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Eye on Washington
State and Local Update

Timely, topical insights on a variety of payroll and reporting issues.

Topics covered in this issue:

Leave

Kentucky Provides Leave to Adoptive Parents

On March 23, 2021, Kentucky Governor Andy Beshear signed into law House Bill 210 (HB 210) which amends KRS 337.015 to require employers to provide the same leave policies to adoptive parents as they provide to birth parents. It also changes the applicable age of an adoptive child from seven to ten and creates an exemption for specified categories of adoption.

HB 210 states as follows:

Section 1. KRS 337.015 is amended to read as follows:

(1) Upon receiving written request by an employee, every employer shall grant reasonable personal leave not to exceed six (6) weeks, or if the employer has established a policy providing time off for birth parents that is greater than six (6) weeks, that period of time shall be the minimum period of leave available to adoptive parents, when the reception of an adoptive child under the age of ten (10) is the reason for such request.

(2) If an employer provides paid leave or any other benefits to employees who are birth parents following the birth of a child, it shall also provide the same type, amount, and duration of paid leave and other benefits to employees following the adoption of a child.

(3) This section shall not apply to an adoption by a fictive kin, stepparent, stepsibling, blood relative, including a relative of half-blood, first cousin, aunt, uncle, nephew, niece, and a person of a preceding generation as denoted by prefixes of grand, great, or great-great, or a foster parent who adopts a foster child who is already in their care.

Section 55 of the Kentucky Constitution provides that "[n]o act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed." The current Kentucky legislation was scheduled to end on March 30, 2021.

For a copy of HB 210, click on the link provided below

https://apps.legislature.ky.gov/recorddocuments/bill/21RS/hb210/orig bill.pdf

New Mexico Enacts Paid Sick Leave Bill

On April 9, 2021, New Mexico Governor Michelle Lujan Grisham signed into law House Bill 20 titled "Healthy Workplaces Act" (the "Act").

Effective July 1, 2022, employees will be permitted to accumulate one hour of paid sick leave per 30 hours worked. Employees are allowed to use up to 64 hours annually for personal illness, to take care of sick family members, for meetings at the school of the employee's child or place of care related to the child's health or disability, or for absences related to domestic abuse, sexual assault, or stalking.

Employers may not require an employee to use other paid leave before the employee uses the paid sick leave under the Act

For a copy of House Bill 20, click on the link provided below.

https://www.nmlegis.gov/Sessions/21%20Regular/Amendments_In_Context/HB0020.pdf

New York State Provides Further Guidance on COVID-19 Vaccine Paid Leave

On March 12, 2021, New York Governor Andrew Cuomo signed legislation, Senate Bill 2588A (S2588A), granting public and private employees paid leave for COVID-19 vaccinations. Specifically, the law provides for up to four hours of paid leave per vaccine injection, to be paid at the employee's regular hourly rate. The law is effective immediately and will expire and be deemed repealed on December 31, 2022.

New York State has now released guidance on S2588A in the form of frequently asked questions ("FAQs"). Most importantly, the FAQs clarify that the new law does not create any retroactive benefit rights to paid vaccination leave. Accordingly, while an employer is free to apply the law retroactively if it wishes, the law mandates that "only employees receiving vaccinations on or after March 12, 2021 are eligible for paid leave."

A sampling of the FAQs is as follows:

> Q: WHAT IS THE MAXIMUM NUMBER OF HOURS OF PAID LEAVE THAT AN EMPLOYEE IS ENTITLED TO UNDER THIS NEW LAW?
> The maximum number of hours that an employee is entitled to paid leave under this law depends on the number of required COVID-19 vaccine injections. If a COVID-19 vaccine requires two injections, then the employee would be entitled to two periods of paid leave of up to four hours each (which could be up to 8 hours in total).
>
> Q: WHAT IS A "SUFFICIENT PERIOD OF TIME" TO BE ABSENT FOR A VACCINE INJECTION?
> The law does not define this term, however, the paid leave period for a single injection cannot exceed four hours.
>
> Q: CAN AN EMPLOYEE USE THIS PAID LEAVE TO ASSIST A RELATIVE OR ANOTHER PERSON IN GETTING A VACCINE?
> No. The paid leave granted by this law is only available to the employee for their own receipt of COVID-19 vaccine.
>
> Q: DO EMPLOYEES HAVE TO BE PAID AT A CERTAIN RATE DURING THIS PAID LEAVE PERIOD?
> The law requires employees to be paid at their regular rate of pay.
>
> Q: CAN AN EMPLOYER REQUIRE EMPLOYEES TO PROVIDE NOTICE BEFORE TAKING THIS PAID LEAVE PERIOD?
> The law does not prevent an employer from requiring notice.
>
> Q: CAN AN EMPLOYER REQUIRE PROOF OF VACCINATION TO ALLOW AN EMPLOYEE TO CLAIM THIS PAID LEAVE PERIOD?
> The law does not prevent an employer from requiring proof of vaccination. However, employers are encouraged to consider any confidentiality requirements applicable to such records prior to requesting proof of vaccination.

For a copy of all the FAQs and the language of S2588A now codified under New York Labor Code 196-C, click on the link provided below.

https://dol.ny.gov/system/files/documents/2021/03/cd6.pdf

Federal District Court Rules State Laws Preempt Dallas, Texas, Paid Sick Leave Law

As previously reported, the Dallas, Texas, City Council passed an ordinance (the "Ordinance") requiring employers to provide paid sick leave to its employees. The Ordinance took effect on August 1, 2019, for all covered employers with six or more employees. The effective date is delayed until August 1, 2021, for employers with fewer than six employees at any time in the preceding 12-month period.

Under the Ordinance, employees earn one hour of sick time for every 30 hours worked, but there are caps on accrual depending on the employer's size. An employer that has had 16 or more employees at any time in the preceding 12-month period must provide at least 64 hours of paid sick leave per year, whereas an employer with fewer than 16 employees must provide at least 48 hours of paid sick leave per year.

The Ordinance was originally scheduled to go into effect on August 1, 2019, for employers with at least six employees, but the city delayed enforcement, except for violations of the anti-retaliation provision, until April 1, 2020.

Court Challenge

On July 30, 2019, the Texas Public Policy Foundation filed suit and a "Motion for Preliminary Injunction" in federal court to halt the implementation of the Dallas Paid Sick Leave Ordinance on August 1, 2019, arguing that the Ordinance is not constitutional as it violates the Texas Minimum Wage Act (TMWA).

On March 30, 2020, two days before penalties were to be enforced a federal judge issued an injunction stopping the city from enforcing the Ordinance that requires private employers to offer paid sick leave.

In granting the temporary injunction, the judge held that the plaintiffs established a substantial likelihood of success on their claim that the Ordinance is preempted by the Texas Minimum Wage Act and, therefore, unenforceable under the Texas Constitution.

Federal District Ruling

On March 31, 2021, a federal district court ruled that the TMWA preempts the Dallas Paid Sick Leave Ordinance. The district court found that the TMWA expressly prohibits cities from regulating the wages that private employers pay. Particularly, the court pointed to rulings regarding similar ordinances in San Antonio and Austin that were struck down by the Texas Court of Appeals on the grounds that the local paid sick leave ordinances violated the Texas Constitution by imposing a minimum wage since the term "wage" is defined as "a payment to a person for services rendered." As such, local paid sick leave laws are preempted by the TMWA.

Virginia Requires Paid Sick Leave for Home Health Workers

On March 30, 2021, Virginia Governor Ralph Northam signed into law House Bill 2137 (HB 2137) requiring paid sick leave be provided to certain home health workers.

Effective July 1, 2021, employers must provide up to 40 hours of paid sick leave per year to home health workers who provide personal care, respite, or companion services to an individual who receives consumer-directed services under the state plan for medical assistance services.

An employee who is an essential worker that works on average at least 20 hours per week or 90 hours per month is entitled to paid sick leave.

Under HB 2137, employees must accrue at least one hour of paid sick leave benefit for every 30 hours worked. Earned paid sick leave may be used for an employee's or family member's illness or health condition — including seeking diagnosis, care, treatment or preventative care.

Employers who have a paid time off policy sufficient to meet the requirements of the paid sick leave law are not required to provide additional paid leave for qualifying reasons.

For a copy of HB 2137, click on the link provided below.

https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0449

Philadelphia, Pennsylvania, Enacts New COVID-19 Leave

It was previously reported that on September 17, 2020, Philadelphia, Pennsylvania Mayor Jim Kenney signed File Number 200303, an amendment to the city's generally applicable paid sick and safe time law, the Promoting Healthy Families and Workplaces Ordinance (PHFWO). The amendment requires new public health emergency leave (PHEL) for employees, gig workers, and others who do not receive leave under the federal Families First Coronavirus Response Act (FFCRA). The emergency leave requirements took effect immediately and expired on December 31, 2020.

On March 29, 2021, a new law — specifically the Public Health Emergency Leave (PHEL) — was signed into law which amends and expands Philadelphia's previous COVID-19 paid leave ordinance that had expired on December 31, 2020. PHEL became effective upon the Mayor's signature. The amended PHEL ordinance expands existing paid sick leave requirements by mandating Philadelphia businesses with at least 50 employees to provide additional paid time off to employees who have worked for the business at least 90 days. Under the previous "Promoting Healthy Families and Workplaces," employers with 500 or more employees were required to provide up to 112 hours of paid sick leave during the COVID-19 pandemic to Philadelphia employees who request it due to:

- Care for self or a family member showing symptoms of COVID-19
- Care for self or a family member advised to self-quarantine by a health-care provider
- Care for self or a family member during local quarantine
- Childcare facility closure

Highlights of PHEL — effective March 29, 2021— are as follows:

To qualify for PHEL leave, an employee must satisfy one of the following location-based requirements:

- Work within Philadelphia;
- Normally work for an employer in Philadelphia but is currently teleworking due to the pandemic; or
- Work for an employer from multiple locations with 51 percent or more of their time spent working within Philadelphia.

Under the PHEL, qualifying employees who work at least 40 hours a week are entitled to up to 80 hours of leave; while those working up to 40 hours per week are provided paid leave in an amount equal to the average amount of time the employee works in a 14-day period. For employees with changing schedules, leave time is calculated as the average number of hours the employee was scheduled to work over the past 90 days multiplied by 14.

Qualifying employees are eligible for PHEL if they are:

- Caring for themselves or a family member diagnosed with, exposed to, or showing symptoms of COVID-19, regardless of a diagnosis;
- Caring for themselves or a family member isolating due to a public quarantine order or advised to self-quarantine by a health-care provider due to COVID-19-related concerns;
- Caring for a child whose school or place of care has closed, or whose childcare provider is unavailable, due to COVID-19; or
- Obtaining or recovering from a COVID-19 vaccine.

Covered employers are required to provide notice to employees regarding eligibility for leave under the Ordinance.

Further, covered employers are prohibited from retaliating against employees for utilizing PHEL, and aggrieved employees have the right to file a civil action against an employer for an alleged violation of the Ordinance.

Finally, the Ordinance contains a sunset provision providing that the Ordinance "shall expire upon the expiration of the Proclamation of Disaster Emergency of the Governor of Pennsylvania related to the COVID-19 pandemic."

For more information on PHEL, click on the link provided below.

https://www.phila.gov/documents/paid-sick-leave-information/

Payroll

Delaware Releases Guidance on Treatment of Wages From Remote Work in 2020

On March 18, 2021, the Delaware Division of Revenue released Technical Information Memorandum 2021-2 (TIM 2021-2) regarding the treatment of wage income generated from employment in Delaware prior to the beginning of the pandemic, but where taxpayers worked from a remote location outside of Delaware as a result of the pandemic. TIM 2021-2 provided guidance to taxpayers about how to report days worked from a home located outside of Delaware on 2020 income tax returns. Delaware has operated under a state of emergency due to the coronavirus (COVID-19) pandemic, beginning on March 12, 2020. This resulted in many employers directing employees to work remotely from their homes, some of which are located in other states.

Highlights of TIM 2021-2 are as follows:

Delaware considers work done by employees from their homes to be "attributable" to Delaware employment when the employee is working from home for their own convenience and not because the work is required by the employer to be performed from home.

From March 22, 2020 through May 31, 2020, taxpayers may treat all days on which they actually worked from a home outside of Delaware during this period as days worked outside of Delaware.

From and after June 1, 2020, taxpayers may report days worked from home as days worked outside of Delaware if the taxpayer's employer directed the employee to work from home and directed that employees were not permitted to work at the Delaware location or alternatively if the employer strongly encouraged remote work but required an employee to seek advance permission to return in person.

When taxpayers are again permitted to return to offices within Delaware in person, taxpayers may not report days worked from home as days worked outside Delaware if the employee elected but was not required to work remotely.

The Delaware Division of Revenue may require proof of direction or advance permission given by an employer after June 1, 2020, with respect to remote work.

For a copy of TIM 2021-2, click on the link provided below.

https://revenuefiles.delaware.gov/2021/TIM%202021-2%20-%20treatment%20of%20remote%20work%20in%202020.pdf

New Mexico Amends Minimum Wage Law

It was previously reported that on April 1, 2019, the Governor of New Mexico, Michelle Grisham, signed into law Senate Bill 437 which increases the state minimum wage as noted below.

January 1, 2020	$9.00
January 1, 2021	$10.50
January 1, 2022	$11.50
January 1, 2023	$12.00

The minimum cash wage for tipped employees, currently $2.13 per hour, will be increased as follows:

January 1, 2020	$2.35
January 1, 2021	$2.55
January 1, 2022	$2.80
January 1, 2023	$3.00

Senate Bill 437 also allowed employers to pay high school students less than the minimum wage rates reflected above. Specifically, effective January 1, 2020, an employer who employed a student regularly enrolled in secondary school to work after school hours or when school is not in session must pay the student a minimum wage rate of at least eight dollars and fifty cents ($8.50) an hour.

Repeal of High School Worker Minimum Wage Rate

The enactment of Senate Bill 35, effective June 18, 2021, eliminates the current $8.50 per hour minimum wage that can be paid to some high school-aged workers and requires student workers to be paid the state minimum wage of $10.50 per hour. However, these requirements do not apply to workers who are younger than 19 years of age and are not students.

For a copy of Senate Bill 35, click on the link provided below.

https://legiscan.com/NM/text/SB35/2021

Rhode Island Teleworking Regulations Extended One More Time

We previously reported that on January 15, 2021, the Rhode Island Department of Revenue Division of Taxation (DOR) announced that an emergency regulation providing withholding tax guidance for employers that have employees who are temporarily working remotely due to the coronavirus (COVID-19) pandemic has been extended to March 19, 2021. The income of employees, who are nonresidents temporarily working outside of Rhode Island solely due to the COVID-19 pandemic, will continue to be treated as Rhode Island-source income for Rhode Island withholding tax purposes. In addition, Rhode Island will not require employers located outside of Rhode Island to withhold Rhode Island income taxes from the wages of employees who are Rhode Island residents temporarily working within Rhode Island solely due to the COVID-19 pandemic.

Further Extension:

The Rhode Island DOR has announced that an emergency regulation (280-RICR-20-55-14) that provides withholding tax guidance for employers that have employees who are temporarily working remotely due to the coronavirus (COVID-19) pandemic has been extended to May 18, 2021. The income of employees who are nonresidents temporarily working outside of Rhode Island solely due to the COVID-19 pandemic will continue to be treated as Rhode Island-source income for Rhode Island withholding tax purposes. In addition, Rhode Island will not require employers located outside of Rhode Island to withhold Rhode Island income taxes from the wages of employees who are Rhode Island residents temporarily working within Rhode Island solely due to the COVID-19 pandemic.

For a copy of the emergency regulation, click on the link provided below.

http://www.tax.ri.gov/COVID/Documents/Emergency_Regulation_280_RICR_20_55_14.pdf

South Carolina Once Again Extends Nexus Relief for Employees Telecommuting During COVID-19

It was recently reported that the South Carolina Department of Revenue (DOR) on November 30, 2020, via Information Letter No. 20-29 has again extended the tax relief regarding withholding and nexus for temporary teleworking employees due to the coronavirus (COVID-19) pandemic, through June 30, 2021.

The DOR has now via Information Letter No. 21-8 dated April 7, 2021, extended the tax relief until September 30, 2021.

In the DOR initial announcement (South Carolina Information Letter No. 20-24, 08/26/2020), temporary relief was provided regarding a business's establishment of nexus because an employee is temporarily working in a different work location due to COVID-19, and guidance was provided with respect to employer withholding requirements for these employees. During the COVID-19 relief period, a South Carolina business's withholding requirements are not affected by the current shift of employees working on the employer's premises in South Carolina to teleworking from outside of South Carolina. Accordingly, the wages of

nonresident employees temporarily working remotely in another state instead of their South Carolina business location are still subject to South Carolina withholding.

Additionally, an out-of-state business with an employee working from home in South Carolina is not subject to South Carolina's withholding requirement solely due to the shift of employees working on the employer's premises outside of South Carolina to teleworking from South Carolina. Accordingly, the wages of a South Carolina resident employee temporarily working remotely from South Carolina instead of their normal out-of-state business location are not subject to South Carolina withholding if the employer is withholding income taxes on behalf of the other state. DOR will not use changes solely in an employee's temporary work location due to the remote work requirements arising from, or during, the COVID-19 relief period as a basis for establishing nexus or altering apportionment of income.

Virginia Enacts Overtime Pay Law

On March 30, 2021, Virginia Governor Ralph Northam signed into law House Bill 2063 (HB 2063) known as the Virginia Overtime Wage Act (VOWA). Previous to this bill's enactment, Virginia did not have its own overtime law and utilized federal rules under the Fair Labor Standards Act (FLSA).

While VOWA, which is effective July 1, 2021, and is similar to FLSA in many ways, there are significant differences. Departures from the FLSA include how the regular rate of pay is calculated, a longer statute of limitations to bring potential claims and the possible damages available.

Like the FLSA, Virginia's new overtime law generally requires payment of time and a half at an employee's regular rate for hours worked in excess of 40 hours in a workweek. Highlights of the variances between the FLSA and VOWA are as follows:

Rate Calculations

Under the FLSA, an employee's regular rate of pay is the sum of all remuneration (e.g., hourly wages, bonus, shift differentials) for employment (barring certain statutory exclusions) divided by total hours worked in a workweek. The new state law employs a different calculation that depends on whether the employee is paid on an hourly or a salary basis.

Hourly Employees Calculation:

The regular rate of pay is the hourly rate plus any other nonovertime wages paid or allocated for the workweek — not counting the same items that would be excluded from the FLSA calculation — and then divided by the total number of hours worked in the workweek. For employees who are salaried or paid on some other regular basis, the regular rate of pay is one-fortieth (0.025) of all wages paid for the workweek.

"Salaried" Employees Calculation:

NOTE: The definition of "employee" under VOWA excludes "any person who is exempt from the federal overtime wage pursuant to 29 U.S.C. Section 213(a) which includes "any employee employed in a bona fide executive, administrative, or professional capacity." Consequently, "salaried" employee under VOWA equates to a salaried nonexempt employee — that is employees that are salaried that are overtime eligible.

Significantly, the new standard for salaried and other regularly paid employees appears to preclude employers from paying traditionally nonexempt employees a fixed salary to cover wages for hours in excess of 40 in a workweek (including on a fluctuating workweek basis), requiring, instead, an hourly rate calculation for overtime pay for even these employees in most circumstances.

The VOWA states as follows: "For employees paid on a salary or other regular basis, the regular rate is one-fortieth of all wages paid for that workweek."

Statute of Limitations:

The new law provides that an employee's overtime claim may include workweeks in a total span of up to three years. It imposes a three-year statute of limitations on overtime claims, rather than the FLSA's default two-year limitations period (three years for willful violations).

Liquidated Damages:

While the FLSA provides for liquidated damages equal to the amount of unpaid overtime wages, an employer may defend against such a damage claim on the basis that it acted in good faith, with reasonable grounds for believing it acted in compliance with the FLSA's requirements. This defense is unavailable under the new law, providing instead that all overtime wage violations are subject to double damages — plus pre-judgment interest at eight percent a year. In addition, the law provides for treble damages for "knowing" violations.

Collective Actions:

Virginia law typically does not authorize class or collective actions. There are exceptions — and the Virginia Overtime Wage Act is now one of them. Amendments to existing sections of the Virginia Code accompanying the new law authorize collective actions "consistent with the collective action procedures of the Fair Labor Standards Act" for violations under the Virginia Overtime Wage Act. Thus, Virginia employers face the possibility of defending overtime claims of multiple employees in a collective lawsuit covering workweeks up to a three-year period.

For a copy of HB 2063, click on the link below.

https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+HB2063

West Virginia Enacts Teleworking Legislation

On April 9, 2021, West Virginia Governor Jim Justice signed new legislation (H2026), **effective January 1, 2022**, that excludes compensation of certain temporary nonresident employees (such as teleworking employees) from state source income.

Under the new legislation, compensation paid to a nonresident is exempt from West Virginia income if, in a calendar year:

(1) Compensation is paid for duties performed in the state for 30 or fewer days;

(2) The nonresident performed duties in more than one state;

(3) Duties were not performed in the capacity as a professional athlete, professional entertainer, or public figure and the nonresident's state of residence provides a substantially similar exclusion or does not impose an income tax or the income is exempt from taxation by the state under federal laws.

Employers are not required to withhold if the nonresident meets the above requirements. However, if the employee works more than 30 days, the employer must withhold and remit tax for every day, including the first 30 days worked.

A time and attendance system may be used to determine liability if it tracks where employees work on a daily basis, records the work location for every day worked outside of West Virginia and is designed to allow the employer to allocate the employee's wages for income tax purposes among all states where work is performed.

Alternatively, employers may determine liability by obtaining a written statement from the employee of the number of days of work reasonably expected to be performed in the state during the taxable year. The certification, absent fraud or gross negligence, will constitute as rebuttable presumption on the number of days worked in the state.

For a copy of H2026, click on the link provided below.

https://www.wvlegislature.gov/bill_status/bills_history.cfm?INPUT=2026&year=2021&sessiontype=RS

Time & Labor

Illinois to Require Equal Pay Reports

Refer to the article **here** for details.

New Jersey DOL Releases Guidance on Employers Requiring COVID-19 Vaccines

On April 5, 2021, the New Jersey Department of Labor (DOL) released guidelines for when employers may require that employees receive the coronavirus (COVID-19) vaccination prior to returning to work.

State guidelines provide that an employer can require a vaccination for returning employees unless:

(1) The employee cannot get the vaccine because of a disability;
(2) The employee's physician has advised them not to get the vaccine while pregnant or breastfeeding; or
(3) The employee has a sincerely held religious belief, practice or observation that prohibits the vaccine.

If the employee falls into one of these categories, the employer must provide a reasonable accommodation from their mandatory vaccine policy, unless doing so would impose an undue burden on their operations. An employer must base its decisions regarding any potential safety concerns on objective, scientific evidence (including the CDC guidelines), and not on unfounded assumptions or stereotypes.

For more information, click on the following link:

https://www.nj.gov/labor/employer-services/business/covid.shtml

ADP Compliance Resources

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration, and help ensure that ADP systems are updated as relevant laws evolve. For the latest on how federal and state tax law changes may impact your business, visit the ADP *Eye on Washington* Web page located at **www.adp.com/regulatorynews**.

If you have any questions regarding our services, please call 855-466-0790.

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