seth did, you have something you wanted to add about the tax implications of the federal law?

Seth Safra: Yes, Harris. In addition to the subsidy that you get to pick a credit for the amount that you’d pay in the emergency sick leave, the sick leave itself is subject to regular taxes except that it’s not subject to the employer’s share of social security tax, which is 6.2%. As drafted, it is subject to the Medicare tax and to regular income taxes.

Harris Mufson: Ok, that’s very helpful. Something else I wanted to just briefly cover is that in addition to the federal laws that have been passed, that Guy just outlined and Seth just reference in terms of the tax provisions and those laws, we’ve also been tracking developments at the state level, and there’s been a particularly important development in New York with the passage of the statewide Coronavirus Response Bill; I just wanted to briefly touch on that. That law requires employers to provide job-protected sick leave to employees who are the subject of a mandatory or precautionary order of quarantine or isolation issued by the State of New York or a state or local health department or any other governmental entity due to the coronavirus pandemic. Now, a question is, what are those orders, what is an order of quarantine or isolation? Frankly that is a bit unclear. Once a mandatory or precautionary order of quarantine or isolation is issued, there are certain requirements that employers have to adhere to.

Employers with a hundred or more employees are required to provide at least fourteen days (14) of job-protected paid sick leave during the period of the order. Employers with between eleven and ninety-nine employees are required to provide at least five days of job-protected sick leave followed by unpaid leave until the termination of the quarantine order, and after those five days of paid sick leave, employees are eligible for paid family leave benefits and New York Statutory disability leave benefits for the remainder of the quarantine period. Notably employees who are asymptomatic or not diagnosed with any medical condition while in quarantine and who are physically able to perform work while under the quarantine order, either remotely or through some other means, are not eligible to use the bank of sick leave made available under this law, which is an important exception.

In addition, employees are not eligible for the paid sick leave benefits if they are under a mandatory or precautionary quarantine order because they are returning to the United States after nonbusiness travel to a country which the CDC has issued a Level Two or Three coronavirus-related travel advisory, so long as that employee provided notice of that travel advisory and the limitations on benefits prior to taking that travel. So, I think it’s important that employers promulgate new policies to ensure that employees are aware of this new coronavirus sick leave bill in New York; and, frankly, also the federal laws that have been passed, once those are enacted, it’s important to notify employees of their eligibility to take benefits of those laws. Something else that we’ve certainly have been confronting, I think, as a Labor and
Employment department and all of the lawyers on the phone have been dealing with these sorts of issues is: clients asking questions and contemplating reducing employees hours, engaging in furloughs and various other exercises, frankly, to avoid terminations of employment; and Seth I wanted to give you an opportunity to address that, and how we have been advising clients and the impact benefits on those sort of exercises.

Seth Safra: Thanks, Harris. So, employee benefits in general, you really have to look at the plan documents to evaluate each situation, because most of the benefit rules are mandated by plan design rather than governmental requirements. So I have basically five points of how I look at this.

Number one, start with the plan document. The planned document should specify when coverage starts and when it ends and your benefit plans, here we are really talking about health plans, will vary in how they treat unpaid leave or furlough or layoffs or termination. So you have to identify the type of leave and the reason for it and what does the plan say. For example, even though coverage typically ends when employment ends, the plan will often say that coverage continues to the end of the month. So, you really need to identify when coverage ends under the plan.

Number two, when coverage ends, COBRA starts; and that is true whether the coverage ends due to a loss of employment or a reduction in hours. So it’s important to note that the COBRA trigger is the loss of coverage, not the employment event.

Number three, most plans require that an employee pay the full cost of COBRA coverage, but this is not a legal requirement. Employers could continue to subsidize the cost of coverage or cover it completely if they do so on a nondiscriminatory basis. So there is a way, even if you get to COBRA coverage, to keep employees in the same position they would have been in if they were still active.

Number four, employers could choose to extend coverage outside of COBRA, so if they do that, they could keep people on leave or furlough just like active employees and just continue their coverage, and they could even do that if employment is terminated. So, there are choices to make between COBRA versus just continuing in the plan.

And number five, paying for coverage. You can require the employees to pay for coverage while they’re on leave, or you can waive the requirements to pay for coverage. If you require them to pay, and they’re on an unpaid leave, you could charge them while they’re out, and they can actually pay the premiums on an after-tax basis, or you could allow them to pay when they get it back, in which case you could do it on the pre-taxed basis through your cafeteria plan. One caveat there is an employer should really treat flexible spending accounts separate from the health plan. The flexible spending account, for a variety of reasons, it’s much better to make employees continue to contribute to their flexible spending account if they want to cover expenses that are incurred during the leave. And again, you can just require them to pay when they get back. So, there’s really three choices for flexible spending accounts if an employee is on leave. The employee could drop the flexible spending account because they’ve had a change in status; and if they make that choice, that just means that they can no longer be reimbursed for expenses that are incurred after they dropped the coverage, but they could still be reimbursed for
expenses that are incurred before they dropped the coverage. Alternative number two is that they can continue making contributions during their leave just as we talked about with continued regular health coverage. And number three, they could continue the FSA during the leave and just pay it when they get back.

**Harris Mufson**: That’s very helpful. Thanks, Seth, for that explanation. Mike, I wanted to ask you to just briefly touch on unionized work forces and what you’ve been seeing in the union environment and considerations that unionized employers should be thinking about in confronting the pandemic.

**Mike Lebowich**: Listening to everybody talk about sick leave and layoffs and furloughs and extension of health benefits, for those of us who work in the labor management relations area, you know, all of these fall into things that are terms and conditions of employment that are often either covered by a collective bargaining agreement or are negotiable because they are the types of things that the National Labor Relations Act requires the unionized employer to meet with their designated bargaining representative. So, over the last week and a half or so, as the various legislation has come out, as various orders of shut downs have come out, there has been constant need to interact with representatives of the unions that represent various employers; and in order to do that, it’s important to evaluate what a collective bargaining agreement currently says about each of these topics, whether there are employment guarantees, whether there are no layoff protections of things like that, other kinds of job security, whether there’s a very strong or weak management-rights clause that allows for layoffs or what severance versions exist and when do they trigger, and then dealing with the effects of all of these new rules that are coming out that probably no collective bargaining agreement ever envisioned. And so that entire range of issues are things that are not necessarily able to be done unilaterally in a unionized work force, so it’s very critical to open those lines of communications with your unionized representative, the representatives of unionized employees, and really just bear down and work with each other to the best way you possibly can under these circumstances.

Of course, making it all the more complicated and interesting is the fact that the collective bargaining negotiation, union relationships are usually face to face, but now you’re dealing with a computer, if you’re lucky, on a video screen or on a conference call, and so you need to prepare for that as well and learning to do those relationships in this new environment as well, so that’s something we’re all going to be working with as the days and weeks go on.

**Harris Mufson**: Alright, these were all very helpful considerations, and frankly I think we may want to do another podcast within the next few weeks just to continue to monitor these developments and present them to our listeners. I just want to thank everyone for joining us today on The Proskauer Brief. Stay tuned for more insights on the latest hot topics in labor and employment law. Be sure to follow us on Apple Podcasts, Spotify and Google Play.

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