Insights: Alerts

Employer Leave Liability in the COVID-19 Era

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main COVID-19 Task Force page and/or your email for updates.

In the wake of COVID-19, employers still find themselves navigating uncharted waters regarding employee leave requests and employer leave responsibilities under various state and federal requirements. Specifically, employee requests for leave under the newly created Families First Coronavirus Response Act ("FFCRA") and the American's with Disabilities Act ("ADA"), have rapidly increased as the pandemic continues to impact the United States and its businesses. As COVID-19 cases are beginning to spike again in various areas nationwide, employers must remain extra vigilant to ensure compliance with their various leave-related obligations.

The Families First Coronavirus Response Act Leave Entitlements

The FFCRA included two completely new paid leave entitlements that employers with fewer than 500 employees must follow. (We have previously written about the FFCRA requirements and regulations here, here, here, here, and here.)

After the FFCRA was signed into law on March 18, 2020, the Department of Labor announced a temporary period of non-enforcement from March 18 through April 17, 2020, in order to "enable public and private employers who are covered by the Act to come into compliance with the new statute," so long as the employer took "reasonable" and "good faith" efforts to comply with the Act. However, since the temporary period of non-enforcement has expired, the DOL has begun enforcing these newly created leave entitlements. So far, the enforcement penalties have been minimal, with employers ranging from consulting services to public schools being forced to pay back wages to employees who missed work for COVID-19-related reasons covered under the Act. To date, most of the penalties have ranged from the hundreds to low-thousands of dollars, and appear to represent instances where the employer wrongly withheld paid leave from its employees under the EPSLA and/or the FMLA provisions of the FFCRA. Employers should be prepared, however, for penalties under the Act to grow more severe in the future, as employers have now had more time to learn about their obligations. The Act allows for all the same penalties as afforded under the FLSA (for violations of the EPSLA) and the FMLA (for violations of the FMLA+).

As recently as June 29, the DOL issued a news release providing employers with additional guidance concerning these absences, and specifically issued guidance concerning how employers should treat leave requests related to summer camp closures if those closures required employers to provide childcare. The DOL has defined a "place of care" as a "physical location in which care is provided for the employee's child while the employee works and includes summer camps and summer enrichment programs." 29 C.F.R. § 826.10(a). An employee who requests leave under the FFCRA leave must provide the employer with certain supporting information, either orally or in writing, that includes an explanation of the reason for the leave and a statement that the employee is unable to work because of that reason. Additionally, when providing care for the employee's child whose school or place of care is closed, the

employee must provide the name of the child, the name of the school or place of care, and a statement that no other suitable person is available to care for the child. *Id*. § 826.100(e). The requirement for summer camps is the same, and the employee must provide the employer with the name of the specific summer camp or program that would have been the place of care for the child had it not closed for COVID-19 related reasons. *Id*. § 826.100(e)(2). The DOL did note, however, that the "expectation that employees take FFCRA leave based on planned summer enrollments" still requires that there be "some indication that the child would have attended" the summer camp or program, just as if the closed place of care was a day care center or school.

Leave Entitlements Under the Americans with Disabilities Act

Similarly, the EEOC has continued to provide updated guidance for employers navigating requests for leave related to COVID-19 and their obligations under the ADA. Generally speaking, there is no blanket exception to the reasonable accommodation process during the COVID-19 pandemic, and employers must provide employees with a disability with a reasonable accommodation, absent the accommodation resulting in an undue hardship to the employer, if that accommodation will allow the employee to perform the essential functions of the job. To date, the EEOC has not stated that a COVID-19 diagnosis, on its own, would be considered a disability under the ADA. However, some sources, including the New York City Commission on Human Rights have stated that it is highly likely that testing positive for COVID-19 would meet the definition of a disability under the applicable state law. Further, it is possible that employees with pre-existing conditions, when paired with the additional concerns raised by the pandemic, would also meet the relevant state and federal statutory definitions of disabled. Employers should consider all such factors – including the applicable state and federal laws in their respective jurisdictions – when weighing requests for accommodations from employees.

When considering accommodation requests, employers may still utilize the "undue hardship" (which the EEOC defined as "significant difficulty or expense") framework to determine whether a specific request is reasonable. Examples of undue hardship considerations specific to the pandemic may include the sudden loss of some or all of an employer's income stream due to COVID-19; the amount of discretionary funds available to the employer at the time; expected dates for current pandemic-related restrictions to be lifted and/or whether new restrictions are expected to be added or substituted; supply chain availability of requested accommodation related items; and, the feasibility of implementing certain restrictions from a teleworking or remote workplace. Although employers may consider certain factors in weighing the hardship posed by a reasonable accommodation request, they should not reject any accommodation that costs money as a matter of course. To the contrary, employers must "weigh the cost of an accommodation against [the employer's] current budget while taking into account constraints created by the pandemic." Current EEOC guidance encourages additional flexibility by employers and employees to determine whether certain accommodations are possible under the circumstances. When faced with a request for a reasonable accommodation, employers may ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist and enable the employee to keep working; explore alternative accommodations that may effectively meet the employee's needs; and request medical documentation if needed.

Employers should remember that an employee who was receiving a reasonable accommodation prior to the COVID-19 pandemic may still be entitled to a different or additional accommodation during the pandemic, absent undue hardship to the employer. For example, the EEOC noted that an employee who is now teleworking due to the pandemic may require a different accommodation while working from home than was required in the office setting.

The EEOC also clarified that, “[g]iven the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the ‘interactive process' and grant the [accommodation] request.” Such granting of the requests may be temporary. Employers are able “to adapt the interactive process – and devise end dates for the accommodation – to suit changing circumstances based on public health directives.”

At the end of May, the EEOC's New York field office confirmed an increase in charges filed with the EEOC related to COVID-19 involving claims that the employer failed to accommodate a disability during the pandemic. The EEOC New York Deputy Director, Judy Keenan (whose office covers bias claims filed by workers in New York and New England), said that their office had received numerous claims accusing employers of violating the accommodation provisions of the ADA. Such claims are likely to continue rising nationwide as the pandemic continues.

Employers should also be careful not to create policies or practices that have a disproportionate impact on certain categories of employees based solely on COVID-19 risk factors. For example, even though the CDC has defined certain categories of employees to be at a higher risk of contracting COVID-19 and/or having more severe symptoms of COVID-19, employers may not unilaterally exclude those workers from the worksite under the ADA, the Age Discrimination in Employment Act (“ADEA”), or Title VII. The EEOC has been clear that under these federal anti-discrimination statutes, employers may not unilaterally exclude older, disabled, or pregnant employees as a matter of course, due simply to the pandemic. While employers may ask an employee if he/she/they would like an accommodation, if the worker refuses, the inquiry should generally end there (absent the worker possessing symptoms of COVID-19, in which case employers may reasonably exclude the employee from the worksite).

Related People



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