Coronavirus (COVID-19) Essentials for the Municipal Employer – Part II

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Agenda

- Overview
- Families First Coronavirus Response Act
- Employment-related issues during the pandemic
- Q&A
Overview

• On March 11, 2020, WHO declared COVID-19 a pandemic
• Families First Coronavirus Act
• Coronavirus Aid, Relief and Economic Security Act (CARES Act)
Families First Coronavirus Response Act (Public Law No. 116-126)
• Signed into law by President Donald Trump on March 18, 2020

• Effective on **April 1, 2020**

• Contains 2 provisions relevant to employment that remain effective through December 31, 2020
  • Emergency Paid Sick Leave Act (“EPSLA”)
  • Emergency Family and Medical Leave Act (“eFMLA”)

• Department of Labor has been issuing Q&As.

• On March __, 2020, Department of Labor released official guidance.
Emergency Paid Sick Leave Act (EPSLA)

- Applies to all Public Sector Employers
- Applies to Private Sector Employers with less than 500 employees
- Employees are immediately eligible for leave, no matter how long employed.
- Leave only available to the extent the employee cannot telecommute or work from home ("WFH")
- Employers May Exclude: Employers of (1) Health Care Providers or (2) Emergency Responders (to be discussed later)
Reasons for EPSLA

1. Employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
2. Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. Employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine.
5. Employee is caring for a son or daughter because the child’s school or place of care has been closed or the child’s childcare is unavailable due to COVID 19 precautions.
6. Employee is experiencing any other substantially similar condition.
Leave

- Leave is not available unless there is work to be done.  DOL Reg. 826.20/ DOL Q&A 23-28

- Employees who have been discharged, laid-off, or furloughed are not eligible for leave.

- Employee who has had their hours reduced is not eligible for leave for the hours that have been eliminated.
Quarantine/Isolation Order

- Includes Quarantine, Isolation, Containment, Shelter-in-place, or stay-at-home ordered by any Federal, State, or local government authority that causes the Employee to be unable to work even though his/her Employer has work that the Employee could perform but for the order. DOL Reg. 826.10

- However, if a Employer is force to shut down because of a Government’s shelter in place or stay at home order, such as issued by Governor Lamont, the leave provisions do not apply. DOL Q&A 60.

- Not Eligible for Leave unless receive a medical diagnosis/advice. DOL Q&A 62.
Individual

- DOL Reg 826.20(a)(5) defines “Individual” as:

  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 he or she were quarantined or self-quarantined.
Son or Daughter

• DOL Reg. 826.10 defines “Son or Daughter” as

A biological adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of mental or physical disability.

Same as 29 U.S.C. 2611 (Section 10 of FMLA)

• Leave may be taken “only if no suitable person is available to care for his or her Son or Daughter during the period of such leave. DOL Reg. 826.20(b).

• Generally not need to take leave if a co-parent/co-guardian/other person is available to care for child. DOL Q&A 69.
Substantially Similar Condition

- The U.S. Dept. of Health and Human Services (HHS) has not yet identified any “substantially similar condition” that would allow an employee to take paid leave. DOL Q&A 73.
Amount of Leave

- **Full-time** employee is entitled to 2 weeks (maximum 80 hours) of paid leave.

- **Part-time** employee is entitled to the number of hours equal to the average number of hours worked over a two week period
  - Example: An employee who works an average of 20 hours per week would be entitled to 40 hours of paid leave

- If time off is for self-care (reasons 1, 2 and 3), employees must be compensated at their regular rate of pay, *capped at $511 per day or $5,110 total per employee*

- If time off is taken to care for someone else or a child who is not in school (reasons 4, 5 and 6), employees must be compensated at 2/3rd of regular rate of pay, *capped at $200/day or $2,000 total per employee*
Amount of Leave (Continued)

- No carryover

- May not require the employee to find a replacement before allowing the employee to take paid time
• Employee may first use the Paid Emergency Sick Leave before other leave.

• Employer **can not require** Employee to use other paid leave provided by the Employer to the Employee before the Employee uses the paid sick time.

• Paid Emergency Sick Leave **can not** run concurrently with other accrued leave.
Retaliation Is Prohibited

- Cannot discharge, discipline or in any other manner discrimination against an employee who takes leave or who files a complaint.
Penalties

• Failure to provide leave is an FLSA violation
  • Fines, imprisonment up to 6 months
  • Amount of leave not paid
  • Liquidated damages for willful violations
  • Attorneys’ fees
Intermittent Leave

- General Rule:
  Employee may not take eFMLA intermittently unless the Employer agrees. DOL Reg. 826.50.

- May NOT take intermittent leave if ill or quarantined.  DOL Reg. 826.30 (b)(2).
IMPORTANT NOTE:
THIS IS AN AMENDMENT TO THE FMLA. THUS, UNLESS OTHERWISE NOTED, ALL FMLA REQUIREMENTS ARE APPLICABLE TO eFMLA
eFMLA Eligibility

- Applies to all public sector employers, irrespective of number of employees
- Applies to Private Sector Employers with less than 500 employees
- Provides for paid leave
- Available only for employees who:
  1. Have been employed a minimum of 30 days (including those working part time);
  2. Cannot WFH; AND
  3. Must be home to care for a minor child whose school has closed because of COVID-19
- Employer may exclude: (1) Healthcare Providers and (2) Emergency Responders exceptions apply
eFMLA Leave Entitlement

- Up to 12 weeks

- First 10 days (2 weeks) are unpaid
  - May substitute EPSLA for this unpaid period
  - May substitute accrued leave (if not using EPSLA)
    
    **NOTE**: An employer cannot require use of accrued time before EPSLA. Therefore, you may only use accrued leave if the employee chooses. An employee who chooses to use accrued leave before EPSLA would be entitled to 14 weeks combined between eFMLA and EPSLA. Thus, it is recommended that EPSLA be used first whenever possible.

- 10 weeks paid
  - Must be paid at least 2/3rd salary, capped at $200 per day, $2000 total
  - May require use of accrued leave for remaining 1/3rd of salary
  - Based on current interpretation of eFMLA and FMLA, may require accrued leave to run concurrently with 10 weeks of eFMLA if the employer’s regular FMLA policy otherwise permits it.
Job Restoration

• FMLA’s standard job restoration requirements will apply to employers with 25 or more employees.

• For employers with less than 25 employees, job restoration is not required if all the following conditions are met:
  • Employee takes E-FMLA.
  • Employee’s position does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave.
  • Employer makes reasonable efforts to restore the employee to an equivalent position.
  • If no equivalent positions are available at the time the employee tries to return from leave, the employer must attempt to contact the employee if an equivalent position becomes available in the next year.
Insurance While On Leave

- Health Insurance is to be maintained under same terms while Employee is on Paid Sick Leave and/or Expanded FMLA leave. DOL Reg. 826.110
Medical Documentation for Leave

- Employee to provide their Employer with documentation containing:
  1. Employee Name
  2. Dates for the Leave
  3. Reason for the Leave
  4. Statement that the Employee is unable to work because of the qualifying reasons for the leave
  5. Name of Gov’t Entity that issued Quarantine/Isolation Order (if applicable)
  6. Name of Health Care Provider that issued Quarantine/Isolation Order (if applicable)
  7. Name of son/daughter (if applicable)
  8. Name of School/Child Care Provider (if applicable)
  9. Representation that no other suitable person is available to care for son/daughter (if applicable)

DOL Reg. 826.100
FMLA and eFMLA

- Employees are entitled to only 12 weeks of FMLA. DOL Reg. 826.60.

- However, an Eligible Employee who has exhausted their 12 weeks of FMLA is not precluded from taking Paid Sick Leave. DOL Reg. 826.60 and 826.70.
Healthcare Provider

- Employer may exclude.

- DOL Reg. 826.30 defines “Healthcare Provider” as: Anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

- Definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

- To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.
Emergency Responder

• Employer may exclude.

• DOL Reg. 826.30 defines “Emergency Responder” as: An employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

• To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.
How does the FMLA Play into this?

• Leave under the FMLA remains available for all employees as it otherwise would had this new law not been passed.

• Employer’s regular FMLA policy continues to apply.

• If the employee requires leave because the employee is himself sick, or because he must care for someone who is sick, the FMLA would provide up to 12 weeks of **unpaid** leave.
  • The first 10 days (2) weeks, the employer can substitute with payment under the EPSLA
  • The remaining 10 weeks would be taken unpaid, unless the employers’ policy allows for substitution of accrued leave
What about the tax credit?

PUBLIC SECTOR EMPLOYERS ARE SPECIFICALLY EXEMPTED FROM THE AVAILABLE TAX CREDIT.
Unemployment Comp Issues

• There is going to be a reimbursement mechanism for some of our unemployment costs related to the corona virus.

• Advised that you merely indicate that folks are laid off for lack of work, you will NOT get reimbursed.

• Advised that the State will be able to track is to “protest” the claim and indicate the reason as natural disaster corona virus.
OSHA and Respirators

• Voluntary v. Involuntary Programs . . . Medical Evaluation & Fit Test
Bargaining Obligations

• **Furlough v. Lay-Off**

• **Town of Farmington, SBLR Dec. No. 3237 (1994).**
  • Furloughs are a mandatory subject of bargaining.

• **New Haven Board of Education, Decision No. 1359 (1976).**
  • Employer reduced the number of hours worked each day by employees.
  • The management rights clause provided that the Board was permitted to “relieve employees from duty due to lack of work or for other legitimate reasons”.
  • Labor Board held that the management rights clause covered and permitted such an action to be taken unilaterally.
Language of CBA is Important

• **City of Bridgeport**, SBLR Dec. No. 4008 (2004):
  • “For purposes of this article, lay-offs shall include all reductions in the work force whether by lay-off, furlough, job elimination or funding elimination.”

• **New Britain Board of Education**, SBLR Dec. No. 4595 (2012):
  • “If the Board implements a summer shutdown, Union members are not required to schedule their vacation during that time period. However, employees electing to take five (5) vacation days during the scheduled shutdown will earn one (1) bonus day; employees electing to take ten (10) vacation days during the scheduled shutdown will earn two (2) bonus days.”
  • For five years prior to the 2009 summer, secretaries had worked a modified schedule, with no challenge from the union.
  • Labor Board held that the practice combined with the contract language gave the Board the right to implement a shutdown on seven Fridays for the summer of 2009 without bargaining.
**ADA**

- COVID-19 is generally not a “disability” under the ADA, but could lead to or affect disabling conditions.

- Beware of potential “regarded as” claims.

- Persons with existing disabilities (e.g., compromised immune systems) might request a reasonable accommodation.
  - Remember the interactive process
**Legal Issues - ADA**

- Employers **may** require individuals who travel to stay home upon their return during the 14-day incubation period.

- It should be clear that this policy is limited to the unusual circumstances of potential Coronavirus exposure.
ADA / Title VII

• **Temperature check?**
  • EEOC gave the green light

• Ensure proper procedures (e.g., safety and confidentiality)
Legal Issues – ADA / Title VII

- Exercise Caution with Screening Questions
Legal Issues – ADA / Title VII

• What about requiring medical clearance (from ill or traveling employees)?
• Be careful of potential national origin, race, ethnicity discrimination claims.
OSHA

- Under OSHA, employees may refuse to work when there is a reasonable belief that there is a risk of imminent death or serious injury.

- Retaliation for complaints about workplace safety.
Wage and Hour Issues

- Changed pay practices due to
  - telework
  - job coverage
- Monitoring/regulating telework
- Impact on exempt/non-exempt status
Wage and Hour Issues

- Telecommuting recordkeeping and pay issues
- Deductions for voluntary absences (exempt and non-exempt)
- Deductions for involuntary absences (exempt and non-exempt)
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