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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

Colorado Enacts Paid Sick Leave Law

On July 14, 2020, Colorado Governor Jared Polis signed into law the Healthy Family and Workplaces Act (the "Act"). The new law mandates that nearly all employees working for public and private employers in Colorado must begin accruing at least one hour of paid sick leave for every 30 hours worked, up to 48 hours total, which balance shall carry over year-to-year subject to the limit. This requirement goes into effect for covered employers with 16 or more employees on January 1, 2021, and for all other covered employers (regardless of how many employees they employ) on January 1, 2022.

Below are highlights of the Act.

Use of Paid Sick Leave

Upon an employee's written or verbal request, an employer must provide paid sick days to allow for the employee to attend to illness, injury or condition of, or preventive care for, the employee or, as needed, the employee's family member (as defined in the Act). The Act specifies that such paid sick leave can be used for circumstances involving domestic violence, sexual assault or stalking, including obtaining a restraining order, obtaining counseling or medical or other services, or safety planning actions such as obtaining temporary or permanent relocation; a public health emergency that causes the employee's place of business or the school of the employee's child to close. Public health emergencies include pandemics and the potential for pandemic, such as the current coronavirus situation.

Employees determine how much paid sick leave they need to use and must be permitted to use it in no greater than one-hour increments. When the need for leave is foreseeable, employees must make a good faith effort to provide advance notification and make a reasonable effort to schedule leave, so as not to be unduly disruptive to operations. If the need for leave is unforeseeable, employees will need to provide notice as soon as practicable. Employers may implement policies regarding reasonable procedures for giving notice but cannot deny paid sick leave based on noncompliance with the policy. Employees cannot be required to find replacements to cover their shifts as a condition to taking paid sick leave. Employers may require documentation from the employee if four (4) or more consecutive paid sick days are taken.

More Generous Existing Policies

If the employer already has more generous paid time off (PTO), vacation or other paid time off policies, the employer is not required to provide additional basic paid sick leave. However, employers should be cautious in making that determination. Preliminarily, the accrual rate must be as generous as that provided by the Act (i.e., one hour for every 30 hours worked), and it must be available to the employee immediately. This can pose a trap for unwary employers, particularly with respect to temporary or seasonal workers and part-timers, who may not be eligible for paid time off under the employer's policies. In addition, the paid time off must be available for the purposes permitted by, and under the same conditions provided by, the Act. There also are carve-outs for policies applicable to public employees, federal contractors and workers subject to collective bargaining agreements.

Additional Paid Sick Leave During a Public Health Emergency

The Act requires employers to make available to employees a one-time allotment of two weeks of additional paid sick leave during a public health emergency. Notably, this one-time allotment applies even if the public health emergency is amended, extended, reinstated or prolonged. For full-time employees, this amounts to 80 hours of additional paid sick leave; for employees who regularly work less than 40 hours per week, employers must provide the greater of the number of hours the employee is scheduled to work in a 14-day period or the average time the employee actually works in a 14-day period. Unused basic paid sick leave may be counted toward this entitlement. Subject to time constraints (i.e., until four weeks after the official termination or suspension of the public health emergency), employees may take additional paid sick leave if:

- they are self-isolating due to a positive diagnosis, are experiencing symptoms, or are seeking medical treatment or preventive care with respect to the disease causing the public health emergency, or are caring for a family member in such circumstances;
- public health officials or the employer determines it is unsafe for the employee to come to work due to the public health emergency;
- the employee must care for a child whose child-care facility is closed due to the public health emergency; or
- the employee suffers from a preexisting condition that would make him or her more susceptible to serious harm if they were infected with the disease causing the public health emergency.

Importantly, ***"Documentation is not required to take leave under this Section."***

No Payout Upon Termination; Reinstatement Upon Rehire

Unused paid sick leave need not be paid out upon termination. However, the employer must reinstate unused paid sick days, if the employee is rehired within six months of termination. For employers who provide PTO instead of separate sick and vacation leave, this requirement will be inapplicable, as accrued PTO will have been paid out upon termination, and therefore need not be reinstated.

Notice, Posting and Record-Keeping Requirements

Employers must provide notices to employees of their rights under the Act via a written notice containing specified information, as well as in a conspicuous posting. The Division of Labor Standards and Statistics (the "Division") will create a template notice to be used as appropriate by employers and a poster detailing the rights provided by the Act, with a penalty of $100 per willful violation of the posting requirement. For employees who telework, notice can be done electronically or conspicuously on the web portal. Employers are required to retain records documenting hours worked and sick days accrued and used by employees for a period of two years, and to make the records available to the Division and the applicable employee for inspection. Failure to maintain appropriate records will result in a presumption that the employer violated the Act. Health, domestic violence and related information regarding the employee and family members must be maintained as confidential.

Non-Retaliation; Enforcement

The Act prohibits interfering with employees' right to use accrued sick leave, and prohibits discrimination and retaliation against employees who use or attempt to use paid sick days, file a complaint with the Division or allege a violation of the Act, cooperate in an investigation or prosecution under the Act, or oppose any policy, practice or act prohibited by the Act. The Division has authority to enforce the Act. Aggrieved employees may file a charge with the Division, and also may bring civil actions within two years, provided they have submitted a complaint to the Division or made a demand for back pay to the employer and have allowed the employer 14 days to respond. The remedies provided under the Act are cumulative.

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

https://leg.colorado.gov/sites/default/files/2020a_205_signed.pdf

New Hampshire Governor Vetoes Paid Family and Medical Leave Insurance Bill

On July 10, 2020, New Hampshire Governor Chris Sununu vetoed the Family and Medical Leave Insurance Program legislation passed by the state house and senate.

In his veto message Sununu stated in part as follows:

> "Whether one chooses to characterize it as a 'premium on wages,' or a 'payroll deduction,' the reality remains that if it looks like an income tax, functions like an income tax, and takes money out of the pockets of hard-working taxpayers like an income tax, then it is an income tax."

Had the legislation become law it would have provided up to twelve weeks of leave a year with up to sixty percent wage replacement for workers who need time away from work to care for themselves or a family member.

Tennessee Enacts Pregnant Workers Fairness Act

On June 22, 2020, Tennessee Governor Bill Lee signed into law Senate Bill 2520 (SB 2520) titled the "Tennessee Pregnant Workers Fairness Act." SB 2520 requires every employer, with at least 15 employees, to make a reasonable accommodation for an employee's or prospective employee's medical needs arising from pregnancy, childbirth or related medical conditions, unless such accommodation would impose an undue hardship on business operations. The new law goes into effect on October 1, 2020.

Some of the highlights of SB 2520 are as follows:

- No covered employee can be required to take leave because of medical needs arising from pregnancy, childbirth or related medical conditions, if another reasonable accommodation would be possible.
- An employer may not take any adverse action against the employee for requesting or using a reasonable accommodation under these circumstances, including, but not limited to, counting an absence related to pregnancy under a no-fault attendance policy.
- If medical certifications are required of other employees needing an accommodation, then the employer may require an employee with a pregnancy- or childbirth-related medical condition to provide certification from a health-care professional to support any request for temporary transfer, job restructuring, light duty or absence from work.
- The employer's duty to engage in a good faith interactive process regarding possible accommodation begins immediately, even while the employee is in the process of obtaining the requested certification; no adverse action can be taken during this time.
- SB 2520 does not provide protections greater than those afforded to other employees who might require reasonable accommodation.
- If the employer would not otherwise hire or promote the employee due to lack of qualification, for instance, it is not required to hire or promote the employee because the employee is pregnant or affected by any other condition related to pregnancy or childbirth.
- If a light-duty position would not be provided to another, non-pregnant "equivalent" employee, a new position does not have to be created for the pregnant employee.
- Additional or extended breaks taken as part of an accommodation do not have to be paid if other employees are not entitled to similar paid breaks.
- No employer is required to construct a permanent space dedicated to the sole purpose of expressing breast milk.
- Any person adversely affected by a violation of these provisions may bring an action in accordance with the Uniform Administrative Procedures Act or may go directly to chancery or circuit court.
- Possible relief includes back pay, compensatory damages, prejudgment interest, reasonable attorney fees and any other appropriate legal or equitable relief.

For a copy of SB 2520, click on the link provided below.

http://www.capitol.tn.gov/Bills/111/Bill/SB2520.pdf

Bernalillo County, New Mexico, Paid Leave Ordinance Effective Date Delayed Until October 1, 2020

It was previously reported that on August 20, 2019, the Bernalillo County Board of Commissioners passed Ordinance 2019-17 mandating employer paid time off to employees within Bernalillo County. Effective July 1, 2020, employers in the county were to provide paid leave for any reason to full-time, part-time, seasonal and temporary employees (including county employees) who have worked at least 56 hours in the year and who are eligible for the state minimum wage rate.

Delayed Effective Date

It has now been announced by Bernalillo County that the effective date of the paid leave ordinance has now been delayed until October 1, 2020. The announcement stated, in part, as follows:

> **Postponement of Implementation of Employee Wellness Act Benefits Employers and Workers**
>
> The 90-day postponement of the Bernalillo County Employee Wellness Act, due to the circumstances surrounding the coronavirus (COVID-19), enacted by the county manager under an emergency powers declaration, will go before the Bernalillo County Commission on June 30 for public comment and a vote by commissioners on whether to support the manager's decision to postpone implementation of the ordinance.
>
> County Manager Julie Morgas Baca postponed enactment of the Employee Wellness Act, also known as the paid time off ordinance, until Oct. 1, 2020.
>
> The ordinance, approved by the County Commission in 2019, was originally scheduled to take effect on July 1.

Click on the link below to access the full announcement:

https://www.bernco.gov/county-manager/news.aspx?2db258aa42a04430b8b8a83f4c866d4ablogPostId=6a0e31b5dee14041b0ee08f3bcdeb5ea#/BlogContent

Emergency Paid Sick Leave Enacted by San Mateo County, California

On July 7, 2020, the San Mateo County Board of Supervisors enacted an emergency paid sick leave measure due to COVID-19. The measure, generally, went into effect on the date of enactment though the paid sick leave obligation in the county's unincorporated areas and began on July 8, 2020. The law will remain in effect through December 31, 2020.

Some of the highlights of the measure are as follows:

Covered Employers and Employees

The ordinance applies to employers with 500 or more employees in the United States, the District of Columbia or any U.S. territory or possession. Covered employees are those who are or have been required to perform work in the county's unincorporated areas since January 1, 2020. Moreover, the ordinance creates a presumption of employment, with the burden on a company to demonstrate that a worker is actually an independent contractor. The ordinance excludes, however, food-sector workers covered by California Executive Order N-51-20, a statewide emergency paid sick leave measure. Additionally, for companies with unionized workforces, parties to a collective bargaining agreement can waive the law's requirements, if the agreement explicitly sets forth the waiver in clear and unambiguous terms.

Amount of Leave

Employers must provide full-time employees, normally scheduled to work 40 or more hours per week, 80 Supplemental Paid Sick Leave (SPSL) hours. Part-time employees, normally schedule to work fewer than 40 hours per week, receive an amount no greater than the average number of hours they work in a two-week period, which employers calculate using the period of January 1 through July 7, 2020.

SPSL is in addition to any paid sick leave the employer provides per California's generally applicable law, the Healthy Workplace Healthy Family Act, or per preexisting time off they provided before March 16, 2020. Employers cannot require employees to use other paid or unpaid time off the employer provides before, or in lieu of, SPSL.

However, employers can reduce the amount of SPSL they must provide by the amount of additional paid leave for COVID-19 purposes they gave an employee between March 17 and June 30, 2020, or supplemental leave they gave the employee under another jurisdiction's law (e.g., San Francisco's Public Health Emergency Leave Ordinance). Moreover, per the ordinance, "[i]f an Employer provided Voluntary COVID-19 Leave to an Employee at a rate of pay or hourly accrual rate less than that provided in Section 4, then

such amounts or hours shall be offset against such rates and hours as the Employee would have received as set forth in Section 4." It is unclear whether this means: 1) employers receive a one-for-one offset even if they provided leave at a lower pay rate or; 2) they receive a reduced offset, based on what percentage of an ordinance hour the lower-paid hour represents.

Covered Uses

The ordinance contains a list of covered uses, generally, and another more limited list for employers of health-care providers, aviation security, or emergency-responder employees.

Generally, employees can use leave if they cannot work or telework because:

1) A health-care provider advises an employee to isolate or self-quarantine to prevent the spread of COVID-19.
2) An employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis.
3) The employee needs to care for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19, or a health-care provider advises the individual to self-quarantine related to COVID-19, or the individual is experiencing COVID-19 symptoms and is seeking a medical diagnosis.
4) The employee takes time off work because of a need to provide care for an individual whose senior-care provider or whose school or child-care provider is closed or is unavailable in response to a public health or other public official's recommendation. Under the ordinance, an "individual" is an employee's immediate family member, a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if quarantined or self-quarantined, or whose senior-care provider or whose school or child-care provider is closed or is unavailable in response to a public health or other public official's recommendation.

Certain companies may offer more limited leave if they are an employer of an employee who is a health-care provider or emergency responder (both defined per the Families First Coronavirus Response Act (FFCRA)). Additionally, they can limit leave if they employ an aviation security worker (one who performs work on behalf of the federal Transportation Security Administration) and make a good-faith determination that granting the employee care-for-others leave would render them unable to meet staffing-level requirements needed to ensure staffing shortages do not adversely affect airport operations. These employers can restrict leave to when employees are unable to work at their customary place of work or telework because:

1) A health-care provider advises an employee to isolate or self-quarantine to prevent the spread of COVID-19.
2) The employee is experiencing COVID-19 symptoms, is seeking a medical diagnosis, and does not meet the Centers for Disease Control and Prevention's guidance for criteria to return to work for health-care personnel with confirmed or suspected COVID-19.

Requesting and Verifying Leave

An employer must provide leave upon an employee's written request, which includes but is not limited to email and text, but may request information supporting a request according to the FFCRA.

Payment

When an employee uses SPSL, employers must pay them their regular rate of pay according to the FFCRA. However, unlike the FFCRA, there is no lower two-thirds the regular rate of pay amount for certain absences. The maximum amount of SPSL is $511 per day and $5,110 in the aggregate.

Prohibitions

A prospective waiver by an employee of any or all of the provisions of the law is contrary to public policy, void, and unenforceable. Additionally, employers cannot discharge, reduce in compensation or otherwise discriminate against any employee for: 1) opposing any practice the law prohibits; 2) requesting to use or using SPSL; 3) participating in proceedings related to the law; 4) seeking to enforce rights under the law by any lawful means; or 5) otherwise asserting rights under the law.

Enforcement

The ordinance does not designate an agency to enforce or interpret the ordinance. Instead, employees can file a lawsuit in state court and, if they prevail, a court can award them reinstatement if unlawfully discharged, back pay and SPSL that were unlawfully withheld (calculated at the employee's average rate of pay), other legal or equitable remedies the court deems appropriate, and reasonable attorneys' fees and costs.

Oakland, California, Issues Emergency Paid Sick Leave Poster

We previously reported that on May 12, 2020, the Oakland, California, City Council unanimously passed the Emergency Paid Sick Leave for Oakland Employees ordinance, **effective immediately** upon adoption, to provide additional paid sick leave to employees who need time off for COVID-19-related reasons. The Oakland ordinance coverage includes large employers with 500 or more employees who are excluded from the emergency paid sick leave requirements under the federal Families First Coronavirus Response Act (FFCRA), but also imposes some additional requirements on employers already covered by the FFCRA.

The ordinance will expire on December 31, 2020, unless the City Council extends it.

For more information on the Oakland Emergency Paid Sick Leave ordinance, click on the link provided below.

https://cao-94612.s3.amazonaws.com/documents/EPSL-FINAL-corrected-amended-5-12-20-Council-corrected.pdf

Posting Requirement

One of the provisions of the Emergency Paid Sick Leave ordinance requires that the city of Oakland prepare and publish on its website a notice for employers to post in a way that it will reach all employees, including but not limited to:

- Posting in a conspicuous place at the workplace;
- Sending via electronic communication; or
- Posting in a conspicuous place in an employer's web-based or app-based platform.

Employers must post and/or provide the notice to their employees within three days after the city publishes it. The notice will be translated into Spanish, Mandarin, Cantonese and Vietnamese (at a minimum), and employers must provide the notice in all languages spoken by more than ten percent of employees.

Poster Released

Oakland has now released the poster as required. The poster must be situated in a place where employees can easily view it and is available in English, Spanish, Vietnamese and Chinese. Employers, including a temporary employment agency but excluding federal, state or local government, are required to provide 80 hours of emergency paid sick leave to employees who performed at least 40 hours per week within the city over the period of February 3, 2020 through March 4, 2020, or at any point thereafter or are classified as full-time by their employer. For employees who performed fewer than 40 hours per week, they will be entitled to emergency paid sick leave equal to the average number of hours worked over 14 days during the period of February 3, 2020 through March 4, 2020. For employees who began work after March 4, employers will use the same methods

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

https://www.oaklandca.gov/resources/emergency-paid-sick-leave-for-oakland-employees-during-the-novel-coronavirus-covid-19-pandemic-ordinance

San Francisco, California, Emergency Ordinance Provides Reemployment Rights and Other Protections

On July 3, 2020, San Francisco Mayor London Breed returned unsigned File Number 200455, an emergency ordinance that took effect immediately and now requires employers with 100 or more employees to provide written notice when layoffs occur, grants reemployment rights for employees impacted by COVID-19-related job separations, and prohibits discrimination against, and requires reasonable accommodations for, employees who experience a family-care hardship.

Some of the highlights are as follows:

Effective Date and Duration

The ordinance took effect on July 3, 2020 and remains in effect for 60 days, unless San Francisco reenacts the measure.

What Constitutes a Layoff

Under the ordinance, a layoff is a separation (termination or end of employment) of 10 or more employees during any 30-day period on or after February 25, 2020 that is caused by an employer's lack of funds or work for employees, resulting from the COVID-19 public health emergency (PHE) and any San Francisco shelter-in-place order, including layoffs in conjunction with San Francisco business operations closing or ceasing operations.

Covered Employers and Employees

Generally, the ordinance applies to private employers that, on or after February 25, 2020, employed or employ 100 or more employees as of the earliest date it separated or separates one or more employees, which subsequently resulted or results in a layoff. There is an exception for health-care operations, which include hospitals, clinics, COVID-19 testing locations, dentists, pharmacies, blood banks and blood drives, pharmaceutical and biotechnology companies, other health-care facilities, health-care suppliers, home health-care service providers, mental-health providers, or any related and/or ancillary health-care services, as well as veterinary care and all health-care service providers to animals.

Under the ordinance, an eligible worker is a person employed for at least 90 days of the calendar year preceding the date on which the employer gave written notice of a layoff and who was separated due to a layoff. The ordinance does not apply to eligible workers covered by a bona fide collective bargaining agreement that expressly waives the law's requirements in clear and unambiguous terms.

Notice of Layoff

Under the ordinance, employers must provide a notice of a layoff to current eligible workers, former eligible workers, and the city.

For current eligible workers, when employers implement a layoff after the beginning of the COVID-19 PHE (February 25, 2020), at or before the time the layoff becomes effective, they must provide all eligible workers written notice of the layoff in a language the eligible worker understands, which must include: 1) Notice of the layoff and its effective date; 2) A summary of the ordinance's reemployment rights; and 3) The phone number for an Office of Economic and Workforce Development (OEWD) hotline. For former employees, within 30 days of July 3, 2020, employers must provide the notice to eligible workers separated due to a layoff that occurred on or after February 25, 2020 and before July 3, 2020. Additionally, employers must provide written notice of a layoff to OEWD within 30 days of the date they initiate a layoff.

However, if the event was unforeseeable, employers must provide written notice within seven days of separation of the tenth employee in a 30-day period as a result of the COVID-19 PHE and any San Francisco shelter-in-place order. The notice must identify: 1) The total number of San Francisco employees affected; 2) Each eligible worker's job classification; 3) Each eligible worker's hire date; and 4) The separation date for each eligible worker.

For at least two years from the date a written notice of layoff was provided to an eligible worker, employers that initiate a layoff after the beginning of the COVID-19 PHE (February 25, 2020) must keep the following records for each eligible worker: 1) Full legal name; 2) Job classification at the time of separation; 3) Hire date; 4) Last known address; 5) Last known email address; 6) Last known telephone number; and 7) A copy of the written notice of layoff.

Offer of Reemployment

Employers that initiate a layoff after the beginning of the COVID-19 PHE (February 25, 2020) and subsequently seek to hire a person must take the following steps:

- If filling the eligible worker's former position, the employer must first offer the eligible worker an opportunity for reemployment before offering it to another person.
- If filling any position substantially similar to the eligible worker's former position that is also located in San Francisco, the employer must first offer the eligible worker an opportunity for reemployment to this position before offering it to another person. Positions that are "substantially similar" include any of the following: 1) A position with comparable job duties, pay, benefits and working conditions to the eligible worker's position at the time of layoff; 2) Any position in which the eligible worker worked in the 12 months preceding the layoff; and 3) Any position for which the eligible worker would be qualified, including a position that would necessitate training the employer would otherwise make available to a new employee to the position upon hire.

If an employer intends to offer an eligible worker reemployment and separated more than one eligible worker from the same job classification, it must make offers based on seniority, which is based on the earliest hire date.

Employers can, however, withhold an offer under the following circumstances:

- **Misconduct:** Based on information learned after a layoff, an employer learns the eligible worker engaged in any act of dishonesty, violation of law, policy, or employer rule, or other misconduct during employment.
- **Severance Agreement:** For eligible workers separated between the beginning of the COVID-19 PHE (February 25, 2020) and July 3, 2020 as part of a layoff, if the parties executed a severance agreement before July 3, 2020 that, in exchange for adequate consideration, the eligible worker agreed to a general release of claims.

- **Hired Another Before July 3, 2020:** Eligible worker was separated between the beginning of the COVID-19 PHE (February 25, 2020) and July 3, 2020 as part of a layoff, and before July 3, 2020, the employer hired a person for the eligible worker's former position or a substantially similar position.

Employers must make good-faith efforts to notify an eligible worker by phone and email of a reemployment offer. If the employer does not have phone or email contact information or is unable to make contact by those means, the employer must attempt to make contact by certified mail or courier delivery. If more than one eligible worker exists, employers must transmit offers in the order of seniority.

Initial Contact

- **By Phone:** If an employer has a record of an eligible worker's last known phone number, it must attempt to notify the eligible worker of a reemployment offer at that number. The employer must notify the eligible worker that: 1) It wishes to extend an offer of reemployment; and 2) It seeks the eligible worker's consent to transmit a written offer by email.
- **By Email:** If an employer has a record of the eligible worker's last known email address, it must attempt to notify the eligible worker of the offer by email. The employer must notify the eligible worker that: 1) It wishes to extend an offer of reemployment; and 2) It seeks the eligible worker's consent to transmit a written offer by email.

Eligible Worker Consent to Offer by Email

An eligible worker must provide written confirmation of consent by text message or email by 5 p.m. Pacific Standard Time (PST) on the business day immediately following the contact date. The employer must transmit the offer by 5 p.m. PST of the first business day following receipt of consent. If the eligible worker does not give timely consent, the employer must transmit a written offer to the eligible worker's last known address by certified mail or courier delivery, which must remain open for at least two business days following delivery (a courier can deliver the offer without obtaining proof of receipt by the eligible worker).

Acceptance of Offer

The eligible worker must accept the offer in writing by reasonable means an employer identifies, including, without limitation, returning a signed version of an offer letter by any reasonable method of delivery or, if the employer authorizes, by e-signing and transmitting acceptance by email or other reasonable electronic method. If by other means, including but not limited to phone or text message, the eligible worker notifies the employer of their intent to accept, an employer must allow the eligible worker two business days from that date to respond by reasonable written means the employer identifies.

If an eligible worker fails to respond to an offer within the time frame, the eligible worker has rejected the offer and the employer can offer the position to the next most senior eligible worker or, if there are no alternative eligible workers, then to an alternative job candidate. However, the parties can mutually agree to extend the acceptance period.

Notice to City

Employers must notify OEWD, in writing, of all offers made, acceptances and rejections.

Family-Care Hardship (FCH) Nondiscrimination/Reasonable Accommodation

Under the ordinance, an employer cannot discriminate or take adverse action against an eligible worker due to the eligible worker experiencing a family-care hardship, i.e., the eligible worker is unable to work due to either: 1) The need to care for a child whose school or place of care has been closed, or whose child-care provider is unavailable, due to the COVID-19 PHE, and no other suitable person is available to provide care during the leave period; or 2) Any reason the San Francisco Paid Sick Leave Ordinance covers to provide care for others. Additionally, eligible workers are entitled to reasonable accommodation of a job duty or requirement if a family-care hardship impacts their ability to perform a job duty or satisfy a job requirement.

In response to a reasonable accommodation request, an employer must make good-faith efforts during the period in which the eligible worker experiences a family-care hardship to reasonably accommodate the eligible worker, which includes, without limitation, modifying the eligible worker's schedule or the number of work hours, or permitting telework, to the extent that is operationally feasible. The duty to accommodate ends when the ordinance expires.

Regulation and Enforcement

San Francisco's Office of Labor Standards Enforcement (SF OLSE) can issue regulations implementing the ordinance. Eligible workers may file a lawsuit and, if successful, be awarded: 1) Hiring and reinstatement rights; 2) Back pay for each day of a violation, and front pay for each day a violation continues; 3) The value of benefits they would have received via an employer's benefits plan had the violation not occurred; and 4) Reasonable attorneys' fees and costs.

Santa Rosa, California, Enacts Emergency Paid Sick Leave

On July 7, 2020, the Santa Rosa City Council enacted emergency paid sick leave legislation via Ordinance 2020-006 (the "Ordinance"). The Ordinance took effect on the date of enactment and will remain in effect through December 31, 2020, though the city can extend its duration.

Highlights of the Ordinance are as follows:

Covered Employers and Employees

The Ordinance generally covers all private employers. It applies to employers with 500 or more employees nationally, i.e., those the federal Emergency Paid Sick Leave Act (EPSLA) does not cover. Additionally, it applies to EPSLA-covered employers to the extent the ordinance provides additional benefits. The Ordinance says it does not apply to employers with fewer than 50 employees that would qualify for EPSLA exemption, but then says the exemption applies only to employees who are caring for a child under the ordinance. Per the staff report, what the drafters intend this to mean is "[e]mployers with less than 50 employees that are experiencing severe economic hardship are not obligated to provide the benefit for employees needing to provide child care." Although the Ordinance borrows this exemption from the EPSLA, the supplemental documentation notes the Ordinance does not borrow all EPSLA exemptions, e.g., the Ordinance covers employees who are health-care providers and emergency responders.

Under the Ordinance, an employee is a person employed by an employer who has worked at least two hours in Santa Rosa. Employers must provide paid sick leave to each employee who performs "allowed or essential work," which means work activities and services permitted in Sonoma County Public Health Officer orders.

Amount of Leave

Under the Ordinance, full-time employees get 80 paid sick leave hours, whereas part-time employees get an amount equal to the number of hours they work on average over a two-week period. Employees who work part of their hours in Santa Rosa get paid sick leave hours equal to the number of hours they work, on-average, over a two-week period in Santa Rosa. The Ordinance does not define full- or part-time or discuss the time period employers use to determine an employee's two-week average.

The Ordinance contains a provision titled "Exemption/Offset." This provision says the Ordinance does not apply to an employer that has provided employees, on July 7, with some combination of paid personal leave at least equivalent to the paid sick leave the Ordinance requires. An employer that provides some combination of paid sick leave amounting to less than what the Ordinance requires must comply with the law to the extent of the deficiency. The Santa Rosa Ordinance's provision also provides that the temporary leave is in addition to leave employers normally provide. Employees cannot carry over leave between years.

Covered Uses

Unlike the federal EPSLA and numerous mini-FFCRA ordinances, there is no requirement that an employee be unable to work and/or telework to use leave, which employees can use for the following purposes:

1) Employee is subject to quarantine or isolation by federal, state, or local order due to COVID-19.
2) Employee is advised by a health-care provider to self-quarantine due to COVID-19 or is caring for someone who is so advised by a health-care provider.
3) Employee experiences symptoms of COVID-19 and is seeking medical diagnosis.
4) Employee is caring for someone who is quarantined or isolated, or otherwise unable to receive care, due to COVID-19.
5) Employee is caring for a minor child because a school or daycare is closed, or child-care provider is unavailable, due to COVID-19. Concerning "otherwise unable to receive care," based on a discussion during the city council meeting, this requirement is akin to absences for child-care provider unavailability, though for other individuals such as the elderly or those with disabilities (the council uses "someone" to align with the federal EPSLA). However, unlike other mini-FFCRA ordinances, this provision was included alongside a covered use other than child care.

Verification and Documentation

The Ordinance's sole provision on this topic provides that a written note from a health-care provider who advises self-quarantine is not required.

Payment

Employers must pay employees for paid sick leave at their regular rate, up to $511 a day, not to exceed an aggregate amount of $5,110. There is no lower two-thirds the regular rate amount for certain absences, so employers covered by the federal EPSLA and this Ordinance must pay the Ordinance's higher rate. When employment ends, employers need not cash out unused SPSL, which is unavailable once the Ordinance expires.

Prohibitions

Employers cannot require employees to find a replacement worker as a condition of using leave. Additionally, employers cannot discharge, reduce in compensation or otherwise discriminate against any employee for opposing any practice the law prohibits, for requesting to use or using paid sick leave, for participating in proceedings related to the law, for seeking to enforce rights under the law by any lawful means, or for otherwise asserting rights under the law.

Enforcement

The Ordinance does not designate an agency to enforce or interpret the Ordinance. Rather, this task falls to the courts. Employees can file a lawsuit in state court and, if successful, a judge can award them: reinstatement if unlawfully discharged; paid sick leave unlawfully withheld; other legal or equitable relief the court deems appropriate; and reasonable attorneys' fees and costs.

For a copy of Ordinance 2020-006, click on the link provided below.

https://edms.srcity.org/WebLink/DocView.aspx?id=3613604&dbid=0&repo=LaserficheInternal&cr=1

Payroll

New Jersey Advises Regarding Wage Income Earned During COVID-19 Pandemic

On July 15, 2020, the New Jersey Division of Taxation, Department of Regulatory Services, provided an email clarifying its policy of sourcing wage income to New Jersey during COVID-19.

The Division advised that if a resident of California who normally works in California is staying in New Jersey during the COVID-19 emergency and telecommutes from New Jersey to a computer in California, the wage income may continue to be reported to California.

However, if the stay in New Jersey is 183 days or more, this individual will be classified as a resident of New Jersey and will be subject to tax on all of their income during their period of residency.

Time & Labor

Michigan Issues Guidance Regarding Employees Refusing to Return to Work

The Michigan Department of Labor and Economic Opportunity has issued guidance in the form of Frequently Asked Questions (FAQs) pertaining to employees who refuse to return to work, as businesses begin to reopen.

These FAQs are divided among three categories, specifically General FAQs, Employee FAQs, and Employer FAQs. A sampling is provided below.

General FAQs

Does the refusal to work policy apply to self-employed, 1099 and low-wage workers eligible for unemployment b enefits under the Federal CARES Act?

Yes, the state policy is consistent with the Federal CARES Act, with one exception. Per federal guidelines, normally available transportation being unavailable, (public transit is reduced or eliminated due to COVID-19) is NOT a suitable reason to refuse returning to work.

What is different about the new COVID-19 Returning to Work policy and the Agency's previous Returning to Work policy?

The new policy reminds employers of their obligations to maintain safe workplaces in compliance with state and federal law and guidance. The policy advises employers that in the age of COVID-19, workplaces must comply with COVID-19 workplace safety specific requirements established by the appropriate state and federal government agencies.

The policy also expands the definition of "good cause" for employees who refuse an offer of suitable work if the good cause is related to a COVID-19 reason. The policy is consistent with and adopts provisions of the CARES Act, U.S. Department of Labor guidance, CDC guidance, MIOSHA guidance, Michigan's Executive Orders, and the MI Safe Start plan.

Employee FAQs

I am afraid of returning to work due to COVID-19, but I do not have a specific COVID-19 reason outlined above. Can I still receive unemployment benefits?

Employees who are merely afraid of returning to work and do not have a specific COVID-19 reason for not returning to work, will likely not remain eligible for unemployment benefits.

My employer offered for me to return to work, but I cannot return to work because my child's in-person school was cancelled due to COVID-19. Am I still eligible to get unemployment benefits?

You are eligible to continue to receive unemployment benefits if the reason you cannot return to work is because it is during the regular school year and your child's school is closed as a direct result of COVID-19.

Employer FAQs

I offered my employees their jobs back, but they refused because the $600 under the CARES Act is more in benefits than they will earn working. If they refuse to come back when I offer them their jobs, will they keep collecting unemployment benefits?

Employees will not be eligible to continue receiving unemployment benefits, if they refuse to work because they are currently receiving a generous weekly amount. Refusing to return to work or refusing an offer of suitable work because an employee would rather collect more in unemployment benefits is not a basis for unemployment benefits eligibility.

What options do I have if I can offer employees to come back to work less than full time? Will my employees still be eligible for unemployment benefits?

Employers are encouraged to consider using Michigan's Work Share program. Work Share allows employers to keep employees working with reduced hours, while employees collect partial unemployment benefits to make up the portion of the lost wages. Employees may also be eligible for the full $600 per week Federal Pandemic Unemployment Compensation (FPUC) benefit through the CARES Act, even if the employee is working less than full time. By participating in Work Share, employers can retain trained employees and avoid the expenses of recruiting, hiring, and training new employees. Employers may file an application for Work Share through their MiWAM account or learn more information about Work Share at Michigan.gov/WorkShare or call the Office of Employer Ombudsman at 855-484-2636.

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

https://www.michigan.gov/leo/0,5863,7-336-78421_97241_98585_100420---,00.html

Michigan has also provided Fact Sheets for employers and employees regarding COVID-19 and unemployment benefits. To access, click on the links provided below.

Employee Fact Sheet:

https://www.michigan.gov/documents/uia/145_-_What_is_Suitable_Work_379859_7.pdf

Employer Fact Sheet:

https://www.michigan.gov/documents/uia/145_-_What_is_Suitable_Work_379859_7.pdf

Guidance Released by Missouri Regarding Employees Returning to Work

The Missouri Department of Labor (DOL) has released Frequently Ask Questions (FAQs) addressing the coronavirus (COVID-19) for employees and employers in relation to Unemployment, Federal Legislation, Workers' Compensation and Discrimination.

It is important to note that one of the questions answers concerns about employees returning to work, and the potential ramifications if an employee receiving unemployment benefits refuses to return to work. The guidance provided by Missouri stipulates that employees, who have been placed on a temporary layoff related to COVID-19 but refuse to return to work when recalled by their employer, will lose unemployment benefits, except in certain circumstances such as:

(1) If the employee has tested positive for COVID-19 and is experiencing symptoms;
(2) If the employee has recovered but medical complications render the employee unable to perform essential job duties;
(3) If a member of the employee's household has been diagnosed with COVID-19;
(4) if the employee is providing care for a member of the household who was diagnosed with COVID-19;
(5) if the employee does not have child care due to COVID-19 reasons; or
(6) if the employee does not have transportation to the workplace because of COVID-19.

In addition, the guidance notes that the U.S. Department of Labor's guidance states that general fear of COVID-19 will not support continuation of unemployment benefits under regular unemployment or any of the federally funded programs available under the CARES Act.

Finally, the Department of Employment Security (DES) has developed a portal (see below) where employers should submit information about employees who refuse to return to work or quit their jobs.

https://uinteract.labor.mo.gov/benefits/linkaction.do?TBwnaDjze4tFKbgfmqLEJQequalequal=IbFsxj561ZfD3aWuH1Q57p-lusn9wXGLOIbygEwA5%2FJT4dwequal&gF4QVFlMk6Zk9pMoCN2vNwequalequal=y9gbPYLgyqDX%2FW40I2lUcW-p6V6G1o25cetTmFVIzYtQequal&HAtTlSDC7OegI8pkCRUArgequalequ

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

https://labor.mo.gov/coronavirus#mini-panel-coronavirus-tabs1

Philadelphia, Pennsylvania, Announces Enforcement Date for Predictability Pay Ordinance

We previously reported that Philadelphia (the "City") released guidance stating that the Office of Benefits and Wage Compliance would not be enforcing predictability pay as of the April 1, 2020, effective date of the Fair Workweek law until further notice. However, other provisions of the law will be enforced.

The guidance stated, in part, as follows:

> In response to the COVID-19 health emergency, the Office of Benefits and Wage Compliance will not be enforcing predictability pay as of the April 1, 2020 effect date of the Fair Workweek law until further notice. However, employers are still expected to comply with other portions of the law. The City, through the Office of Benefits and Wage Compliance, will continue to work with businesses on compliance during this difficult and constantly evolving situation.

Finally, the Department of Employment Security (DES) has developed a portal (see below) where employers should submit information about employees who refuse to return to work or quit their jobs.

Enforcement Date Announced

The Philadelphia Office of Benefits and Wage Compliance has now announced on its website that the city will begin enforcing its predictability pay ordinance as of September 1, 2020. The city paused the enforcement of predictability as of April 1, 2020, due to the coronavirus (COVID-19) public health emergency. Beginning September 1, 2020, predictability pay will be required for any employer-initiated changes to the 10-day advanced notice of work schedule.

Background

On December 8, 2018, the City Council of Philadelphia passed a "Fair Workweek" bill, which was signed into law on December 20, 2018 by Philadelphia Mayor Jim Kenney. The law applies to employers in the retail, fast-food and hotel industries with more than 30 locations and 250 employees. It will require covered employers to:

- Provide employees with a written, good-faith estimate of the employee's schedule when hired.
- Engage in an interactive process regarding the employee's availability.
- Give employees two weeks' advance notice of their schedules.
- Provide "predictability pay," if schedules change within ten days of the schedule being delivered (and increasing to 14 days beginning January 1, 2021), unless an employee consents to the change.
  - If hours are added to an employee's schedule, or the schedule is changed with no loss in hours to the employee, the employer must pay one hour of predictability pay.
  - If hours are reduced, the employer must pay predictability pay at a rate of time- and-a-half for all hours not worked as a result of the change.
  - Some exceptions for extenuating circumstances, such as natural disasters, apply.
- Offer available shifts to existing employees before hiring new ones.
- Provide employees with at least a nine-hour break between shifts.
- Maintain records of their compliance with the law.
- Any part of the ordinance may be waived in a bona fide collective-bargaining agreement.

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

https://www.phila.gov/2020-03-19-understanding-predictability-pay-under-fair-workweek/

Sacramento, California, Enacts Worker Protection, Health, and Safety Act

On June 30, 2020, the Sacramento City Council enacted the Sacramento Worker Protection, Health, and Safety Act (the "Act"). This ordinance, that became operative on July 15 and sunsets on December 31, 2020, addresses various workplace concerns in light of the COVID-19 pandemic. The ordinance has six particularly notable provisions: 1) Employer Safety Practices and Protocols; 2) Right to Refuse Work Under Certain Circumstances;3) Supplemental Paid Sick Leave; 4) Enforcement; 5) Conditions on City Financial Assistance; and 6) No Waiver of Rights. These provisions are discussed below.

Employer Safety Practices and Protocols: Under this provision, covered employers are required to implement specific safety practices and protocols at employment sites:

1. Daily cleaning and disinfection of high-touch areas in accordance with the Centers for Disease Control and Prevention (CDC) guidelines;
2. Formalized cleaning protocols for all other areas of an employment site;
3. Formalized protocols for responding to the discovery that a person with a confirmed or probable case of COVID-19 has been at the employment site;
4. Ensuring employees have access to regular handwashing with soap, hand sanitizer and disinfectant wipes;
5. Cleaning of common areas (e.g., break rooms, locker rooms, dining facilities, restrooms, conference rooms and training rooms) daily and between shifts;
6. Providing face coverings for employees to wear during their time at the employment site, mandating the use of face coverings while at the employment site in accordance with the CDC guidelines subject to exceptions, and establishing protocols to ensure proper physical distancing; and
7. Providing employees with written notice of these required practices and protocols in English and any other language spoken by at least 10 percent of the employees at the employment site.

For employees working at sites that are not owned, maintained, leased or controlled by their employer, an employer is not in violation of requirements 1, 2, and/or 5 if it takes steps to contact the entity that owns, maintains, leases or controls the site and encourages compliance with the required safety practices and protocols.

Right to Refuse Work Under Certain Circumstances: An employee may refuse to work for an employer if the employee reasonably believes that the employer is in violation of one or more of the seven specified safety practices and protocols listed above, and provides the employer with notice of the alleged violation(s).

Additionally, the city may investigate whether an employer violated a required safety practice or protocol, as alleged by an employee. If after conducting its investigation, however, the city finds that the employer was not in violation of a required safety practice or protocol,

or if the employer provides the city with proof that it has cured the violation, the employee who made the allegation no longer has the right to refuse to work.

Supplemental Paid Sick Leave (SPSL): Employers must provide 80 hours of SPSL to full-time employees.

Enforcement: Notably, retaliation is the only private right of action available to employees for an employer's violation of any of the provisions in the ordinance, and the statute of limitations for such actions is one year. Moreover, employees cannot file suit until after they have provided their employer with written notice of the alleged violation(s) and all facts supporting the alleged violation(s), and allowed their employer 15 days from the receipt of the written notice to cure the alleged violation(s). If a lawsuit proceeds and an employee prevails, the court can award actual damages, punitive damages, reinstatement, front-and-back-pay, other legal or equitable relief, and attorneys' fees and costs.

The Ordinance provides limited information regarding administrative enforcement. Based on this limited information, administrative enforcement will fall to the city attorney or another department. The administrative penalty for a violation of the ordinance will likely be $100 to $999.99 per violation, with each day a violation continues to occur constituting a separate violation.

Conditions on City Financial Assistance: Employers that receive financial assistance from the city through any program designed to provide financial assistance to businesses due to COVID-19 must certify compliance with the Ordinance as a condition of receiving funds. Employers found to have violated the Ordinance must refund all such financial assistance received.

No Waiver of Rights: Employers cannot request that employees waive any rights provided under the Ordinance. Such waivers are contrary to public policy, void and unenforceable.

Covered Employers and Employees: This Ordinance defines an "employer" as "a person that operates a business in the City of Sacramento and who directly employs or exercises control over the wages, hours or working conditions of any employee." It defines "employee" as workers who are considered employees per California Labor Code Section 2750.3, regardless of whether they are unionized. Notably, the SPSL provision only applies to employers with 500 or more employees nationally.

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

https://www.californiaworkplacelawblog.com/wp-content/uploads/sites/867/2020/07/2020-0026.pdf

Tax Credits

Georgia Provides Relief for Taxpayers Claiming Jobs Credits

In response to the economic impact of the ongoing COVID-19 pandemic, the Georgia Assembly enacted legislation (H.B. 846) to provide relief for taxpayers currently claiming the Georgia Jobs Tax Credit and the Georgia Quality Jobs Credit. It was signed by Governor Kemp on June 30, 2020. The enacted legislation applies to the jobs credits described in Sections 48-7-40 (related to the Georgia Jobs Tax Credit in designated counties), 48-7-40.1 (related to the Georgia Jobs Tax Credit for qualified business expansion), and 48-7-40.17 (related to the Georgia Quality Jobs Credit).

Specifically, H.B. 846 states that, for taxable years beginning in 2020 and 2021, a taxpayer that claimed the Georgia Jobs Tax Credit or the Georgia Quality Jobs Credit in 2019 shall have the option to utilize the number of new full-time jobs or quality jobs claimed in 2019, or calculate its job creation based on current year jobs. The measure will allow a taxpayer that has suffered a drop in its job count during 2020 and 2021 to continue to claim the credit using its 2019 job threshold.

Additionally, H.B. 846 creates a new jobs credit for manufacturers engaged in the production of personal protection equipment (PPE). The new credit is valued at $1,250 per qualifying job created and may be claimed in addition to the regular Georgia Jobs Tax Credit. However, the additional credit for PPE manufacturers will be allowed to offset 100 percent of income tax liability, and any amount in excess of income tax liability will be available to offset withholding taxes. The jobs credit for PPE manufacturers is limited to jobs engaged in the qualifying activity of manufacturing PPE and is available for jobs created through December 31, 2024.

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**.

ADP is committed to assisting businesses with increased compliance requirements resulting from rapidly evolving legislation. Our goal is to help minimize your administrative burden across the entire spectrum of employment-related payroll, tax, HR and benefits, so that you can focus on running your business. This information is provided as a courtesy to assist in your understanding of the impact of certain regulatory requirements and should not be construed as tax or legal advice. Such information is by nature subject to revision and may not be the most current information available. ADP encourages readers to consult with appropriate legal and/or tax advisors. Please be advised that calls to and from ADP may be monitored or recorded.

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