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House Passes Bill Containing Changes to FMLA, FLSA and other Employer Policies, in Response to Coronavirus Pandemic

On March 14, 2020, in response to the rapid spread of the coronavirus (COVID-19), the House of Representatives passed the Emergency Families First Coronavirus Response Act (the "Emergency Act"). The Senate is expected to vote on the proposed legislation shortly, and may approve, reject, or modify the Emergency Act. As such, it is important to note that the Emergency Act is not yet current law and may be revised or rejected in its entirety. If passed by the Senate, the Emergency Act will take effect no later than 15-days after its enactment and it will remain in effect for the one-year period following enactment. The Emergency Act addresses immediate public health-related matters and contains several provisions that will directly impact employers. Below is a summary of the relevant provisions of the Emergency Act that employers should be aware of.

Amendments to the Family and Medical Leave Act

As currently drafted, the Emergency Act will expand the provisions of the Family Medical Leave Act ("FMLA"). Though the FMLA typically only covers employers with 50 employees or more, the Emergency Act requires that all employers with fewer than 500 employees provide eligible employees with up to twelve (12) weeks of job-protected leave to:

(a) adhere to a requirement or recommendation by a health authority or health care provider to quarantine due to: (i) exposure of the employee to the coronavirus; or (ii) the employee's exhibition of symptoms of the coronavirus, and the employee is unable to both perform the functions of their job and comply with the recommendation/requirement to quarantine; or

(b) to care for an at-risk family member who has been required or recommended to quarantine due to exposure to the coronavirus or the exhibition of symptoms of the coronavirus; or

(c) to care for a child of an employee who is under 18 years of age if the child's elementary or secondary school or place of care has been closed, or the childcare care provider is unavailable, due to the coronavirus.

To be eligible for coronavirus-related FMLA leave, employees must have been on their employer's payroll for thirty (30) days.

The employee's first two (2) weeks of leave may be *unpaid, however, the employee can choose to use accrued and unused vacation or personal time or other medical or sick leave during this period. After the first two (2) weeks of unpaid leave, employers must provide paid leave at a rate no less than two-thirds of the employee's regular rate of pay. Employers must pay these benefits. However, there are provisions in the bill that provide tax credits to employers in certain circumstances and with certain caps.*

Similar to the traditional qualifying events under the FMLA, FMLA leave taken for coronavirus-related qualifying events is job-protected. As such, an employer must allow the employee to return to the same or equivalent position at the end of their leave. However, employers with fewer than twenty-five (25) employees are exempt from having to restore an employee's position if the position no longer exists after FMLA leave due to an economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave.

Employers should also consider the potential impact of state and local level paid leave laws which may also be triggered by an employee's absence for coronavirus-related reasons.

Emergency Paid Sick Leave

In addition to paid leave required under the amendments to the FMLA, employers with fewer than 500 employees must immediately provide employees with paid sick leave, paid at the employee's full regular rate, *if the employee themselves:*

(a) is seeking a coronavirus diagnosis if such employee is experiencing symptoms of the coronavirus, and/or

(b) needs to self-isolate because the employee has been diagnosed with coronavirus, and/or

(c) is quarantined by recommendation or requirement of a public health official on the basis that the physical presence of the employee at their job would jeopardize the health of others because of: (i) the exposure of the employee to the coronavirus; or (ii) the exhibition of symptoms of the coronavirus.

Leave is paid at two-thirds the employee's regular rate *if the leave is taken to:*

(a) care for a family member who: (i) is self-isolating because they have been diagnosed with coronavirus; (ii) is experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care; or (iii) has been quarantined by a public official or a health care provider because they have been exposed to the coronavirus or are exhibiting symptoms of the coronavirus; or

(b) care for a child whose school has closed, or childcare provider is unavailable, due to the coronavirus.

Under the Emergency Act, full-time employees are entitled to two (2) weeks (i.e. 80 hours) of leave, and part-time employees are entitled to the number of hours they work, on average, over a two (2) week period.

Collective Bargaining Agreements

An employer signatory to a multiemployer collective bargaining agreement ("CBA") may fulfill its obligations under the Emergency Act by making contributions to a multiemployer fund, plan or program based on the hours each of its employees accrues while working under the multiemployer collective bargaining agreement, provided that the that the fund, plan or program enables employees to secure pay from such fund, plan or program based on the hours they have worked under the CBA and for the qualifying reasons specified in the Emergency Act.

Retaliation is Prohibited

It is important to note that the Emergency Act includes anti-retaliation protections and, thus, it shall be unlawful for an employer to interfere with, restrain, or deny anyone from exercising or attempting to exercise their rights under the Emergency Act.

Health Care Worker Protection

The Emergency Act directs the Occupational Safety and Health Administration ("OSHA") to issue an Emergency Temporary Standard within one (1) month of its enactment. The Emergency Temporary Standard shall include comprehensive plans to ensure the immediate protection of front line health care workers, such as hospitals and skilled nursing facilities, safe from the coronavirus. For instance, covered employers will be required to develop and implement a comprehensive infection disease exposure control plan.

The attorneys at Kaufman Dolowich & Voluck are available to provide clarity and guidance on an employer's obligations under the proposed Emergency Act, as well as other recent changes to an employer's legal obligations due to the current coronavirus pandemic. For more information about the proposed legislation, and its enactment, please contact the members of Kaufman Dolowich & Voluck's Labor & Employment Law Practice Group at (516) 681-1100.

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