Monday, June 8, 2020

This is the second in a series of articles written from my perspective as a labor and employment lawyer and mother addressing issues raised by the pandemic on multiple levels. My hope is that this series will provide practical guidance on how to deal with COVID-19 concerns based on current federal and state COVID-19-related laws.

The Problem: Lack of Childcare Due to COVID-19

The last nine weeks of homeschooling three kids while both parents telework full time jobs has resulted in chaos that lead to many tear-filled days and stress headaches in my household. And, as many have discovered, despite the easing of stay-at-home orders and other restrictions, life has not returned to normal. For
example, though some day camps and childcare centers have reopened, not all have. The day camp that my children were scheduled to attend will not reopen for the summer due to COVID-19. Other parents are facing similar challenges. Here are some new laws and regulations that have issued since the start of the pandemic that may be of interest to employers.

**Employer Considerations When Faced With Employee Childcare Issues**

When employers are faced with employees struggling with childcare issues during the pandemic, there are several points to consider. First, historically the childcare issue has predominately affected female workers who, in many instances, carry the majority of childcare duties. For years, many companies have focused on diversity and inclusion measures in the workplace. With an ongoing pandemic, employers want to ensure they do not take a step back in the diversity and inclusion space. So what is a company to do?

**The Families First Coronavirus Response Act and Other Leave Laws**

*What is the FFCRA?*

The Families First Coronavirus Response Act (FFCRA) requires employers with fewer than 500 employees to provide their employees with emergency paid sick leave under the FFCRA’s Emergency Paid Sick Leave Act (EPSLA) or expanded emergency family and medical leave provisions under the FFCRA’s Emergency Family and Medical Leave Expansion Act (EFMLEA) for specified reasons related to COVID-19. The EPSLA and EFMLEA leave provisions are applicable to employees who cannot work due to the closures of schools or childcare facilities and the lack of childcare resulting therefrom. The Department of Labor’s (DOL) Wage and Hour Division (WHD) administers and enforces the new law’s paid leave requirements. These provisions will apply through December 31, 2020. The FFCRA requires employers with fewer than 500 employers to provide paid leave related to childcare closures due to COVID-19.

*Healthcare providers and emergency responders are exempt*

The WHD released a set of “Questions and Answers” (Q&As) that provide guidance concerning healthcare providers and emergency responders. The FFCRA provides that employers of health care providers and emergency responders may elect to exclude these employees from coverage.

*Small employers (fewer than 50 employees) may be exempt*

Under the FFCRA, small businesses, including religious and nonprofit organizations, with fewer than 50 employees may be exempt from the law’s paid sick leave and expanded family and medical leave requirements “when the imposition of such requirements would jeopardize the viability of the business as an ongoing concern.” The WHD also released guidance concerning how employers may take advantage of
the small business exemption under the FFCRA.

**How much and for how long must an employee on EPSLA or EFMLEA be paid?**

The total amount of paid leave available due to the closure of childcare facilities is 12 weeks. The first 2 weeks of leave are paid under the EPSLA provisions. Weeks 3 through 12 are then paid under the EFMLEA provisions. An employer must pay the employee two-thirds of the employee’s average rate of pay (i.e., total compensation other than discretionary bonuses) over the past six months, subject to a statutory cap of $200 per day. Employers that provide paid leave under the FFCRA are eligible for a tax credit to pay for the leave.

**Is telework an option?**

Employers may want to consider if telework over the summer is a viable option for their employees. Many employers have transitioned large portions of their workforces to telework arrangements during the COVID-19 crisis. The COVID-19 pandemic has opened the eyes of many employers that with today’s technology, a good telework policy (and a little training) makes telework a much more viable option for many employees. I am lucky. My husband and I both have flexibility with our jobs and can continue to work from home as needed. Not everyone is so lucky, and not all jobs are suitable for work-from-home arrangements. If telework is an option for employees, this can be an optimal approach—and one that has been suggested by the U.S. Centers for Disease Control and Prevention (CDC) as the country begins to reopen.

**Is intermittent leave or schedule flexibility a viable option?**

Another option to consider is intermittent leave, job partnering, or alternate work schedules. It may be possible that a different shift may allow an employee to return to work and still have childcare during the summer. Job partnering or a reduced-hours schedule may also offer an alternative. Finally, intermittent leave for childcare may be useful in this situation to allow an employee to come back to work on a part-time basis.

The WHD’s Q&As provide guidance concerning teleworking arrangements (Q&As 17-20) and intermittent leave (Q&As 21 and 22) under the FFCRA.

**Can an employer lay off or furlough an employee due to childcare issues?**

If there is no other option, an employee may be subject to a furlough (a leave to zero hours without pay) or a permanent layoff. Availability to work is a cornerstone of holding a job, even in these trying conditions. Before taking this type of action, the employer must confirm it is not subject to the FFCRA or any other state law related to childcare. As schools closed due to the pandemic, several states enacted special leave laws related to COVID-19, childcare, and school closures.

**What is the applicability of unemployment insurance to scenarios involving a lack of childcare?**
Prior to the COVID-19 outbreak, an individual would not have qualified for unemployment benefits if he or she was discharged or left work as a result of childcare issues. The reason was simple. If the person had childcare issues, then the person was not available to work.

In the wake of the COVID-19 pandemic, many states loosened the qualifications required for the receipt of unemployment benefits. Some states now temporarily allow affected individuals to receive state unemployment if they cannot work due to a school or daycare closure resulting from COVID-19. In states that have revised their qualifications, an individual will qualify for normal state unemployment insurance under his or her employer’s unemployment account. In states where the inability to work due to childcare has not been waived, the individual will likely qualify for unemployment benefits under the Pandemic Unemployment Assistance Plan provided for in the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

Pandemic Unemployment Assistance (PUA) is a new form of federal unemployment assistance that covers individuals who do not qualify for state unemployment benefits. If an individual is not qualified for state unemployment benefits due to childcare issues, the person may qualify for unemployment under PUA. PUA is funded by the federal government, but payment is processed by the state unemployment agency. The benefit amount will be the same as the benefit under the state unemployment plan.

Summer Childcare That Is Open and Available

The WHD has made clear (Q&A 93) that whether an individual is eligible to receive unemployment and FFCRA leave is based on the closure of a school or daycare, not the fear of sending a child to school or daycare. An exception may exist if the fear is “reasonable” or if the child has a high risk factor according to the CDC’s risk guidelines. Now that summer has arrived, the issues facing parents may be different. Once the school year has ended in the location in which the employee lives, the issue no longer revolves around the closure of a school but rather what an employee normally did for summer childcare and the availability of that childcare option.

Unfortunately, there is no magic bullet to help employees deal with the closure of schools and daycare. The reality is that this may be a problem employees and employers face this summer and into the next school year. Employers are encouraged to work with employees to the extent possible. Many good workers have been compelled to confront situations where their normal, reliable childcare options are simply not available.
