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The FFCRA Trap: Employers Must Consider Retaliation Even After the FFCRA

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While the light at the end of the tunnel is visible, the darkness of the COVID-19 pandemic still looms over employers.

Over the last few weeks, states across the nation began taking steps to reduce the restrictions caused by the pandemic. Mask mandates are being lifted, groups are gathering, and social events are being scheduled again. Availability of the COVID-19 vaccine also allowed many employers to bring workers back to the workplace safely. Though these are much-needed victories and signs of the progress made through this tumultuous time, employers must remain cautious and careful in their actions to avoid running afoul of the law. A return to normalcy seems to be on the horizon, but there are still lingering concerns employers must consider before terminating or disciplining employees impacted by COVID-19.

The Family First Coronavirus Response Act ("FFCRA") previously governed uniform leave and retaliation prohibitions for employees affected by COVID-19. Generally, the FFCRA provided up to 80 hours of paid sick leave to employees dealing with qualifying issues related to COVID-19 and prevented employers from discharging, disciplining, or discriminating against employees who take FFCRA leave. Although the FFCRA expired December 31, 2020, and along with it went its protections prohibiting retaliation against employees, employers should continue to tread lightly when making decisions surrounding employees impacted by COVID-19. Many states have enacted retaliation bans, leave laws, and employer standards that, in conjunction, effectively take the place of the FFCRA's restrictions.

Retaliation Bans Against Adverse Employment Actions

The first issue employers must consider before taking disciplinary action against their employees is whether the state in which the employee works enacted a retaliation ban against said actions. Many states — including Colorado, Illinois, Maryland, Michigan, Minnesota, and New Jersey — and the District of Columbia passed bans directly prohibiting employers from discharging, disciplining, or interfering with an employee's COVID-19 related leave or actions. While most of these laws aim to prevent employers from taking adverse employment actions against employees who test positive for the virus or need to quarantine due to close contact with an infected individual, many of the laws go beyond that obvious situation. For example, several

of these laws protect an employee's right to care for a family member, although the employee, personally, may not be inflicted with the virus. Even more ancillary, Colorado's WARNING Act provides employees the right to wear personal protective equipment in the workplace without recourse from their employer. With the variance in the protections provided from state to state, employers must remain well-informed on what actions are directly impermissible under relevant state law.

Designated COVID-19 Sick Leave

Employers must also consider whether the states in which they maintain employees passed COVID-19 Sick Leave laws. While few states have passed such laws, those that did passed extensive legislation. The most pressing examples are California and New York. Each of these states enacted laws during the pandemic, providing employees with rights to take leave, in addition to other applicable leave laws, to quarantine due to COVID-19, to care for certain family members subject to a quarantine order, or to attend vaccine appointments. Depending on the employer's size and net income, employers may be required to offer paid COVID-19 Sick Leave in these states. Additionally, all covered employees exercising the right to use COVID-19 Sick Leave under these laws are protected from retaliation, meaning the employee may not be fired or disciplined for utilizing COVID-19 Sick Leave and must be restored to the position they held prior to taking leave. Similar to the retaliation bans, the differences in state leave laws enacted to combat the pandemic are vast and could lead to issues for multi-state employers with uniform policies.

General State Leave Laws and How They May Apply

Despite the fact that additional designated COVID-19 Sick Leave laws were not passed in many states across the country, states' general leave laws could create retaliation issues for employers dealing with the pandemic. States like Arizona, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Oregon, Rhode Island, and Washington have addressed the pandemic through guidance recognizing that the respective state's law covers COVID-19 or passed amendments to their leave laws to include such coverage expressly. In addition, a growing number of states are pushing for mandatory sick leave in the wake of the pandemic. New Mexico recently joined these states with the passage of its Healthy Workplaces Act, which requires employers to offer paid sick leave beginning in July 2022. Each of these states has its own rules regarding covered employers and employees, accrual methods, and permitted uses. However, they all agree that COVID-19 could be a qualifying circumstance to take job-protected leave under their respective laws. Therefore, actions taken by an employer against an employee dealing with COVID-19 related issues could lead to unintended consequences.

What Should Employers Do?

Although the FFCRA's requirements for COVID-19 related leave expired, multi-state employers may miss the uniformity of the federal law as compared to addressing inconsistent state leave laws. While many employers will not feel the brunt of the disparity within state laws, multi-state employers (including employers with employees teleworking in various states) must deal with these issues as they craft sick leave policies or make difficult decisions regarding their employees. Multi-state employers are tasked with navigating differing laws, expectations, and expiration dates in each state in which they operate — not to mention the local laws and ordinances that may exist. These employers must be willing to diverge from their uniform policies and provide appropriate state addendums to adapt to state laws as circumstances dictate. Employers should continue to monitor state legislation as they amend and implement their policies. Employers must also be prepared to accommodate the ongoing COVID-19 related needs of their employees while balancing the needs of the business to avoid retaliation claims. The trick, of course, will be how to strike such a balance without jeopardizing the sanctity of the business' rules or inviting a legal challenge. Consulting informed legal counsel

would be the place to start.

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