WARD AND SMITH, P.A.
ATTORNEYS AT LAW

COVID-19 Update for Employers: New Key Guidance

Written By X. Lightfoot (xlightfoot@wardandsmith.com) **and Hayley R. Wells** (hrw@wardandsmith.com)

March 27, 2020


On March 25, 2020, the U.S. Department of Labor's Wage and Hour Division ('WHD') published its initial guidance to provide compliance assistance for employers related to the application of the benefits and leave entitlements authorized by the Families First Coronavirus Response Act ('FFCRA' or the 'Act') effective April 1, 2020.

Background:

On March 18, 2020, the United States Congress passed the FFCRA to target some of the effects COVID-19 has caused in workplaces across the United States. We previously summarized the provision of the FFCRA.

Since then, the WHD issued a model notice that all covered employers are required to post in a conspicuous place on their premises, which describes the Act's requirements. The posting requirement may be satisfied by emailing or mailing the notice to employees, or posting the notice on an internal or external website used for employee information. Employers are also prohibited from discharging, disciplining, or otherwise discriminating against those employees who avail themselves of the paid sick leave and files a complaint or institutes a proceeding due to the Act's requirements.

Intermittent Leave Under the FFCRA:

Intermittent leave under the new Emergency Sick Leave Act is permitted if an employer allows it and if an employee is unable to telework the employee's normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, the employee and employer may agree that the employee may take paid sick leave intermittently while teleworking. Similarly, if an employee is prevented from teleworking during the employee's normal schedule of hours because he or she needs to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, the employee and employer may agree that the employee can take expanded family medical leave intermittently while teleworking.

Intermittent leave may be taken in any increment, provided the employee and employer agree. For example,

by agreement, an employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

However, intermittent sick leave under the FFCRA cannot be taken if:

- An employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- An employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- An employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- An employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- An employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless an employee is teleworking, once she begins taking paid sick leave for one or more of the above qualifying reasons, the employee must continue to take paid sick leave each day until either (1) the employee uses the full amount of paid sick leave or (2) the employee no longer has a qualifying reason for taking paid sick leave.

For an employee using sick leave to care for a child whose school or place of care is closed, or whose child care provider is unavailable for, because of COVID-19 reasons, the employee may take the leave intermittently on the days such leave is needed. The Department of Labor provides the following example: An employee may take paid sick leave on Mondays, Wednesdays, and Fridays to care for a child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 reasons, but work at the employer's normal worksite on Tuesdays and Thursdays when regular childcare is available.

Expanded family and medical leave may also be taken intermittently if agreed upon by the employer and employee.

The Department of Labor encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.

Termination or Furlough:

Many employers are now wrestling with the difficult decision of whether to terminate or furlough employees due to drastic changes in economic conditions, temporary business closings or a slowdown in operations, and stay home orders issued by divisions of state or local government.

The WHD compliance assistance materials related to the FFCRA have clarified an employer's obligations with respect to the payment of benefits if an employer chooses furlough over termination.

If, prior to the FFCRA’s effective date (April 1, 2020), an employer sends an employee home and stops paying an employee because it does not have work for the employee to do, the employee will not be eligible to receive paid sick leave or expanded family and medical leave. This holds true whether the employer closes a worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.

If an employer closes after the FFCRA’s effective date (April 1, 2020), it will not be required to pay paid sick leave or expanded family and medical leave to its employees (even if an employee requested leave prior to

the closure). This holds true whether an employer closes a worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive.

In either of the preceding scenarios, an impacted employee may be eligible for unemployment insurance benefits.

If an employer furloughs an employee because it does not have enough work or business for the employee, the employee is not entitled to then take paid sick leave or expanded family and medical leave. If an employer closes while one or more employees are on paid sick leave or expanded family and medical leave, the employer must pay the employee or employees for any paid sick leave or expanded family and medical leave used before the employer closed. As of the date, the employer closes the worksite, the employee or employees are no longer entitled to paid sick leave or expanded family and medical leave. If an employer reduces an employee's work hours because it does not have work for the employee to perform, the employee may not use paid sick leave or expanded family and medical leave for the hours that the employee is no longer scheduled to work. An employee may, however, take paid sick leave or expanded family and medical leave if a COVID-19 qualifying reason prevents the employee from working her full schedule. If so, the amount of leave to which the employee is entitled is computed based on the employee's work schedule before the hours were reduced.

Considerations

While the Act provides covered employers with relief through tax credits, it has yet to be determined when those credits will be provided to such employers. Some businesses are experiencing significant cash-flow issues that make compliance with the Act's requirements financially impossible or unsustainable. For those employers, the decision between whether to furlough employees or shutter their operations and layoff employees is somewhat imminent. Such employers should consider the viability of furloughing employees rather than a layoff.

Potential benefits of furlough over termination may include:

1. The ability to keep employees on a group health insurance plan (employer must check the health plan documents to ensure its carrier allows continued coverage for furloughed employees);
2. Avoiding the obligation to pay out accrued PTO to employees;
3. Avoiding having to re-hire an entire workforce including obtaining new I-9 and W-4 forms from employees when the business re-opens;
4. Allowing employees to avoid the "waiting period" applicable to new employees under a group health insurance plan in the event the business re-opens; and
5. Potentially enhanced employee morale because employees feel that they still have a job to return to and that they are connected with the employer.

Finally, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), contains a provision known as the Paycheck Protection Loans ("PPL") Program. This program provides for loans under the Small Business Administration's ("SBA") 7(a) program, which may be forgiven if certain conditions are met. Among the conditions are that an employer retains its employees. Employers should be mindful of the PPP Program requirements if they intend to take advantage of these loans and related forgiveness before deciding between termination or furlough. In any event, an employee subject to a permanent layoff (termination) or furlough for a COVID-19 related reason, should be entitled to apply for unemployment benefits from the North Carolina Department of Employment Security.

Takeaways

We recognize that each business is unique and that there are many considerations that employers must bear in mind when making these difficult decisions. The Department of Labor has not yet issued any regulations corresponding to the Act's requirements. However, the DOL has issued fact sheets for both employees and employers to provide further guidance and an enhanced understanding of the requirements and rights provided under the Act. Additionally, the DOL has provided a Questions and Answers document addressing many concerns by employers and employees.

--