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Payroll Compliance Special Briefing

Highlights

- ✓ Wage payments for employees working at home
- ✓ Emergency FMLA expansion
- ✓ When to provide emergency paid sick leave
- ✓ Employee health benefits

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Handling Payroll in a Pandemic

The coronavirus is spreading throughout the United States—and experts warn that the worst is yet to come. State and local governments and businesses are taking steps to contain the virus—cancelling events, closing schools and colleges, and shutting or curtailing business for the duration. Every business needs to prepare for the worst (and hope for the best).

How your business responds to an outbreak of the virus in your community or your workplace will involve high-level decision-making. However, you can be prepared to provide valuable input on how those decisions will affect payroll operations, including the impact of—

NEW LAW CHANGES. *Congress passed and, on March 18, 2020, the President signed the Families First Coronavirus Response Act, which includes important new rules for businesses and employees.*

WAGE-HOUR BASICS

The coronavirus outbreak may cause employees to miss work for a variety of reasons—because they themselves have contracted the virus, because they are needed to care for a family member with the virus, because a child’s school has closed due to the virus outbreak, because they are under quarantine, or, in the worst case scenario, because your business has closed. Whatever the reason, some basic wage-hour principles apply.

Non-exempt employees. For non-exempt employees, the Fair Labor Standards Act (FLSA) generally applies to hours actually worked. The law does not require employers to pay non-exempt employees for hours not worked, regardless of whether the absence is due to the employee’s inability to come to work or the employer’s inability to provide work.

Exempt employees. The rules are different for administrative, executive, and professional employees who are exempt from the FLSA’s minimum wage and overtime requirements. Exempt, salaried employees generally must receive their full salaries for any week in which they perform any work.

There are, however, two key exceptions that may come into play during the coronavirus pandemic. An exempt employee’s pay may be reduced for:

- Absence from work for one or more full days for personal reasons, other than sickness or disability; or
- Absence from work for one or more full days due to sickness or disability if the deductions are made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences.

Moreover, exempt employees are not required to be paid in weeks when they perform no work, again regardless of the cause.

By Dorinda DeScherer

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Work from home. According to health experts, “social distancing” is the name of the game when it comes to containing and mitigating the coronavirus. To that end, many employers are asking employees to work from home. Others are adopting staggered schedules with alternating groups of employees reporting to the workplace, while others work at home to reduce the number of employees in the workplace at one time. Here again, exempt workers must be paid their full salary for any week in which they perform work, including work at home.

Non-exempt workers must be paid at least the minimum wage for all hours worked at home, plus overtime for hours over 40 in a workweek. Thus, the key to a work-at-home option for non-exempt employees is accurately tracking hours worked. This may include logging in remotely to the employer’s timekeeping system or a timekeeping record that’s attested to by the employee.

In addition, employers may be required to reimburse non-exempt employees for expenses incurred with working at home—such as Internet, phone, and utility costs—if those expenses would reduce the employee’s pay below the required minimum wage or overtime.

CAUTION. *The requirement to pay for work at home applies to any work, regardless of whether it is requested or authorized by the employer. So, for example, minor tasks, such as checking emails, can trigger payroll responsibilities. If an employer intends to furlough employees without pay, employees should be informed that work is not authorized during the furlough period without advance approval.*

EMPLOYEE LEAVE REQUIREMENTS

With the exception of certain federal contractors, federal law has not required employers to provide paid leave for employees. The Family and Medical Leave Act (FMLA) provides job-protected leave for specified qualifying events, including an employee’s serious illness or the serious illness of a spouse or child. However, the coronavirus pandemic has revealed gaps in the FMLA. For

example, the FMLA applies when an employee is forced to stay home from work on account of a serious illness, but the traditional FMLA rules do not apply if an employee who is not ill is quarantined on account of the virus. Similarly, the traditional FMLA rules kick in if an employee must miss work to care for a child with a serious illness but not if the employee must stay home when a child’s school is closed on account of the virus. Moreover, the FMLA generally applies only to employers with 50 or more employees and only to employees who have worked for the employer for at least one year. And, of course, FMLA leave is unpaid—leaving income gaps for many employees.

NEW LAW CHANGES. *The Families First Coronavirus Response Act contains two key provisions that are aimed at filling in some of those gaps.*

Emergency FMLA expansion. A section of the new law dubbed the *Emergency Family and Medical Leave Expansion Act* provides a temporary expansion of job-protected leave under the FMLA for employees who cannot work or telework because of the need to care for a child whose school or daycare is closed or whose childcare provider is unavailable to work due to the coronavirus.

The expansion applies more broadly than the traditional FMLA to employees who have been on a covered employer’s payroll for at least 30 days. Moreover, the new requirement may apply to an employer with only a single employee. Significantly, however, the changes apply only to employers with fewer than 500 employees. In addition, the Department of Labor is authorized to exempt small businesses with fewer than 50 employees if the expanded leave requirements would jeopardize the viability of the business as a going concern.

Paid and unpaid leave. The first 10 days of leave is not required to be paid, but employees can choose to substitute any accrued vacation, personal, medical, or sick leave for unpaid leave. Employers cannot, however, require employees to use accrued paid leave.

After 10 days, public health emergency leave is required to be paid at a rate of not less than two-thirds of the employee’s regular rate of pay based on the number of hours that the employee would normally be scheduled to work. However, in

no event is paid leave required to exceed \$200 per day or \$10,000 total.

As with traditional FMLA leave, public health emergency leave is job-protected—that is, the employer must generally return the employee to the same or an equivalent job on return to work. However, in the case of employers with fewer than 25 employees, an exception to job restoration may apply if the employee's position no longer exists due to economic conditions or other changes due to the public health emergency.

KEY POINT. *While the new law expands the circumstances for FMLA leave, it does not expand the cumulative 12-week maximum in a 12-month period that applies to all types of FMLA leave (other than military family leave to care for a covered service-member). Thus, if an employee has taken FMLA leave for another purpose during the applicable 12-month period, the maximum 12 weeks of leave for a school or daycare emergency will be reduced.*

Emergency paid sick leave. Another section of the bill, the *Emergency Paid Sick Leave Act*, requires all employers with fewer than 500 employees to provide all employees (regardless of their tenure with the employer) with paid sick time for any of the following:

- To quarantine, as required by a federal, state, or local order related to the coronavirus;
- To self-quarantine, if advised to do so by a health care provider due to concerns related to the coronavirus;
- To obtain medical diagnosis or care if the employee is experiencing symptoms of coronavirus;
- To care for an individual who is under quarantine, has been advised to self-quarantine, or is experiencing coronavirus symptoms;
- To care for a child whose school or daycare has been closed or whose childcare provider is unavailable due to the virus; or
- To deal with any other substantially similar condition as specified by the Secretary of Health and Human Services (HHS) in consultation with the Secretaries of Treasury and Labor.

An employer of an employee who is a health-care provider or emergency responder may elect

to exclude the employee from the paid sick leave requirements.

A covered employer must provide 80 hours of paid sick time for full-time employees. Part-timers must be provided with paid sick time hours equal to the average number of hours that the employee works over a two-week period. Employers with paid leave policies may not require any employee to use other paid leave before the employee uses the paid sick time required by the new law.

As a general rule, paid sick time must be paid at the employee's regular rate for the employee's normally scheduled work hours. However, sick time used to care for a family member affected by the coronavirus, to care for a child whose

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As with traditional FMLA, public health emergency leave is job-protected.

school or daycare is unavailable, or for another purpose specified by HHS can be paid at two-thirds of the employee's regular rate. Paid sick time under this law is limited to \$511 per day or \$5,110 in total if used for the employee's own quarantine, self-quarantine, or medical care and to \$200 per day or \$2,000 total if used to care for a family member or a child whose school or daycare is unavailable.

Effective dates. Both the family leave expansion and the paid sick leave requirements will take effect no later than 15 days after March 18 and will expire on December 31, 2020.

PAYROLL TAX CREDITS FOR EMPLOYERS

To offset the cost of emergency paid family leave and emergency paid sick leave, employers will be able to claim tax credits against the employer portion of Social Security (FICA) taxes (I.R.C. §311(a)).

The credit is generally equal to 100% of qualified paid sick leave wages and qualified FMLA leave wages paid under the new law. However, the amount of wages taken into account for any

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employee in calculating the credit is limited to \$511 per day for paid sick leave on account of the employee's own treatment, quarantine, or self-quarantine on account of the virus. In the case of other paid sick leave or paid FMLA leave, the amount of wages taken into account is limited to \$200 per day. Moreover, the credit is generally limited to 10 days of wages.

The amount of the credit is increased by the employer's "qualified health plan expenses" that are allocable to the wages for which the payroll tax credit is allowed. Qualified health plan expenses are amounts paid or incurred by the employer to provide group health plan coverage that is excluded from employee gross income.

Wages required to be paid under the Emergency Family and Medical Leave Expansion Act or the Emergency Paid Sick Leave Act are not treated as wages for purposes of the employer share of FICA taxes. Paid sick leave and paid FMLA leave wages are subject to the employer portion of Medicare (HI) taxes (I.R.C. §311(b)). However, the employer's payroll tax credit for paid leave is increased by the employer share of HI taxes on qualified wages.

KEY POINT. *If the amount of the payroll tax credit exceeds the employer's share of FICA taxes for a calendar quarter, the excess credit is refundable. That is, the employer can claim the excess credit as an overpayment for the calendar quarter. In addition, Treasury Secretary Steven Mnuchin has announced that the Treasury Department will use its regulatory authority to advance funds to employers to cover paid leave costs. According to Mnuchin, "Employers will be able to use cash deposited with the IRS to pay sick leave wages. Additionally, for businesses that would not have sufficient taxes to draw from, Treasury will use its regulatory authority to make advances to small businesses to cover such costs."*

Note: The new law does not include a payroll tax holiday for employees.

Employee Health Benefits for Coronavirus Costs

While pay during the coronavirus crisis is undoubtedly the number one issue for employees, many are also worried about how they will handle the health care costs if they are affected by the virus.

Coronavirus testing. The Families First Coronavirus Response Act provides that a group health plan or health insurer providing group health coverage must provide full coverage for the costs associated with coronavirus testing without cost sharing (including deductibles, copayments, and coinsurances).

Coronavirus treatment. The Department of Health and Human Services (HHS) has designated diagnosis and treatment of the coronavirus as essential health benefits (EHB) that must be covered by health insurance in the small group market. However, the exact coverage details and cost-sharing amounts for individual services may vary by plan. Self-insured and large group plans are not technically subject to the EHB requirements but may cover EHB to satisfy other regulatory requirements.

The HHS notes that many states are encouraging issuers to cover a variety of COVID-19-related services, including testing and treatment, without cost-sharing [HHS FAQs on Essential Health Benefit Coverage and the Coronavirus (COVID-19), 3/12/2020].

Health savings accounts. The IRS has announced that high-deductible health plans (HDHPs) will not jeopardize their status because they cover the cost of testing or treatment for coronavirus before plan deductibles have been met. Therefore, employees with HDHPs that fully cover coronavirus costs can continue to contribute to associated health savings accounts (HSAs) [Notice 2020-15; IR-2020-54, 3/11/2020].

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